

COMPANIES ACT PROVIDES RELIEF FOR PREJUDICED MINORITY SHAREHOLDERS

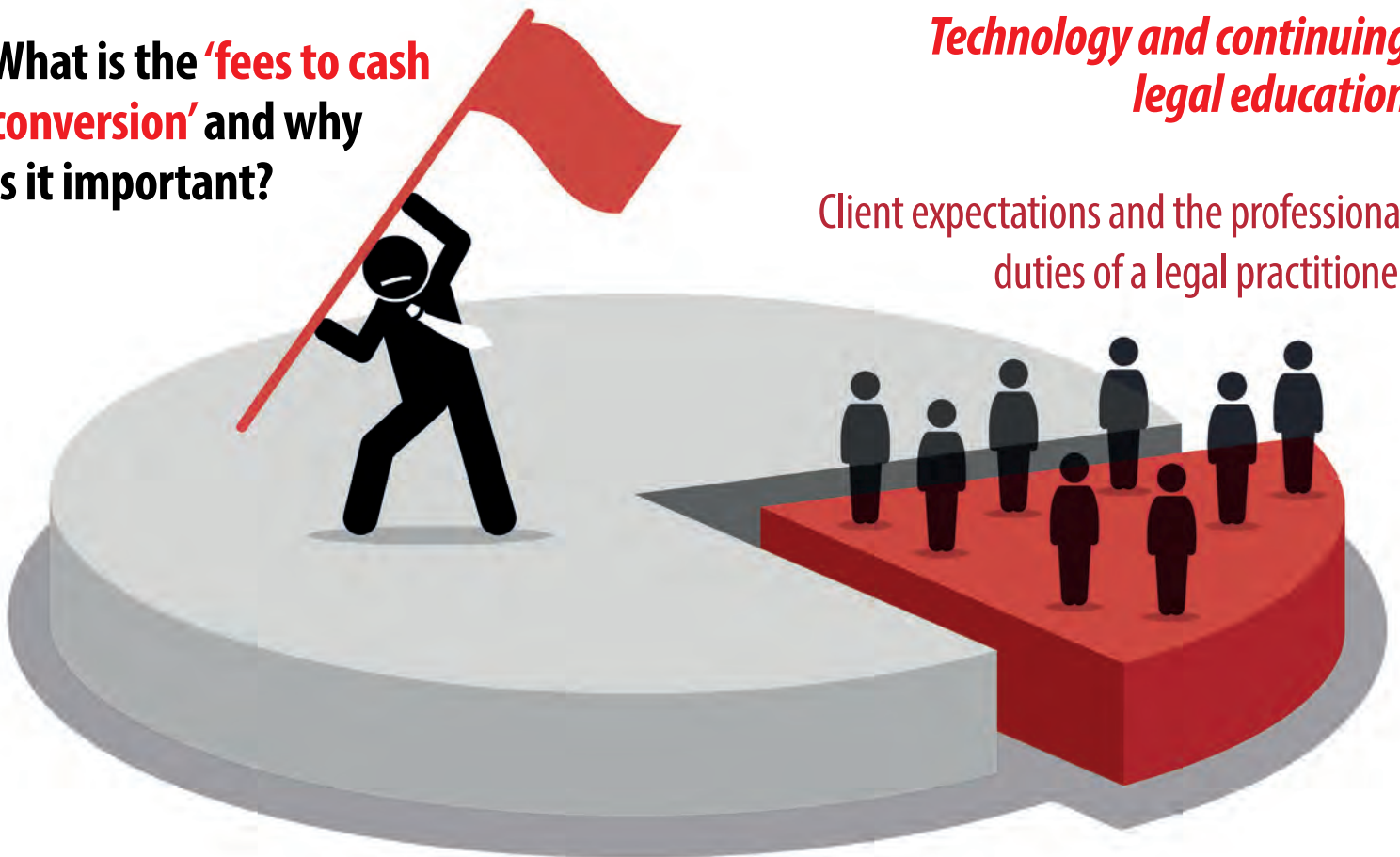
A European perspective on modern
day piracy – **copyright, hyperlinks
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*Donations tax –
a summary of calculations*

What is the **'fees to cash
conversion'** and why
is it important?

*Technology and continuing
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Client expectations and the professional
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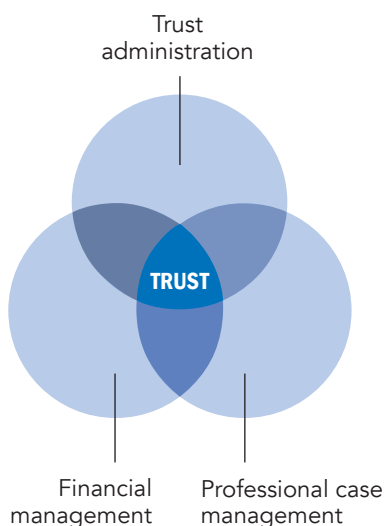
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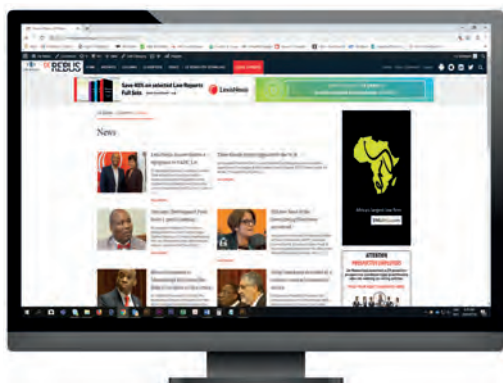
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- The war against corruption discussed at LSSA conference
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FEATURES

14 Companies Act provides relief for prejudiced minority shareholders



Candidate legal practitioner, **Max Rainer**, writes that it is not uncommon for many shareholders to find themselves in an undesirable position. Such a position can be particularly detrimental when shareholders are in the minority and find themselves being prejudiced by the majority shareholders. Currently the Companies Act 71 of 2008 makes provision for the protection of shareholders' rights and in this article, Mr Rainer discusses s 163.

16 Donations tax – a summary of calculations

In this article, legal practitioner, **Petro Krüger**, writes that donations tax is payable on the total value of property disposed of, whether directly or indirectly, by a resident by means of a donation. 'Donation' is defined as the 'gratuitous disposal of property including any gratuitous waiver or renunciation of a right' that is without expecting something in return and the test for a donation in our common law is well-established and is that the disposition must have been motivated by 'pure liberality' or 'disinterested benevolence' (see *Avis v Verseput* 1943 AD 331). Ms Krüger gives us a summary of donations tax in her article.



19 A European perspective on modern day piracy – copyright, hyperlinks and the Internet



The Berne Convention for the Protection of Literary and Artistic Works, 1886 is the principal international treaty governing copyright, writes candidate legal practitioner, **Ntsako Kennedy Ngonyama**. In the European

Union, copyright laws derive from directives aimed at harmonising laws among the member states. The directives are, therefore, implemented by national legislation at each member state under the regulatory framework established by the directives. In this article, Mr Ngonyama discusses Directive 2001/29/EC and how the author of a work has the exclusive rights to authorise or prohibit any reproduction of the work and communication of such work to the public by wire or wireless means.

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Conveyancing examination update: What has the LSSA done so far?

Following the discussions on conveyancing examinations at the recent Law Society of South Africa (LSSA) and National Association of Democratic Lawyers annual conferences, the LSSA has made headway in ensuring that the perceived gatekeeping in the conveyancing field through the examinations is dealt with.

The LSSA Conveyancing Task Team has made recommendations for various interventions that will deal with issues regarding perceived gatekeeping in the field of conveyancing and the apparent high failure rate of the conveyancing examinations. The following recommendations made by the Task Team were approved by the LSSA and placed before the Legal Practice Council (LPC), who are responsible for the examinations:

- The format of the examination needs to change, so that the examination is written on two separate days (with at least a few days between the papers), in contrast to the current format where both papers are written on one day.
- The order of the two papers needs to change, so that the theory paper is written first, followed by the practical paper.
- Candidates should retain credit for a period of a few years (to be determined) for the paper that they have passed, so that they will not have to re-write that paper.
- Past examination papers and model answers must be made freely available to candidates by placing them on the LSSA website.
- The pool of examiners must be increased and the qualification requirement to conduct the assessments should be reduced from seven years' experience.
- The LSSA is working on urgently introducing a mentorship programme, which will involve lo-

cal conveyancers and organisations. A pilot project will be launched as soon as possible and the LSSA hopes to obtain the buy-in of potential mentors and mentees. The LSSA will hold a roadshow on 1 and 2 August 2019 to meet the mentors and mentees in Mthatha and Polokwane and to introduce them to the pilot project. Attendees can choose to attend on either day. During the roadshow, the mentors and mentees will have the opportunity to meet and possibly form a mentorship match. While the LSSA will make every effort to match a mentee to a mentor, the match will depend on the number of mentors available in the mentee's geographical preferred area.

The LSSA is hopeful that these resolutions will be adopted by the LPC and that most, if not all, the interventions will be in place for the September 2019 examinations.

At the LSSA Exco meeting in July, the President of the LSSA, Mvuzo Ntyesi reiterated the fact that the above recommended interventions have not been made to lower the standard of the conveyancing examinations so that the number of black conveyancers increases. Mr Ntyesi added that as much as transformation needs to occur in the conveyancing field, the LSSA has noted that the high failure rate affects all races.

- Give us your views on social media by tagging your message with #conveyancingmatters.

De Rebus mourns the loss of one of its own

It was with deep sadness the LSSA announced the death of the LSSA Communication Manager, Barbara Whittle. Ms Whittle was in the employ of the LSSA since 1987. She started off as an Editorial Assistant at *De Rebus* and worked her



Mapula Sedutla - Editor

way through the ranks to become Communication Manager in 2006.

As part of the communication department of the LSSA *De Rebus* functioned under the guardianship of Ms Whittle. The *De Rebus* team and Editorial Committee will miss the deep pool of institutional knowledge and intelligence from Ms Whittle.



Would you like to write for *De Rebus*?

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

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

- Please note that the word limit is 2000 words.
- Upcoming deadlines for article submissions: 19 August, 16 September and 21 October 2019.

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LETTERS

TO THE EDITOR

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

Step ahead carefully – the uncertainty of unfair contracts continues

I refer to the article 'Step ahead carefully – the uncertainty of unfair contracts continues' 2019 (May) *DR* 13. This article is not correct. From the heading onwards, it confuses 'unfair contracts' and 'unfair contract terms' with the power of a court to refuse to enforce a contract.

The question whether to enforce a contract is not reliant on 'a particular judge's view' any more than findings of, for instance, wrongfulness is subjective rather than based on public policy. Nor was the Constitutional Court developing the common law. The common law relating to enforcement of contracts precedes the Constitution (see *Sasfin (Pty) Ltd v Beukes* [1989] 1 All SA 347 (A)). Since 1994, the Constitution infuses public policy with its values. While *Botha and Another v Rich NO and Others* 2014 (4) SA 124 (CC) does create difficulties for attorneys advising their clients, it is neither wrong nor destructive to the rule of law as suggested.

In addition, the suggestion that 1981 legislation was 'enacted to give effect to the Constitution' is clearly misplaced.

Patrick Bracher, legal practitioner,
Johannesburg

Unfair contracts – the uncertainty continues – a reply

I refer to Patrick Bracher's letter and his comments on the article 'Step ahead carefully – the uncertainty of unfair contracts continues' 2019 (May) *DR* 13.

Unfortunately, Mr Bracher's questions and reasoning are incorrect for the reasons discussed below.

The area of law known as 'unfair contracts' consists of any one of the following scenarios:

- **Unfairness in the making of a contract**, which is generally related to the problem of inequality of bargaining power.
- **Unfair contracts and contract terms**, which is the scenario Mr Bracher mentions. Even before the demise of the *exceptio doli generalis* it was settled law that *exceptio* could not be used to give relief against unfair terms of a contract or the fact that the other party had driven a hard or harsh bargain (see *Paddock Motors (Pty) Ltd v Igesund* [1976] 3 All SA 332 (A)). This was the common law position.
- **Unfair enforcement of a contract**, which was the issue in the *Botha and Another v Rich NO and Others* 2014 (4) SA 124 (CC). The *Botha* case was not about 'unfair contracts terms', but

whether it would be fair to enforce the agreement.

All three of the above are known as 'unfair contracts'. All three pre-constitutional cases were fought on the grounds of 'public policy' as common law did not offer relief. Further this is supported by *Brisley v Drottsky* 2002 (12) BCLR 1229 (SCA), where Cameron JA held that observations on public policy are as valid in the law of contracts as any other branch of law.

Therefore, it is incorrect to state my article confuses 'unfair contracts' and 'unfair contractual terms' as 'unfair contractual terms' are 'unfair contracts' just like 'unfair enforcement of a contract' also falls under the category of 'unfair contracts'. Both are determinable on public policy considerations in determining their enforcement.

Unfair contract terms are absolutely 'unfair contracts'.

In *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) Smalberger JA accepted that it served no useful purpose to classify contracts into those contrary to the common law, those against public policy and those *contra bonos mores*, since the three expressions were interchangeable.

Mr Bracher's question: '[W]hether to enforce a contract is not reliant on "a particular judge's view" any more than findings of, for instance, wrongfulness is subjective rather than based on public policy' – is incorrect.



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Firstly, the test for 'wrongfulness' is not a subjective test but an objective test and is likewise entirely based on public policy (see *Steenkamp No v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at 139; *SM Goldstein & Co (Pty) Ltd v Cathkin Park Hotel (Pty) Ltd and Another* 2000 (4) SA 1019 (SCA); and *McMurray v HL & H (Pty) Ltd* 2000 (4) SA 887 (N) at 905). While Van Deventer J in *Graham v Cape Metropolitan Council* 1999 (3) SA 356 (C) referred to 'the sense of justice and legal convictions of the community'. Whereas it should not be based on a particular judge's legal conviction or view.

Secondly, the notion of 'wrongfulness' applies to the law of delict and has nothing to do with the law of contracts. However, I do agree with Mr Bracher's statement that a 'particular judge's view' is rather subjective in the Constitutional Court (CC), and the Supreme Court of Appeal (SCA) most definitely agrees with me on that point. This goes to the root of the problem with the *Botha* case because the enforcement of contractual obligations according to the case now relies more on a particular judge's view of what is fair rather than on the terms of the contract. This was a slap in the face and ultimate insult to the founding principle of our contract law namely 'the sanctity of contracts' (and *pacta servanda sunt*).

Mr Bracher is incorrect in saying that the CC was not developing the common law. In *Barkhuizen v Napier* 2007 (5) SA 323 (CC) Ngcobo J held what public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression to by the provisions of the Bill of Rights. The judge went on to hold that public policy imported notions of 'fairness, justice and reasonableness', and it precluded the enforcement of a contractual term if its enforcement would be 'unfair or unjust'. This approach was followed by the CC again in *Botha* even though, the CC decided to formulate a totally new free notion of 'fairness' according to what judges now believe is fair, as compared with the *Barkhuizen* case.

On the contrary, the SCA to this day continues to maintain the following position in determining the common law of contract:

'[A]lthough abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relationships. These abstract values perform creative, informative and controlling functions through established rules of the law of contract. *They cannot be acted upon by the courts directly.* Acceptance of the notion that judges can refuse to enforce

a contractual provision merely because it offends their personal sense of fairness and equity, will give rise to legal and commercial uncertainty. After all, it has been said that fairness and justice, like beauty, often lie in the eye of the beholder' (my italics) (see *SA Forestry Co Ltd v York Timbers Ltd* [2004] 4 All SA 168 (SCA)).

Of course, the common law enforcement of contracts precedes the Constitution as pointed out by Mr Bracher in the *Sasfin* case. But Mr Bracher fails to take note of major differences between traditional common law public policy determination of cases, such as *Sasfin* and the CC's public policy determination. In the CC, the test is purely subjective on a particular judge's point of view, because if we consider the SCA's judgments – such as, *SA Forestry*; *Potgieter and Another v Potgieter NO and Others* 2012 (1) SA 637 (SCA); and *Bredenkamp and Others v Standard Bank of SA Ltd* [2010] 4 All SA 113 (SCA) – these judgments are in direct conflict with the proposition that unfairness in itself is a ground for refusing to enforce a contractual provision. Further Nkabinde J in *Botha* found support for her line of reasoning in the statement that 'our law of contract, based as it is

on the principle of good faith, contains the necessary flexibility to ensure fairness' and that '[c]onsiderations of good faith have shaped the content and development of existing legal concepts of contract in many ways'. However, the judge was subjective with regard to her view of the notion of 'fairness', because as discussed above unfairness in itself is not grounds for refusing to enforce a contractual provision. The *SA Forestry* case tells us that good faith does 'not constitute independent substantive rules that courts can employ to intervene in contractual relationships. These abstract values perform creative, informative and controlling functions through established rules of the law of contract'. This is further supported by the *Brisley* case, where the court held that good faith could not be accepted as an independent basis for setting aside or not enforcing contractual provisions. Further, the court in *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) held that although the concept of good faith serves as a foundation and justification for legal rules, the court cannot act on the basis of abstract ideas but only on the basis of established legal rules. Therefore, it is established that the notion of 'fairness'



Seen on social media: Responses on #LLBDegree



De Rebus asked social media users the following:

Is it time to change the LLB degree? In the July editorial, Editor, Mapula Sedutla, looked at the recommendations from the Council on Higher Education report on the State of the Provision of the LLB Qualification. #LLBDegree



The LLB Programme is extremely theoretical and lacks the practical element, necessary to place students in an environment akin to what they will be faced with in practice.

Hlengiwe Mahlangu,
employment law associate



Exactly my opinion. I ended up envying Nursing and Education students who go through a compulsory practical experience every semester. They gain a wealth of experience out there; whereas the LLB students are stuck in the library memorising statutes and studying cases, with no practical knowledge of the highly competitive field they are going into.

Yolisa Somtsewu,
law student



It is fine as is. Don't change.

Lwazi,
@khanyelwazi



What is the basic purpose of this so called 'change' of LLB? This is just a meaningless exercise. Your concentration should be on decolonising the law and to actually Africanise our legal system and not this nonsensical obsession with the LLB.

Neneza,
@TsheziAndile



Thanks for sharing this article. The curriculum has to be updated, the world of law is changing. Many practical areas of practice and business are lacking in the current programme.

Futures Law Faculty,
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is based on nothing more than a subjective view of a particular judge sitting in the CC, while the traditional common law test was objective as discussed above, it was also confirmed in the *SA Forestry* case. There is, likewise, a further major difference, in that the common law public policy is a question of fact and not of law (see *Ryland v Edros* [1996] 4 All SA 557 (CC), and *Amod (born Peer) and Another v Multilateral Motor Vehicle Accidents Fund* [1999] 4 All SA 421 (A)). The CC, by introducing free standing requirements of 'fairness', turned it into a legal test, as one must now look at reasonableness, good faith and fairness and first try to determine what the law actually is or, ought to be. Thanks to the CC we do not really know what the law itself is anymore and the CC – as I point out below – is now also unsure. The other differences between the common law public policy and CC's public policy is that, according to Ngcobo J in *Barkhuizen*, a term of contract, which is unreasonable will be precluded from enforcement. On the contrary, the *Sasfin* test generally favours utmost freedom of contract and will not allow a party to escape a contract on the grounds of fairness or reasonableness. By ignoring the SCA's warnings we now have a situation in the CC exactly as having a moving goal post in a soccer match and every time there is a new umpire, they are entitled to change the rules as they see fit.

On this very basis, we now have a new made up law by the CC arising out of the *Botha* case in that:

The fairness in determining cancellation is self-evidently linked to the consequence of doing so and is no longer dependant solely on breach by the other side and the other sides failure to remedy same and that forfeiture is now reliant on the cancellation of an agreement.

I, therefore, submit that public policy considerations should be determined objectively and subject to a factual test as in the *Sasfin* case. Further, public policy can also alter in the course of time see *Goodman Brothers (Pty) Ltd v Rennies Group Ltd* 1997 (4) SA 91 (W). Whereas the common law factual test is more flexible than a legal one.

On this basis I, therefore, welcome the decision of the CC in *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC), which reads as follows:

'[T]he law cannot countenance a situation where, on a case-by-case basis, equity and fairness considerations are invoked to circumvent and subvert the plain meaning of a statutory provision which is rationally connected to the legitimate purpose it seeks to achieve, as is the case here. To do so would be to undermine one of the essential fundamentals of the rule of law, namely the principle of legality.'

This is exactly in line with what the SCA was saying all along. I believe the same view must now be applied by the CC to all different scenarios of 'unfair contracts'.

