

## IS A CREDITOR PRECLUDED FROM INSTITUTING ACTION IN COMMON LAW AGAINST A DECEASED ESTATE?

*Cerebral palsy and delictual compensation – is there a need for a register?*

**Precautionary suspension –**  
right to be heard

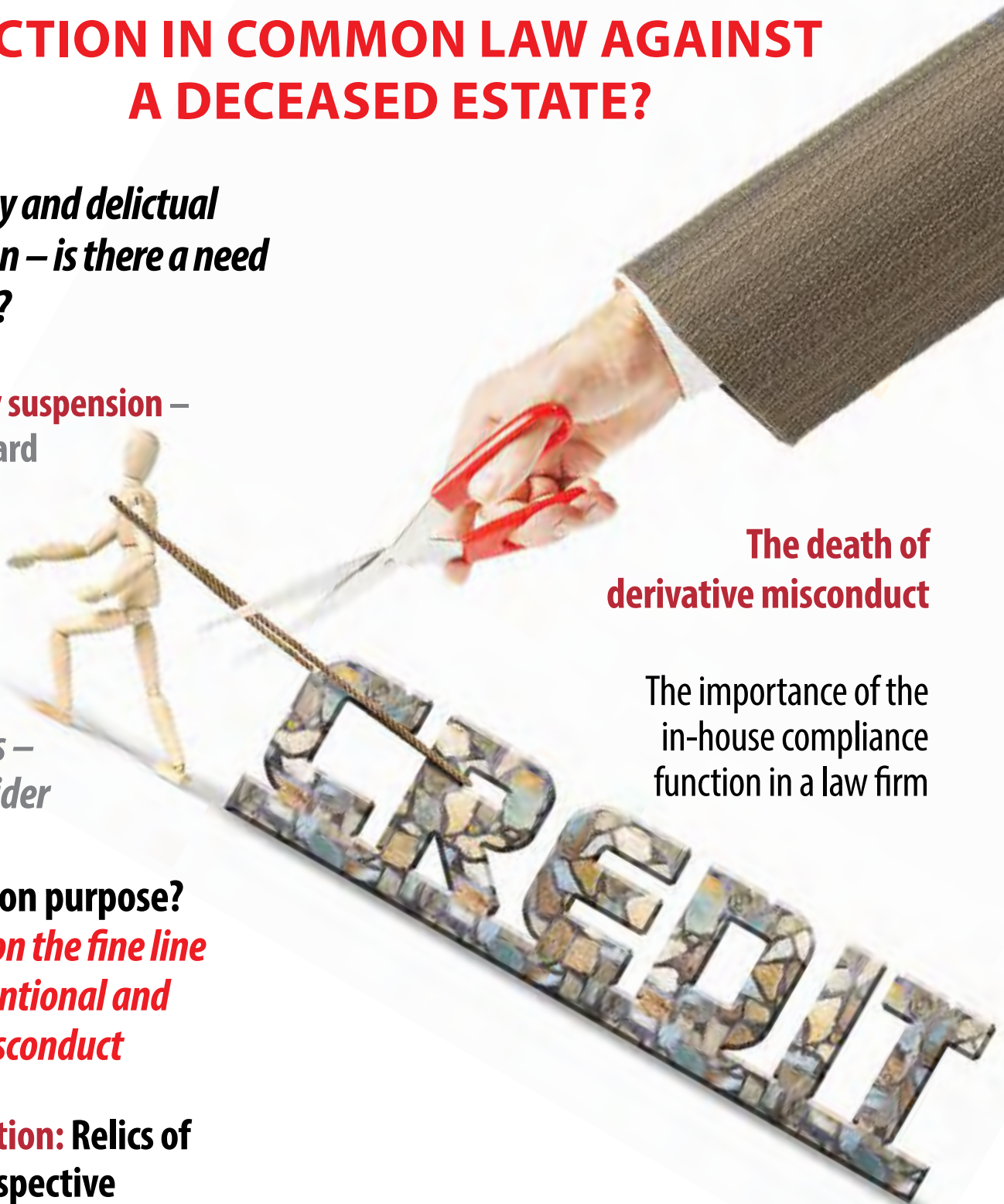
*Drafting wills –  
what to consider*

**Accidentally on purpose?**  
*A case study on the fine line  
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**Nasciturus fiction: Relics of  
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## FEATURES



### 12 Is a creditor precluded from instituting action in common law against a deceased estate?

**C**andidate legal practitioner, **Antonatta Chihombori** questions whether the corollary effect of the claims procedure prescribed by the Administration of Estates Act 66 of 1965 is to effectively bar a creditor from instituting an action in common law against the executor of the deceased estate? She writes that South African case law is replete with cases in which the aforementioned question was brought to court for consideration. This article aims to provide insight into the current legal position regarding this seemingly abstruse legal issue.

### 14 Cerebral palsy and delictual compensation – is there a need for a register?

**C**onsultant and part-time lecturer, **Sarel Steel**; paediatrician, **Andre Stephan Botha**; and actuary, **Tashvir Khalawan** discuss the uncertainty surrounding estimation of the life expectancy of a child in South Africa suffering from cerebral palsy, especially given the absence of a local data register, and the implications of this uncertainty; and they give some thoughts on the possibility of establishing a local cerebral palsy data register.

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# Constitutional Court dismisses Proxi Smart's leave to appeal application with costs

**T**he Constitutional Court (CC) has dismissed the application for leave to appeal in the matter of *Proxi Smart Services (Pty) Ltd v Law Society of South Africa and Others* (CC) (unreported case no CCT114/2019, 5-8-2019) (Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J and Theron J). In late 2016 it came to the attention of the Law Society of South Africa (LSSA), including its constituent members, the Legal Practitioners' Fidelity Fund (LPFF) and other interested parties that Proxi Smart sought to render certain conveyancing related services, which are currently exclusively performed by conveyancers – who are regulated by the Legal Practice Council.

Proxi Smart Services planned to perform certain 'non-reserved' or 'administrative' conveyancing-related services. The LSSA contends that Proxi Smart's attempt at creating a distinction between 'reserved work' and 'non-reserved work' has no basis in law, and that the full conveyancing process is regarded as professional work performed by conveyancers. The view of the LSSA is that the proposal by Proxi Smart cannot be supported as the full conveyancing process is regarded as reserved work and should remain so in the interest of the public.

An application to the Gauteng Division of the High Court in Pretoria, which the LSSA opposed, was subsequently served on the LSSA for an order to the following effect: Declaring that the steps in the transfer process identified by Proxi Smart do not contravene the Attorneys Act 53 of 1979, the Legal Practice Act 28 of 2014, the Deeds Registries Act 47 of 1937 and the Regulations made under the Deeds Registries Act and that it does also not constitute the performance of conveyancing work reserved to attorneys or conveyancers.

In *Proxi Smart Services (Pty) Ltd*

*v Law Society of South Africa and Others* 2018 (5) SA 644 (GP), Proxi Smart brought an application for declaratory relief concerning the lawfulness of its business model for performing the administrative and related services pertaining to property transfers that it contended was not by law reserved to conveyancers or legal practitioners. Judgment was delivered in favour of the respondents. Although the application was dismissed on technical grounds, the judges set out their views on the merits clearly. According to the court, the proposed model, was based on supporting documents that may be required to be lodged in a 'typical transfer of immovable property' involving the sale by private treaty of a freehold property. 'This ignores the fundamental reality that every property transaction is unique and is not typical' (para 17). The court held that the applicant did not make a case for the relief it sought and dismissed the application with costs.

In mid-2019 Proxi Smart approached the CC for leave to appeal the judgment by the High Court and the subsequent dismissal of its application for leave to appeal by the Supreme Court of Appeal (SCA). The SCA dismissed the application for leave to appeal in the matter of *Proxi Smart Services* on 7 May on the basis that there is no reasonable prospect of success in an appeal and there is no other compelling reason why an appeal should be heard.

In early August the matter was dismissed by the CC as it concluded that 'given the procedural insufficiencies in the applicant's case, it is not in the interests of justice for this court to adjudicate this issue on these papers'. The LSSA hopes that the order of the CC brings the matter to conclusion.

- To view all documents on the matter, see: [www.LSSA.org.za](http://www.LSSA.org.za)

See also:

- 'Conveyancing work encroached upon' 2016 (Dec) DR 3;



Mapula Sedutla – Editor

- 'LSSA takes on Proxi Smart model in Gauteng High Court' 2017 (July) DR 14;
- 'Proxi Smart loses conveyancing battle against the LSSA' 2018 (June) DR 3; and
- 'Proxi Smart applies to the Constitutional Court for leave to appeal' at [www.derebus.org.za](http://www.derebus.org.za)



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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](http://www.derebus.org.za)).

- Please note that the word limit is 2000 words.

- Upcoming deadlines for article submissions: 16 September and 21 October 2019.

# LETTERS TO THE EDITOR

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

## Responses to #LLBDegree

**S**tudents are not prepared for the practical side of legal practice after graduation. Some modules in the LLB degree need to be scrapped altogether because once a candidate legal practitioner's articles have commenced, they are not effective.

Law clinics must be utilised more often, to enable students to learn the practical side of things while still at university.

What is the point of contracts when a candidate legal practitioner cannot draft a contract while serving articles? What is the point of civil procedure, when students only start learning about it towards their final year?

Subjects need to be aligned so they may go together. Hence why most students struggle out there. Practical modules should be intensive to prepare students for what is to come.

*Mpho Siphugu*, legal practitioner,  
Johannesburg

**I** am a legal practitioner who qualified in July 2011 and completed my LLB at the University of KwaZulu-Natal and practical legal training (PLT) in 2008. Once I entered practice as a candidate legal practitioner, I realised that apart from a brief exercise in PLT where

we worked on a mock divorce matter, I was not equipped for practice and had barely seen any pleadings let alone drafted them. Apart from one mock trial during our LLB degree, I was certainly ill-equipped for court appearances.

The focus of the modules in the LLB degree is on memorising notes comprised of statutes and cases and regurgitating them in examinations followed by an application of the law to the provided facts. The memorising of the notes should not be the focus but the application as this is what is pertinent in practice.

The lecturer for the criminal procedure course I attended implemented a system where our class notes and textbooks were allowed in the examination and our application of the law was tested. I propose this for all modules because when one is practising, the law is continually expanding. Case law is continually developing, and a statute can be repealed in its entirety or amended. When one researches a matter in order to serve a client, the law is readily available through legal research, but the application in order to draft papers, provide legal advice or for court appearances are not. The testing of the application of the law is a more logical method of training future legal practitioners.

PLT can be incorporated into the LLB degree instead of being a separate

course. I felt that many subjects merely repeated modules completed in the LLB degree.

Practice management is also a separate six months online course, which has now been introduced for those embarking on opening a practice and I have successfully completed this recently.

Many of these modules can be taught within the LLB degree, therefore, saving the student unnecessary costs. Most of the modules in first year are academic in nature and not specifically legally related. I propose that modules, such as linguistics and gender studies – which are all optional – be shortened to one semester and the second semester of first year commence with more actual legal modules. Conveyancing could be included, at least as a basic course.

Employers require risk and legal compliance for which students have no knowledge or training, and this can be included in the LLB degree as well. Overall, a more practical approach to the LLB is required, in my opinion.

*Nishaye Sewlal Padayachee*,  
legal practitioner, Durban

**T**he LLB syllabus is not aligned to vocational training and practice. It does not equip the LLB student with the necessary skills needed



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of a legal practitioner. For example, 80% of practice work is procedure, but a student only starts doing civil procedure in their third year of study and only for a period of ten months.

For this, I would propose that civil procedure should be a module that is done throughout the LLB degree. In the first year, students can be taught to write letters of demand, draft summonses and even be taught how summonses are served by the Sheriff. Civil procedure should be practical and students could take part with assisting law clinics with small litigation matters.

What is the point of contract law if universities are not going to teach students actual drafting? There is really no point to teaching the principles of contract law, if during their final year a student cannot produce a two-page contract. Courses such as jurisprudence should be for a duration of six months or the module should be scrapped altogether.

Secondly, all other courses in the LLB degree must be offered in conjunction with civil procedure matters relating to that course. For example, students must learn how an application for *mandament van spolie* and eviction cases can

be worked on while doing property law theory.

Students must be taught how to index and paginate, and how to apply for a trial date from their second year of study onwards. Finally, law firms must be willing to provide vocational training to students from their second year onwards to gain practical experience before commencing articles.

**Thembinkosi Sithole,**  
legal practitioner, Johannesburg



## Seen on social media



This month, social media users gave their view on the following:

*Remembering the Law Society of South Africa's  
Communication Manager, Barbara Whittle.*



My sincere condolences to the family, friends and all at the LSSA. Barbara was a joy to work with. May her loving soul rest in eternal peace.

**Ntibidi Rampete,** Assistant State  
Attorney at Department of Justice and  
Constitutional Development



May she rest in peace and condolences to the family.

**Shaheid Schrueder,**  
Managing Director at  
Schrueder Inc



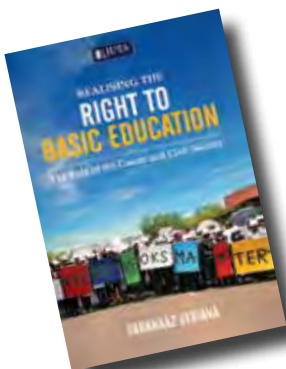
Thanks LSSA, indeed the format of the exam needs to change. Please let us have the mentor workshop in Johannesburg and/or Pretoria, as well.

**Ntibidi Rampete,** Assistant State  
Attorney at Department of Justice and  
Constitutional Development



## BOOKS FOR LAWYERS

## Book announcements



***Realising the Right to  
Basic Education: The  
Role of the Courts and  
Civil Society***  
By Faranaaz Veriava  
Cape Town: Juta  
(2019) 1st edition  
Price R 300 (incl VAT)  
212 pages (soft cover)

This book examines the crucial roles of civil society and the courts in developing the right to education in South Africa amid substantial and persistent inequalities in education provisioning. It presents an overview of education-provisioning cases and the roles played by civil society and the courts. It analyses the contribution of these two role-players in the normative development of the right to basic education.



***Legal Aspects of  
Financing Corporates***  
By Tracey Gutuza  
Durban: LexisNexis  
(2019) 1st edition  
Price R 655.50 (incl VAT)  
(soft cover)

This book explains the legal and transactional issues of financing corporates and aims to simplify the structured finance process. It explains the legal implications, as well as the tax considerations and will be of great use to post-graduate students in commercial law, corporate advisers, legal practitioners, inhouse counsel, financial institutions and the South African Revenue Service.





By  
Elli  
Bissett

# Drafting wills – what to consider

**F**or most people, drafting a will is a very emotional process. Not only do you have to confront the notion that you will no longer be there for your loved ones, but you will also need to decide what will happen to all your earthly possessions after you pass on. When drafting a will, or giving a legal practitioner the instruction to do so, you are fairly confident that certain persons mentioned in your will will receive a certain benefit and will be, in some way, entitled to it. But, according to South African law, you will need to take certain factors into account to ensure just that.

Firstly, it is important to note that if a beneficiary is to receive a benefit from your will, the beneficiary cannot sign your will as a witness or write your will on your behalf, either wholly or partially. In terms of s 4A(1) of the Wills Act 7 of 1953 (the Wills Act), any person who signs a will as a witness, or writes it wholly/partially out in their handwriting, is disqualified from receiving any benefit from that will. Fortunately, as with most things in law, there are some exceptions listed in s 4A(2) of the Wills Act, which include:

- A court can declare a person (or the testator's spouse) who signed the will as a witness or who wrote out the will (or any part thereof) in their own handwriting to be competent to receive a benefit from that will, if the court is satisfied that there was no undue influence and/or fraud.
- A spouse who would have inherited in terms of intestate succession laws will not be disqualified insofar that the benefit they would have received in terms of the will is not greater than that which they would have received in terms of intestate succession laws.
- A person or spouse of the testator will not be disqualified if two other witnesses (who will not inherit from the testator) sign the will.

In the unreported case of *Van Der Watt v Die Meester van die Hooggeregshof: Pretoria en Andere* (T) (unreported case no 39934/05, 15-2-2007) (Dunn AJ) the applicant was not only an heir, but also

a witness to the testator signing his will. She and the testator were not married but lived together for approximately 20 years. The testator's daughter and son-in-law (the third and fourth respondents) objected to the applicant inheriting, although the Master of the High Court (the first respondent) and the executor of the will (the second respondent) did not object. The applicant's legal team relied heavily on s 4A(2)(a) of the Wills Act for relief, but the third and fourth respondents contended that the applicant and testator had only lived together due to economic reasons and not as 'husband and wife', and that the applicant manipulated the testator. The third and fourth respondents did not succeed with their contentions. The court ruled that the testator and the applicant had lived together as husband and wife and that there was no undue influence and manipulation on the part of the applicant. The court ruled in favour of the applicant and she was not disqualified to inherit, even though she did sign the will as a witness.

In *Opperman v Opperman and Others* (FB) (unreported case no 3659/2015, 3-3-2016) (Van der Merwe J) the applicant – this time the surviving spouse of the testator – signed the will as a witness and was to receive a benefit in that same will. The children of the testator's previous marriage opposed the application in that the applicant should be disqualified in terms of s 4A(1) of the Wills Act. Again, the court declared in terms of s 4A(2)(a) of the Wills Act that the applicant was competent to receive a benefit from the will, as she did not defraud or unduly influence the testator in the execution of the will.

Secondly, there is the somewhat tricky concept of s 2B of the Wills Act. It provides that if you die within three months of becoming divorced, your ex-spouse will be deemed to have predeceased you. Thus, if you have bequeathed a benefit in terms of your will to your ex-spouse, for up to three months after the divorce, the will would be interpreted to exclude the ex-spouse, namely, the ex-spouse will not inherit. If the spouse is, however, a

beneficiary after three months of your divorce, it will be interpreted that you intended for your ex-spouse to still receive a benefit from your will. The position of s 2B of the Wills Act was considered in *Louw NO v Kock and Another* 2017 (3) SA 62 (WCC). In that case, the husband and wife were married for almost 30 years before getting divorced in October 2014. The husband passed away of natural causes in January 2015 and the surviving ex-wife insisted on inheriting in terms of the joint will, in which she was the sole beneficiary. The court ruled that and as Professor JC Sonnekus states in his article 'Die doodgewaande gade en die wil van die testateur' (1996) 59 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 294 the legislature created a three month 'grace period' during which divorcees could draft new wills, which take proper account of their altered circumstances. Failure to alter a will during the three-month period would leave the will – and any bequests to the ex-spouse – intact, should the testator die after the three-month grace period. The operation of the section leaves the remainder of the will unaffected and, therefore, other beneficiaries will still be entitled to the benefits allotted to them by the testator. The court found that the ex-spouse could not sufficiently prove that the testator intended her to inherit and she was excluded from doing so in terms of the will.

Then there is the age-old concept of *de bloedige hand er neemt geen erffenis* (the bloody hand does not inherit), which broadly entails that if you are the cause of the testator's death, you will be excluded from inheriting, even if you are mentioned in the testator's will. In *Danielz NO v De Wet and Another; De Wet v Danielz NO and Another* [2008] 4 All SA 549 (C) the wife of the testator was set to inherit in terms of the testator's will and hired two men to assault her husband, who they then killed. Mrs de Wet was married to the deceased in community of property. The applicant was the nominee of Old Mutual Trust Limited and the executor of the deceased's estate and applied for a declaratory order that Mrs de



Wet was not entitled to the proceeds of the policies taken out on the life of the deceased. The court found in the executor's favour.

In certain instances, the testator will definitely not be able to foresee the possibility of a beneficiary in terms of their will being excluded, for example, if the beneficiary was the cause of the testator's death. Certain precautions can be taken to avoid any potential disqualifi-

cation, such as to regularly update your will, to let two independent witnesses sign the will and to type the will out instead of hand writing the will out or letting anyone else write your will out. Undue influence of the testator is also a tricky, and somewhat emotional subject, but luckily there is a safety net that the Wills Act makes provision to disqualify any such persons who make themselves guilty of such conduct.

- **National Wills Week** will take place from 16 to 20 September 2019. Visit the Law Society of South Africa's website at [www.LSSA.org.za](http://www.LSSA.org.za) for more information.

Elli Bissett *LLM (UP)* is a candidate legal practitioner at Henk Kloppers Attorneys in Pretoria.



By  
Christo  
Opperman

## Precautionary suspension – right to be heard

**T**he Constitutional Court (CC) recently held in *Long v SA Breweries (Pty) Ltd and Others* (2019) 40 ILJ 965 (CC) that there is no requirement to afford an employee an opportunity to make representations, where precautionary suspension is invoked. It is relevant to explore this finding, concerning contextual application, as there are many employment scenarios in South Africa where an employee may think that it was unfair to have not been heard prior to being suspended. This hinges on whether the precautionary suspension was procedurally unfair.

Firstly, the finding may not seem that surprising, as the South African labour law dispensation has many examples of case law, which illustrate that – depending only on the circumstances – a right to be heard shall be necessary. There is, however, no general requirement or obligation for the right to be heard concerning any suspension and before institution of a precautionary suspension. On this aspect, the *Long* decision is welcomed. The CC in fact referred to and arguably, impliedly confirmed a lower court's decision holding that a right to

be heard is warranted depending on the circumstances. This decision in *Member of the Executive Council for Education, North West Provincial Government v Gradwell* (2012) 33 ILJ 2033 (LAC), where the court mentions at para 44, regarding the issue of procedural fairness that is triggered when a right to a hearing in the above context has not been afforded and where unfairness is present:

'Fairness by its nature is flexible. Ultimately, procedural fairness depends in each case upon the weighing and balancing of a range of factors including the nature of the decision, the rights, interests and expectations affected by it, the circumstances in which it is made, and the consequences resulting from it' (my italics).