The above mentioned in itself is not, however, the reason why the *Botha* case is fundamentally wrong. In Mr Bracher's letter he states that I argue that the case of *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) in relation to s 27(1) of the Alienation of Land Act 68 of 1981 as well. I blame the CC for bypassing the Alienation of Land Act and that the Alienation of Land Act was enacted to deal with unfair penalties or forfeiture clauses. Mr Bracher has misread my article in its entirety. My argument was that it is the Conventional Penalties Act 15 of 1962 that was bypassed and not the Alienation of Land Act. The Conventional Penalties Act is a piece of legislation that was specifically enacted to address the unfairness of penalties. As stated in the article: 'The CC in its judgment refers to the seller as making a fundamental error by treating forfeiture and cancellation of the contract independently. Interestingly enough, based on the [Conventional Penalties Act], the seller had the right to enforce the forfeiture by law in the event of a breach, so there was no obligation for the seller to justify the consequences of cancellation, as forfeiture is not reliant on cancellation but on breach of the agreement (see s 1). The CC should have

granted the order of cancellation based on breach instead of not agreeing to the cancellation, because it is prejudicial to the money already paid by the purchaser. The law was not followed accordingly, as regard to whether there is cancellation or there is no cancellation of the agreement, under s 1 the seller was still entitled to forfeiture' (my italics).

The CC also failed to recognise the fact that *Botha* had a claim for the reduction of the penalties. The correct outcome of the matter should have been as follows:

Justice and rule of law dictates that Rich was legally entitled to cancel the agreement because *Botha* did not only breach the agreement, she remained in breach of the agreement despite demands made by Rich and even after the contract was cancelled. Despite owing arrears she then demanded transfer in terms of s 27 of the Alienation of Land Act without making reference to how those arrears were to be dealt with. That is why she could not get the transfer.

On cancellation, *Botha* was then entitled to claim for reduction of the 'unfair or excessive penalties' taking into consideration that she had use of the premises since 2003 minus any improvements made to the property. This is justice, this is restitution, this is the law, this is what legislation dictates, this is substantive fairness as it ensures the exercise of contractual autonomy of an adult person, as well as the sanctity of a contract.

The CC violated the principle of legality, s 1 of the Conventional Penalties Act, as well as the separation of powers doctrine as it is not entitled to go against the legislature unless it applies the s 36 limitation clause. Therefore, the Conventional Penalties Act continues to stand and the judgment is incorrect.

Whereas, Mr Bracher's allegations that my article is incorrect and that the *Botha* case is neither wrong nor right remain unsupported and are entirely incorrect.

Igor Szopinski, legal practitioner,
Johannesburg



BOOKS FOR LAWYERS



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By
Thomas
Harban

Client expectations and the professional duties of a legal practitioner

It is trite that legal practice is a service industry. The clients to whom legal services are provided are important stakeholders for the legal practice. In engaging the services of the legal practice, the client will have certain expectations, which if not properly managed, will create a risk for the law firm and may also affect the quality and duration of the relationship between the parties.

Legal practitioners must be aware of the risks associated with clients' expectations and appropriately manage them, preferably at the commencement of the relationship with the client. You should never compromise yourself and/or your practice by breaching your professional duties in order to meet a client's expectations if those expectations go against the ethics, values and standard of professional conduct expected of a legal practitioner.

For present purposes, we will address this topic with reference to three examples of which we have become aware, being the –

- minimum investment requirements, which some banks have reportedly introduced for firms serving on their panels;
- relationship between some estate agents and conveyancers; and
- relationship between personal injury legal practitioners and their clients.

In considering this topic, readers should also have regard to the previously published articles, namely –

- Ann Bertelsmann 'Is your client a ticking bomb?' 2015 (April) *DR* 22;
- Thomas Harban 'Professional indemnity claims and breaches of the professional duties of an attorney: Is there a link?' 2017 (Jan/Feb) *DR* 20;
- Risk Management and Prosecutions Unit of the Attorneys Fidelity Fund 'Leave no doubts in your client's mind' 2017 (April) *DR* 14; and
- Thomas Harban 'Some red flag risk areas to keep a look out for in clients' 2018 (May) *DR* 19.

The Code of Conduct for all legal practitioners, candidate legal practitioners and juristic entities (the Code), was published on 29 March 2019 (see GenN198 GG42364/29-3-2019) and can be accessed at: www.lssa.org.za.

Banks' minimum investment requirements

A number of legal practitioners have, informally, raised concerns regarding the 'minimum investment requirements' imposed by some banks for the law firms serving on their panels. At the outset, we must point out that the reports have not referred to all banks and, what is stated in this article, is drawn from the investment requirements as raised by the practitioners concerned. The comments in this article thus do not apply to banks in general. Legal practitioners have reported that, in some instances, the banks in question have imposed a requirement that firms on the respective panels place investments of a minimum of R 100 million in certain investment products with the particular bank. Banks are, in many instances, a key (or even the major) client of the firm and any threatened loss of the bank as a client or a 'downgrading' of the firm (whether for failing to meet the minimum investment requirements or any other reason) could have a significant impact on the sustainability of the firm. We are informed that the firms concerned are threatened with losing their ranking on the panel of the banks if they do not meet the minimum investment requirements. These minimum investment requirements, according to the reports, are also part of the criteria used by the banks in assessing the performance of the firms on their panels. There are a number of risk factors that legal practitioners must consider in seeking to meet the reported minimum investment requirements.

It must always be remembered that all funds held in trust do not belong to the firm. Trust money is to be kept separately from other money (rs 54.6, 54.7 and 54.8 of the final rules as per s 95(1), 95(3) and 109(2) of the Legal Practice Act 28 of 2014 (the LPA) and s 86 of the LPA). Money held in trust must be invested and managed as prescribed in the LPA and the Rules. Payments of any amounts due to clients must, unless otherwise instructed, be made within a reasonable time and the firm must take steps to verify the banking details prior to making any such payment (r 54.13). Delaying payments to clients in order to 'bulk up' investment amounts may also be considered as a breach of the Rules.

The reports are that the minimum investment thresholds required by the

banking institutions concerned relate to the consolidated balance of investments placed by firms. Legal practitioners must not, for example, pool the trust investments of various clients together in order to meet the minimum investment requirements, as this would amount to a breach of rs 55.9 and 55.10, which provide that:

'Pooling of investments'

55.9 No firm may mix deposits in a pooled account or make other money market investments in any manner otherwise than by accepting funds as agent for each participating client and placing such funds with a bank in a savings account or on the money market on behalf of the client. The firm shall obtain from the bank an acknowledgement of receipt of each deposit or money market investment and such written receipts shall be retained by the firm as part of its accounting records.

55.10 All monies received by a firm for investment with a bank shall be paid to such bank as soon as reasonably possible after receipt by the firm, having regard to matters such as whether a payment by cheque has been cleared with the issuing bank.'

Pooling the investment of funds held in trust on behalf of clients in order to meet the requirements imposed by banks may thus breach the Rules and expose a firm to possible action by the regulator (the Legal Practice Council (LPC)) and/or professional indemnity (PI) claims. It must be remembered that all investment instructions from the clients must be in writing, detailing the manner and form of the investment (r 56) and that only approved trust investment products and accounts should be utilised.

The premature payment of commission to estate agents

Some conveyancers receive a substantial amount of their instructions from estate agents. In forming close working relationships with the estate agents, conveyancers must, however, ensure that the relationship with the estate agents is at arm's length and that they (the conveyancers) do not, in effect, become an extension of the business of the estate agent. We have been informed that there are some conveyancing practices, which also provide services as estate agents. Such practices and their clients run the

risk that, in the event of a loss being suffered, the end-to-end (or 'one stop shop') services they provide will not fall within the definition of legal services and thus not fall within the ambit of the indemnity provided under the Master Policy issued annually by the Legal Practitioners' Indemnity Insurance Fund NPC (the LPIIF).

Some estate agents insist that the commission is paid to them by the conveyancer prematurely, namely, before the transfer of property is registered in the Deeds Office. An estate agent may place this as a requirement for instructing a particular conveyancer and threaten not to direct any instructions to a conveyancer who is unwilling to pay the commission prematurely. An assessment of the bridging finance related claims against conveyancers reported to the LPIIF shows that in a number of instances the bridging finance was sought in order for the conveyancer to make payment of the estate agent's commission prematurely.

Some estate agents may even demand a share of the conveyancer's fee or request that part of the commission be disguised as the fee. The Code prohibits the sharing of fees with a person who is not an attorney. The code at para 12.1 provides:

'12. Sharing of fees

12.1 An attorney or firm shall not, directly or indirectly, enter into any express or tacit agreement, arrangement or scheme of operation or a partnership (express, tacit or implied), the result or potential result wherefore is to secure for him or her or it the benefit of professional work, solicited by a person who is not an attorney, for reward, whether in money or in kind; but this prohibition shall not in any way limit *bona fide* and proper marketing activities.'

The sharing of offices by an attorney with an estate agent or any person who is not an attorney or an employee of an attorney is prohibited, unless the LPC has granted its written consent in this regard (para 13 of the Code). In investigating bridging finance claims, which had been brought against a particular conveyancer, the LPIIF team found that the conveyancer concerned had offices adjacent to an estate agent and that the latter had free and unrestricted access to the former's premises and systems. It was also found that bridging finance transactions were applied for by the estate agent using the conveyancer's computers and other systems. The conveyancer simply signed the undertakings in each of the bridging finance transactions without interrogating or applying his mind meaningfully to the transactions. The conveyancer concerned was held liable for the repayment of the amounts advanced in terms of the transactions. Bridging finance related claims are now

excluded from the LPIIF Master Policy, unless the bridging finance has been provided for either -

- the payment of transfer duty and costs;
- municipal or other rates and taxes; or
- levies payable to the applicable body corporate or homeowners' association relating to the immovable property, which is to be transferred.

A copy of the Master Policy can be accessed at <https://lpiif.co.za>.

The code also prohibits the premature payment of commission.

'14. Payment of commission

An attorney or firm may not effect payment, directly or indirectly, of agent's commission in advance of the date upon which such commission is due and payable, except out of funds provided by the person liable for such commission and on the express authority of such person.'

The risks associated with premature payment of agent's commission even where para 14 of the code has been complied, include -

- the transaction may, for a number of reasons, not proceed to completion;
- there may not be sufficient available funds to pay the creditors;
- disputes may arise with regards to whether or not the agent's fee is in fact due; or
- more than one agent may claim to be entitled to the commission.

Conveyancers must advise clients of the risks associated with the premature payment of agent's commission and must insist on written authority and an indemnity from the parties (the seller and the estate agent) in the transaction before paying out the commission in advance of the date on which it is due.

The expectations of personal injury clients

In the past five years, claims arising from prescribed or under-settled Road Accident Fund (RAF) matters make up the highest number and value of claims paid by the LPIIF. It is important that practitioners practising in this area of the law properly manage the expectations of their clients when the initial instruction is taken and also throughout the claim and litigation process. Part of the management of the client's expectations entails properly (and in detail) explaining the process, as well as the length of time such claims take to finalise. If necessary, an interpreter should be used. All the consultations and discussions with the client must be recorded in detailed contemporaneous file notes and correspondence must be sent to the client confirming the content of the discussions.

While the underlying reasons for the prescription or under settlement of the personal injury claims (not just RAF

claims) vary, there are a number of points to be noted by legal practitioners in handling such claims in order to properly manage the expectations of the client.

These include -

- explaining to the client that the quantum (the amount of compensation) is dependent on the injuries or other damages that can be proven (including the *sequelae*);
- not every claim will result in a multi-million Rand pay-out;
- experts may have to be engaged at a cost to investigate the merits and the quantum of the claim;
- these claims may take a number of years to be finalised;
- the terms of the contingency fee agreement in the event that the practitioner is acting on a contingency basis;
- the risks of adverse costs orders against the client in the course of or at the conclusion of the matter;
- the prescription date and the implications of a claim prescribing;
- the practitioner's lien over the file of papers in the event that the mandate is terminated;
- the need for the client to be available for consultations and to provide the required instructions on an ongoing basis;
- that the experts acting for the defendant may wish to cross-examine the plaintiff; and
- that instructions will be taken from the client in respect of any offer (even if the recommendation of the legal practitioner is that the offer be rejected). Beware of a power of attorney worded in such a manner that it gives the legal practitioner wide powers, including the power to accept an offer in the sole and absolute discretion of the legal practitioner without taking an instruction thereon from the client or the client even being aware of the offer.

In some instances, the clients terminate the mandate of the legal practitioner, either due to unhappiness with the service received or even influence of other parties, including, touts and legal practitioners competing in this area of practice. The client may also have an unrealistic expectation of the amount of compensation and this must also be managed. Regular communication with clients is an important part of the engagement.

Conclusion

Assessing and managing the expectations of your client is an essential part of your proactive risk management of your firm.

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By
Carl
Holliday

What is the 'fees to cash conversion' and why is it important?

Law firms are businesses, and all businesses rely on money to survive. Retail sales executives know all about sales conversion and managers eagerly track the metrics of a cash conversion cycle, but this may not apply directly to law firms.

Legal practitioners, especially those in solo practice, do not have the luxury of dedicated administrative, accounting and management staff. The legal practitioner becomes self-reliant and must have a working knowledge of a wide range of management concepts to keep the boat of business afloat. Understanding which metrics are important and where to find them, provides guidance in otherwise murky financial water.

In addition, professional staff are often remunerated on their productivity: Fees.

Accounting terminology

As law firms do not retail in commodity, some of the typical management accounting terminology used by legal practitioners appears 'strange' in the professional services environment. Traditional accounting tools have to be adapted to fit a legal practitioner's/law firm's specific need.

The term 'sales' does not fit well. A legal practitioner's professional time is sold to clients as 'professional fees' regardless of whether this is billed by the hour or minute or based on a tariff. The value of this professional billing rate represents the market value of the services. It is primarily defined internally. In addition, 'fees' are not 'sold' to faceless customers. Fees are billed to clients in a confidential, privileged relationship with the firm. Fees are billed to a client (debit) and credited to an income or revenue account.

For a legal practitioner's purpose, a fee is a revenue item, debited to a client and credited to an income statement account.

Disbursements are value added cost items, which are both incurred on behalf of, and recovered from clients. This often includes items such as travel or photocopies. There is no direct relationship between the cost item and the client debit, and a portion of the total value is discretionary.

Disbursements, insofar as they are discretionary and contain an arbitrary, value-added component are simply fees.

Reimbursements are direct cost items, which are both incurred on behalf of, and recovered from clients. There is a direct relationship between the cost item and the client debit, and the total value is invoice based.

Reimbursements are cost items that are invoiced directly with no arbitrary or value-added component. These should be separated from fees and for a legal practitioner's purposes may be journalised as a debit to a client and a credit to a creditor's account.

A client account may reflect any combination or none of these. Client business debit balances represent a legal practitioner's accounts receivable, or debtors' book (an asset). This is what is owing to the firm. It must not be confused with the value of the capital involved in debt collecting matters.

Note that 'fees' represent a book entry against a client (current asset, a debit) and a revenue account (income, a credit). It is not yet cash, it merely represents the value of work done.

Only once payment is received the value moves from the debtors' book to the business cash book, which is also an asset. One can spend cash from the cash book, but one cannot spend the balance of the debtors' book. This makes it imperative to understand the values of the debtors' book and cash book, as well as the conversion rate of fees to cash.

Contingency fees do not form part of this discussion

Fees written represents the income account balance of work done but is not tracked across the debtors' book or cash book, which means that there is no control over the conversion of those fees to cash.

A simple, high-level tool to measure productivity is a fee to cash report. For a given period one can calculate the total nett fees generated by a specific fee earner. Nett fees include fees, any discounts or reversals, and value added tax (VAT), if applicable. Discounts amount to 'fee reversals' and will not be recovered from the client and must reduce the firm's revenue.

An age analysis gives an easy breakdown of who owes what, and for how long. An age analysis should show as much detail as possible, with each individual matter listed and a breakdown of outstanding balances for at least current, 30 days, 60 days, 90 days and 120 days and older. Older debt should be aggressively managed. A best-fit solution should clearly distinguish contingency fee matters.

Movement on the debtors book for the period is critical. Fees and recoverable fees charged to client accounts increase the debtors' book. There are at least three outcomes, namely:

- Once the debt is settled, the debtors book decreases and the value moves to the cash book. Cash flows into the bank account.
- Bad debt is written off, which should reduce the fees as a debit to the income account. The debtors book decreases in line with the income account balance. No cash is realised.
- The debt is not settled. The debtors book balance gets progressively bigger, with no cash flowing into the business.

This clearly indicates that generating fees alone does not equate to cash. In addition, it reveals the relevance of monitoring fees to cash conversion, as it indicates the cash quality of clients. Remunerating staff based on fees written is a common, but dangerous premise as it may rapidly deplete available cash reserves while income is not rapidly converted to cash.

The brief example (table 1) is designed to explain the discussion. The following metrics are used: Three fee earners, with all matters assigned to one of these three, a defined date overview, total fees in overview, debtors book movement in overview.

On John's matters fees were charged to the value of R 100 000. The movement on the debtors' book is only R 10 000, which indicates that most of John's clients settled their accounts in the period under review. The movement is deducted from the fee total. John's fees to cash conversion rate is 90%, which shows that John's fees to cash is R 90 000.

On Peter's matters fees were charged to the value of R 120 000. The movement on the debtors' book is R 90 000, which indicates that most of Peter's clients did not settle their accounts

Fee earner	Fees	Debtors book	Conversion rate	Fees to cash
Fees: John	R 100 000	R 10 000	90%	R 90 000
Fees: Peter	R 120 000	R 90 000	25%	R 30 000
Fees: Frank	R 90 000	R 120 000	-33%	- R 30 000
	From income statement.	From age analysis, movement.	100 - ((debtors' book / fees) * 100).	Fees - debtors' book.

Table 1: Example of the discussion.

in the period under review. The movement is deducted from the fee total. Peter's fees to cash conversion rate is only 25%, which shows that Peter's fees to cash is R 30 000.

On Frank's matters, fees were charged to the value of R 90 000. The movement on the debtors' book is R 120 000, which indicates that in the period under review –

- most of Frank's clients did not settle their accounts; and
- debits other than Frank's fees were charged to clients, such as recoverable fees, or fee charges by other fee earners.

The movement is deducted from the fee total. Frank's fees to cash conversion rate is a negative 33%, which shows that Frank's fees to cash is a negative R 30 000. Frank is costing the firm money.

From a management point of view, a report such as this is

merely one of several tools to be used. Additional reports such as budgets, forecasts and age analysis should be added to provide a more holistic view of the firm and its operations. Fee targets may be added to this example – the value of which – should at least cover fixed salaries or drawings and a commission rate calculation. Especially with professional remuneration based on a fixed salary, targets should at least cover the fixed remuneration component and commission can then be calculated on the fees to cash value. Multiple fee targets, covering overlapping time periods will go a long way to protecting the firm against manipulation and abuse.

Working from a high-level fees to cash model such as this, it is possible to customise and personalise an individual remuneration model for any firm. As illustrated, fees to cash protects the firm from pay-outs where cash has not been realised.

In our example, if Peter had a fee target of R 100 000, he has made target, which entitles him to commission. A commission rate of 17% on fees to cash results in a pay-out of R 5 100.

A discussion such as this, attempts to simplify a specific concept. It must be seen in the context of management accounting with the emphasis on operational success and cash flow management. 'Fees written' is simplistic as a productivity measurement metric and proactive management of the debtors' book is essential. Simple, easy to use tools are to be preferred, but these should be accurate and contribute to our understanding of the problem at hand. Overly simplistic solutions, such remuneration based on fees written pose dangers to the survival of the business.

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Companies Act provides relief for prejudiced minority shareholders



By
Max
Rainer

It is not uncommon for many shareholders to find themselves in an undesirable position. Shareholders may wish to dispose of their shares for any number of reasons, such as –

- a breakdown in relations;
- not being able to actively exercise their rights; or
- purely for business reasons.

Such a position can be particularly detrimental where shareholders are in the minority and find themselves being prejudiced by the majority shareholders. Currently the Companies Act 71 of 2008 (the 2008 Act) makes provision for the protection of shareholders' rights. This is primarily provided for in s 163 of the 2008 Act.

Section 163 of the 2008 Act

Section 163 of the 2008 Act focuses specifically on the interests of minority shareholders. In contrast to s 161, s 163 states that an applicant may apply to court where any act of omission or conduct by the company or one of its prescribed officers is unfairly prejudicial or oppressive of the applicant's rights or interests. Section 163 can thus be broken down into two requirements, namely –

- conduct; and
- what is seen as prejudicial or unfair.

Background and s 252 of the Companies Act 61 of 1973

Prior to the 2008 Act, prejudicial conduct was regulated by s 252 of the Companies Act 61 of 1973 (the 1973 Act). In the case

of *Grancy Property Ltd v Manala and Others* 2015 (3) SA 313 (SCA) the court confirmed (at para 22) that s 163 of the 2008 Act is in all material respects the same as the s 252 of the 1973 Act. The biggest difference between s 163 and s 252, is arguably that the former, accommodates the interests of shareholders rather than just the rights of the shareholders.

Section 163: Who may apply?