In the case of *Mashego v Mpumalanga Provincial Legislature and Others* (2015) 36 ILJ 458 (LC), at para 10, the court confirmed the position, which was also confirmed by the CC, that precautionary suspension is in itself only precautionary pending the outcome of an investigation and is not intended to be punitive.

However, although dependent on the circumstances, an antecedent question may be when shall a hearing be war-

ranted on invocation of precautionary suspension?

The *Mashego* case answers this quite empirically. In emphasising that in contrast to a disciplinary inquiry, the hearing concerning the invocation of suspension involves an employer setting out the details of the allegations on which suspension is based, and the employee being invited to make written representations as to why they should not be suspended (*Mashego* at para 11). The same was held in the *Gradwell* case that the suspension be compliant with the dictates of procedural fairness (*Gradwell* at para 44). In summary, where an employee has been provided with the details of an allegation, not the merits of the case since an investigation is still to be undertaken and to be finalised, and where an opportunity is present to make written representations, which have been considered, then subsequent invocation of precautionary suspension shall be procedurally fair.

The case of *Independent Municipal and Allied Trade Union obo Hobe v Merafong City Local Municipality and Others* [2017] 10 BLLR 1040 (LC) the court held at para 21:



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'[A]n employer contemplating suspending an employee need not demonstrate with any degree of certainty that the employee is guilty of misconduct or that the employee probably will interfere with the investigation of the alleged misconduct. Obviously, it is not necessary for the employer to place evidence before the employee but simply to outline the allegations of misconduct that will be investigated.'

Therefore, it seems that the common denominator as to when a hearing on precautionary suspension shall be warranted, is when an employee has not been informed of a brief satisfactory outline and/or details of allegations or alleged misconduct. It should be, I submit, elementary to allow an employee to make inquiries and written representations of what the alleged misconduct entails, where the employer will legitimately be entitled only to provide the mentioned outline of allegations and not to place evidence before the employee and to deal with the merits. The latter

shall be impractical and unlikely at that point in time, since an investigation must still take place, which is quintessentially the reason for suspension. Furthermore, generally, invocation of precautionary suspension must not prejudice an employee, where it is generally accepted and as further confirmed by the CC that since such suspensions are on full pay, 'cognisable prejudice' shall be significantly reduced (*Long* at para 25).

But, depending on the circumstances and the workplace in which one is employed, other forms of cognisable prejudice besides financial loss can also occur. This may entail issues concerning impairment of dignity, job security or job security concerning the age of the employee at the time of suspension and reputation. I submit that it is not pragmatic nor constitutionally sound for a proverbial 'turning of a cold shoulder' on an employee, by comprehending that the only general foreseeable prejudice that shall be significantly reduced is that of a financial one when precautionary sus-

pension is invoked. A more normative approach is necessary, in terms of the circumstances of each case, where meaningful dialogue occurs in ensuring that the *audi alteram partem* rule is followed. Given the varied existence of the South African demographic, with businesses ranging from small to large and where unemployment reduction is a necessity, how one treats one's employee is pertinent, not only for the employee but also more so for the employer, to generate a healthy and dignified workplace culture.

The CC's utilisation of the words 'cognisable prejudice' and limiting it to the generality of prejudice concerning financial loss of an employee to be negligible, is unfortunate. Such cognisable prejudice paradigm, I submit, is impractical within the contextual and varied types of South African workplaces that exist.

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## Foreclosure proceedings: Recent judgments provide greater certainty



By Aslam Moosajee and Joshua Davis

**W**hen a homeowner defaults on their home loan agreement, which is secured by a mortgage bond, the credit provider can generally seek recourse by making application for payment of the outstanding amounts owed and an ancillary order declaring the property to be executable. Until the recent cases of *ABSA Bank Limited v Mokebe* and 3 related matters [2018] 4 All SA 306 (GJ) and *Standard Bank of South Africa Limited v Hendricks and Another and related matters* [2019] 1 All SA 839 (WCC), there

has been uncertainty about whether –

- the application for payment and an order declaring the property executable have to be determined simultaneously;
- the court is required to set a reserve price when it declares an immovable property executable and what onus rests on the credit provider in regard to the setting of a reserve price; and
- execution against movables is a bar to reviving a credit agreement under s 129 of the National Credit Act 34 of 2005 (NCA).

### Both applications must be heard simultaneously

In both *Mokebe* and *Hendricks*, the courts held that an application for payment and an order for declaring the immovable property executable must be heard together (see *Mokebe* at para 30 and *Hendricks* at para 40). The court held that the judgment sounding in money is an intrinsic part of the cause of action and linked to the claim for an order for execution. It is, therefore, desirable that both applications are heard together (see *Mokebe* and *Hendricks* (*op cit*)). The courts explained that hearing the applications separately gives rise to piecemeal adjudication, which inhibits a proper consideration of the relevant issues and increases the cost of litigation.

### Setting a reserve price

The courts held that except in exceptional circumstances, a reserve price must be set. In addition, the courts explained that the setting of a reserve price depends largely on the facts of each case and, as a result, it is incumbent on the credit provider to provide details of the following (see *Mokebe* at para 66):

- What is the market value and forced sale value of the property?
- What is the local authority valuation of the immovable property?
- What are the outstanding arrears on the property?
- What are the amounts owing as rates or levies?
- Is the debtor a serial defaulter?
- Has there been any reduction of the judgment debtor's indebtedness and what steps has the credit provider taken to assist the debtor to avoid a sale in execution?
- Is there any equity, which may be realised between the reserve price and the market value of the property?
- What are the costs associated with purchasing the property?
- What is the likelihood of the reserve price not being realised and the likelihood of the immovable property not being sold?
- Is there any prejudice, which any party may suffer, if the reserve price is not achieved?
- Is the immovable property occupied and what are the circumstances of such occupation?
- Is there any other factor, which in the opinion of the court, is necessary for the protection of the interests of the execution creditor and the judgment debtor?

## Reviving a credit agreement

Section 129(3) of the NCA provides as follows:

'Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all

amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied'.

Section 129(4)(b) provides that default cannot be remedied under s 129(3) after 'the execution of any other court order enforcing that agreement'.

Until the *Mokebe* and *Hendricks* judgments, it was unclear whether execution against movables constituted 'the execution of any other court order enforcing that agreement' and, therefore, barred revival of the agreement under s 129(3). The question has now been decisively resolved. In *Mokebe* it was held that it 'is only the sale in execution of the immovable property and the realisation of the proceeds of such sale' (para 44) that prevents reinstatement of the credit agreement under s 129(4)(b). Likewise, in the *Hendricks* case it was held that '[w]hat prevents the reinstatement in terms of section 129(4)(b) is only the sale in execution of the immovable property and the realisation of the proceeds of such sale' (para 53).

It was also held in the *Mokebe* case that, in order to ensure that the home owner understands their rights under s 129(3), a document initiating execution proceedings must include the following statement in a reasonably prominent manner:

'The defendants (or respondent's) attention is drawn to section 129(3) of the National Credit Act No. 34 of 2005 that he/she may pay to the credit grantor all amounts that are overdue together with the credit provider's permitted default charges and reasonable agreed or taxed costs of enforcing the agreement prior to the sale and transfer of the property

and so revive the credit agreement' (para 47).

## Conclusion

Even though the *Mokebe* and *Hendricks* judgments seem, at first blush, to make it more difficult for credit providers to seek judgment and claim an order declaring immovable property specially executable, they provide welcome certainty. It is now clear that –

- credit providers must simultaneously apply for the judgment sounding in money and an order declaring immovable property specially executable;
- except in exceptional circumstances, the court will set a reserve price and credit providers need to provide sufficient details to assist the court in setting the reserve price; and
- execution against movables is not a bar to a debtor reviving a credit agreement under s 129 of the NCA.

Our courts will continue to balance the credit provider's interests in reliable and predictable enforcement processes and the debtors rights to access to adequate housing.

- See law reports 'Mortgage bonds' 2019 (June) DR 17 for the *Hendricks* judgment.

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By  
Thomas  
Harban

## The importance of the in-house compliance function in a law firm

**T**his article aims, firstly, to highlight the importance of the broad compliance environment in which law firms – as business entities – operate and, secondly, to make the argument that a compliance plan must be developed and applied in every law firm for which a dedicated resource should be appointed.

An often repeated adage goes along the lines of ‘a man who is his own lawyer, has a fool for a client’. The prudence in obtaining independent external legal advice, when faced with legal challenges, cannot be overemphasised. However, the adage may not always be apposite where the legal questions facing a legal practice are of a compliance or governance nature. In such instances, the legal practitioners in the firm, with their understanding of the nature, structure, size, and operating environment of the firm are best placed to scan the compliance landscape and to develop a compliance plan. The duties in respect of compliance ultimately lie with the partners. The compliance requirements facing law firms have their origin in the legal and regulatory environment in which the law firm operates.

Often, legal practitioners are called on to identify and interpret the compliance obligations for themselves and that has its own inherent disadvantages, including a possible lack of objectivity and an underlying need to protect one’s turf.

The compliance universe in which a law firm operates, includes the general compliance landscape applicable to any other business enterprise. Certain compliance obligations are unique to law firms, for example, the requirements applicable to the management of trust funds. General compliance and governance in legal practices cover an area, which is too wide to cover exhaustively, in this article.

### The complex compliance framework

The compliance obligations for commercial business entities in general have seen a sharp increase in the last two decades as the various regulatory authorities have sought to address a number of matters, including –

- the protection of consumers;
- combating financial crime;
- addressing the risks emanating from the general financial crisis; and
- addressing the gaps identified in the regulation of certain professions.

The compliance landscape for legal practitioners in South Africa (SA) has also undergone significant changes in this period, most notably with the implementation of the Legal Practice Act 28 of 2014 (the LPA), the Rules and the Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities (the Code) promulgated in terms of the Act, the Companies Act 71 of 2008, the Financial Intelligence Centre Act 38 of 2001 (FICA) and the Financial Advisory and Intermediary Services Act 37 of 2002 (the FAIS Act). The LPA introduced significant changes for the regulation of the legal profession in SA. The Companies Act affects commercial juristic entities established to conduct legal practices, with the FAIS Act applying to those legal practices providing financial advisory and/or intermediary services, while FICA applies to all legal practices as accountable institutions. Legal practitioners are also obliged to comply with other pieces of legislation such as the Prevention of Organised Crime Act 121 of 1998 and to have regard to the implications of the Protection of Personal Information Act 4 of 2013 (POPI) in preparation for its scheduled implementation. The complex compliance web includes –

- the various statutes;
- the common law;
- the principles of ethical conduct espoused by the jurisprudence emanating from court judgments delivered over time; and
- for those firms whose services include foreign clients, the obligations imposed by international instruments, such as the European Union’s General Data Protection Regulation (GDPR).

There have been several articles written on the impact of the data protection obligations of the legal profession arising from the provisions of POPI and the GDPR. Statutes, which do not receive as much general media coverage, also impose obligations on law firms pursuing practice in areas falling within the relevant statutory ambit. For example, s 3.3 of the PFA Guidance Note No 6 of 2018 issued in terms of the Pension Funds Act 24 of 1956 that prescribes the recovery of arrear contributions from an employ-

er is outsourced to a legal practitioner, the agreement entered into between the pension fund and the attorney must at least provide that –

- any amount recovered by the attorney must be transmitted into the pension fund’s bank account within seven business days of receipt; and
- the defaulting employer must provide the relevant contribution statement as required in terms of s 13A(2)(a) and reg 33(1) of the Pension Funds Act, together with the outstanding contributions.

This is an example of a compliance obligation prescribed to form part of the terms of the mandate granted to a legal practitioner imposing an obligation on the legal practitioner (the obligation to pay the funds within the prescribed period) and also specifying that the mandate granted to the legal practitioner must make provision for the obligations of the defaulting employer. The latter will, in the ordinary course, not be party to the agreement between the legal practitioner and the pension fund, and yet the requirement is that the obligations of the defaulting employer (a third party) are included in the mandate. It is unclear how the legal practitioner will be expected to ensure compliance with this obligation by a party who is not party to the agreement.

The compliance obligations imposed by certain pieces of legislation (such as the FAIS Act) prescribe that the regulated entities must appoint a compliance officer. In certain industries the regulated entities have had to increase the capacities of their respective compliance resources in order to meet the applicable requirements. Increased compliance obligations may result in a commensurate increase in the operating costs.

The complex compliance environment has created some upside risks for the legal profession in that providing compliance advice and support has become a lucrative area of practice, as there is an increased need for legal and other specialist professional services to assess the impact of the compliance obligations for their clients and to provide advice on how the compliance obligations are to be met. The flip side is that there is also a downside risk associated with the increased compliance requirements in that legal practitioners now have a myriad of compliance obligations to meet in their own practices. In some instances,

meeting the compliance obligations has placed additional strain on the (often limited) financial and human resources in practices, particularly smaller practices. Some legal practitioners have, colloquially, raised a concern that the increased compliance requirements may create an additional barrier for new legal practitioners wishing to enter practice or suggested that the financial burden of (and time dedicated to) compliance may be the reason that some legal practitioners cease practising. I am not aware of any comprehensive study carried out in this regard where the effect of increased compliance requirements has been studied and empirical evidence examined in order to assess how, and to what extent, the decision to enter or exit practice is affected by the compliance obligations on law firms.

The impact and perception of the three related concepts of governance, risk and compliance has been assessed in a number of reports, including those produced by PWC ('Being a smarter risk taker through digital transformation' [www.pwc.com](http://www.pwc.com), accessed on 22-7-2019) and Aon ('Managing Risk: How to Maximize Performance in Volatile Times' [www.aon.com](http://www.aon.com), accessed on 22-7-2019). It will be noted from the Aon report that the risk associated with changes to the regulatory or legislative environment is only partially insurable.

## Some of the compliance challenges for law firms

Compliance obligations cut across every area of operation in a legal practice. Writing on the attorney's trust accounting environment in the United States, Dr Rick Kabra ('Top 10 Compliance Challenges for Law Firms' [www.cosmolex.com](http://www.cosmolex.com), accessed on 22-7-2019) lists the top ten challenges for law firms as:

- lack of trust specific knowledge and rules;
- limited resources of small firms;
- manual systems;
- commingled trust funds;
- trust ledger overdrafts;
- absence of safeguards to prevent common trust mistakes;
- uncleared funds not addressed;
- sloppy bank reconciliation;
- separate billing and accounting systems; and
- lack of controls and data protection.

The ten challenges listed by Dr Kabra would also apply in the South African environment.

In larger law firms and those with adequate financial resources, a specialist dedicated compliance resource may be employed. Smaller firms will not have such capacity and the compliance function may be delegated to one of the legal practitioners as part of their other du-

ties. Sole practitioners, in particular, are at risk as the single practitioner will be responsible for compliance as part of all the other functions carried out in the firm and when providing legal services to clients. No matter the size or structure of the legal practice, ultimately the responsibility for compliance resides with the partners/directors jointly.

In the trust accounting environment, for example, legal practitioners have a responsibility to study and apply the applicable rules. For example, r 54.14.7 is of particular importance and it provides that:

'54.14.7 A firm shall ensure:

### Internal controls

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

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

54.14.7.1.2 that the internal controls have been implemented as designed;

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

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

Essentially, compliance with r 54.14.7 requires -

- the conduct of an assessment to identify the applicable risks;
- the designing and implementing of appropriate internal controls to address the identified risks;
- the constant monitoring of the implementation and effectiveness of the internal controls in order to ensure that they adequately meet their intended avoidance and/or mitigation of the identified risks at all times; and
- designating a person or persons with appropriate authority (which will be a senior person in the practice) to monitor compliance of the effectiveness of the identified risks.

The compliance obligations in respect of trust accounts are much more than those set out in r 54.14.7.

## Some suggestions for a compliance plan

In developing a compliance plan, a law firm may consider a number of tools including:

- A monitoring mechanism: Compliance by the firm with its compliance obligations can be monitored by the audit function. An assessment of the compliance function can be included as part of the scope of the internal audit carried out in the firm as part of its internal control measures. This will ensure

that any breaches in the compliance obligations are identified at an early stage and that appropriate corrective measures can then be implemented. The danger of self-review must, however, always be borne in mind even where the services of an outside resource such as an auditor are engaged. The party/entity conducting the compliance function should not be the same party providing the review.

- Regular training for all staff on the compliance obligations of the firm: It is hoped that, going forward, the training programme for legal practitioners (both pre-admission and in the future continuing professional development program) will include a component of compliance training.
  - Embedding the compliance obligations in all areas of operation of the firm: Meeting compliance obligations should not be viewed as a mere tick box exercise. Non-compliance by a legal practice with the applicable compliance obligations will lead to regulatory action and, in certain instances, criminal prosecutions. Compliance must be part of every area of operation in the legal practice and should be instilled in all staff at all levels of operation - from the most senior partners to support staff.
  - The development of a compliance checklist: A list of all the compliance obligations of the firm can be created with the timelines for action documented thereon together with the names of the responsible person/s.
  - The purchase of appropriate insurance cover such as Directors' and Officers' liability cover: The purchase of insurance cover is a risk transfer measure.
  - Drawing up a statutory compliance checklist: The main pieces of legislation applying to the firm can be listed together with a summary of the obligations imposed by each piece of legislation and a timeline for when such obligations are due to be performed and by whom.
  - Obtaining specialist advice on the compliance obligations of the firm and, if necessary, engaging an external specialist compliance service provider.
- Remember that in the event of a breach of any of the statutory compliance obligations, ignorance of the law will not be an excuse.

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# Is a creditor precluded from instituting action in common law against a deceased estate?



By  
Antonatta  
Chihombori

**T**he question whether the corollary effect of the claims procedure prescribed by the Administration of Estates Act 66 of 1965 (the Act) is to effectively bar a creditor from instituting an action in common law against the executor of the deceased estate, seems evidently trite. However, South African case law is replete with cases in which the aforementioned question was brought to court for consideration. This article aims to provide insight into the current legal position regarding this seemingly abstruse legal issue.

## The claims procedure

The claims procedure pertaining to deceased estates is contained in s 35 read with ss 29, 32, and 33 of the Act. The salient provisions of the Act encapsulate the following:

- As soon as may be possible after a letter of executorship has been granted to them, an executor is required in terms of s 29, to cause a notice to be published in the *Government Gazette* and in a newspaper, calling on persons who have claims against the deceased estate to lodge these claims within a stipulated period.
- Thereafter, creditors are required to submit their claims in the prescribed form and within the stipulated period.
- If the estate is solvent the executor is obliged to submit an account, of the

liquidation and distribution of the estate. This account will indicate, whether or not a particular claim has been admitted.

- The aforementioned account will lie with the Master for 21 days, during which a purported creditor whose claim has been rejected and who wants to object to the account, must file that objection with the Master.
- The executor is then afforded an opportunity to respond to the objection.
- The decision regarding whether the objection is justifiable or not lies with the Master who then makes a ruling on the matter.
- The Master's decision can be reviewed on motion to the High Court within 30 days.

## Background

Although the Act provides an elaborate procedure for the recovery of a claim

from a deceased estate, it was formerly not clear whether the aforementioned procedure operates as an embargo to the institution of a common law action against a deceased estate. This issue was brought to the Supreme Court of Appeal (SCA) for determination in the case of *Nedbank Limited v Steyn and Others* [2015] 2 All SA 671 (SCA).

The decision in *Steyn* emanates from a dispute that arose in the Gauteng Division of the High Court in Pretoria, in the case of *Standard Bank of South Africa Ltd and Others v Ndlovu and Others* (GP) (unreported case no 33265/13, 24-10-2013) (Mabuse J). In *Ndlovu* the court dismissed 17 applications for default judgment on the basis of non-compliance with the provisions of ss 29, 32, 33 and 35 of the Act. A direct consequence of this ruling is that the plaintiff's attempt to recover their dues through the action procedure were effectively quashed.





Their only remedy according to Mabuse J, was to lodge a claim with the executors in accordance with the Act. This meant that the creditors would have to institute proceedings afresh. However, the appellant in *Steyn*, namely, Nedbank Ltd was the plaintiff in six of these applications and it lodged an appeal against the decision with the leave of Mabuse J.

In reaching its decision, the court in *Steyn* took cognisance of the fact that the issue before the court was in fact not new, having been brought to court for determination numerous times under the previous Administration of Estates Act 24 of 1913 (the 1913 Act), which contains substantially similar provisions. One of the decisions under the 1913 Act was the ruling of *Estate Stanford v Kruger* 1942 TPD 243, which held that there was nothing under the 1913 Act to indicate that the legislature intended to deprive a creditor of their common law right to sue the deceased estate.

*ipality* 1917 AD 718, 'where a statute creates a right or an obligation and gives a special and particular remedy for enforcing it the remedy provided by the statute must be followed and it is not competent to proceed by action at common law.'

In *Davids* the right in question was found to have emanated from a contract and, therefore, under the common law, the creditor (*Davids*) was entitled to enforce it by action. This reasoning is directly applicable to *Steyn*.