Section 163(1) of the 2008 Act states that either a director or shareholder may apply for relief. Interestingly s 163 does not state that it must be a minority shareholder who may apply, but rather that any shareholder may make use of s 163. The difficulty for a majority shareholder, however, is arguably proving prejudicial or unfair conduct.

Furthermore, directors may often apply on behalf of minority shareholders they represent.

Section 163: What constitutes unfair or prejudicial conduct?

An act or omission, which is unfair or prejudicial need not necessarily be unlawful, and the fact that an action is unlawful does not on its own make it prejudicial or unfair. In determining what the test for unfairness is, South African courts have had to largely rely on English case law and similar cases under s 252 of the 1973 Act. In the English case *Re a Company (No 00709 of 1992)* *O'Neill and Another v Phillips and Others* [1999] 2 All ER 961, the court held



(at paras 966H-967E) that the concept of 'fairness' is wider than conduct merely affecting rights, and that it involves rather a consideration of what is just and equitable. In the case of *Donaldson Investments (Pty) Ltd and Others v Anglo-Transvaal Collieries Ltd: SA Mutual Life Assurance Society and Another Intervening* 1979 (3) SA 713 (W) the court held (at 722 E-G) that in order to succeed under s 252 of the 1973 Act, an applicant had to establish:

'A lack of probity or fair dealing, or a visible departure from the standards of fair dealing, or a violation of the conditions of fair play on which every shareholder is entitled to rely.'

cants can prove that they have a right or legitimate expectation to be involved in the managerial decisions of the company (at para 30).

In the *Grancy* case, the court held (at para 27) that when determining what constitutes unfair or prejudicial conduct, one must look not at the motive of the conduct, but rather look objectively at the act itself and the effect of such conduct on members of the company.

In *De Sousa and Another v Technology Corporate Management (Pty) Ltd and Others* 2017 (5) SA 577 (GJ) the court held (at paras 44-45) that the applicant had been excluded from the activities and management of the company, by the

- directing an issue or exchange of shares;
- appointing directors in addition to existing directors;
- directing the company or any person to pay a shareholder any part of the consideration paid for shares or the equivalent value thereof;
- setting aside a transaction to which the company is a party and payment of appropriate compensation; or
- for the trial of an issue as determined by the court.

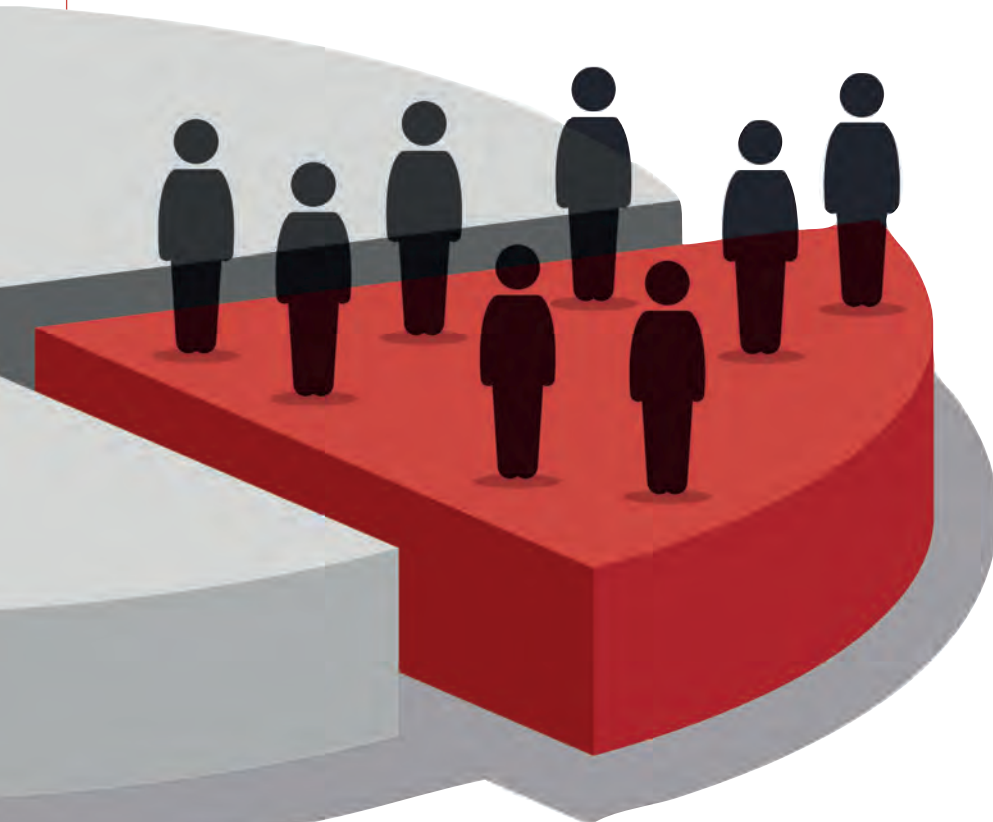
South African courts have determined that one possible remedy under s 163 is to force the company to buy out a shareholder at a fair value, as confirmed in the case of *Bayly and Others v Knowles* 2010 (4) SA 548 (SCA). In the *Grancy* case, the court held (at para 27) that when determining what constitutes unfair or prejudicial conduct, one must look not at the motive of the conduct but rather look objectively at the act itself and the effect of such conduct on members of the company. If the two requirements are satisfied, it is clear that the court has a wide discretion to grant any relief, which it deems just and equitable under the circumstances (at para 25).

In the *Bayly* case, a director, K, faced prejudicial circumstances as a director and was offered a buyout by the company, albeit at an unreasonable value. K proposed a counter-offer and instead offered to buy out the majority shareholder by way of s 252. The High Court granted the application stating that there was no other way for K to protect his investment, as the company had not responded to his counter-offer. The SCA, however, rejected this relief sought by K, and held that the interest of the non-warring shareholders must also be considered. The court held in this case (at para 24) that a minority's refusal to accept a fair value buyout offer constitutes strong evidence of a willingness by the minority to endure oppressive treatment.

Conclusion

In conclusion, s 163 of the 2008 Act offers substantial relief to a prejudiced minority shareholder. The test for proving such unfair or prejudicial conduct is an objective one, evidenced by factual circumstances, and not mere allegations. It should also be borne in mind that fairness is a flexible concept and the court may have wide discretion in the relief granted which must be just and equitable in the circumstances.

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South African courts have further emphasised that in assessing unfairness one must look at the conduct itself rather than the motive, although the motive may be of some assistance (see *Donaldson Investments (Pty) Ltd and Others v Anglo-Transvaal Collieries Ltd and Others* 1983 (3) SA 96 (A)).

In the case of *Geffen and Others v Martin and Others* [2018] 1 All SA 21 (WCC) the court held at para 78 that prejudicial conduct can be objectively proved if it had the effect of adversely or materially affecting financial interests. This would be proved by way of reference to objective evidence, such as financial statements, and market prices.

In the *Geffen* case, the court suggested a unique remedy – namely to actively involve the applicants in the managerial decisions of the company, if the appli-

majority who refused to engage in any good faith negotiation to buy him out at a fair value. The court further held the test used for unfair prejudice is an objective one (at para 35), and the so-called 'reasonable bystander' test is used. In other words, would a reasonable and external bystander looking in, see the alleged conduct as unfair and prejudicial?

Available relief under s 163

Section 163 of the 2008 Act gives a court vast remedied powers, such as –

- restraining the conduct complained of;
- placing the company under supervision and commencing business rescue proceedings;
- directing the company to amend its Memorandum of Incorporation or to create or to amend its shareholders' agreement;

Donations tax – a summary of calculations



By
Petro
Krüger

Donations tax is payable on the total value of property disposed of, whether directly or indirectly, by a resident by means of a donation. A 'resident' is defined in the Income Tax Act 58 of 1962, (the Act) as a –

'(a) natural person who is –

(i) ordinarily a resident in the Republic; or

...

(b) person (other than a natural person) which is incorporated, established or formed in the Republic or which has its place of effective management in the Republic.'

'Donation' is defined as the 'gratuitous disposal of property including any gratuitous waiver or renunciation of a right' that is without expecting something in return (s 55(1) of the Act). The test for a donation in our common law is well-established and is that the disposition must have been motivated by 'pure liberality' or 'disinterested benevolence' (see *Avis v Verseput* 1943 AD 331).

'Donee' is defined as 'any beneficiary under a donation and includes, where



Picture source: Gallo Images/Getty

property has been disposed of under a donation to any trustee to be administered by him for the benefit of any beneficiary, such trustee: Provided that any donations tax paid or payable by any trustee in his capacity as such may, notwithstanding anything to the contrary contained in the trust deed concerned, be recovered by him from assets of the trust' (s 55(1) of the Act).

Where any property has been disposed of for a consideration, which in the opinion of the Commissioner of the South African Revenue Service (Sars), is not an adequate consideration for that property, that property shall be treated as having been disposed of or under donation (s 58(1) of the Act). The value of the donation will be the amount by which the donation does not reflect an adequate consideration. Where property is disposed of by what is called an 'inadequate consideration', the difference between the value thereof and the consideration given, is deemed to

be a donation (see *Estate Welch v Commissioner for SARS* [2004] 2 All SA 586 (SCA)).

According to Adri Ludorf 'Tax implications of making donations' (www.goldbergdevilliers.co.za, accessed 5-7-2019), donations tax is a 'tax payable at a flat rate on the value of property disposed of by donation' (ss 54 to 64 of the Act).

'Property' is defined for donations tax purposes, as 'any right in or to property, movable or immovable, corporeal or incorporeal, wheresoever situated.'

Ludorf (*op cit*) states that '[d]onations tax is levied at a flat rate of 20% on the value of the property donated.'

Should the amount of the donation or donations, however, exceed R 30 million, the rate will be 25% on the value of all the donations.

When is a donation effective?

In terms of s 55(3) of the Act, a donation is deemed to be effective from the date on which all legal formalities for a valid donation have been complied with.

A donation may be contracted verbally, except when by law it is required that the contract be in writing. The contract needs to be in writing, when immovable property is donated or in the case of executory donations. In terms of s 43 of the General Law Amendment Act 70 of 1968, an executory donation (that is a donation prom-

ised for a date in the future) must be in writing and signed by the donor or by a person acting on their written authority granted by them and two witnesses. An executory donation takes effect when the property donated is actually delivered (*TC* (unreported case no 11372, 13-10-2004) (Traverso DJP)).

Until the above formalities have been completed, no donation takes place.

Exemptions

Section 56(1) of the Act, contains a list of exemptions from donations tax, as set out hereunder.

Annual exemptions

A donation will be exempt if the total value of donations for a year of assessment does not exceed:

- Casual gifts by companies and trusts (taxpayers who are not individuals): R 10 000.
- Donations by individuals: R 100 000.

Donations between spouses

The following exemptions between spouses are allowed in terms of the Act –

- donations to or for the benefit of the spouse of the donor under a registered antenuptial or post-nuptial contract; and
- donations to or for the benefit of the spouse of the donor who is not separated from them by judicial order.

Section 57A of the Act, stipulates that a donation made by one of the spouses, who is a party to a marriage in community of property, and such property falls in the joint estate of the spouses, such donation shall be deemed to have been made in equal shares.

Section 57A further stipulates that a donation made by one of the spouses, who is a party to a marriage in community of property, where the property was excluded from the joint estate, shall be deemed to have been made solely by the spouse making the donation.

Further exemptions from donations tax

- Donations *mortis causa*.
- Any donation of which the donee will not benefit until the death of the donor.
- Any donation, which is cancelled within six months from when it took effect.
- Any donation made by or to the benefit of any traditional community, traditional council or any tribe as referred to in s 10(1)(f)(vii) of the Act.
- Donations to charitable, ecclesiastical and educational institutions, and certain public bodies in the Republic of South Africa (SA).
- Donations made by companies, which are recognised as public companies



for tax purposes in terms of s 38 of the Act.

- Donations between companies forming part of the same group of companies.
- The donation of assets situated outside SA, subject to certain conditions as set out in s 56(g) of the Act.
- Any donations by or to any person referred to in subss 10(1)(a), (cA), (cE), (cN), (cO), (cQ), (d) or (e) of the Act. This includes government, provincial administration, local authorities, political parties or retirement funds.
- Any voluntary award of which either the value is required to be included in the gross income of the donee in terms of para (c), (d) or (f) of the definition of 'gross income' in terms of s 1 of the Act or a voluntary award of which the gain must be included in the gross income of the donee in terms of s 8A, 8B or 8C of the Act.
- Any donation of which such property consists of a right (other than a fiduciary, usufructuary or other like interest), to the use or occupation of property used for farming purposes, for no consideration or a consideration which is not an adequate consideration, and the donee is a child of the donor.
- Any donation where such property consists of the full ownership in immovable property if –
 - such immovable property was acquired by any beneficiary entitled to any grant or services in terms of the land reform programme as contemplated in the White Paper on South African Land Policy, 1997; and
 - the Minister of Land Affairs or a person designated by him has, on such terms and conditions as such minister in consultation with the Commissioner prescribe, approved the particular project in terms of which such immovable property is acquired; or
 - such immovable property was acquired in terms of land reform initiatives by virtue of measures as contemplated in ch 6 of the National Planning Commission, Presidency of the Republic of South Africa.
- Donations to approved Public Benefit Organisations (PBO's) – see s 56(1)(h) of the Act. This will only apply to PBO's registered with Sars in accordance with s 30 of the Act.
- Any donation if made under a trust.

Who is liable to pay donations tax?

Donations tax applies to any individual, company or trust that is a resident of SA (as defined in s 1 of the Act).

Non-residents are not liable for donations tax. If your brother lives and works in Australia and donates some of his hard-earned Dollars to you, from funds

generated while working overseas, he will not be liable to pay donations tax in SA.

The donor is liable for the payment of donations tax. However, if the donor fails to pay the donation tax in time, the donor and donee become jointly and severally liable for the donations tax (s 59 of the Act).

Paying donations tax

After a donation is made, the donor needs to complete an IT 144 form and submit it to the nearest Sars branch.

Donations tax must be paid at the end of the month, following the month in which the donation was made. Sars may in certain circumstances allow for a longer period of payment (s 60(1) of the Act).

Valuation of property for donations tax

In the case of any fiduciary, usufructuary or other like interest in property, the annual value of the right of enjoyment of the property over which such interest was or is held, is capitalised at 12%, over the life expectation of the donor, or if such right is to be held for a lesser period than the life of the donor, over such lesser period (s 62 (1)(a) of the Act).

In the case of any right to any annuity, the value is also determined by capitalising the annual value of the annuity at 12% percent, over the expectation of the life of the donor, or if such right is to be held by the donee for a lesser period than the life of the donor, over such lesser period (s 62(1)(b) of the Act). (Note that the calculation is made over the life of the donor and not the life of the person enjoying the right.)

In the case of a right of ownership in any movable or immovable property, which is subject to a usufructuary, fiduciary or other like interest the value of such property will be the amount by which the fair market value of such property exceeds the value of such usufructuary, fiduciary or other interest (s 62(1)(c) of the Act).

If the Commissioner, however, is of the opinion that the property donated will not be able to provide a 12% yield over the period, the Commissioner may use such other value that he deems reasonable.

Where the fiduciary, usufructuary or other like interest is to be determined over the life expectancy of a natural person and where it is not a natural person – like a company or a trust – the value of such right shall be determined over a period of 50 years.

In the case of other property, the value of the property will be the fair market value of the property, on the date that the donation is made, without any limitations placed on the donation by the donor. If the Commissioner is of the opin-

ion that conditions were imposed by the donor, by which the value of any property is reduced in consequence of the donation, the value of such property shall be determined as though the conditions in terms of which the said valuation of the property is reduced in consequence of donation, had not been imposed (s 62(1)(d) of the Act).

An owner of immovable property on which a *bona fide* farming undertaking is being carried out in SA, the fair market value is determined by reducing the price, which could be obtained on a sale between a willing buyer and willing seller dealing at arm's length in an open market by 30%. The fair market value is 70% of the normal market value.

Any company not quoted on the stock exchange or close corporation, which owns immovable property on which *bona fide* farming operations are being carried on in SA, the value of such immovable property shall also be determined as 70% of the normal market value.

If the Commissioner is not satisfied with the fair market value placed on the property, they may fix the fair market value of the property (s 62(4) of the Act). When determining the fair market value, the Commissioner shall take into consideration, *inter alia* –

- the municipal or divisional council valuation of such property;
- any sworn valuation provided by the donor or the donee; and/or
- any valuation made by a competent and disinterested person appointed by the Commissioner (s 62(5) of the Act).

Conclusion

To summarise, in order to calculate donations tax, the following should be taken into account:

- Which various movable and immovable properties were disposed of during the year of assessment?
- Was the disposal a donation or deemed to be a donation?
- Was the donation specifically exempt from donations tax?
- What was the value of the exemption?
- Was any consideration received from the donee?
- Were the yearly threshold amounts for yearly donations by a natural person or a person other than a natural person taken into account?

The donations tax will then be calculated on amounts not exempt from donations tax at a rate of 20% or 25% – if the donations are over R 30 million.

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A European perspective on modern day piracy – copyright, hyperlinks and the Internet



By
Ntsako
Kennedy
Ngonyama

The Berne Convention for the Protection of Literary and Artistic Works, 1886 (the Berne Convention) is the principal international treaty governing copyright.

In the European Union (the EU), copyright laws derive from directives aimed at harmonising laws among the member states. The directives are, therefore, implemented by national legislation at

each member state under the regulatory framework established by the directives.

Copyright laws are, among other things, there to –

- give the authors of copyrightable works control over the usage of their work by third parties;
- encourage creation and innovation; and
- incentivise the creators.

The 21st century brought about and is appropriately characterised as the ‘digital age’. The digital age is succeeded by the so-called ‘social age’. In the social age, the Internet bears witness – on a daily basis – to the uploading and sharing of information on websites and social media platforms. Information includes books, musical pieces, films, pictures and drawings that are considered as works of art and/or literary works protected by copyright laws pursuant to the Berne Convention.

In terms of arts 2 and 3 of Directive 2001/29/EC (the InfoSoc Directive) respectively, the author of a work has the exclusive rights to authorise or prohibit any reproduction of the work and communication of such work to the public by wire or wireless means.

Generally, this means that reproducing and/or communicating copyrightable work to the public, without the author’s prior permission would be considered as a violation of their copyright.

Article 5 of the InfoSoc Directive provides for various exemptions under which copyright protected work may be reproduced or communicated to the public without the author’s prior consent. By way of example and a common occurrence, art 5(3)(a) provides for use of the authors work without prior authorisation in an event where the ‘use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author’s name, is indicated, unless this turns out to be impossible’. The above exempted use is not without a limitation as the InfoSoc Directive provides that such use should not be for commercial purposes.

On a cursory glance through the InfoSoc Directive, one can self-assuredly say that the act of placing copyrighted work on the Internet undisputedly constitutes an act of communication to the public by wireless means. However, as it will be shown below, there are underlying technicalities attached to the question

whether or not an act of placing copyrighted work on the Internet constitutes an act of communication to the public by wireless means. Further, as interpreted before the appropriate fora, in the social age, communicating copyrighted work to the public goes beyond the mere act of placing such work on the Internet.

As is common with loosely drafted provisions in legislation, a question of law has arisen as to whether providing a hyperlink on a website, which hyperlink gives the general public access to a work that would normally not be available to them constitutes an act of communication to the public and thus, as required in terms of the InfoSoc Directive, prior permission to provide the hyperlink should be obtained from the copyright holder?

In the landmark case of *Svensson and Others v Retriever Sverige AB* [2014] EU-ECJ C-466/12 the Court of Justice of the European Union (the CJEU) in giving its preliminary judgment held that ‘Article 3(1) of [the InfoSoc] Directive 2001/29 must be interpreted as meaning that the provision on a website of clickable links to works freely available on another website does not constitute an “act of communication to the public”, as referred to in that provision.’

Therefore, when providing a hyperlink, one should take the accessibility of the work to which the hyperlink leads into consideration. The provision of a hyperlink, which for example, bypasses a password that is protecting copyrighted work means that the work would ordinarily not be available to the general public and, as a result, prior authorisation to provide such a hyperlink should be obtained from the copyright holder.

Notwithstanding the clarification provided by the CJEU in the *Svensson* case, the national courts of member states still found it difficult to interpret or apply that precedent in giving effect to art 3(1) of the InfoSoc Directive. In the case of *GS Media BV v Sanoma Media Netherlands BV and Others* (C-160/15) ECLI: EU: C: 2016: 644, the Dutch Supreme Court approached the CJEU, seeking clarity on the CJEU’s judgment in the *Svensson* case.

Specifically, the Dutch Supreme Court sought clarity on the following questions:

‘(a) If anyone other than the copyright holder refers by means of a hyperlink on a website controlled by him to a website, which is managed by a third party and is accessible to the general internet public, on which the work has been made available without the consent of the rightholder, does that constitute a “communication to the public” within the meaning of Article 3(1) of Directive 2001/29?

(b) Does it make any difference if the work was also not previously communi-

cated, with the rightholder’s consent, to the public in some other way?