Secondly, the court held that even if the application of the aforementioned principle were to be extended to cases where the statute does not itself create the right/obligation, then it must be clear that the legislature intended that the remedy provided by the Act must be the only remedy available, to the exclusion of all others. In this regard the court cited the case of *Mhlongo v McDonald* 1940 AD 299 at 310, which articulated this principle as follows:

'If the legislature's intention be to en-

the estate and could potentially lead to a protracted and, therefore, costly legal process.

However, the SCA in *Steyn* dissented from this view and pointed out that even claims procedures done in accordance with the Act could be lengthy and expensive. The court stated that hypothetically where there is a dispute regarding the authenticity of a creditor's claim the creditor might have to launch a review in the High Court, which could lead to the hearing of oral evidence akin to a trial. In light of the aforementioned the court concluded that there was no basis for concluding that a magistrate's court action would be more expensive than for instance a High Court application with the potential risk of being converted into a trial.

## Conclusion

The interest of justice dictates that all legal remedies available to an aggrieved party be made available to that party.



Picture source: Gallo Images/Getty

## Interpretation of the Act

In *Steyn* the court cited the judgment of Watermeyer AJ in *Davids v Estate Hall* 1956 (1) SA 774 (C) in order to elicit two fundamental points, which were crucial in correctly interpreting the effect of the relevant provisions of the Act on the creditor's right to institute action proceedings against a deceased estate.

First, the court concurred with the view that the 1913 Act does not preclude a creditor from instituting an action in common law against the deceased estate. In Watermeyer AJ's view, the 1913 Act had not created the right, which it sought to enforce. Thus, the remedy supplied by it could not be applied to the exclusion of all other legal remedies. This submission was made in order to rebut a submission in *Davids*, where the executors sought to rely on an established legal principle referred to in *Madrassa Anjuman Islamia v Johannesburg Munic-*

*croach* on existing rights of persons it is expected that it will manifest it plainly, if not in express words, at least by clear implication and beyond reasonable doubt.'

The court in *Steyn* found that there were no express words in either the 1913 Act or the Act to indicate that the creditor was barred from proceeding by way of action against an executor for the recovery of their debt.

## Time and cost implications of applying the action procedure

The issue of costs remains a determinant factor when one is deciding whether or not to institute legal proceedings, as well as the nature of the proceedings to be instituted. In *Ndlovu*, Mabuse J was of the view that the institution of both the common law action and the claims procedure simultaneously by creditors could precipitate a delay in the finalisation of

In this regard, the decision in *Steyn* is useful in that it eliminates any doubt or ambiguity on the current legal position regarding the effect of the claims procedure stipulated in the Act on the common law right of the creditor to institute action proceedings.

In *Steyn* the court correctly held that the provisions of the Act do not preclude an executor from instituting an action in common law against the deceased estate.

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# Cerebral palsy and delictual compensation – is there a need for a register?

Picture source: Gallo Images/Stock

By  
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Tashvir  
Khalawan

**T**he quantification of damages in certain legal matters involves calculating the capitalised value, or expected present value, of a list of future anticipated medical expenses. In this calculation, allowance is made for the probability that the injured plaintiff may die before incurring the future expense. The number of years that the individual is likely to survive – namely, their life expectancy – is therefore, a critical assumption affecting the quantum. Furthermore, typically in the case of medical negligence matters, the plaintiff may not be expected to experience ‘normal’ life expectancy due to the impact of the medical condition on survival.

One such medical condition is cerebral palsy.

- This article has two aims –
- first, a discussion of the uncertainty surrounding estimation of the life expectancy of a child in South Africa (SA) suffering from cerebral palsy, especially given the absence of a local data register, and the implications of this uncertainty;
  - secondly, some thoughts on the possibility of establishing a local cerebral palsy data register.

The uncertainty involved when life expectancy is estimated is especially important given the current practice of a once-off payment to the plaintiff. Although this article is not intended to present a comprehensive discussion of these issues; the intention is to heighten awareness of their importance.

## Uncertainty when estimating life expectancy

The life expectancy of a person is the number of years that the person can expect to live beyond their current age. This definition needs some explanation. A life expectancy of 60 years for a child aged 10 implies that the child can expect to live for another 60 years. This does not imply with certainty that the person will in fact die at age 70. ‘Expect to live’ in this context has a specific meaning, derived from the statistical approach that is used to arrive at a life expectancy of 60 years. It implies that the average age at death of all 10-year-old children comparable to the specific person is estimated to



be 70 years. Although all the children in this homogeneous group have a life expectancy of 60 years, some will die at age 11, and others only after the age of 90.

To estimate life expectancy, an investigation is typically required that analyses the past mortality experience of a group of individuals that are similar to the individual under consideration. Such an investigation would require suitable past data. The mortality rates derived from the investigation can then be applied to estimate the future mortality experience of the individual.

Given the uncertainty of future life, it is clear that life expectancy should be interpreted carefully and with discernment. This perspective is even more relevant for persons afflicted by a condition such as cerebral palsy, since clinical factors affect these individuals differently. Methods that are used to estimate life expectancy do attempt to take this into account by pooling together data for children forming relatively homogeneous groups. With cerebral palsy, the most important factors that are used to define 'homogeneous groups' are gross motor function ability and the method of feeding. There are several other less important factors that have to be taken into account.

There are several other less important factors that have to be taken into account such as weight for age, epilepsy, socio-economic position and general cognitive ability. In this regard a dilemma arises. If more factors are used to define homogeneous groups in order to estimate life expectancy, more relevant data is obtained, but the groups become smaller and the results correspondingly less statistically reliable.

Regarding the availability of data that can be used to estimate the life expectancy of cerebral palsy individuals, the largest and most comprehensive mortality database is provided by the Life Expectancy Project in San Francisco (LEP). Unfortunately, this database has never been published and only limited mortality data and life expectancy figures are provided in the literature, the latest publication being JC Brooks, DJ Strauss, RM Shavelle, LM Tran, L Rosenbloom, and YW Wu 'Recent trends in cerebral palsy survival. Part II: Individual survival prognosis' (2014) 56(11) *Developmental Medicine & Child Neurology* 1065. It is feasible to estimate life expectancy for a cerebral palsy individual at a given age from the LEP database and this

estimate can be used to construct a life table for the individual. Strauss *et al* propose various mathematical techniques to do this (DJ Strauss, RM Shavelle, C Pflaum and C Bruce 'Discounting the cost of future care for persons with disabilities' (2001) 14(1) *Journal of Forensic Economics* 79 and DJ Strauss, PJ Vachon and RM Shavelle 'Estimation of future mortality rates and life expectancy in chronic medical conditions' (2005) 37(1) *Journal of Insurance Medicine* 20).

Summarising the above discussion, in an ideal world, given an infinite amount of data and perfect knowledge regarding the best method for estimating life expectancy, one would be able to arrive at an accurate estimate. Naturally this is not feasible. Moreover, even if an accurate life expectancy estimate could be obtained, the considerable variation in individual lifetimes within a homogeneous group of individuals would remain. An individual life expectancy estimate and calculations based on this estimate should, therefore, be viewed cautiously.

A cerebral palsy register in SA would enable data to be collected to perform a mortality investigation that could then be used to estimate life expectancy in SA. In the absence of local data, estimates that are constructed are based on foreign data. This entails adjustments that are applied to foreign results to account for local conditions. Different choices are made regarding these adjustments and it is difficult to decide which choice is best. All of this implies a further increase in uncertainty.

### What are the implications for cerebral palsy related litigation?

Current practice usually entails the plaintiff presenting an expert opinion to the court, which is used to calculate an amount that the defendant (a provincial Department of Health or medical negligence insurer) is deemed to be liable for as compensation for proven negligence. An important part of the expert opinion is a life expectancy estimate. The defendant presents a different expert opinion, that may include a different life expectancy estimate, and that leads to a different estimate of damages, leaving the court to resolve the matter and determine a once-off payment intended to purchase reasonable care until death.

This system has several flaws. The estimates in any expert opinion are subject to uncertainty and this is not always sufficiently recognised. Given this uncertainty, attempts are often made to avoid under-compensating the plaintiff. This, however, also has drawbacks. In a presentation to the 123rd Annual Meeting of the American Academy of Insurance

Medicine, Robert Shavelle, a prominent researcher in cerebral palsy life expectancy, states: 'Does care matter? If "good" versus "bad", then yes. If "excellent" versus "reasonable and necessary", then no' (RM Shavelle 'Life expectancy after catastrophic injury', <http://aaimedicine.org>, accessed 9-7-2019). Over-compensation also ignores the reality of limited provincial health budgets. Finally, if an individual that has been granted a once-off payment passes away before the expiry of the estimated life expectancy, the remaining cash devolves to the estate of the deceased, and so the heirs of this person benefit.

It seems clear that a system of staggered payments to a plaintiff would substantially reduce the impact of the life expectancy estimate and hence reduce the uncertainty implied by a once-off payment. Part of such a staggered payment approach would be regular expert input, say on a five-year basis, providing up-to-date information on the condition of the individual. This will provide a more reasonable basis for deciding on further payments to the plaintiff. Such a system would require separate consideration from a legal and legislative perspective.

### A cerebral palsy register for South Africa

According to KA Donald, P Samia, A Kakooza-Mwesige and D Bearden 'Pediatric cerebral palsy in Africa: A systematic review' (2014) 21(1) *Seminars in Pediatric Neurology* 30, the estimated prevalence of cerebral palsy in Africa is between two and ten cases per 1 000 live births (hence, between 0,2 and 1%), compared to between 2 and 2,5 per 1 000 live births globally. The higher prevalence in Africa may be the result of a lower level of health care compared to global standards, although the impact of different methods of estimating cerebral palsy prevalence cannot be discounted. Ideally, prevalence estimation should be based on accurate and comprehensive data. Such data does not seem to be widely available in Africa. S Goldsmith, S McIntyre, H Smithers-Sheedy, E Blair, C Cans, L Watson and M Yeargin-Allsopp 'An international survey of cerebral palsy registers and surveillance systems' (2016) 58 *Developmental Medicine and Child Neurology*, discuss the results of a global survey of cerebral palsy registers. Their survey reports on 25 registers, of which 12 are in Europe, eight in



Australia and five in North America. According to these authors there does not seem to be any cerebral palsy register in Africa.

Narrowing the focus to SA, a local cerebral palsy register will increase the confidence in prevalence estimates. This will not be the only benefit. According to Goldsmith (*op cit*) the registers included in their survey indicated aims that can be grouped into five broad categories, namely –

- a cerebral palsy register is a valuable resource for research;
- it provides a base for surveillance of individuals afflicted by cerebral palsy;
- it contributes to initiatives aimed at prevention;
- it is an important aid in health care planning; and
- it contributes to the raising of community awareness.

One can add to this the importance of a relevant data register in the computation of life expectancy estimates.

Regarding the role of a cerebral palsy register in research, only one point is expanded. Cerebral palsy is not a single homogeneous condition. The population of patients must, therefore, be considerably stratified, leading to small numbers of cases in some categories. This reduces the confidence in estimates and predictions for these categories, a problem that can be addressed partially by pooling local data with that from other countries.

A more detailed picture of the aims with a cerebral palsy register and of the services provided by existing registers can be obtained by visiting the web pages of, for example, the following two registers: the 'Australian Cerebral Palsy Register Group' at [www.cpregister.com](http://www.cpregister.com), and the 'Surveillance of Cerebral Palsy in Europe' at [www.scpennetwork.eu](http://www.scpennetwork.eu).

It is not clear how establishing a South African cerebral palsy register should be approached – what follows are merely some ideas, namely:

- Identifying interested role players will be required. These will include Departments of Paediatrics at universities, public and private hospitals, caregiving centres, practising paediatricians, institutions such as the Medical Research Council, the provincial and national Departments of Health, and possibly medical schemes.
- It may be advisable to launch the project in a single province first, for example the Western Cape, and to extend it to the other provinces only once it is running smoothly.
- Basing the register at one or more universities also seems natural. The initiative can initially be proposed as a joint research project between several universities, which should generate funding from research bodies and possibly private health care providers. Obtaining assistance from abroad would be advisable.

### South African conditions

Under-reporting of cerebral palsy probably occurs in SA for various reasons, which will not be expanded here. This deprives the children involved of proper care. A South African cerebral palsy register will contribute to heightened community awareness of the condition and will lead to a decrease in the stigma surrounding cerebral palsy, one of the possible reasons for under-reporting.

The reality of substantial once-off payments for delictual compensation is placing a strain on state resources, to the detriment of, for example, projects to reduce cerebral palsy incidents and to improve the care of individuals afflicted by cerebral palsy not ascribable to medical negligence. As pointed out earlier, a contributing factor is that claims are being contested on an individual basis, with life expectancies and compensations be-

ing estimated and contested without local data being available. Establishing a cerebral palsy register will, in the long term, alleviate this problem.

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### Fact corner

- **Cerebral palsy** is a condition marked by impaired muscle coordination (spastic paralysis) and/or other disabilities, typically caused by damage to the brain before or at birth.
- **Cerebral palsy** is a common neurological disorder with a prevalence of between two and three per 1 000 live births globally and up ten to per 1 000 in rural South Africa.
- **Cerebral palsy** is the most common motor disability in childhood. Population-based studies from around the world report prevalence estimates of cerebral palsy ranging from 1,5 to more than four per 1 000 live births or children of a defined age range.



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# THE LAW REPORTS



By Johan Botha and Gideon Pienaar (seated);  
Joshua Mendelsohn and Simon Pietersen (standing).

## July 2019 (4) South African Law Reports (pp 1 – 329)

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

### Abbreviations

ECG: Eastern Cape Division, Grahamstown

GJ: Gauteng Local Division, Johannesburg

KZP: KwaZulu-Natal Division, Pietermaritzburg

LCC: Land Claims Court

MN: Mpumalanga Division, Nelspruit

SCA: Supreme Court of Appeal

WCC: Western Cape Division, Cape Town

### Costs

**Court's discretion to order peregrine private individuals to furnish security for the costs of claims pursued against *incolae* of South Africa (SA):** In *Barker v Bishops Diocesan College and Others* 2019 (4) SA 1 (WCC) the court had to decide whether to order the appellant, MB, a permanent resident of the United Kingdom who held no assets in SA, to furnish security for costs in a claim he was pursuing here against the respondent. The plaintiffs, MB and his parents, claimed damages from Bishops College (the school) for injuries MB sustained in SA in 2005. The plaintiffs did initially furnish security for the school's costs but refused to increase it when the school later complained that the furnished security had been depleted by the costs since incurred. The

school successfully applied to the High Court seized of the matter for an order directing the plaintiffs to furnish additional security, MB appealed to a Full Bench.

The court held that while *peregrini* were generally obliged to provide for security for costs for litigation conducted in SA, *incolae* had no right to demand it: It was a discretionary matter for the judge, who had to conduct a balancing exercise, taking into account considerations of equity and fairness; weighing the injustice to the plaintiff if prevented from pursuing his claim by an order for security, and the injustice to the defendant if no security was ordered. The court pointed out that a litigant resisting an application for security had to provide documentation to support allegations of impecuniosity, and a failure to do so might lead to the inference that the allegations were unfounded, and that undisclosed documentation would contradict them.

Applying these principles to the case, the court, per Steyn J (Yekiso and Schippers JJ concurring) found that if MB had wanted the High Court to consider his financial position in isolation from that of his parents, he should have shown, on a balance of probabilities, that being required to furnish

security would stifle his action. It was incumbent on him to clearly set out the financial backing available to him from all sources, including his parents. Since it was probable that MB had access to funding from his parents, he had failed to show that he would be unable to furnish security if considered separately from them, or that he would as a result of this inability be unable to continue with the action. Hence the finding of the court *a quo* that MB was not impecunious was correct. The appeal was accordingly dismissed.

### Delict

**Municipal liability for flood damage:** The facts in *Bergvliet Municipality v Van Ryn Beck* 2019 (4) SA 127 (SCA) were as follows: Following rainfall, the storm water system near Mr Van Ryn Beck's home was overwhelmed, and his home flooded. He later sued the municipality for his damages, alleging it had negligently and wrongfully failed to –

- provide an effective system;
- maintain the system; and
- timeously effect flood-prevention measures.

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The High Court dismissed the action, concluding that the evidence established neither negligence, nor wrongfulness, nor causation. Van Ryn Beck then appealed to the Full Bench, which upheld the appeal. It was satisfied the evidence established those elements.

The municipality appealed to the SCA, which agreed with the High Court. In its view, as regards negligence, Van Ryn Beck had failed to establish what could be foreseen by the municipality, and what steps could have been taken to prevent the flooding.

Concerning wrongfulness, it stated that such a finding would result in an onerous duty on municipalities generally and would ignore the budgetary priorities of the Bergrivier Municipality, specifically.

Accordingly, it upheld the appeal, set aside the Full Bench's order and substituted it with an order dismissing Van Ryn Beck's appeal against the High Court's decision.

**Liability of a school for injury of a visitor to its property:** In *Parktown High School for Girls v Emeran and Another* 2019 (4) SA 188 (SCA), the second respondent, a boy, attended a fashion show at Parktown High School for Girls organised by its representative council of students. After paying the entrance fee and entering the grounds, he at some point came to lean against a concrete table. The table, which was for use of learners, comprised of a top that rested on – but was not secured – to its base. When the second respondent so leaned, the top fell off and injured his hand.

The second respondent and his father, the first respondent, later instituted an action for their respective damages against the school. They based the action on the school's alleged omission to secure the table tops.

In response the school raised a special plea that the state was the proper defendant. This was on the basis of s 60(1) of the South African Schools Act 84 of 1996. The first and second respondents, invoking s 60(4), contended

that the school was properly cited.

The High Court dismissed the plea but granted the school leave to appeal to the SCA. The issue there was whether the omission was in connection with a 'school activity' (s 60(1)), which would render the state liable; or in connection with a 'business' or 'enterprise', which would result in the school being liable.

The SCA concluded that the show was merely a 'school activity' and not an 'enterprise or business', and accordingly held that the school had been misnamed as the defendant.

It upheld the appeal, set aside the order of the High Court, and replaced it with an order upholding the special plea, and dismissing the first and second respondents' claims.

**Liability of a school for injury to a student:** In *Gora v Kingswood College and Others* 2019 (4) SA 162 (ECG), by an oversight, a grade 9 history class at the first defendant school was left unattended for an hour. In that time, the plaintiff, a then 15-year-old minor, provoked a pupil, and was struck in the face by another 15-year-old pupil.

The blow shattered the plaintiff's glasses and injured his eye. The plaintiff, now aged 20, sued the school for damages. The plaintiff's claim was that leaving the class unattended was negligent and wrong. The school denied negligence, but asserted that, if negligence is established, then liability was excluded by the contract between the plaintiff's parents and the school. The school did, however, concede wrongfulness.

The High Court, per Picker-J, found that the law was to the effect that the degree of supervision required was dependent on the risks in the environment concerned. Here, it was not foreseeable that should the class be left unattended, the incident would occur. This was because –

- there were no inherent risks in the classroom;
- the school was 'extremely well regulated';
- pupils were left unsupervised outside the classroom

- daily, without incident; and
- the age of the plaintiff and the boy he had provoked supported an expectation that they would act maturely.

Accordingly, neither negligence nor indeed gross negligence having been established, the action was dismissed.

## Divorce law

**Permitted exclusions from accruals:** In *BF v RF* 2019 (4) SA 145 (GJ) the husband (respondent) and wife (appellant), were married out of community of property with accrual. They were involved in divorce proceedings, and disputed a clause of their antenuptial contract, excluding, *inter alia*, certain shares from the husband's estate, for purposes of the accrual calculation.

On the commencement of the marriage the husband had possessed a certain number of the shares, which, it was agreed, would be excluded from the calculation. But during the marriage the husband had acquired further shares in the same company, and the issue was whether these were excluded from his estate for accrual purposes. The additional shares had not been acquired through the fruits or realisation of any of the shares possessed at the commencement of the marriage.

The judge – who was presented with the issue in a stated case – held that the clause excluded the shares acquired after commencement of the marriage. Dissatisfied, the wife appealed to the Full Bench. Sutherland J (Matojane J concurring, Siwendu J dissenting) found that properly interpreted, the clause did not exclude the later-acquired shares from the husband's estate. Moreover, the Matrimonial Property Act 88 of 1984 only permitted exclusion – in an antenuptial contract – of assets actually possessed at the commencement of the marriage. These, and assets acquired later, by virtue of them, could alone be excluded. Assets not already possessed on commencement, and which would not derive from assets held on commencement, could not be excluded.

The appeal was upheld, and it was declared, *inter alia*, that only the shares possessed at the commencement of the marriage were excluded from the accrual calculation.

## Equality legislation

**Poverty qualifying as unlisted prohibited ground of unfair discrimination under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Act):** *Social Justice Coalition and Others v Minister of Police and Others* 2019 (4) SA 82 (WCC) dealt with the separated issue of whether the South African Police Service's human resources allocation policy in the Western Cape indirectly resulted in unfair discrimination – as contemplated in the Act – against black and poor people. While race is listed under para (a) of the 'prohibited grounds' of discrimination in s 1 of the Act, poverty is not. This raised the issue whether poverty constituted 'any other ground' under para (b) of the 'prohibited grounds'.

The court, per Dolamo J (Boqwana J concurring), agreed with the applicant that while the policy was ostensibly intended to benefit historically poor and black areas, it resulted in allocations, which were skewed in favour of privileged and historically white areas. It held that this *prima facie* constituted indirect discrimination on the listed ground of race and on the unlisted ground of poverty; and that, the respondents having failed to discharge the onus of proving that such discrimination was fair, it constituted unfair discrimination under the Act.