(c) Is it important whether the “hyperlinker” is or ought to be aware of the lack of consent by the rightholder for the placement of the work on the third party’s website mentioned in (a) above and, as the case may be, of the fact that the work has also not previously been communicated, with the rightholder’s consent, to the public in some other way?’

The CJEU acknowledged that the InfoSoc Directive is silent as to the meaning and scope of the concept of ‘communication to the public’. Accordingly, this concept ought to be interpreted having regard to the objectives of the InfoSoc Directive.

The CJEU went on to identify one of the key objectives of the InfoSoc Directive, which is to establish a high level of protection of authors, allowing them to obtain an appropriate reward for the use of their works, including on the occasion of communication of the work to the public.

The court remarked that a distinction ought to be drawn between the decision in *Svensson* and the current case. In the *Svensson* case, the CJEU was faced with the question where the hyperlink leads to protected works, which have been made freely available on another website, where the copyright holders of those works have consented to such communication, which consent accordingly includes all Internet users as the public.

Given the above distinction, the CJEU in the *GS Media* case set out other key guidelines, in addition to the principle set out the *Svensson* case that must be taken into consideration in determining what constitutes a communication to the public within the prescripts of art 3 of the InfoSoc Directive. Such guidelines can be briefly summarised as follows:

- The act of providing a hyperlink for financial gain (that is, for profit) to work, which was illegally placed on the Internet constitutes a communication to the public. Accordingly, a person posting a hyperlink for financial gain is reasonably expected to conduct the necessary checks to ensure that such work is not illegitimately published on the website to which the hyperlink leads.
- The provision of a hyperlink constitutes a communication to the public when a person providing the hyperlink knows or ought to have known that the hyperlink that they posted provides access to work that has been illegally placed on the Internet (an example of a person who ought to have known is a person that has been notified by the copyright holder).
- A hyperlink that enables users to circumvent the restriction placed on the

access to protected work on the website where the work is originally posted constitutes a communication to the public.

- When the hyperlink does not provide access to the protected work by a ‘new public’, there cannot be communication to the public.
- A communication to the public does not arise when the posting of a hyperlink to a work that is freely available on another website is carried out by a person who, in so doing, does not pursue a financial gain. Such a person is presumed to not know and is reasonably not expected to have known that the work had been published on the Internet without the consent of the copyright holder. Further, since such work is already available with unrestricted access on the website to which the hyperlink provides access, all Internet users could, in principle, readily have access to the work without the hyperlink concerned.

In the *GS Media* case, the CJEU made a preliminary ruling (subject to the verification to be made by the referring court) that the act in question constituted a communication to the public in that, the copyright holder of the work concerned had not consented to the publication of such work on the Internet and that the hyperlink provider was aware of this fact. Further, the act of providing the hyperlink was carried out for profit.

It appears, therefore, that when faced with the question of whether an act constitutes a communication to the public, the national courts of the EU member states ought to interpret this concept broadly rather than narrowly and subjectively rather than objectively.

While some intellectual property law experts still criticise the precedent set by the CJEU for want of completeness, the current precedent is adequate for one to comprehend that:

- a person (natural or juristic) who posts a hyperlink for profit, should always verify whether the operator of the website to which the hyperlink leads, has obtained consent from the copyright holder prior to that work being placed on the website; and
- a person (natural or juristic) who posts a hyperlink cannot plead an ignorance of law defence where they know or ought to have known that the copyright holder of the work to which the hyperlink leads has not consented to that publication.

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REQUEST FOR PROPOSAL – ATTORNEYS SERVICES

The Legal Practitioners Fidelity Fund (Fund) is a client protection fund, constituted by statute for the purpose of reimbursing members of the public for loss resulting from the theft of money or property entrusted to attorneys in the course and scope of their practices.

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Firms are invited to submit proposals for consideration. The information submitted in such proposals should include experience, qualifications, and fee tariff. The proposals will be reviewed for the purpose of selecting firms to provide legal representation to the Fund. A favourable fee structure, a firm's experience, qualifications, resources and quality of proposed services will be key factors in determining firms to represent the Fund. Please refer to the Scope of Proposal Content on the Fund's website at: www.fidfund.co.za for detailed information on the content of the proposals or e-mail debra@fidfund.co.za for a copy.

Sealed proposals received up to and including close of business on Friday, 30 August 2019 for the attention of the Claims Executive, 5th Floor, 28 Wale Street, Cape Town I P.O Box 3062, Cape Town, 8000 will be considered. Facsimile and Electronic proposals will be accepted at (021) 423 4819 or debra@fidfund.co.za.

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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

June 2019 (3) South African Law Reports (pp 341 – 662);
May [2019] 2 All South African Law Reports (pp 307 – 628);
2019 (2) Butterworths Constitutional Law Reports – February
(pp 165 – 288); 2019 (3) Butterworths Constitutional
Law Reports – March (pp 289 – 428)

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
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
KZP: KwaZulu-Natal Division, Pietermaritzburg
LAC: Labour Appeal Court
LC: Labour Court
LCC: Land Claims Court
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Access to information

Defence that documents sought do not exist or are not in the possession of the respondent: The facts in the case of *Manuel v Sahara Computers (Pty) Ltd and Another* [2019] 2 All SA 417 (GP) were that News24, an online news provider, published an article in which it was alleged that the first respondent, Sahara Computers, a company owned by the Gupta family, and the second respondent,

Chawla, its former Chief Executive Officer (CEO), had unlawfully obtained and disclosed personal information of the applicant Manuel and his wife. The article claimed that the applicant and his wife had been subjected to unlawful surveillance and that their personal details such as identity numbers and traveling arrangements had been collected and disclosed to the respondents. The applicant did not know those responsible for the unlawful surveillance. In order to identify the culprits and consequently protect his constitutional right to privacy the applicant, after unsuccessfully engaging the respondents, approached the GP for access to information in terms of s 78(2) of the Promotion of Access to Information Act 2 of 2000 (PAIA). Relying on s 50 of PAIA he further requested access to certain records. As the case unfolded the request of the applicant changed to referral of the matter to oral hearing

where the respondents and their witnesses could testify and be cross-examined to establish information and documents in their possession.

The court granted an order postponing the matter to a later date to be arranged with the Registrar for the hearing of oral evidence. The second respondent and the CEO of the first respondent were ordered to attend that hearing for examination and cross-examination. Costs were reserved.

Weiner J held that in establishing that information was required for the exercise or protection of a right, the applicant was required to satisfy two distinct requirements, namely:

- He had to identify the rights which he sought to exercise or protect and show that *prima facie* he had established that he had such a right.
- He should demonstrate how the information would assist in exercising or protect-

ing the right in question. He should, therefore, establish a connection between the information requested and the right sought to be exercised or protected. The information should provide the applicant with 'assistance' in the sense of substantial advantage or an element of need.

In the present case, the applicant was entitled to use PAIA to establish who his defendants could be and/or what cause of action he had against them. He did not require the records to assess his prospects of success, which would amount to pre-litigation discovery. Therefore, the request was permitted under PAIA and did not amount to pre-litigation discovery.

Contracts

No termination of contract of perpetual duration and concurrent liability in delict and contract: In *Trio Engineered Products Inc v Pilot*



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Crushtec International (Pty) Ltd 2019 (3) SA 580 (GJ) the plaintiff, Trio Products, had a contract with the defendant, Pilot Crushtec, in terms of which the defendant was given the sole and exclusive right to sell and distribute the products of the plaintiff in defined territories. When the plaintiff sought payment from the defendant in terms of the contract, the latter lodged a counterclaim based on three grounds:

- The defendant alleged that the plaintiff breached the agreement by replacing the party with W Group as distributor, for which breach it sought damages.
- The defendant alleged that the plaintiff breached the agreement, which was required to run 'continuously and indefinitely'.
- In the alternative to the claim above the defendant alleged that the plaintiff, through its holding company W Group, unlawfully competed with it contrary to the distribution agreement, which gave it the sole and exclusive right to distribute the products.

The plaintiff excepted to the defendant's second counterclaim on the ground that it failed to rely on any term that prevented the plaintiff from terminating the agreement. That being the case the contract was terminable on reasonable notice. The plaintiff further excepted to the second counterclaim on the ground that as it was based on delict, it was not sustainable in a contractual context.

The court dismissed the exceptions with costs. Unterhalter J held that an agreement of unspecified duration was valid. Such agreement could not be terminated unless it contained a clause to that effect, express or tacit. Absent a term of the agreement permitting termination, which was a question of construction, there was no presumption that a contract of unspecified duration was terminable on reasonable notice. If the agreement was one in perpetuity, the parties would be held to the bargain. As in the present case the defendant pleaded that the agreement was continuous and

indefinite, it was not one of unspecified duration in the sense that it was silent on the matter of duration. On the contrary it was specified to be indefinite. Once that averment was made the agreement had to be understood to endure in perpetuity, requiring no plea that it was not terminable. There was no presumption that an agreement expressed to be of indefinite duration had to be taken to be tacitly subject to termination on reasonable notice. On the contrary once an agreement was expressed to endure in perpetuity, it was for the party relying on reasonable notice to make the case for such construction. Where the agreement was silent as to the duration, it was terminable on reasonable notice, in the absence of a conclusion that it was intended to continue indefinitely.

Turning to the question of concurrence of action in delict and contract, the court held that few areas of private law had given rise to as much conceptual uncertainty as the circumstances in which a breach of contract could subsist alongside an actionable delict. From the case of *Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) the following principles emerged, namely -

- a breach of contract itself and without more was not a wrongful act for the purposes of Aquilian liability;
- where the duty of care arose independently of any contractual duty, there was a concurrence of actions in contract and delict provided the other requirements for liability were satisfied; and
- where the duty arose strictly in contract and where such contract subsisted, there was no need to extend liability beyond that arising under the contract because the remedy in contract sufficed and extension of liability into the realm of delict would infringe the autonomy of the parties in framing their rights and obligations under the contract.

A summary of the position was, therefore, that -

- a breach of contract was not, without more, a delict;

- the existence of a contract ordinarily excluded the recognition of delictual duties at variance with contractual ones;
- parties to a contract could have additional or complementary duties arising independently in delict; and
- determining wrongfulness, one had to proceed with caution when assessing whether a third party, harmed by a breach of contract, could sue a party to the contract for such harm, outside well-defined causes of action.

Foreign judgments

Recognition and enforcement of foreign civil judgment sounding in money if it is final and conclusive: The facts in *Elan Boulevard (Pty) Ltd v Fryn Investments (Pty) Ltd and Others* 2019 (3) SA 441 (SCA) were that in 2002 Mr and Mrs Essack, South African nationals, emigrated to Australia where their trust, the Farhat Essack Family Trust (the Trust) concluded two contracts, one to buy an apartment and the other to buy furniture. Both Mr and Mrs Essack guaranteed performance by the Trust under the first contract, while Mr Essack alone guaranteed performance under the second contract. After breach of contract by the Trust, the appellant, Elan Boulevard sued the Trust in the Supreme Court of Queensland, Australia for damages and the Essacks under the guarantees. The court erroneously granted judgment against Mr and Mrs Essack for the full amount in respect of the two guarantees instead of splitting it up into judgment against Mr and Mrs Essack in respect of the first guarantee and against Mr Essack only regarding the second guarantee. As the Essacks had returned to South Africa the appellant applied to the GP for recognition and enforcement of the judgment of the Queensland Supreme Court. Legodi J dismissed the application.

The SCA upheld the appeal with costs. Ponnar JA (Dambuza, Mocumie, Schippers JJA and Mothle AJA concurring) held that it was a legal requirement of any action to enforce a foreign judgment in this country that the judg-

ment be final and conclusive. The requirement of finality meant that the judgment had to be final in the particular court, which pronounced it. Final and conclusive meant that the judgment could not, although it would still be subject to appeal, be varied by the court which granted it. Furthermore, the judgment had to be final and conclusive on the merits and not only as to some interlocutory issue not affecting the merits.

South African courts would ordinarily not investigate the merits of a case adjudicated by a foreign court. It would not make a difference that a local court might have taken a different view or felt that the foreign court had erred. That was so as the remedy of an aggrieved litigant would be to appeal that judgment in the foreign jurisdiction. A South African court did not sit on appeal in relation to the judgment of a foreign court and, therefore, if it was contended that the decision of the foreign court was wrong, recourse has to be had to the mode of appeal provided for in that country.

In the instant case although notionally the foreign court order could have been varied by the Australian court to rectify the error, such variation would not relate to the merits of the liability of Mrs Essack, which was not disputed, but merely as to the quantum of such liability. As there was no appeal by the Essacks against the order of the Australian court, nor was there any attempt by them to have the obvious error corrected, that judgment was final and conclusive.

Fundamental rights

Differentiation between persons having same qualification not allowed: In terms of s 26(1)(a) of the Legal Practice Act 28 of 2014 (the LPA) for a person to be admitted and enrolled as a legal practitioner, they must have completed a Bachelor of Laws (LLB) degree offered at a 'university' over a period of four years. In *Independent Institute of Education (Pty) Ltd v KwaZulu-Natal Law Society and Others* [2019] 2 All SA 399 (KZP) the

applicant, the Independent Institute of Education (IIE) approached the High Court for, among others, an order declaring that s 26(1)(a) of the LPA was unconstitutional and invalid to the extent that it failed to include Higher Education Institutions registered in terms of the Higher Education Act 101 of 1997 (the HEA), which were accredited and registered to provide an LLB degree approved by the South African Qualifications Authority (SAQA). That was after the first respondent, the KwaZulu-Natal Law Society, 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, which has since been repealed by the LPA, which came into effect on 1 November 2018. After the repeal the admission of legal practitioners, including attorneys, fell under the LPA.

At the beginning of 2018, the applicant started offering the LLB degree at some of its campuses. The applicant is not a 'university' but a private 'higher education institution' duly registered in terms of the HEA. Its LLB degree was registered and accredited by SAQA and was on par with that offered at universities.

The court granted an order declaring s 26(1)(a) unconstitutional and invalid insofar as the use of the word 'university' excluded private higher education institutions duly registered and accredited to offer the LLB degree. It was further held that students graduating with an LLB degree offered by the applicant

after January 2018 were qualified to enter the practice of the legal profession just like graduates from public universities. The Minister of Justice was ordered to pay costs.

Sibiya AJ held that having shown that the applicant met the criteria set out in s 29(3) (no discrimination on basis of race) of the Constitution and those in ch 7 of the HEA, the applicant enjoyed the same rights to offer the accredited four-year LLB degree as public universities. Its exclusion from s 26(1)(a) of the LPA limited that right. The impugned provision clearly differentiated between public 'universities' and private 'higher education institutions' that had been duly accredited to offer the LLB degree by the relevant structures in general and the applicant together with its students in particular. There was only one LLB degree that was accredited by SAQA and it was the same for public universities as that for the applicant. There was, therefore, no rational basis for differentiating between persons with the LLB degree obtained from the applicant following due recognition, accreditation and registration with the relevant educational authorities, including SAQA, from those with an LLB from public universities. That was particularly so because of confirmation from the Council on Higher Education and Training that the applicant's four-year LLB degree was on par with that from public universities. There was, therefore, no rational link between the impugned provision and the government purpose it sought to achieve through

differentiation. For that reason, the impugned provision limited the provisions of s 9(1) (equality provisions) of the Constitution.

- See case note Geoffrey Abrahams 'LLB graduates from private institutions are qualified to enter professional legal practice' 2019 (June) *DR* 23.
- Note: The above matter is to be heard in the CC in August – *Editor*.

Labour law

Reinstatement is primary remedy for substantively unfair dismissal: The facts in *South African Commercial, Catering and Allied Workers Union and Others v Woolworths (Pty) Ltd* 2019 (3) SA 362 (CC); 2019 (3) BCLR 412 (CC) were that until 2002 the respondent, Woolworths, employed its employees on a full-time basis, which gave them better benefits. However, it was decided in that year that in future all its employees would be employed on flexible working hour basis (flexi-timers) resulting in reduced benefits. In 2012 the respondent started converting full-time workers to flexi-time workers, which resulted in the majority of its employees opting for early retirement or voluntary severance while others agreed to become flexi-timers. Nevertheless, some employees, including the present applicants, insisted on remaining full-time workers. After negotiations the applicants agreed to become flexi-timers to be paid at the rate of full-time workers. The respondent mistakenly understood

their stance to be that they insisted on remaining full-time workers and accordingly retrenched them for operational reasons, namely because of the employer's economic, technological, structural or similar needs as provided for in s 189A(19) of the Labour Relations Act 66 1995 (the LRA). The respondent did not consider the alternatives of employing the applicants as full-time workers on reduced benefits, the effect of natural attrition and/or wage freezes. The first applicant traded union, the South African Commercial, Catering and Allied Workers Union (SACCWU), in its name and on behalf of its affected members instituted proceedings in the LC for reinstatement of the applicants due to their alleged substantively and procedurally unfair dismissal. The CC held that the dismissal was both substantively and procedurally unfair and accordingly reinstated them. On appeal to the LAC, reinstatement was changed to 12 months' remuneration, the court having been persuaded by the respondent's argument that the applicants' positions were no longer available.

The CC granted leave to appeal and upheld the appeal with no order as to costs. Reading a unanimous judgment of the court, Khampepe J held that the dismissal of individual applicants was substantively unfair as the respondent failed to prove that it complied with s 189A(19) (b) or (c) of the LRA by considering all possible alternatives before retrenching them. In other words, the respondent failed to show that the re-

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trenchments were operationally justifiable on rational grounds or that it properly considered alternatives to retrenchments. In view of the finding on substantive unfairness there was no need for the court to engage on the issue of procedural unfairness.

In regard to the remedy to be granted, the court held that it was axiomatic that reinstatement was the primary remedy that the LRA afforded employees whose dismissal was found to be substantively unfair. Employees who were reinstated would resume their employment on the same terms and conditions, which prevailed at the time of the dismissal. Reinstatement had to be ordered when a dismissal was found to be substantively unfair unless one of the exceptions set out in s 193(2) applied, namely -

- that the affected employees did not wish to continue working for the employer;
- the employment relationship had deteriorated to such a degree that continued employment was rendered intolerable;
- it was no longer reasonably practicable for the employees to return to the position that they previously filled; or
- that the dismissal was found to be procedurally unfair only.

None of the exceptions were applicable in the present case.

The respondent had not shown that reinstatement was not reasonably practicable. Therefore, the LC was correct in ordering reinstatement with retrospective effect to the date of dismissal. That being the case the court had to revive the contracts of employment, which existed between the applicants and the respondent at the time of the dismissal, that being done on the basis that as soon as possible after the judgment had been handed down the parties would resume the consultation process which ended when the dismissal took place.

- See employment law update Monique Jefferson 'Employer's policy resulting in dismissal found to

be substantively fair' 2017 (April) DR 40 for the LAC judgment.

Land reform

Power of the LCC to determine or approve compensation upon expropriation of land: In terms of s 22(1)(b) of the Restitution of Land Rights Act 22 of 1994 (the LRA) the LCC has power to determine or approve compensation payable in respect of land owned by or in the possession of a private person on expropriation or acquisition of such land in terms of the LRA. However, in terms of s 12(1)(a) of the Property Valuation Act 17 of 2014 (the PVA) whenever a property has been identified for purposes of land reform, it must be valued by the Office of the Valuer-General.

The issue in *Moloto Community v Minister of Rural Development and Land Reform and Others* 2019 (3) SA 523 (LCC) was 'just and equitable' compensation to be paid. There the first defendant, the minister, made certain offers to landowners (second to 17th defendants), which were rejected as inadequate. To resolve the issue the parties agreed that the LCC would determine compensation payable by the minister. By consent, the agreement was made an order of court on 24 May 2018. At the hearing of the matter on a later date it was indicated that the minister intended to make an application to set aside the court order granted on 24 May 2018 so that determination of compensation could be done by the Office of the Valuer-General. However, no such application was made, but at the hearing of the matter counsel handed-in a 'Notice of Motion' accompanied by attachments, which showed values to the affected properties as determined by the Valuer-General. There was nothing new in the valuations as they were the already rejected offers previously made by the minister. It was submitted on behalf of the minister that the Notice of Motion had 'overtaken' the court order granted on 24 May 2018 and that the PVA

ousted the jurisdiction of the LCC to determine or approve compensation payable.

The LCC held that the court order dated 24 May 2018 remained binding and had not been negated by the contents of the Notice of Motion handed up at the hearing. The minister was ordered to pay costs on a punitive scale because of the many postponements, delays and failures to comply with various directives.

Canca AJ held that once a claim for restitution of a right in land, instituted in terms of the LRA, had been referred to the LCC for adjudication, that claim was subject to the court's jurisdiction. In such an instance the court also had the power to determine or approve the compensation payable to the owner whose property was the subject of such a claim on expropriation or acquisition by the state. In the present case, the fact that the issue of the determination of the amount of just and equitable compensation payable by the minister would be left to the court, absent agreement between the parties, was also recorded in the minutes of a pre-trial conference held thereafter. There could, therefore, be no doubt that in the light of the court order and contents of a subsequent pre-trial conference, the amount of the just and equitable compensation

would be determined by the LCC.