## Financial institutions

**Liability of financial adviser for losses incurred by investor:** In *Symons NO and Another v Rob Roy Investments CC t/a Assetsure* 2019 (4) SA 112 (KZP) the plaintiffs, the trustees of a family trust, instituted an action against their former financial adviser for damages incurred when the company recommended by the adviser for investment collapsed. The respondent



close corporation was represented by one Griffen, a financial adviser registered with the Financial Services Board as a financial services provider.

The background of the investment decision was as follows: When the first plaintiff, Symons, a wealthy former company director, in May 2009 told Griffen, his financial adviser, that he was interested in investments that would produce a monthly income, the latter mentioned Sharemax Investments (Pty) Ltd, a property syndication scheme. Griffen explained that the Sharemax product was an investment in a shopping mall and that Symons would receive 12,5 % interest from the date of the investment. Griffen left Symons a brochure and a prospectus that, *inter alia*, described the investment as a risk capital investment in a newly formed company. Two weeks later Symons signed the investment documents. He eventually invested R 5 million in Sharemax.

The Reserve Bank, however, intervened in Sharemax's affairs, accusing it of taking unlawful deposits from the public and directing it to change its funding model, which it was unable to do. Finding it impossible to raise further funds, Sharemax collapsed. While Symons did not initially blame Griffen for having recommended Sharemax, he together with his fellow trustees eventually sued, alleging that the defendant had undertaken –

- to advise the plaintiffs on low-risk investments;
- to execute its mandate with the diligence and skill expected of financial advisers (which it represented it possessed); and
- that it would not recommend any investment until it had satisfied itself that it was low-risk.

The plaintiffs contended that, contrary to these undertakings, the defendant persuaded them to invest in Sharemax, which it falsely represented to be a low-risk investment with guaranteed returns. This, and defendant's failure to exercise the requisite level of skill and dil-

igence by properly investigating Sharemax, resulted in the loss of their investment. The plaintiffs specifically pleaded that it was a material term of the agreement that it was a low-risk investment.

In deciding whether the defendant was liable, the court considered the following issues –

- the risk attaching to the investment;
- whether the defendant breached its contractual obligations; and
- whether any such breach was the cause of the plaintiffs' loss.

The court, per Ploos van Amstel J, held that the allegation that the defendant, via Griffen, breached its contractual obligations by advising the plaintiffs to invest in Sharemax made little sense since Symons understood that he was investing in a syndicated property development, and since the documents he had signed made it clear that repayment of income and capital were not guaranteed, there was no basis for finding that Griffen had told him otherwise. The court was satisfied that, on the information given to Symons, he was able to make an informed decision, and it was probable that he substantially understood the nature of the investment and went into it with his eyes open. Symons' initial failure to blame Griffen pointed to the aim of the action being to get compensation from the defendant's professional indemnity insurer without having to go to court.

In the circumstances it could not be said that Griffen breached his contractual obligations to the plaintiffs, but even if it were so, the cause of the loss was not any breach on the part of the defendant; it was the unforeseeable intervention of the Reserve Bank, which caused the collapse of Sharemax, and therefore, such breach was not causally connected to plaintiffs' loss. In the final analysis Symons was an astute businessman who made a considered investment when the intervention of the Reserve Bank, the cause of his loss, was not foreseeable by Griffen. Accordingly, it was held that the

plaintiffs failed to establish liability on the part of the defendant. The claim was dismissed with costs.

## Land reform

**The legal status of a valuation by the Office of the Valuer-General in determination of just and equitable compensation:** In *Emakhasaneni Community and Others v Minister of Rural Development and Land Reform and Others* 2019 (4) SA 286 (LCC) – a matter where, by agreement between the parties, 'just and equitable compensation' was to be determined by the LCC – the state parties (the Minister of Rural Development and Land Reform, and the Regional Land Claims Commissioner KwaZulu-Natal) contended that both they and the LCC were bound by the Office of the Valuer-General's valuation.

For their stance the state parties relied on s 12(1)(a) of the Property Valuation Act 17 of 2014 (read with the definition of 'value' in the Act), which in relevant part provides that '[w]henever a property has been identified for –

(a) purposes of land reform, that property must be valued by the Office of the Valuer-General for purposes of determining the value of the property having regard to the prescribed criteria, procedures and guidelines'.

The court (per Canca AJ and assessor EJ Sibeko concurring), however, rejected the state parties' interpretation of the Act, holding that on a proper reading the court retained the power to determine just and equitable compensation in respect of land, identified for land reform purposes, purchased by the minister. Neither the court nor the minister was not bound by the Office of the Valuer-General's determination of value. In the result the minister was not prevented from paying compensation that exceeded the value determined by the Office of the Valuer-General.

The Office of the Valuer-General's determination, the court pointed out, could at best be used as a guideline by the minister when nego-

tiating the purchase price of any property they intended acquiring under s 42D of the Restitution of Land Rights Act 22 of 1994, and the landowner should then be able to approach the court for a determination of the just and equitable compensation should they be unhappy with the Office of the Valuer-General-based valuation at which the minister undertook to acquire the property.

## Practice

**Rescission application not suspending execution:** In *Pine Glow Investments (Pty) Ltd and Others v Brick-On-Brick Property and Others* 2019 (4) SA 75 (MN) the applicant sought an order, *inter alia*, that certain judgments and orders were operational and executable. One of the respondent's grounds of opposition was that there were rescission applications pending against certain of the orders, which they contended automatically suspended such orders.

For this contention the respondents relied on *Peniel Developments (Pty) Ltd and Another v Pieterse and Others* 2014 (2) SA 503 (GJ); [2014] 2 All SA 219 (GJ), where it was held that there was nothing in law that prevented a court from extending the common-law rule relating to the automatic suspension of orders pending appeal, to applications for rescission.

The court, per Legodi JP, declined to follow *Peniel*. The real question, it stated, was whether it was necessary to develop or extend the common-law rule to apply to rescission applications, in order to automatically suspend the operation of an order of court, in circumstances where a procedural rule is provided in the Uniform Rules of Court. In this regard it noted that an application for the rescission of a court order did not automatically suspend its execution, and that a party fearing irreparable harm from the execution of a bad order could apply under r 45A of the Uniform Rules of Court. (This rule provides that: 'The court may suspend the execution of any order for such period as

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it may deem fit'.) The court accordingly concluded that it should not develop the common law in this regard, for to do so would result in parties resorting to meritless rescission applications to frustrate the execution of judgments or orders.

## Road Accident Fund claims

**What constitutes a 'motor vehicle':** *Mbele v Road Accident Fund* 2019 (4) SA 65 (WCC) concerned an appeal to a High Court Full Bench against the dismissal by Desai J of a loss of support claim against the Road Accident Fund (the Fund). The appellant's husband, a stevedore, had succumbed to injuries sustained after he was knocked over at his workplace in Cape Town Harbour, by a 'reach stacker'. The 'reach stacker' is a large diesel-powered machine, 12 metres long and 4 metres wide, weighing over 70 tons, and designed to grab, lift, move and load ocean containers.

It appeared that while the stacker had a normal Cape Town registration number, its weight and size prevented it from operating on public roads without appropriate escort. In its day-to-day operations it did duty on both public and non-statutory roads within Cape Town Harbour. The court *a quo* agreed with the Fund's basis for disputing liability: That the stacker was not a 'motor vehicle' as contemplated in s 1 of the Road Accident Fund Act 56 of 1996 (the Act), thus excluding the claim from the ambit of the Act.

The Full Bench's approach was that the issue was to be decided by objectively ascertaining what the primary purpose of the design of the road stacker was; and if, in giving effect to that purpose it might need to travel on a road, that it would follow that it was a 'motor vehicle' as defined in the Act. The test was, therefore, not whether it travelled on roads, but whether, viewed objectively, the persons responsible for its design intended that it should be propelled on a road.

The court, per Gamble J (Le Grange J and Sievers AJ concurring) applied the above test to find that:

- the stacker was clearly designed and equipped to move around the harbour along roads and over adjacent areas such as parking and storage lots in the ordinary course of its work;
- its everyday functions required it to traverse both public and non-statutory roads; and
- its designers, objectively viewed, would have contemplated that it would be required to be propelled along such roads.

The court accordingly concluded that the stacker was a motor vehicle as intended in s 1 of the Act and upheld the appeal.

## Other cases

Apart from the cases and material dealt with or referred to above, the material under review also contained cases dealing with –

- admission and enrolment requirements of an LLB degree obtained at any university and not encompassing private higher education institutions;
- change in shareholding of company solely or mainly for purpose of utilising assessed loss;
- creation of bus lane bounded by rumbling stones and solid island;
- exceptional circumstances in leave to appeal;
- handing-over of the bride as a requirement for customary marriage;
- judgment rewritten by an attorney with approval of the magistrate;
- referral of a decision by the SCA refusing leave to appeal; and
- the requirement of where judgment or order arising from act or transaction connected with possession of 'matter or material'.

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# New legislation

Legislation published from  
5 – 31 July 2019

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

## Bills

Appropriation Bill B6A of 2018.  
Appropriation Bill B6B of 2019.  
Special Appropriation Bill B10 of 2019.  
Selected list of delegated legislation  
**Allied Health Professions Act 63 of 1982**

Unprofessional Conduct Board Notice: The bio-energetic synchronisation technique ('the BEST technique') not in legal scope of practice of registered chiropractors. BN103 GG42561/5-7-2019.

Unprofessional Conduct Board Notice: Ingestion by or oral administering to patients of aromatherapy oils not in the legal scope of practice of registered therapeutic aromatherapists. BN104 GG42561/5-7-2019.

Unprofessional Conduct Board Notice: Issuing of certificate of indisposition without an examination of a patient. BN102 GG42561/5-7-2019.

Guidelines for professions: Continuing professional development (CPD). BN108 GG42576/12-7-2019.

Guidelines of homeopathy internships in terms of s 19. BN110 GG42576/12-7-2019.

**Auditing Profession Act 26 of 2005**  
Amendments to the rules regarding Improper Conduct. BN105 GG42561/5-7-2019.

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

South African Orthotic and Prosthetic Association Amendment 2019, *Optometrist and Speech/Audiologist Gazette* 2019, annual increase in medical tariffs for medical services providers, and general information. GenN353 GG42561/5-7-2019.

Notice to Compensation Fund medical service providers: Compulsory invoicing requirement in medical claims. GenN354 GG42561/5-7-2019.

**Competition Act 89 of 1998**  
Notice: Definitions of 'medium-sized business' and 'small business'. GN987 GG42578/12-7-2019.

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

Transfer of administration, powers and functions entrusted by legislation to specific cabinet members in their capacity as executive authority of specific departments. Proc48 GG42601/30-7-2019 (also available in isiZulu).