Unless a court order had been set aside or rescinded, it remained valid and binding on all the parties. Having failed to set aside the court order of 24 May 2018, it was not up to the minister to contend that her hands were tied by the provisions of the PVA. The mere fact that the Valuer-General was empowered by the PVA to determine the compensation did not, without more, oust the jurisdiction of the LCC to do so. Had that been the intention of the legislature, it would have done so in specific terms or by implication.

Sale of land

Effect of late recordal of instalment sale agreement: In *Amardien and Others v Registrar of Deeds and Others* 2019 (3) SA 341 (CC); 2019 (2) BCLR 193 (CC) the applicants, Amardien and others, were beneficiaries of a low-cost housing subsidy scheme who received financial assistance by way of a state subsidy from the fifth respondent, the Cape Town Community Housing Company (the company) to buy houses from it. In terms of s 20(1)(a) of the Alienation of Land Act 68 of 1981 (the ALA) the company, as a seller, was required to record the instalment sale agreements

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with the first respondent, the Registrar of Deeds. Failure to record the sale had the result that no person would, by virtue of the deed of alienation, receive any consideration until the recording had been effected, which provision was found in s 26(1) of the ALA. The company did not record the instalment sale agreements but contrary to the section started receiving instalments from the applicants. When the latter fell into arrears, the company sent them letters demanding payment, without specifying the amount of arrears and threatening cancellation of the contracts if there was no payment within ten days. It was only at a much later date, some ten years after conclusion of the instalment sale agreements, that the agreements were registered with the Registrar of Deeds. Thereafter, the company terminated the agreements and sold the properties to a third party, the S & N Trust (the Trust). Furthermore, the company caused the Registrar to cancel the recordal of the instalment sale agreements and have the

properties transferred to the trustees of the Trust.

The applicants challenged the validity of cancellation of the instalment sale agreements by the company and cancellation of recordal of same by the Registrar. The WCC per Binns-Ward J dismissed the claims. After unsuccessfully petitioning the SCA for leave to appeal, the applicants approached the CC where leave to appeal was granted and the appeal upheld with costs to be paid by the company.

Reading a unanimous judgment of the court Mhlantla J held that the company was obliged to record the instalment sale agreements with the Registrar of Deeds within 90 days of their conclusion but failed to do so timeously, only doing so after more than ten years. The effect of late recordal of the agreements was clear, namely that payment made under the agreements were not due and payable and, therefore, the applicants were not in arrears as contended by the company. For the period that the agreements remained

unrecorded, no fault could be imputed to the purchasers for not paying the instalments. Moreover, the s 129 of the National Credit Act 34 of 2005 notices served on the applicants advising that they were in arrears with payment of instalments were defective as they did not indicate the amount of the arrears. It followed that the s 129 notices were premature and invalid. They could not, therefore, form a basis for cancellation of the instalment sale agreements. The effect thereof was that the subsequent cancellation of the recording of the agreements by the Registrar, premised on valid cancellation thereof by the company, was also invalid.

- See case note Kgomoitso Ramotsho 'Purchaser not obliged to make payment until recordal is complete' 2019 (July) DR 23.

Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with: Actuarial surplus

of a pension fund, admission of advocates, application for mining and prospecting rights, community schemes ombud, construction of fibre optic network, formation of tacit agreement, interim interdict preventing payment of pension benefits, interpretation of construction agreement, interpretation of professional indemnity insurance, interpretation of replacement-value clause in insurance contract, leave to continue proceedings on behalf of company, *locus standi* to sue on contract, no separation of decree of divorce from forfeiture of benefits in divorce proceedings, organised crime and sentencing, parole evidence rule, professional misconduct by attorney, removal of liquidator from office, refusal to effect transfer after sale of municipal land, review and setting aside of administrative action, review of conduct of own officials by state, submission of labour and social plan by holder of mining right, treatment of evidence of accomplice, writ of summons *in rem* and warrant of arrest of ship.



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By
Samuel
Mariens

Is compensation in terms of s 189A(13)(d) of the LRA a self-standing remedy?

Steenkamp and Others v Edcon Limited (CC) (unreported case no CCT29/18, 30-4-2019) (Basson AJ (unanimous))

The case of *Steenkamp* entailed an employment dispute wherein Ms Steenkamp and 1 817 other employees (the applicants) were dismissed based on the operational requirements of their employer, Edcon Limited (the respondent). The respondent fell into financial hardship and issued each of the applicants with a notice in terms of s 189(3) of the Labour Relations Act 66 of 1995 (LRA), communicating, *inter alia*, its intention to retrench them. Due to the number of employees the respondent contemplated retrenching, the scope of s 189A of the LRA was triggered, resulting in the commencement of facilitation proceedings between the applicants and the respondent. Subsequently, the facilitation proceedings broke down, which ultimately prompted the respondent to issue each of the applicants with a notice of termination of their contracts of employment. The applicants, defeated in the first instalment of their battle against the respondent (*Steenkamp and Others v Edcon Ltd* 2016 (3) SA 251 (CC)), instituted an application in terms of s 189A(13) of the LRA, seeking 12 months' compensation to ameliorate (as alleged by the applicants) their procedurally unfair dismissals in consequence of the respondent's non-compliance with the peremptory provisions of s 189A of the LRA.

Issue before the Constitutional Court

One of the issues the Constitutional Court (CC) was required to decide on was: Whether s 189A(13)(d) was a 'self-standing remedy'? Put differently, the CC had to determine whether an aggrieved employee could bypass the remedies provided for in terms of subs 13(a) to (c) and immediately claim compensation in terms of subs (d).

Section 189A(13) of the LRA reads as follows:

'If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order –

- (a) compelling the employer to comply with a fair procedure;
- (b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;
- (c) directing the employer to reinstate an employee until it has complied with a fair procedure;
- (d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate.'

The CC held

The CC found that the broader context of s 189A and the primary purpose of s 189A(13) should be taken into account in order to aid the interpretation and consideration of the remedies provided for in terms of s 189A(13). The CC held that the primary motive of s 189A(13) is to make provision for corrective relief, which is directed at ensuring the retrenchment process resumes and is conducted fairly. In addition, the primary motive of s 189A(13) is informed by s 189A(18). Section 189A(18) removes the Labour Court's (LC) jurisdiction in adjudicating disputes involving a procedurally unfair dismissal based on the employer's operational requirements. In circumstances where an employer is not engaging in a fair procedure, the function of the LC is supervisory in nature and aimed at putting the employer and the employee in a position, which enables them to engage in a procedurally fair retrenchment process.

The CC considered the language, purpose and overall scheme of s 189A(13), in conjunction with the effect of s 189A(18), and concluded that a court is only permitted to consider subs (d) in specific circumstances, namely where awarding relief in terms of subs (a) to (c) would be inappropriate, given the particular facts placed before the court. Therefore, s 189A(13) creates a hierarchy of appropriate relief, wherein subs (a) to (c) are the preferred remedies and subs (d) is the 'last resort' remedy.

In the event that a court postpones the

consideration of relief in terms of subs (d) to a later date, this does not have the effect of separating subs (d) from subs (a) to (c). In such circumstances, the court would have already been afforded the opportunity to, firstly, consider the relief provided for in terms of subs (a) to (c) and, secondly, to have satisfied itself as to the appropriateness of awarding the relief contained therein. Consequently, s 189A(13) does not provide an applicant with a procedure to pursue compensation at some future remote time. The CC referred to the LC's finding in *Parkinson v Edcon Ltd* (CC) (unreported case no JR2644/14, 28-6-2016) (Van Niekerk J) at para 4, whereby it held that the object of s 189A(13) is to allow a court to 'supervise an *ongoing retrenchment process* or one that has *recently been concluded*; it is not a remedy that is available well after dismissals have been effected' (my italics).

Conclusion

The legislature phrased s 189A(13) in a way, which creates a condition precedent, namely that relief in terms of subs (a) to (c) are first required to be considered in their order of ranking, and thereafter, deemed inappropriate in the circumstances. Compliance with the condition precedent is peremptory before relief in terms of subs (d) may be awarded. Therefore, relief in terms of subs (d) is not a self-standing remedy, and thus, its consideration cannot be isolated from subs (a) to (c).

- See Moksha Naidoo 'Termination in breach of a statutory provision – a dismissal or nullity?' 2015 (May) *DR* 53 for the LAC judgment.

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By
Meshack
Fhatuwani
Netshithuthuni

A South African constitutional jurisprudential duty to consult affected and interested parties before awarding mining and prospecting rights

Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others 2011 (4) SA 113 (CC)

Since the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) came into effect on 1 May 2004, the promulgation of the MPRDA was generally welcomed and embraced by the mining industry. The MPRDA was enacted to facilitate equitable access to and sustainable development of the nation's mineral and petroleum resources. The notable change brought about by the MPRDA is that custodianship of the mineral's vests in the state. The MPRDA set out the process to be followed when submitting an application for mining and prospecting rights.

However, since the enactment, affected and interested parties affected by mining and prospecting activities and/or operations have been fighting against unfair administrative decisions or conduct taken by the Department of Mineral Resources and Energy, acting through the minister in favour of the applicants for mining and prospecting rights.

There has been rigorous enforcement of the legislation by the courts and other enforcement agencies such as the mining inspectorate. The negative impact on mining houses as a result of non-compliance with this regulatory framework cannot be overemphasised. One of the far-reaching consequences of non-compliance is that a mining house intending

to start a new mine can be refused an operating license.

The Department of Mineral Resources and Energy and the applicants of mining and prospecting rights have been ignoring the constitutional obligation underpinning the duty to notify and consult affected and interested parties before awarding mining and prospecting rights by employing administrative technicalities.

The Constitution and the MPRDA

The Constitution and the MPRDA provides for the duty to notify and consult affected and interested parties before granting and/or awarding mining and prospecting rights.

The MPRDA sets out the process to be adhered to when applying for mining rights, and failure to comply will result in the mining rights not being granted. Chapters 4 and 6 of the MPRDA set out constitutional imperatives underpinning the duty to notify and consult interested and affected parties when applying for mining rights, prospecting rights, petroleum rights and permits.

The obligation and duty to notify or consult interested and affected parties for mining and prospecting rights are

codified and entrenched in ss 5(4)(c) (deleted by the Amendment Act 49 of 2008), 10(2), 16(4)(b) and 27(5)(b) of the MPRDA read with reg 3 under s 107 of the MPRDA.

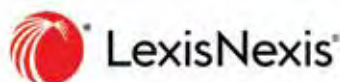
On the other hand, the duty to notify and consult interested and affected parties regarding petroleum rights and permits are codified in ss 69(2), 74(4)(b) and 83(4)(a) of the MPRDA also read with reg 3 under s 107 of the MPRDA.

It is important to differentiate on who issues the above rights and permits. Petroleum rights and permits are issued by the Petroleum Agency SA, while mining rights, mining permits and prospecting rights are issued by the Department of Mineral Resources and Energy.

Further, the MPRDA incorporates the mining charter, which aims to extend ownership in mining companies to previously disadvantaged South African citizens and makes provision for beneficiation by previously disadvantaged citizens from the exploitation of mineral resources. The charter further imposes an obligation on mining houses to ensure human resource development, employment equity, mine community and rural development, housing and living conditions and procurement from historical disadvantaged South Africans. It requires mining companies to commit to

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a social and labour plan, which shall be filed and/or submitted with an application for a mining right.

Case law

In *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC), the constitutional duty to notify and consult the landowner prior to granting mining and prospecting rights was the issue before the court (see *Bengwenyama* at paras 26 and 42). The first respondent was awarded prospecting rights on the community's land under the MPRDA. The community challenged the award on the ground that the first respondent did not comply with the consultation requirements as set out in s 16(4)(b) of the MPRDA. The court laid the foundational principles on which the duty to notify and consult is founded.

The decision of the minister to grant a prospecting right without notifying and consulting the landowner, as required by the MPRDA read with the Constitution, was taken for review. It was argued that the decision of the minister to grant prospecting rights in favour of the prospector was discharged without notifying and consulting the landowner as required by ss 10(2) and 16(4) of the MPRDA.

The court held that the first respondent failed to consult as required by the MPRDA. The award of the prospecting rights was accordingly set aside.

Froneman J analysed the constitutional obligations, which should be con-

sidered for the purposes of notifying and consulting affected and interested parties pre-granting and/or awarding prospecting rights (see *Bengwenyama* at 65–66). Among others:

To ensure the possibility of notification and consultation between the landowner and the applicant for a prospecting right in as far as interference with the landowner's rights to use property is concerned.

To provide landowners or occupiers with the necessary information to make an informed decision on everything that is to be performed on their land.

In *Meepo v Kotze and Others* 2008 (1) SA 104 (NC) the court held that, the MPRDA provisions are intended to strike a rational balance between the property rights of the landowner and the rights of the prospecting rights holder, as well as the constitutional right to have the environment protected. It further held that, the MPRDA provisions should be interpreted with due regard to constitutional values (see *Meepo* at para 13).

The notification and consultation process forms part of the principle of fairness. In order for the decision to be procedurally fair in granting the application, the administrator shall have full regard as to what occurred during the notification and consultation stage.

Conclusion

In conclusion, the *Bengwenyama* decision has sent a strong message to the Department of Mineral Resources and Energy and companies that they cannot

ignore the consultation and notification process with affected and interested parties when considering applications for mining rights, prospecting rights, petroleum rights and permits. Accordingly, this decision by the Constitutional Court is a landmark decision on which the duty to consult is founded on. Therefore, the Department of Mineral Resources and Energy and companies must be cautious when considering the applications for and issuing the above rights and permits.

The strict regulatory framework empowers enforcement agencies to issue directives where there is non-compliance, which will have a negative impact on a mining house. For instance, failure to comply with the Mine Health and Safety Act 29 of 1996 can result in operations being stopped pending compliance with the requirements of the Act (see s 54 of the Mine Health and Safety Act).

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By
Kgomo
Ramotsho

Gated estates can enforce speed limits within the gated community

Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh and Others (SCA) (unreported case no 323/2018, 28-3-2019) (Ponnan JA (Salduker, Swain and Schippers JJA and Rogers AJA concurring))

The Supreme Court of Appeal (SCA) had to look at a matter on whether the impugned conduct rules relating to the speed limit within the Mount Edgecombe Country Club Estate were unlawful and invalid with regard being had to the National Road Traffic Act 93 of 1996 (the NRTA), in the case of

Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh and Others (SCA) (unreported case no 323/2018, 28-3-2019) (Ponnan JA (Salduker, Swain and Schippers JJA and Rogers AJA concurring)).

Property owners of the Mount Edgecombe Country Club Estate are – according to the Memorandum of Incorporation – obliged to be part of the estate's

Management Association. The directors of the Association determined that the speed limit on all of the roads within the estate shall be 40 km/h. During October 2013, the daughter of the first respondent was issued with three contravention notices for exceeding that limit. The Association imposed financial penalties for

these contraventions, which amounts were deemed to be part of the levy due by the owner and were debited to the first respondent's account.

The first respondent refused to pay, consequently the Association deactivated the access cards and biometric access of the first respondent and members of his household. The respondents approached the KwaZulu-Natal Division of the High Court in Pietermaritzburg (KZP) for urgent spoliatory relief. The court directed the Association to re-activate the first respondents access cards and the biometric access of his family. The Association appealed in respect of the road rules.

The counsel for the Association accepted that "the roads in question are public roads for the purposes of the NRTA". Accordingly, the Full Court analysed the roads challenge on the basis and assumption that the roads in question were public roads and subject to the [NRTA]. Before [the SCA] it was contended that the concession "appears to have been erroneously made" ... [T]his court is not bound by a legal concession if it considers the concession to be wrong in law' and that the withdrawal of the concession can cause the respondents no prejudice. The court held that, after applying the definition of public roads in the NRTA and citing various cases, that the roads within the estate were private roads.

The SCA further held that even on the assumption that the roads within the estate were public roads, the approach of the Full Court could not be supported. According to the SCA, the relationship between the Association and the respondent was contractual in nature and the conduct rules, and the restrictions imposed by them, are private ones entered into voluntarily when an owner elects to buy property within the estate. Therefore, the control of the speed limit within the estate fell squarely within the provisions of the contract concluded between the Association and the owners of the properties within the estate.

Once it was accepted that the rules were private ones, the respondents' arguments that the Association was usurping the functions of the recognised authorities or contravening the provisions of the NRTA could not be sustained. The SCA concluded that contractually binding regulations are enforceable by the parties to the contract, and against them only. There is, therefore, no conflict between the NRTA and the contract and the rules of the Association, agreed privately. With notice to its members and by their agreement, the Association, for good reason, chose to impose a consensual limit of 40 km/h.

The SCA said that left untouched the limit of 60 km/h. In that, the mischief sought to be addressed by the NRTA was achieved, inasmuch as 40 km/h is

less than 60 km/h. Accordingly, the Full Court ought to have found that approval under the NRTA for purposes of contractual self-regulation, was not required. There was no warrant for the finding by the Full Court that the Association had to first seek and obtain the requisite permission of the Member of the Executive Council of the local municipality. The SCA upheld an appeal against a judgment and order of the Full Court of the KZP declaring certain conduct rules of the appellant, the Mount Edgecombe Country Club Estate Management Association, invalid. The SCA accordingly upheld the appeal as follows:

'1. The appeal is upheld with costs, including those consequent upon the employment of two counsel, to be paid by the respondents jointly and severally.

2. The order of the Full Court is set aside, and in its stead is substituted the following:

"(a) Save for declaring Conduct Rules 9.3.2, 9.4.1 and 9.4.3 of the Mount Edgecombe Country Club Estate Two unlawful, the appeal is otherwise dismissed.

(b) The appellants shall, jointly and severally, pay 80% of the respondent's costs, including those of two counsel."

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New legislation

Legislation published from
3 – 29 June 2019

Selected list of delegated legislation

Auditing Profession Act 26 of 2005

Assurance fees payable to Independent Regulatory Board for Auditors from 1 April 2019. BN82 GG42511/5-6-2019.

Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972

Local authorities authorised to enforce ss 10(3)(b), 11 and 24. GN R896 GG42521/10-6-2019 (also available in Afrikaans).

Labour Relations Act 66 of 1995

List of bargaining councils accredited by the Commission for Conciliation, Mediation and Arbitration for conciliation and/or arbitration and/or inquiry by arbitrator. GenN315 GG42514/7-6-2019.

Land and Agricultural Development Bank Act 15 of 2002

Repeal of staff regulations made in terms of Land Bank Act 13 of 1944. GenN316 GG42514/7-6-2019 (also available in Afrikaans).

Local Government: Municipal Finance Management Act 56 of 2003

Municipal Cost Containment Regulations, 2019. GenN317 GG42514/7-6-2019.

Marine Living Resources Act 18 of 1998

Recognition of the East of Cape Hangklip Lobster Association as an interest group

in terms of s 8. GN937 GG42545/28-6-2019.

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- Amendments to regulations relating to assistance to victims in higher education and training in terms of the

Promotion of National Unity and Reconciliation Act 34 of 1995 for comment. GenN310 GG42504/3-6-2019.

- Draft data dictionary of post-school education and training, 2019 in terms of the Continuing Education and Training Act 16 of 2006 for comment. GenN331 GG42536/21-6-2019.
- Amended rules in terms s 33(3) of the Petroleum Pipelines Act 60 of 2003 for comment. GN935 GG42543/26-6-2019.
- Amendment of regulations relating to qualifications for registration of basic ambulance assistants, ambulance emergency assistants, operational emergency care orderlies and paramedics in terms of the Health Professions Act 56 of 1974 for comment. GN938 GG42545/28-6-2019.
- Amendment of the Allied Health Professions Regulations, 2019 in terms of the Allied Health Professions Act 63 of 1982 for comment. GN940 GG42545/28-6-2019.
- Proposed amendments to Animal Diseases Regulations under the Animal Diseases Act 35 of 1984 for comment. GN936 GG42545/28-6-2019.



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Employment law update



Nadine Mather BA LLB (*cum laude*) (Rhodes) is a legal practitioner at Bowmans in Johannesburg.

Evidence relating to the trust relationship

In *Autozone v Dispute Resolution Centre of Motor Industry and Others* [2019] JOL 41073 (LAC), the applicant, who was employed by Autozone as a driver, was instructed to recruit casual labour to clean up waste and rubble at an Autozone store. The applicant recruited three casual workers, each of whom would be paid R 50 for the task. The applicant, however, requested R 180 from the cashier of the store, paid each worker R 50, and withheld the additional R 30. Later, the applicant explained that he had acted on his own initiative to pay the casual workers more and had withheld the R 30 until the task was complete. The applicant was dismissed for dishonesty relating to the misappropriation of petty cash.

The applicant challenged the fairness of his dismissal and the Commission for Conciliation, Mediation and Arbitration (CCMA) subsequently found his dismissal to have been substantively fair. Unsatisfied with the CCMA's finding, the applicant took the ruling on review to the Labour Court (LC). Without making an explicit finding in that regard, the LC accepted the misconduct to have been proven. However, it held that the test was whether the trust relationship between the applicant and Autozone had been breached to the extent that the employment relationship had become intolerable.

The LC concluded that there was no evidence that showed how the conduct for which the applicant was found guilty impacted on the trust relationship between the parties. In the absence of such evidence, the arbitrator ought to have held that the dismissal was unfair. The LC accordingly set aside the award, reinstated the applicant and ordered that he should be issued with a written warning for the misconduct.

On appeal, the Labour Appeal Court (LAC) held that the evidence as a whole established that the applicant had deliberately and falsely represented to the cashier that the total amount to be paid to the casual workers was R 180 instead of R 150 and that he intended to pocket the difference for his own benefit. Consequently, the only issue on appeal was whether the applicant's conduct breached the trust relationship so as to render the continuation of the employment relationship intolerable.

Although it would ordinarily be prudent for an employer to lead evidence of irreparable damage to the employment relationship to justify a dismissal, the LAC was of the view that where an employee is found guilty of misconduct involving dishonesty or deceit, it would be difficult for an employer to trust that employee going forward. Autozone was entitled to have a driver it could rely on to act in good faith to advance and protect its interests. The applicant's conduct, however, demonstrated that he was not such a driver. In the circumstances, it was not necessary for Autozone to have produced evidence to show that the employment relationship had been irreparably destroyed.

It was accordingly accepted by the LAC that dishonesty will render the employee unreliable and the continuation of the employment relationship unfeasible. The appeal was upheld and the LC's decision was set aside and replaced with one in terms of which the applicant's dismissal was declared to have been substantively fair.

What constitutes a temporary employment service?

In *CHEP South Africa (Pty) Ltd v Shardlow NO and Others* [2019] 5 BLLR 450 (LC), 201 workers were employed by Contracta-Force Corporate Solutions (Pty) Ltd (C-Force) to repair wooden pallets on behalf of CHEP South Africa (Pty) Ltd (CHEP). The workers, claiming that C-Force was a temporary employment service (TES) (otherwise commonly known as a labour broker), referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) in which they sought to give effect to rights contained in s 198A(3)(b) and (5) of the Labour Relations Act 66 of 1995 (the LRA), namely, to be deemed to be employees of CHEP for purposes of the LRA and to be treated on the whole not less favourably than an employee of CHEP performing the same or similar work.

The legal issue in dispute between the parties was whether C-Force was a TES as defined in the LRA. The workers contended that C-Force was a TES. CHEP, on the other hand, argued that C-Force was not a TES, but rather a service provider rendering services to CHEP as an independent contractor in terms of a service level agreement for the condition of pallets. In order for the workers to access both the right to be deemed permanent employees of CHEP in terms of s 198A(3)(b) and the right to be treated no less favourably than other employees in terms of s 198A(5), they must be working for a TES.

The CCMA commissioner ruled that C-Force was a TES and that the employees were deemed employees of CHEP. CHEP took the CCMA's ruling on review. The Labour Court (LC) held that the applicable test on review was whether the CCMA's ruling was right or wrong, rather than whether it was reasonable. However, it could still be attacked on the basis that it was unreasonable. The issue for determination lay in the interpretation of the definition of a TES in s 198(1) of the LRA.

A TES is defined as any person who, for reward, procures for, or provides to a client, other persons who perform work for the client and who are remunerated by the TES. An independent contractor is not an employee of a TES. With reference to this definition, the commissioner was required to determine whether C-Force provided CHEP with 'other persons', that these persons 'performed work for' CHEP, that these persons were remunerated by C-Force, and that C-Force provided these persons labour to CHEP 'for reward'. A reward in this context means a fee payable for the work performed by the hired persons.

In interpreting the definition of a TES, the LC held that the issue was not whether a placed worker is an employee of the TES, what mattered was the relationship between the workers and the client, CHEP. The notion of 'performing work' means that the workers become part of the client's organisation to pursue the client's business interests. The TES is, in a sense, merely the third party that delivers the employees to the client. The employees do not contribute to the business of the TES except as a commodity. Accordingly, C-Force cannot be regarded as a TES if it did not 'provide or procure' the individual employees for reward to CHEP. The finding of the commissioner to the contrary constitutes a material error of law that cannot be correct.

Turning to the facts, the LC found that

C-Force was not providing CHEP with 'other employees', but rather providing it with a specified product, namely wooden pallets. Further, C-Force was not receiving a reward or fee for providing employees to CHEP, but was pursuing its own business for profit. C-Force was a service provider, receiving an agreed price for

a specified product. This arrangement fell outside the statutory definition of a TES. There was also no evidence that indicated that the relationship between CHEP and C-Force was an arrangement designed to evade s 198A of the LRA. The LC accordingly held that the commissioner's finding that s 198A(3)(b) ap-

plied amounted to an error of law that rendered the ruling reviewable.

C-Force was declared not to be a TES as defined in s 198(1) of the LRA and its employees not to be deemed employed by CHEP.



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A legitimate limitation on the right to join a trade union

Lufil Packaging (Isithebe) (A division of Bidvest Paperplus (Pty) Ltd) v CCMA and Others (LAC) (unreported case no DA8/2018, 13-6-2019) (Murphy AJA with Musi JA and Savage AJA concurring).

For purposes of claiming organisational rights, can a trade union recruit as members, employees who work in an industry, which falls outside the registered scope of the trade union's activities?

This formed the central question before the Labour Appeal Court (LAC).

The appellant employer works within the printing and packaging sector and falls under the Statutory Council of the Printing, Newspaper and Packaging Industry. The third respondent National Union of Metalworkers of South Africa

(NUMSA), wrote to the employer seeking organisational rights. NUMSA's demand was premised on the notion that it had, as members, the majority of employer's workforce. In a letter denying NUMSA's demand, the employer took the view that because NUMSA's constitution did not include organising in the paper and printing industry, it was prevented from recruiting any of its employees as members.

Although it was common cause that NUMSA's constitution stated that all employees working in the metal and related industries are eligible for membership, as well as the fact that the employer operated outside this scope; NUMSA nevertheless referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of s 21 of the Labour Relations Act 66 of 1995 (LRA). (Any dispute about whether a registered trade union is entitled to any organisational rights is determined by referring a dispute to the CCMA in terms of s 21 of the LRA - if not settled at conciliation, an arbitrator would determine whether the union is entitled to the organisation right or not.)

At arbitration, the employer raised the same argument as set out in its reply to NUMSA and argued further that because NUMSA's constitution did not permit it to recruit any employee working outside its registered scope; it did not have *locus standi* to bring a dispute under s 21 of the LRA. The arbitrator dismissed this point and directed the CCMA to set the matter down for arbitration. NUMSA succeeded at arbitration whereafter the employer sought to review both the ruling

and the award at the Labour Court (LC).

The LC dismissed both review applications and held that having 70% of the workforce as members entitled NUMSA to organisational rights.

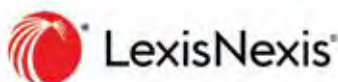
On appeal the employer argued that NUMSA was bound by its own constitution that prevented it from recruiting members who 'fall outside of the eligibility for membership requirements contained in its constitution'. On the argument, so the employer continued, employees who are not eligible for membership cannot be said to be members of the union when assessing the union's representation in an organisational right dispute. Therefore, any purported member whose admission is contrary to the union's constitution is invalid on the basis that such employees are incapable of becoming members of the union.

In respect of the preliminary ruling NUMSA argued that the fact that it is a registered trade union with majority of employees in the workforce as members, gave it the right to refer a dispute in terms of s 21. Addressing the award, NUMSA argued that one must assess the employer's argument against the constitutional right to join a trade union, as well as the right of freedom of association. While NUMSA acknowledged that s 4(1)(b) of the LRA, which states that every employee has the right to join a trade union subject to the union's constitution, imposed a limitation on joining a trade union - it argued that such a limitation should be interpreted restrictively while the constitutional rights should be interpreted 'generously'.

NUMSA further argued that s 4(1)(b)

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regulated the relationship between the union and any prospective member and, therefore, it is the union and not the employer, who can object to an employee becoming a member of the union. Put differently, membership is a contract between the employee and the union and while the parties to the contract can agree not to adhere to every term of the contract, it is not open for a third party (the employer *in casu*) to raise the point that certain terms of the contract have not been met.

The LAC found that NUMSA did have *locus standi* to challenge the employer's refusal to grant it organisational rights, however, noted that both the ruling and award turned on the question of whether a trade union could admit as a member an employee who worked in an industry, which fell outside the scope of the union's constitution.

In answering this question, the LAC turned to the provisions of the LRA.

For a trade union to be registered it must set out in its constitution, in terms of s 95(5)(b) of the LRA, qualifications for admission as a member. The registrar would only register a trade union once all statutory requirements, including that prescribed in s 95(5)(b), have been met.

The provisions of s 4(1)(b) implies that membership is subject to the quali-

fications determined by the union's decision-making body and set out in its constitution, which the registrar has registered.

Although the argument that s 4(1)(b) unduly infringed the constitutional right to join a trade union was not on the papers before the LAC, the court nevertheless addressed this argument. It began by stating that s 23(5) of the Constitution provides that national legislation may be enacted to regulate collective bargaining – the LRA was such legislation. On this basis, any limitation to the right to join a trade union or freedom of association, as contained in the LRA, must meet the requirements of s 36(1) of the Constitution and be reasonable and justifiable in an open and democratic society.

The LAC was satisfied that the limitation of the right to join a trade union or freedom of association, as contained in s 4(1)(b) met the requirements of s 36(1) of the Constitution.

The LAC went on to say that a decision to admit a member who is not eligible for membership is not an internal decision immune from attack by the employer. The decision would be *ultra vires* and invalid, which in turn gives the employer the right to challenge such a decision as a party from whom the organisational right is sought.

The LAC went on to state:

'The *ultra vires* rule is of both practical and policy value. There is a direct relationship between the conception of the trade union as a distinct legal entity and the rule that it may not legal carry out any activity which it is not authorised by the LRA and the powers and capacities provided in its constitution. The LRA grants trade unions specific powers and capacities to act within a particular scope and does so in furtherance of a contemplated constitutional and policy framework. The principle of legality requires observance of that framework and its purposes may not be arbitrarily dissipated. NUMSA is accordingly not permitted in terms of the common law or the LRA to allow workers to join the union where such workers are not eligible for admission in terms of the union's own constitution. As such it is not entitled to any of the organisational rights contained in respect of Lufil's workplace.'

Following the above the LAC stated that NUMSA could not have demonstrated that it was sufficiently represented at the employer's workplace – the employees it relied on to show its representation were not eligible to be members of the union.

The LAC upheld the appeal and substituted the LC's finding with an order that the arbitration award be set aside.



By
Meryl
Federl

Recent articles and research

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<i>PER</i>	Potchefstroom Electronic Law Journal	North West University, Faculty of Law	(2019) 22 May (2019) 22 June
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By
Kerron
Edmunson

Technology and continuing legal education

Technology has revolutionised access to education, with online learning transforming the way people learn new skills and share knowledge. It is particularly exciting to see the impact of this in developing countries like South Africa (SA). Many of our top educational institutions are moving into this arena with relevant and top-quality content. We are also seeing a growing uptake of e-learning among people of all age groups, not just millennials.

However, the traditionally cautious legal profession has been slower to adapt. This poses a challenge for busy (and ambitious) legal practitioners who are looking for convenient access to continuous professional development (CPD). While leading university law departments offer continuing legal education for legal practitioners, not much is available entirely online. In most instances, seminars and workshops, as well as short courses, may be supported by online platforms, but physical participation on site is still a requirement.

This has to change. Not only because legal practitioners need more flexibility in how they continue their education, but also because professional development should not be restricted to cities like Cape Town, Johannesburg and Lusaka. The legal profession needs affordable skills training, which will be available to all legal practitioners across Africa, regardless of where they are.

After proposing a mandatory professional development programme for attorneys in 2010, the Legal Practice Act 28 of 2014 introduced – for the first time in ss 3, 5 and 6 – the idea that continuing legal education is necessary and should

be part of the revised framework for the legal profession.

This means that mandatory CPD is on its way for all legal practitioners in SA; and both law educators and legal practitioners need to be prepared. Educators can learn from the methodologies already established by our counterparts in countries like the United Kingdom (UK) and Canada. But, even more vital is to take account of local trends in e-learning and blended learning – a combination of online and face to face courses, short courses, online learning modules and interactive forums, seminars and conferences.

Online learning offers the convenience of mobility (if using a device) and the ability to plan your time. Online systems enable users to create accounts, purchase or acquire content when it is free, and record their time online, including modules completed. Where modules have been accredited and allocated CPD points, the points can be recorded in a private facility, accessible at any time as evidence of compliance with the regime that is put in place.

Younger legal practitioners are likely to take to online learning more easily than their older counterparts, but the benefits are the same. Accessing content from multiple sources in one place means –

- a wider world view;
- insights into alternative approaches to problems;
- the ability to increase the emotional intelligence that many professionals do not have time to acquire but really need; and
- it will enable senior management to more easily mentor and coach junior staff through a selection of online tools.

Technology is even changing the way legal practitioners might work in the future. Artificial intelligence already offers basic drafting templates, trial preparation packages and answers to frequently asked questions. It may not be the most appropriate way to deal with legal problems, but it is already in use. Software developers are creating more tools to benefit lawyers all the time. In the UK, discovery of documents takes place through a standardised set of software protocols, which can eliminate duplication of documents and identify the most recent version of contracts (and previous versions, where there may be a dispute).

The legal profession should aim at driving this vital transformation with new technology platforms for continuing legal education. Recognising that time is money in this profession, accredited and convenient online short courses, as well as resources and discussion forums to support collaborative learning should be established.

Strategic partnerships should be built with academic institutions, leading law firms, corporate legal departments and public sector stakeholders to ensure best practice in all aspects of legal education.

The potential impact of such a resource on socio-economic advancement for all nations is incredibly inspiring, but it cannot be done without embracing technology.

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Pretoria	Afrikaans	22 - 26 July	<input type="checkbox"/>	22 - 24 July	<input type="checkbox"/>	25 - 26 July	
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Pretoria	English	7 - 11 October	<input type="checkbox"/>	7 - 9 October	<input type="checkbox"/>	10 - 11 October	
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17 October

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3 October

Johannesburg (Sandton)
11 October

Pretoria (Wingate Park)
16 October

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RISKALERT

AUGUST 2019 NO 4/2019

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RISK MANAGEMENT COLUMN

COURT FINDS ATTORNEY LIABLE FOR CYBERCRIME LOSS

In the last decade, the Legal Practitioners Indemnity Insurance Fund NPC (the LPIIF) has spent a considerable amount of its risk management resources alerting members of the legal profession to the increasing risks associated with cybercrime. The warnings have, unfortunately, either gone unheeded in many cases or reached the intended recipients too late as can be gleaned from the more than 137 cybercrime related claims notified to the insurance company since 1 July 2016 when the cybercrime exclusion (clause 16(o)) was implemented in the Master Policy. The value of repudiated cybercrime claims now exceeds R85 million. This figure only represents those claims that are reported to the LPIIF. The number and value of cybercrime claims reported by legal practitioners to the commercial market are not made publically available as is the data for such claims where members of the profession have to bear the losses as a result of not having appropriate risk transfer measurers (insurance or otherwise) for this risk. Ongoing attempts by the LPIIF over a number of years to get the law enforcement agencies (the police and the National Prosecuting Authority) to prioritise the investigation of these matters have, unfortunately, not met with any traction. We have even offered to make specialist resources available and have had discussions with a number of the other stakeholders (including



Thomas Harban,
Editor
and General Manager
LPIIF, Centurion
Email: thomas.harban@lpiif.co.za
Telephone: (012) 622 3928

some of the banks) who had undertaken to provide assistance to the law enforcement agencies investigating these crimes.

At times, the lessons to be learned from certain risks are best taught by relating 'war stories' as will be demonstrated in an examination of a recent matter where the court found a practitioner liable for a loss suffered by her clients following on cybercrime.

The Eastern Cape Local Division of the High Court was recently called upon to adjudicate a matter where the plaintiffs suffered a loss following a cybercrime being perpetrated in a conveyancing transaction (See *Ben Adrian*

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SOUTH AFRICA

RISK MANAGEMENT COLUMN continued...

Jurgens and Wendy Jurgens v Lynette Volschenk, case no: 4067/18). The facts of this matter are similar to the *modus operandi* employed in the vast majority of cybercrime related matters reported to the LPIIF. The applicants, Mr and Mrs Jurgens, sought an order for the payment of an amount of R967,510.53 from the respondent, an attorney and conveyancer. During April 2017, the applicants had instructed the respondent to effect transfer of one of their properties. After the successful completion of the transfer, the proceeds of the sale were duly paid into the applicants' Standard Bank account, the details of which they had furnished to the respondent. Intending to relocate to the United States of America, the applicants instructed the respondent to act as their conveyancer in the sale of a second property in October 2017. They expected that the sale would be finalised before their departure. At all times, the first applicant (Mr Jurgens) corresponded with a secretary in the employ of the respondent and copied the conveyancer in the correspondence. The chronology of the relevant events can be summarised as follows:

- 13 December 2017- Mr Jurgens received an email from the respondent's secretary advising him that the transfer papers had been lodged with the Deeds Office the previous day. Mr Jurgens responded on the same day advising the secretary that the proceeds of the sale should be paid into the Standard Bank account which had been used for the previous transaction, assuming that the respondent would already have those account details on record having paid the proceeds of the previous transaction into that account;
- 14 December 2017- Mr Jurgens received an email purporting to be from the respondent's secretary requesting proof of the Standard Bank account number. He was not aware that this email was from a hacked email address and he responded with his account number. Noting the difference in email addresses, he responded to the hacked email address and as well as to the secre-

tary's legitimate email address. The correspondence was also copied to the respondent;

- On Friday, 15 December 2017- Mr Jurgens enquired, using both the hacked and the legitimate email addresses (as well as that of the respondent), when he could expect payment of the proceeds of the sale. The secretary received an email purporting to be from Mr Jurgens advising her that the proceeds should be deposited into an interest bearing account purporting to be that of Mr Jurgens held at ABSA Bank, the details of which would be furnished the following Monday;
- On Monday, 18 December 2017, the secretary received two emails purporting to be from Mr Jurgens. The emails purported to be a letter confirming that Mr Jurgens had an account with ABSA Bank and provided what purported to be a statement drawn from the account. Also on that date, the secretary, in response to Mr Jurgens' email enquiring on the progress regarding the proceeds of the sale, responded that the transaction had not yet come up for registration;
- 20 December 2017- the purchaser's bond attorneys paid the balance of the purchase price into the respondent's trust account;
- 21 December 2017- Mr Jurgens received an email from the secretary's hacked email address enclosing a registration letter, final account and proof of payment. The email also requested Mr Jurgens to direct all further correspondence to the hacked email address (the offices were closed for the holiday). The proof of payment reflected the purported transfer of the proceeds of the sale into the applicants' Standard Bank account. On the same day, the respondent went to the office to effect payment of the money to the applicants. Mr Jurgens' bank account details appeared to have been amended to reflect the ABSA bank account details. Payment was effected and forwarded to the hackers and the proof of payment sent to them at their spoof email address. The hack-

ers, in turn, then amended the proof of payment into the legitimate Standard Bank account of Mr Jurgens and forwarded those details to him together with the legitimate registration letter and final statement of account;

- 26 December 2017- Mr Jurgens addressed an email to the respondent advising her that he had not received payment in accordance with the proof of payment dated 21 December 2017;
- 27 December 2017- Mr Jurgens sought clarification from the respondent's banker, Nedbank, copying both the respondent and her secretary. It was at that stage that the respondent advised Mr Jurgens that the emails exchanged between himself and her secretary had been hacked, with his hacked email address used to furnish the ABSA banking details to the secretary. The applicants did not have any bank account with ABSA Bank.

The applicants did not receive any of the proceeds of the sale. By the time the enquiries were made and the fraud discovered, only R65,584.21 of the amount of R967,510.53 paid was still in the ABSA account. The applicants argued that the respondent was liable for the loss in that she accepted the mandate to act on their behalf, owed them a duty of care and was negligent in paying the amount to the hackers, thus causing them the loss. The applicants, following on the reasoning in the test for liability espoused in *Holtzhause v Absa Bank Ltd* 2008 (5) SA (SCA), contended that the respondent, being a conveyancer, had failed to exercise the necessary diligence, skill and care required of a reasonable attorney as contemplated in their agreement when the mandate was entered into.

The respondent denied that she was negligent in the matter. She alleged that she was not aware that Mr Jurgens' email address had been hacked. The respondent's contention was that, she had carried out the mandate with the due care, skill and diligence expected of a reasonable attorney and a conveyancer in the circumstances.

RISK MANAGEMENT COLUMN continued...

Justice Tokota remarked that the

“[a]ttorney’s profession is an honourable profession which demands complete reliability and integrity from the members thereof. It is, therefore, the duty of an individual attorney to ensure, as far as she/he is able to do so, that he/she measures up to the high standards demanded of him/her. A client who entrusts his affairs to an attorney must be able to be rest assured that the attorney concerned is an honourable man who can be trusted to manage his affairs meticulously in the interests of the client. When money comes to an attorney to be held in trust, the general public is entitled to expect that that money will not be distributed for any other purpose than that for which it is being held, and that it will be available to be paid to the persons on whose behalf it is being held whenever it is required.” (paragraph 16)

After considering a number of authorities including *Lillicrap, Wassenaar and Partners v Pilkington Brothers (Pty) Ltd* 1985 (1) SA 475 (A), *Margalit v Standard Bank of SA Ltd* 2013 (2) SA 466 (SCA) and the other leading authorities on the question of liability, the court found that:

[22] An attorney is liable to his/her client for damages suffered as a result of his negligence in the performance of his mandate. (*sic*) The liability is based on the breach of contract between the parties. It is a term of the mandate that the attorney concerned will execute the mandate by exercising his skill, adequate knowledge and diligence expected of an average practising attorney. He may be held liable even when he committed an error of judgment or matters of discretion if the attorney failed to exercise the skill, knowledge and diligence.” (paragraph 22, footnotes omitted)

The court found that it was not necessary, in the circumstances of this case, for expert evidence to be led in order to prove what a conveyancer, in a position similar to the respondent, would have done if faced with the same circumstanc-

es in acting with the necessary care, skill and diligence which would ordinarily be expected from a reasonable attorney, which the respondent failed to do. The court’s findings can be summarised as:

- (i) the applicants had entrusted their affairs to the respondent and that she had been furnished with their Standard Bank account details in their previous dealings with her and in this matter;
- (ii) It was therefore incumbent on the respondent to verify the sudden change in banking details. The purported change in banking details had taken place a day after Mr Jurgens had furnished his legitimate account details. The change in banking details within such a short space of time should have been a red flag for the respondent (the words used by the court are that it should have ‘raised eyebrows’);
- (iii) An examination of the purported proof of the ABSA bank account should have alerted the respondent to the fact that something may be amiss in that, *inter alia*, the document purporting to be an ABSA bank statement did not have the names and addresses of the account holder, most of the transactions were in Gauteng, and the name listed for most of the transactions did not fit that of the applicants;
- (iv) A diligent, reasonable attorney would have taken steps to verify the information with Mr Jurgens, which the respondent failed to do;
- (v) It was no defence for the respondent to pass the buck to her secretary and to state that the account was dictated to her by her secretary;
- (vi) The respondent owed a duty to her clients to act in their interests and to safeguard their money. A reasonable attorney in her position would have exercised more care in the circumstances, which the respondent failed to do resulting in the applicants suffering a loss as a result of her negligence; and

- (vii) The respondent had a duty to ensure proper supervision of her secretary and control in order to safeguard the applicants’ money. The court stated that “[w]hen a client instructs and an attorney accepts instructions to perform certain services for that client, there arises an implied term in the agreement between attorney and client that the attorney will perform the services required in a professional, non-negligent manner. This duty arises as a matter of law.” (paragraph 27)

The application succeeded and the court ordered that the respondent was liable to the applicants for the amount of R967,510.53. The respondent was also ordered to pay interest on that amount from the date of the judgment to the date of final payment as well as the costs of the application.

There are a number of risk management lessons that can be learned from this case including:

1. When Mr Jurgens communicated with the hacked email address and copied the respondent and her secretary on their respective legitimate email accounts, this should have alerted them (and possibly Mr Jurgens as well) as early as the first hacked communication on 14 December 2017 that something was amiss. Seeing that the email is addressed to the secretary on two email addresses (the fraudulent and the legitimate), on reading the email received they should have discovered this and alerted Mr Jurgens that one of the email addresses he had used was incorrect;
2. The respondent, as the principal to whom the mandate was given, had been copied on all email communication and could have paid closer attention to the events that were unfolding in the matter;
3. The applicants were relocating from South Africa yet a new South African bank account was provided for them;
4. A reading of the judgment implies that the Standard Bank account was a joint account of the applicants

RISK MANAGEMENT COLUMN continued...

- used in the previous transaction. The applicants were the joint owners of the property in question (paragraph 3 of the judgment), yet the purported instruction from one of the owners (with no verification of such instruction with the joint owner) was accepted for the alleged change in banking details. The fraudulent account held with ABSA bank was, the respondent was led to believe, in the name of Mr Jurgens only (paragraph 10- ‘...the money should be deposited in “**his**” interest bearing account with Absa Bank...’) (emphasis added) Was Mrs Jurgens ever contacted in order to verify and/or confirm the purported instruction to change the details of the bank account into which the proceeds of the sale of a property of which she was a joint owner?
5. In discussing the claim statistics in the next article in this edition of the *Bulletin*, a number of suggestions are made regarding appropriate steps practitioners can take in order to verify purported changes in banking details. These include phoning the client to verify any changes in the banking details or any other instruction initially given in the matter;
6. The respondent should have scrutinised the purported change in banking details and taken steps to verify the account before payment. As happened in this case, the purported “proof” of banking details attached to the emails sent to many of the other practitioners falling victim to this form of cybercrime also do not fit the profile of the parties to the transaction. In many cases an examination of the transactions listed will show that the activity on the account in a separate part of the country and that the transactions are mainly for small amounts, fast food, airtime and the like. It will also be noted that there will be no other large deposits visible on the documents. The perpetrators of the fraud have now also resorted to producing false letters purporting to be from the banks with fraudulent bank stamps thereon. The language and writing style of the hackers may differ to that of the client;
7. The lessons learned from other jurisdictions (the United Kingdom and Australia in particular) is that the *modus operandi* for this type of cybercrime is similar to that deployed in this case. The fact that this particular incident occurred just before the Christmas break may not be entirely a coincidence. In the United Kingdom it has been noted that such incidents generally increase in the lead up to weekends and long-weekends in particular. It is for this reason that such scams are referred to in some circles as ‘the long-weekend’ scams. The thinking is that the perpetrators of these crimes are of the view that legal practitioners are more likely to ‘let their guards down’ and not be as vigilant in scrutinising transactions as they prepare for time away from the office. In some firms, there may be less staff on duty in these periods and the regular checks and balances may thus not be in place; and
8. This type of fraud is perpetrated on all parties to a transaction, including estate agents and parties who make payments to law firms. One of the notifications received by the LPIIF related to the interception and alteration of a guarantee received from a major bank. It is thus imperative that practitioners alert all stakeholders and all the parties in the property sale and transfer value chain of the prominence of these scams and the common *modus operandi*.

CLAIMS STATISTICS

“**I** do not dispute the doctrine that an attorney is liable for negligence and want of skill. Every attorney is supposed to be proficient in his calling, and if he does not bestow sufficient care and attention in the conduct of business entrusted to him, he is liable, and where this is proved the Court will give damages against him.” *Van der Spuy v Pillans* 1875 Buch 133 at 135

It is apposite to begin this article with the often quoted *dictum* enunciated by De Villiers CJ in a judgment delivered 144 years ago – the principles regarding the liability of a legal practitioner who fails to meet the required standard of care and skill in carrying out a mandate

still apply today. Though the principle may have been expressed using different words in recent times, the core of that *dictum* still applies in the present day as will be gleaned from the authorities cited at the end of this article. The statistics for professional indemnity (PI) claims listed below suggest that many attorneys have (or are, at least, alleged to have) breached the standard of care expected of members of the profession.

As you read this edition of the *Bulletin*, the Legal Practitioners Indemnity Insurance Fund NPC (the LPIIF) will be commencing the second month of the 2019/2020 insurance scheme year. This is an opportune time to assess

where we are in terms of claims and the main areas of practice from which the claims arise. The outstanding reserve requirement for PI claims notified to the LPIIF was actuarially assessed at **R498,272,000** as at the end of March 2019. An exposure of just under half a billion Rands in outstanding PI claims against legal practitioners in South Africa is a serious cause for concern for the LPIIF, the legal profession as a whole and all other stakeholders. The underlying causes of claims must be addressed, and members of the profession need to pay urgent attention to developing and implementing appropriate risk management measures in their respective firms in order to avoid or mitigate the risk of

RISK MANAGEMENT COLUMN continued...

PI claims (or even regulatory action) materialising. All stakeholders have a role to play in reducing the high number of claims.

Tables 1 and 2 on the right give a breakdown of the claims notified to the LPIIF in the last five years. It will be remembered that the LPIIF insurance year runs from 1 July of one year to 30 June of the following year. The figures in table 1 have been conveniently broken down into quarterly intervals. It will be noted from table 1 above that the number of outstanding claims continues to grow. PI claims are long tail in nature and take a number of years, in some instances, to be finalised. Many of the claims are the subject of litigation and this prolongs the finalisation of the matters. A lack of cooperation (and late notification) on the part of some insured practitioners also adds to the long tail. Clauses 25, 26 and 27 of the LPIIF Master Policy place a duty on the insured practitioners to provide the required cooperation to the LPIIF. Every claim must be thoroughly investigated. The investigation and assessment of the claim includes:

1. An assessment of whether or not the claim falls within the indemnity provided by the LPIIF;
2. If question 1 is answered in the affirmative, whether or not there is any liability on the part of the insured. The test for liability enunciated in the various authorities (including those listed at the end of this article) is used in assessing whether or not there is liability; and
3. If questions 1 and 2 are answered in the affirmative, then the extent of the liability (the quantum of the claim) must be assessed.

Table 2 shows the main claim categories. These have remained consistent in the last decade as has the overall claims development. We continue focusing our risk management initiatives on addressing the underlying risks, which lead to claims in these categories.

Road Accident Fund (RAF) claims

Notifications arising out of the prescrip-

Table 1- The number and status of PI claims notified quarterly in the last 5 scheme years

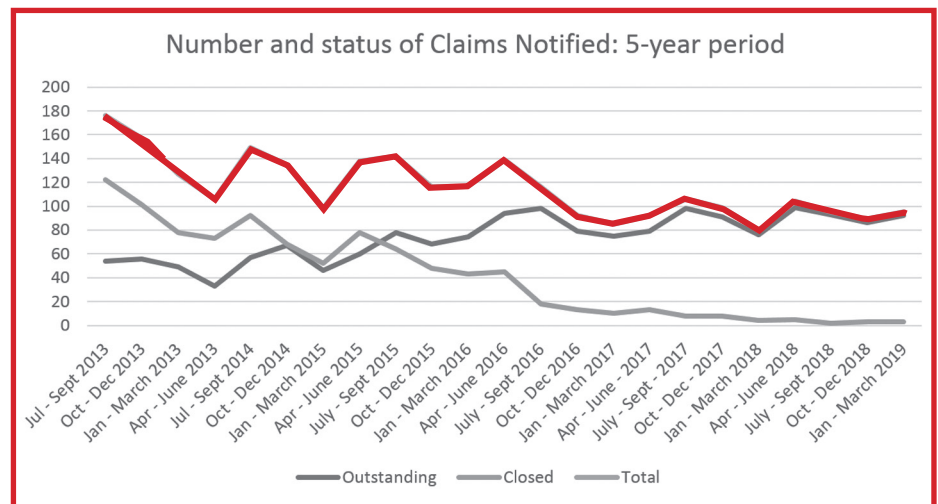
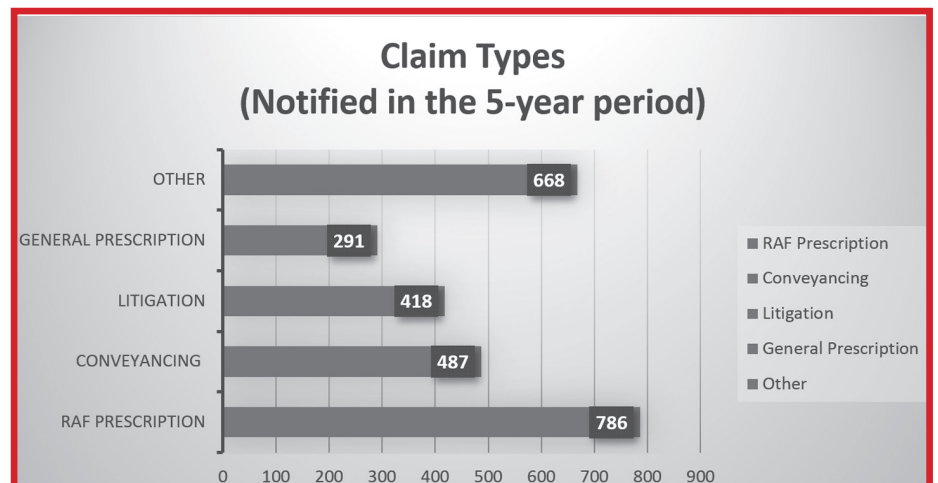


Table 2: The main PI claim types notified in the last 5 scheme years



tion of RAF related matters (786 notifications) make up the highest number and value (approximately 68%) of the value of claims paid. The average quantum of this claim category is generally higher than the other categories and the investigation of prescribed RAF claims (prescribed and under settled) is also, in many instances, more expensive than other claim types - panel attorneys,

medico-legal experts, actuaries, forensic investigators and other experts need to be instructed in order to investigate every aspect of the merits and quantum of these claims. Practitioners can mitigate the risk of prescribed RAF claims by implementing internal controls which can include:

- Conducting regular file audits, reviewing files and, where necessary

RISK MANAGEMENT COLUMN continued...

and appropriate, closing problem files after taking and documenting instructions from clients and explaining the implications of the prescription date to the affected clients;

- Not accepting new instructions close to the prescription date;
- Taking full instructions and getting as much information and documents as early as possible after accepting the mandate so that the matter can be pursued timeously;
- Acting on instructions promptly and not procrastinating- in *Mlenzana v Goodrick & Franklin Inc* 2012 (2) SA 433 (FB) and *Minister of Police v Masina* (1082/17) [2019] ZASCA 24 (28 March 2018) the courts expressed their dissatisfaction with the procrastination of the attorneys involved which led to the prescription of the respective claims. In the *Masina* matter the court stated “[17] There was no explanation for the failure of [the respondent’s] attorneys to pursue the matter expeditiously once he instructed them to do so in June 2014...The delay [was] also unexplained.” Justice Rampai, in the *Mlenzana* case, wrote that “[89]...this was a chronicle of procrastination and neglect on the part of the defendant.”
- Registering all time-barred matters with the LPIIF’s Prescription Alert Unit and adhering to all reminders sent by that unit;
- Implementing a peer review system within the firm;
- Designing and implementing a dual diary system with support staff;
- Obtaining more than one contact number and an accurate address for clients in case further instructions are required before legal action is instituted (or as the litigation progresses);
- Ensuring that action is instituted in the correct court (having to withdraw an action instituted in the incorrect court in order to institute a new action in the court with jurisdiction exposes the firm to the risk of prescription);
- Assessing whether the practice has

the capacity, appetite and resources to properly attend to the matter before accepting an instruction;

- Being wary of RAF tactics- do not accept the word of RAF claim handlers that a matter will be settled and requesting that summons should not be served to interrupt prescription; and
- Providing regular training within the firm and not assuming that a three year prescription period applies in all cases **[Important note: In the event that the practice is dealing with ‘hit and run’ cases (that is, claims where neither the driver nor the owner of the vehicle is identified), please contact us so that we can assist you in challenging the constitutionality of the two-year prescription period set out in the RAF Regulations, in the event that the RAF raises the prescription point];**

Cybercrime

As will be noted from the article on page 1 of the *Bulletin*, it is also concerning to note that practitioners (particularly conveyancers) are still falling victim to cyber scams and phishing emails purporting to be instructions to change banking details of clients. The mitigation measures that we recommend practitioners adopt in order to mitigate cyber risks include:

- An awareness of the areas highlighted by the court in assessing whether or not there was negligence on the part of the legal practitioner in the case discussed on page 1;
- Using the account verification services offered by banks and some insurers;
- Getting payment instructions from clients in writing (with supporting documents) at the face-to-face initial instruction;
- Ensuring that adequate risk mitigation/ avoidance measures are in place in the firm to deal with cyber related risks;
- Educating staff on cyber risks;
- Purchasing appropriate cyber and commercial crime cover- this is a

risk transfer measure that firms can use to protect themselves and their clients against losses;

- Properly supervising staff, and implementing checks and balances for all payments and the verification of beneficiary banking details before any payment is made as prescribed in Rule 54.13;
- An awareness of and alertness to spoof/ phishing scams;
- Carrying out a proper FICA verification process on all clients and the banking details supplied- insist on original documents (the fraudsters produce documents which look very similar to legitimate banking statements and confirmation letters);
- Contacting the client telephonically on the number provided at the initial consultation and in person to verify changes to banking details;
- Insisting that changes to banking details can only be made by clients in person physically attending the office with original bank stamped documents- Clause 16 (o) of the LPIIF Master Policy provides that: “*verify*” means that **the Insured must have a face to face meeting with the client and or other intended recipient of the funds. The client (or other intended recipient of the funds, as the case may be) must provide the Insured with an original signed and duly commissioned affidavit confirming the instruction to change their banking details and attaching an original stamped document from the bank confirming ownership of the account.”;**
- Obtaining advice from Information and Communication Technology (ICT) risk experts on appropriate security measures that can be implemented in the firm- some insurers offer a cyber security assessment to their clients as part of the service offering;
- Keeping up to date with changes in the risk environment in which the firm operates;
- Adding a prominent note in all correspondence warning recipients that banking details will not be changed

RISK MANAGEMENT COLUMN continued...

- on the strength of an email; and
- Improving firewalls and other IT security and constantly assessing the susceptibility of the firm to hacking and other security and/or data breaches.

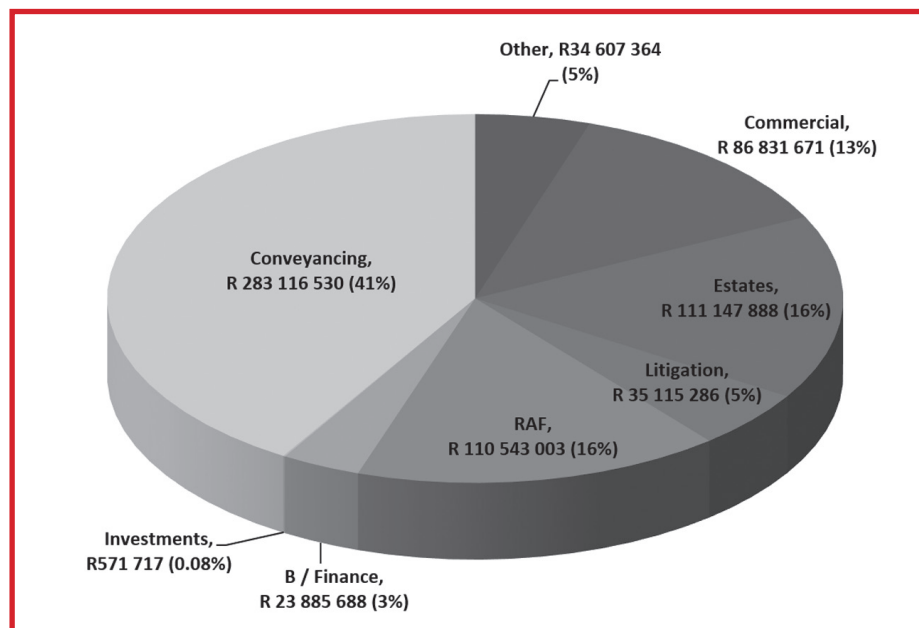
Many of the suggestions above were published in the August 2018 edition of the *Bulletin*. In the light of the continued scourge of cybercrime perpetrated against the legal profession, we thought that it would be prudent to re-publish and update the suggestions. The suggestions above must be communicated to the finance, risk and all other operational departments in the firm. Cyber risk must be listed as one of the main risks facing any practice and appropriate risk mitigation measures must then be designed and implemented as prescribed by Rule 54.14.7 for the trust accounting environment in particular and the firm in general.

Legal Practitioners' Fidelity Fund (the Fidelity Fund) claim statistics

Table 3 on the right is a graphic illustration of the current claims against the Fidelity Fund. As at 31 May 2019, the Fidelity Fund had 1247 claims on record with a combined value of R685,819,000. The bulk of the contingent claims arise from the areas of conveyancing (41%), deceased estates (16%) and RAF work (16%).

There are similarities in the main risk areas faced by both the LPIIF and the Fidelity Fund. Conveyancing, RAF related matters, litigation and commercial related matters make up a significant portion of the claim categories notified to both entities. The claims brought by the Master of the High Court in enforcement of the bonds of security issued by the LPIIF to executors of deceased estates also mainly arise from misappropriation of estate funds by executors and/or their staff. Practitioners pursuing practice in these high risk areas of the law must be more vigilant in their awareness of the underlying risks both from a PI and theft of trust money perspective.

Table 3: Contingent claims against the Fidelity Fund



Partners are jointly and severally liable for the debts of the practice. In so far as incorporated practices are concerned, it must be noted that section 34 (7)(c) of the Legal Practice Act 28 of 2014 provides that all present and past shareholders, partners or members are jointly and severally liable with the juristic entity: -

- for debts and liabilities of the entity contracted during their period of office; and
- in respect of theft committed during their period of office.

Regard must be had to the judgments in *Laniyan v Negota SSH (Gauteng) Incorporated and Others* [2013] 2 All SA 309 (GSJ) and *Fundtrust (Pty) Ltd (in liquidation) v Van Deventer* 1997 (1) SA 710 (A) as well as section 19(3) of the Companies Act 71 of 2008 in this regard.

Practitioners are encouraged to study the underlying principles in respect of potential liability on their part and to ensure that they (and their staff) do

not fall below the expected standard of conduct expressed in a number of cases over the years, including -

- *Slomowitz v Kok* 1983 (1) SA 130 (A);
- *Honey & Blanckenberg v Law* 1966 (2) SA 43 (R);
- *Rampal (Pty) Ltd v Brett, Willis and Partners* 1981 (4) SA 360 (D);
- *Mazibuko v Singer* 1979 (3) SA 258 (W);
- *Mlenzana v Goodrick & Franklin Inc* 2012 (2) SA 433 (FB);
- *Margalit v Standard Bank of South Africa Ltd and another* (883/2011) 2013 (2) SA 466 (SCA);
- *Hirschowitz Flionis v Bartlett and Another* [2006] (SCA 24 (RSA)3) SA 575 (SCA);
- *Du Preez and Others v Zwiegers* 2008 (4) SA 627 (SCA);
- *Steyn v Ronald Bobroff & Partners* (025/12) [2012] ZASCA 184 (29 November 2012);
- *McCain v Mohamed and Associates* [2013] 3 All SA 707 (C); and

SETTLEMENT AGREEMENTS: SOME CAUTION FROM THE COURTS

The freedom to contract is a long-established principle of South African law. The courts will only interfere with this freedom in very limited circumstances where, for example, the contract is *contra bonos mores*, violates the Constitution, is against public policy or is unlawful.

Parties to disputes may, before or after the initiation of litigation, resolve (or narrow) the issues in dispute between them and enter into settlement agreements setting out the terms and conditions on which the resolution is reached. The parties may apply to court to have the terms of the settlement made an order of court, if they so agree. One of the advantages of making a settlement agreement an order of court is that the parties may find that it will then be (relatively) easily enforceable and, in appropriate circumstances, a judgement creditor could then enforce the terms of the agreement and court order by way of execution against the debtor – in this context, the terms ‘judgment creditor’ and ‘debtor’ are, respectively, used to refer to the party to whom performance is due and the party who is obliged to perform). The focus of this article is on settlement agreements sought to be made an order of court after litigation has commenced. For an examination of the position of pre-litigation settlement agreements see, for example, the article published by Vincent Manko, Johanna Lubuma and Camille Kafula titled ‘The power of a court when a settlement agreement is not preceded by litigation’ (accessible at <https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2019/Dispute/downloads/Dispute-Resolution-Alert-19-June-2019.pdf>)

Before dealing with the approach taken by the courts to settlement agreements, it is necessary to highlight some aspects of settlements which give rise to the risk of professional indemnity (PI) claims being brought against legal practitioners. It is always the legal practitioner’s professional duty to act in the best interests of the client/s. Under settled Road Accident Fund (RAF) claims are one of the main claim categories dealt with by the Legal Practitioners Indemnity Insurance Fund NPC (the LPIIF). In reaching any settlement, it is important that practitioners take appropriate instructions from their clients and that those instructions are properly documented in contemporaneous file notes and confirmed in correspondence sent to the client. The terms of the settlement and how the amount is arrived at must be included in the discussion with the client and the recordal of the instruction. Reliance should never be placed on the authority in the power of attorney or a letter of engagement to conclude a settlement without taking proper instructions. If acting on a contingency basis, settlement should not be solely pursued in order to obtain ‘an early payout of the investment in the matter’. It has been noted with concern that many matters (particularly personal injury matters) are settled at pre-trial conferences held close to the trial date or even at the trial Roll Call court on the date of trial without proper instructions being taken. Faced with the imminent trial, some practitioners may be tempted to even abandon certain heads of damages that they have not properly prepared on. The practice adopted by some opposing legal practitioners of simply ‘meeting half-way’ between the amounts being counter-proposed in settlement negotiations could lead

to potential professional negligence claims where the settlement agreed has no bearing on the underlying claim, or the damages suffered by a party. In the same way that the plaintiff/ applicant’s legal representatives run the risk of under settling a matter, the legal team on the other side runs the counter risk of over settling a matter. In line with the principles enunciated in *Goldschmidt and Another v Folb and Another* 1974 (3) SA 778 (T), all settlement offers must be put to the client even where the legal representative recommends that the offer be rejected outright or that a counter offer be made. The pressure that may be exerted by family members or other parties to accept an offer that the legal representative may not be in favour of is well known. If necessary, consideration should be given to applying for the appointment of a *curator ad litem*, especially in claims involving minor children or some other party not able to manage their own affairs adequately – a seasoned business person may understand the potential risks in a matter and adopt the attitude that it is best to ‘snatch at a bargain’ or ‘a bird in the hand is better than two in the bush’ but not every client will be able to appreciate the full implications of an offer. The once-and-for-all principle must also be explained to clients. No offer is without risks and this should be properly explained to clients.

Matters may be settled at any stage in the litigation process, with many settlements being reached after the close of pleadings or even on the doorsteps of the courts. The considerations taken into account by the parties in reaching settlement agreements will vary from matter to matter and may include, for example, considerations of the risks

GENERAL PRACTICE continued...

involved in litigation, a desire to save resources, avoiding delays, curtailing legal costs, a concession of liability on the part of one of the litigants or an agreement to narrow the scope of the dispute. The practice directives applicable in the various divisions of the High Court include provisions relating to the settlement of matters and removals of settled matters from the roll. In those matters where the parties agree that the terms of their settlement agreements are to be made an order of the court, the lessons learned in a number of recent judgements show that the parties cannot assume that the terms of the their settlements will be accepted by the court and made an order of court as a mere formality. It should never be assumed that the courts will act as a mere rubber stamp of the settlement agreement. Though the South African courts adopt an adversarial model (and not the inquisitorial system), as can be seen from several recent judgments, the courts will exercise judicial oversight of the settlement agreements.

The approach adopted by the courts in considering settlement agreements will be now examined by looking at three recent judgements, beginning with the most recent. There are a number of other judgments where aspects of this topic have been considered.

Case 1:

Maswanganyi obo Machimane v Road Accident Fund (1175/2017) [2019] ZASCA 97 (18 June 2019)

Briefly put, the circumstances in this matter were that the appellant had instituted a dependent's action against the RAF on behalf of her minor child claiming a total amount of R 1 million. The allegations were that the child's father had been killed in a head-on collision, the sole cause of which the negligence of the insured driver. The collision had occurred when the deceased had attempted to overtake a vehicle that was in front of him. The

RAF defended the matter. The matter was set down for hearing in the court *a quo* and after being rolled over for two consecutive days, the case was called for hearing on the third day and the parties requested that the matter stand down as they were attempting to reach a settlement. The presiding judge stood the matter down but informed the parties that she was ready to commence with the trial. The parties returned to court at 14:00 and requested that the court make their settlement agreement an order of court. The terms of the agreement were that the RAF conceded liability to pay 100% of the appellant's proven or agreed damages. The damages were agreed in the sum of R561 314.63.

The judge was not satisfied that the agreement should be made an order of court and noted that, from the pleadings and the witness statements, there was no indication that the insured driver was negligent at all or that she/he could have avoided the collision. On enquiring with counsel for the RAF whether she was satisfied with the agreement the latter (I paraphrase) indicated that:

- (i) she was not satisfied;
- (ii) she had only been briefed in the matter on the previous day;
- (iii) she had tried to get hold of the insured driver who could not attend court on the day of the trial;
- (iv) the RAF thus did not have any evidence to counter that of the plaintiff; and
- (v) going through the statements, she could not find the required 1% negligence on the part of the insured driver.

Refusing to make the agreement an order of court, the judge requested that witnesses be called to testify as to how the collision had occurred. A passenger in the deceased's vehicle was called to testify and the matter could not be finalised and was, consequently, postponed to a later date. Five days before the agreed date for the resumption of the trial, the appellant, alleging that the *lis* between herself

and the RAF had been settled and that there was no basis, in fact or law, for a hearing or a trial to take place, launched an application seeking –

1. the calling off the part-heard trial;
2. an annulment of the part-heard trial;
3. declaring that the *lis* between herself and the RAF to have been fully and finally settled in terms of the agreement and resultant draft order made and prepared by the parties on the date of the commencement of the trial; and
4. that the draft order referred to in paragraph 3 above be made an order of the court.

The RAF did not oppose the application and played no further part in the proceedings. The applicant's contention was, *inter alia*, that as an agreement had been concluded, the proceedings and the trial, as well as the presiding judge's direction that the trial should proceed, were fatally flawed and irregular and that the court no longer had the jurisdiction or power to continue to hear evidence and to further pronounce on the matter. The court *a quo* dismissed the application and an appeal to the full bench was also dismissed. The Supreme Court of Appeal (the SCA) granted special leave for an appeal to that court.

In the SCA, Weiner AJA (with Maya P and Wallis JA concurring) identified the following two issues for decision:

1. whether it was permissible to challenge the judge's decision in this way; and
2. if the question 1 was answered in the affirmative, whether the approach adopted by the judge to the settlement agreement was permissible.

The majority judgment in the SCA, after examining numerous authorities, found against the appellant and dismissed her appeal. The principles considered by the court included –

- (i) once a matter is placed before it, in rendering a judgment, a court is obliged to adjudicate on all the

GENERAL PRACTICE continued...

- issues raised in the pleadings or affidavits and that it is not for the court to vary the defined issues. The parties can specifically withdraw all or some of the issues from judicial consideration by either abandoning a claim or defence or withdrawing the action or application in its entirety subject to certain limitations (paragraph [14]);
- (ii) the position is that (paragraphs [15] and [16])
- '[15] When the parties arrive at a settlement, but wish that settlement to receive the imprimatur of the court in the form of a consent order, they do not withdraw the case from the judge but ask that it be resolved in a particular way. The grant of the consent order will resolve the pleaded issues and possibly issues related "directly or indirectly to an issue or *lis* between the parties"..., [T]he jurisdiction of the court to resolve the pleaded issues does not terminate when the parties arrive at a settlement of those issues. If it did, the court would have no power to grant an order in terms of the settlement agreement.**
- [16] The correct position is that the grant of an order making a settlement agreement an order of court necessarily involves an exercise of the court's jurisdiction to adjudicate upon the issues in the litigation. Its primary purpose is to make a final judicial determination of the issues litigated between the parties. Its order is *res judicata* between the parties and the issues raised by the parties may not be re-litigated...' (footnotes omitted and emphasis added);
- (iii) the premise that the settlement put an end to the *lis* and thus deprived the court of any further jurisdiction was shown to be incorrect. The court's jurisdiction was unaffected by the agreement (at paragraph [19]);
- (iv) section 173 of the Constitution specifically empowers the court to prevent orders that amount to an abuse of process and the courts have a duty to ensure that they do not grant orders that are *contra bonos mores* (at paragraph [32]);
- (v) **a court cannot act as a mere rubber stamp of the parties** (at paragraph [33]);
- (vi) the court's duty extends further than considering whether the terms are illegal or immoral (at paragraph [33]);
- (vii) the RAF, being an organ of state, is bound to adhere to the basic values and principles governing the public administration under the Constitution (at paragraph [34]) and that, in line with section 195(1) of the Constitution, '[a] high standard of professional ethics must be promoted and maintained'; and that '[e]fficient, economic and effective use of resources must be promoted' (at paragraph [34])
- (viii) that in cases involving public funds, judicial scrutiny may be essential as judges are enjoined by section 173 of the Constitution to ensure that there is no abuse of process (paragraph 35); and
- (ix) the agreement lacked adequate protection for the minor child (paragraph [37]).
- The majority judgment noted that it is not every case that will require this form of judicial scrutiny (paragraph [36])
- Zondi JA penned a dissenting judgment (with Mocumie JA concurring). The minority judgment:
- (i) disagreed with the conclusion of the majority that the relief sought by the applicant in her notice of motion amounted to reviewing the court a *quo* or that the failure to provide safeguards for the management of the funds (which was never advanced as a ground of refusal) laid a sufficient basis for the court of first instance to refuse to make the settlement agreement an order of court;
- (ii) disagreed with the identification of the issues for adjudication by the SCA and the manner in which the two questions posed were answered in the majority judgment; stated that the agreement per the draft order put paid to any and all existing issues giving rise to the *lis* and litigation between the parties; and
- (iv) stated that there must be a basis gleaned from the facts for a court to exercise its discretion against making a settlement an order of court.

Case 2

Mzwakhe v Road Accident Fund (24460/2015) [2017] ZAGPJHC 342 (26 October 2017)

This matter also arose out of a motor vehicle where applicant instituted action against the RAF for the damages he allegedly suffered following on injuries sustained in a motor vehicle collision. The plaintiff had suffered a fracture of the fibula. The RAF conceded liability but did not file a plea with regards to the quantum claimed. The applicant applied for default judgment. There was an appearance for the RAF at the hearing and the parties presented a draft order to the court in terms of which the RAF agreed to pay the applicant an amount of R250, 000 in settlement of his claim. The court stated that:

'[6] In being requested to make [the settlement agreement] an order of court the court is not merely a rubberstamp. The court has a duty to investigate the matter and ascertain

GENERAL PRACTICE continued...

whether or not the agreement is one which should be made an order of court, This is even more essential when the respondent is a public institution whose finances and the administration thereof are in the public interest.' (emphasis added)

The court had postponed the matter in order to peruse the court file and the various expert summaries. The court noted several crucial inconsistencies and contradictions in the reports by the experts.

The court also noted that:

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

[24] **Our courts have a duty to ensure that it does not grant orders that are *contra bonos mores*. Thus, a court will not enforce a contract that is against public policy.'**

The court refused to make the draft order an order of court and ordered that –

- (i) the matter would proceed as if no agreement had been concluded;
- (ii) the applicant would be obliged to prove his claim;
- (iii) the matter would be referred back to the Registrar for the purpose of pleadings to be filed;
- (iv) the RAF was interdicted from paying to the applicant any amount in settlement of the entire claim without a court order first being obtained; and
- (v) each party was to pay its own costs.

Case 3

Eke v Parsons [2015] ZACC 30

The matter before the Constitutional Court arose out of a commercial transaction between the parties wherein Mr Eke agreed to purchase the membership interest of Mr Parsons in a close corporation. Mr Eke defaulted in the payment terms of the agreement and Mr Parsons instituted proceedings in the High Court claiming the balance of the purchase price, the former entered an appearance to defend and the latter applied for summary judgment. A settlement agreement was entered into on the doorstep of the court and that agreement was made an order of court (paragraph [3]).

Mr Eke again defaulted on the payment terms as agreement and then sought to challenge the court order which incorporated the settlement. He eventually launched proceedings in the Constitutional Court. One of the matters which the Constitutional Court was called upon to adjudicate was the status and effect of making a settlement agreement an order of court. On this point, Madlanga J (writing for the majority) made several points, including that:

' [19]... In certain circumstances, agreement- or lack of it- on certain terms may mean the difference

between an end to litigation and a protracted trial. Negotiations with a view to settlement may be so wide-ranging as to deal with issues that, although not strictly at the issue in suit, are related to it- whether directly or indirectly- and are of importance to the litigants and require resolution....

[22] ..., [A]n expedited end to litigation may not only be in the parties' interest, it may serve the interests of justice. This finds support at common law....

[24] Whilst ordinarily the purpose served by a settlement order is that, in the event of non-compliance, the party in whose favour it operates should be in a position to enforce it through execution or contempt proceedings the efficacy of the settlement orders cannot be limited to that. A court may choose to be innovative in ensuring adherence to the order... (footnotes omitted)

[25] **This is no way means that anything agreed to by the parties should be accepted by a court and made an order of court. The order can only be one that is competent and proper. A court must thus not be mechanical in its adoption of the terms of a settlement agreement....** (footnotes omitted)

[26] Secondly, "the agreement must not be objectionable, that is its terms must be capable, both from a legal and practical point of view, of being included in a court order". That means, its terms must accord with both the Constitution and the law. Also, they must not be at odds with public policy. Thirdly, the agreement must "hold some practical and legitimate advantage". (footnotes omitted) (emphasis added)

The court also considered the provisions of section 173 of the Constitution and a wide range of authorities on the topic.

GENERAL PRACTICE continued...

Discussion

The judicial activism on the part of Justice Weiner in the *Maswanganyi* and the *Mzwakhe* matters is, with respect, applauded. The manner in which litigation is run against the RAF in some matters is a cause for concern for both the sustainability of the RAF, the interests of legitimate claimants, the protection of public funds and the reputation of the legal profession.

Litigants wishing to have their settlement agreements made orders of courts must consider the approach and principles applied by the courts and the warning that courts will not simply act as rubber stamps. A number of questions arise though, including circumstances where the parties agree on terms of a settlement and elect not to apply to make such settlement an order of court, agreements that are potentially *contra bonos mores* (against public policy) illegal or even unconstitutional could still be entered into and the courts will only have sight (and thus oversight) of these in the event of a dispute between the parties to the settlement which is taken through the litigation process.

While the emphasis on the protection of public funds in the *Maswanganyi* and *Mzwakhe* matters is, with respect, supported, the attitude and approach of the RAF to the litigation in these and many other cases must also be a cause for concern. Many destitute plaintiffs have to endure costly and lengthy litigation against the RAF while that statutory entity fails to deal with many legitimate claims expeditiously, in compliance with its legislative mandate or to litigate effectively and efficiently in certain matters on the court rolls. In the *Maswanganyi* matter, counsel was only briefed the day before trial. The attendance of the insured driver at the trial was not secured timeously and the RAF, represented by counsel at the

trial, had elected to settle the matter. Similarly, in the *Mzwakhe* matter the RAF did not plead in respect of the quantum claimed and appears not to have done any investigation in respect thereof. Many plaintiffs (and their legal representatives) are frustrated by the RAF dragging its feet in terms of the investigation of matters and not providing proper instructions to its legal representatives. In many matters, even on the date of the trial, the RAF's legal representatives simply contend that they do not have instructions thus frustrating the legal process and possibly the constitutionality entrenched rights of the plaintiffs for a speedy resolution of disputes and access to justice. One wonders how many RAF claims are actually investigated to finality internally within the 120-day period after lodgement. The RAF is funded by the public purse whereas indigent plaintiffs, in many instances, have limited access to justice and must rely on legal practitioners who pursue their claims on a contingency basis. The scales of justice, I would respectfully submit, are heavily balanced against these plaintiffs.

Had the *Maswangani* and *Mzwakhe* matters not involved public funds, one wonders whether the courts would have taken a similar approach. In both matters the protection of public funds was one of the factors emphasised.

It is hoped that the interests of justice of all parties will be taken into account by courts called upon to make settlement agreements orders of court.

The (un)preparedness of the respective plaintiffs for trial in the *Maswanganyi* and *Mzwakhe* matters is also a cause for concern. In the *Maswanganyi* matter, the litigation proceeded to trial with no witnesses who available could testify on the circumstances under which the accident occurred. How,

with respect, was it expected that the plaintiff would discharge the onus of proving that the accident was caused by the negligent driving of the insured driver? How well prepared or well advised was the plaintiff in taking the matter to trial in these circumstances? It is incumbent on attorneys acting for plaintiffs in RAF matters to investigate all aspects of the matter, including the circumstances under which the accident occurred. Presumably, the case as pleaded would have been formulated after there had been some consultation with witnesses. The plaintiff's legal representatives in the *Mzwakhe* matter should have been aware of the risks associated with contradictory reports by the experts and the effect this could have on proving the quantum of their client's claim.

Practitioners will be well advised to take heed to the warnings by the courts that settlement agreements will not, as a mere formality, be made orders of courts. Those acting for plaintiffs in RAF matters in circumstances similar to the *Maswanganyi* and *Mzwakhe* matters, will be similarly advised to consult with all the witnesses and obtain all the relevant information upfront, to investigate all matters thoroughly, analyse the pleadings and draw up an advice on evidence before proceeding to enroll matters for trial. A last minute concession by the RAF will not necessarily be rubber stamped by the court.

Do not bank on a concession and ultimate settlement agreed to by the RAF, negotiating with its proverbial back against the wall, at the doors of court being made an order of court in all cases. Where will the line be drawn for courts interfering with the parties' freedom to contract? Are the courts taking a more inquisitorial approach to matters involving public funds?