**Construction Industry Development Board Act 38 of 2000**

Construction Industry Development Regulations: Amendment of the tender value range adjustments. GenN357 GG42561/5-7-2019.

**Financial Services Board Act 97 of 1990**  
Levies on financial institutions. GenN384 GG42579/12-7-2019.

**Government Employees Pension Law 21 of 1996**

Amendment of rules: Divorce. GenN399 GG42603/31-7-2019.

**Higher Education Act 101 of 1997**

Amended Institutional Statute of the University of Johannesburg. GN993 GG42584/19-7-2019.

**National Nuclear Regulator Act 47 of 1999**

Nuclear authorisation fees. GN991 GG42584/19-7-2019.

**National Water Act 36 of 1998**

Continued application of the general authorisation for water uses until the new general authorisation for waste relate activities is gazetted. GenN383 GG42576/12-7-2019.

**Natural Scientific Professions Act 27 of 2003**

South African Council for Natural Scientific Professions: Recommended consultation fees. BN111 GG42576/12-7-2019.

**Public Finance Management Act 1 of 1999**

Statement of the National Revenue, Expenditure and Borrowings as at 30 June 2019. GenN398 GG42602/30-7-2019.

**Skills Development Act 97 of 1998**

Re-establishment of Sector Education and Training Authorities (SETAs) from 1 April 2020 to 31 March 2030, within the new SETA Landscape. GN1002 GG42589/22-7-2019.

**Superior Courts Act 10 of 2013**

Determination of date for Judiciary Day 2019: 3 October 2019. GenN400 GG42605/31-7-2019.

Determination of sittings of specific courts. GenN401 GG42605/31-7-2019.

## Draft delegated legislation

- New standards, revision standards and cancelled standards in terms of the Standards Act 8 of 2008 for comment. GenN382 GG42576/12-7-2019.
- Draft dispensing fee to be charged by persons licensed in terms of s 22C(1) (a) of the Medicines and Related Substances Act 101 of 1965 for comment. GN972 GG42576/12-7-2019.
- Regulations relating to a transparent pricing system for medicines and scheduled substances (draft dispensing fee for pharmacists) in terms of the Medicines and Related Substances Act 101 of 1965 for comment. GN973 GG42576/12-7-2019.
- Draft curriculum and assessment policy statement for the subject 'Marine Sciences' to be listed in the National Curriculum Statement Grades R-12 in terms of the National Education Policy Act 27 of 1996 for comment. GN990 GG42584/19-7-2019.
- Amendment of Annexure B of the Radio Frequency Spectrum Regulations, 2015 in terms of the Independent Communications Authority of South Africa Act 13 of 2000 for comment. GN1003 GG42590/23-7-2019.

## Draft Bills

Draft National Ports Amendment Bill, 2019. GenN372 GG42547/11-7-2019.



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# High Court rules that the common law principle of set-off is not applicable to debts arising from credit agreements regulated by the NCA

*National Credit Regulator v Standard Bank of South Africa Limited (GP)*  
(unreported case no 44415/16, 27-6-2019) (Keightley J)



By Mohamed Shafie Ameermia and Peacemore Mhodi

**O**n 27 June, Keightley J from the Gauteng Local Division, Johannesburg ruled in the case of the *National Credit Regulator v Standard Bank of South Africa Limited (GP)* (unreported case no 44415/16, 27-6-2019) (Keightley J) on the correct interpretation of the National Credit Act 34 of 2005 (NCA).

The matter arose as a result of various complaints received by the National Credit Regulator (NCR) by consumers against Standard Bank regarding its practice of applying the common law principle of set-off against amounts received by consumers into accounts they hold with Standard Bank.

## Relief sought by the applicant

The NCR, as the applicant in the matter sought a declaratory order to the effect that credit providers are not entitled to rely on the common law principle of set-off to satisfy debts that are owed by consumers in terms of credit agreements that are subject to the provisions of the NCA.

## Issue for determination

The question for determination by the High Court was whether ss 90(2)(n) and 124 of the NCA render the common law right of set-off inapplicable in respect of credit agreements that are subject to the NCA.

## Common law set-off scheme v statutory scheme of set-off

The common law principles of set-off allows banks to have the right to transfer

cash from an account holder's bank account to pay off other debts held with them, such as credit cards or loans. This practice is known as the right to 'set-off', or to combine accounts.

It becomes evident when regard is had to the provisions of ss 90(2)(n) and 124 of the NCA that the common law principle of set-off and the statutory scheme of set-off in terms of the NCA, sit at two diametrically opposing sides. The statutory scheme of set-off (gleaned from s 124 of the NCA) reveals that there are certain requirements set out under s 124 of the NCA, which a credit provider must comply with. In terms of s 124 of the NCA, the creditor must comply with the following process before a set-off can be applied –

- the consumer must provide consent and authorisation, which specifies the account/s from which the set-off will be applied to;
- in respect of which amounts the set-off is to be applied to; and
- in respect of which obligations must the set-off be effected against.

## Arguments advanced by the parties

The NCR argued that properly interpreted, ss 90(2)(n) and 124 of the NCA displaced the common law principle of set-off in respect of credit agreements concluded in terms of the NCA. The NCR contended that the statutory scheme of set-off was a significant departure from the common law principle of set-off, in that it introduced stringent safeguards designed to protect the consumer.

The South African Human Rights Commission (SAHRC), aligned itself with the submissions of the NCR further add-

ing that in answering the question of whether ss 90(2)(n) and 124 of the NCA, render the common law right of set-off inapplicable in respect of credit agreements that are subject to the Act, regard must be had to the socio-economic and institutional context within which these provisions operate, as well as the impact of set-off on the debt review process on the one hand and the economic welfare of citizens on the other. The SAHRC led expert evidence from a debt counselor who adduced evidence that the use of the common law principle of set-off by banks, often renders debtors incapable of complying with their debt repayment plans, because the income with which they intend to make payment is claimed by the bank, before they are able to honour obligations to other creditors under the repayment plan. Accordingly, the SAHRC argued for an interpretation, which would better promote the purport, spirit and purposes of the Bill of Rights and favour the dignity of the debtor. Such an interpretation, the SAHRC argued, was one where the NCA is to be interpreted to prohibit the application of the common law principle of set-off to debts arising from credit agreements as regulated by the NCA.

Standard Bank, the respondent in this matter, disagreed with the relief sought by the NCR arguing instead, that the common law principle of set-off was applicable to credit agreements concluded in terms of the NCA as the NCA had not expressly ousted the application of the common law principle of set-off to these agreements. In making this argument, Standard Bank focused on the language of the provisions, in particular the wording of s 90(2)(n). Although accepting that an interpretive exercise must be holistic, taking into account context and purpose of the legislation in question, Standard Bank argued that sight must not be lost to the actual words used by the lawmakers. Thus, Standard Bank submitted that if it had been the intention of the lawmakers to oust the application of common law set-off to credit agreements concluded in terms of the NCA, the lawmakers would have expressly stated this.

## Salient features of the judgment

In her judgment, Keightley J, stated

that all parties were *ad idem* that there was no 'express exclusion of common-law set-off' in either ss 90(2)(n) or 124 of the NCA and set-off is still permissible under the NCA. Keightley J, highlighted that where the parties were at cross-roads, was on the form of set-off permitted. The NCR and SAHRC were of the view that the 'only form' of set-off permitted is the statutory scheme established under ss 124 and 90(2)(n) of the NCA. Standard Bank, on the other hand, argued that the statutory scheme did not displace the common law right to set-off in respect of credit agreements subject to the NCA.

Keightley J, highlighted that the main object of the NCA was to protect consumers and held at para 63 that:

'The system of set-off established under s 124 is plainly designed to *represent a complete break* from the past application of the common-law principle of set-off, and its overt purpose is to *safeguard the rights of consumers* in the set-off process' (our italics).

According to Keightley J, the statutory scheme introduced by s 124 of the NCA 'promotes equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers'. The common law principle of set-off, which did not impose

any restrictions on the credit provider or provide safeguards was at odds with this balancing exercise and retained 'the upper hand for credit providers with little actual benefit to consumers'. This, Keightley J, held had a detrimental effect on the socio-economic welfare of the debtor. As a result, Keightley J, was constrained not to accept the interpretation advanced by Standard Bank as it was incongruent to the objects of the NCA and did not promote the basic constitutional rights to socio-economic welfare, dignity and possibly, the property of consumers.

Consequently, Keightley J declared that in light of ss 90(2)(n) and 124 of the NCA, the common law right to set-off is not applicable in respect of credit agreements, which are subject to the NCA.

### What does the ruling mean going forward?

Henceforth, for debts arising from such credit agreements, which are subject to the NCA, a credit provider must comply with the requirements set out under s 124 of the NCA. In terms of s 124 of the NCA, the creditor must comply with the following process before a set-off can be applied: The consumer must provide consent and authorisation, which specifies the account/s from which set-

off will be applied, in respect of which amounts when set-off is to be applied, and specify in respect of which obligations the set-off is to be effected.

### Conclusion

This judgment is likely to have widespread ramifications for the financial sector as a whole and, in particular, the banking sector and debtors throughout SA on all agreements that are subject to the NCA. From the point of view of debtors, the ruling protects them as consumers, but from the credit providers' perspective the judgment adds another layer of requirements, which they must comply with when using set-off, to collect debts and it may force them to take additional security measures, which might have an effect on access to and cost of credit for consumers.

Mohamed Shafie Ameermia BA LLB (Wits) LLM (UP) BA (Hons) Business Administration (TGSM&L) Fellowship in American and International law and Arbitration (SWIICL-Dallas-TX, USA) is a Commissioner and Peacemore Mhodi LLM (UKZN) is a Research Advisor at the South African Human Rights Commission in Johannesburg. □



By  
Kelsey  
Allen

## The death of derivative misconduct

*National Union of Metalworkers of South Africa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Ltd and Others (CC)* (unreported case no CCT202/18, 28-6-2019) (Froneman J (Mogoeng CJ, Cameron J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Nicholls AJ and Theron J concurring))

As with many protected strikes in South Africa (SA), the industrial action in which the employees of Dunlop participated during August and September 2012 became one which was marked by violence. The violence started on the first day of the strike and, notwithstanding that the employer obtained an interdict from the Labour Court (LC) to bring it to a halt, it escalated over a period of a month. In that time, several ve-

hicles belonging to staff and visitors were damaged, a petrol bomb was thrown, as were stones, death threats were recorded on a billboard, the homes of two managerial employees were set alight, and the workplace entrances were blockaded.

Ultimately, a number of the striking employees were dismissed: Some on the basis of having been the perpetrators of the acts of violence in question, the others on the basis of what has come to be termed 'derivative misconduct.'

'Derivative misconduct' has developed in our case law as a type of misconduct distinct from the primary misconduct in question, generally relied on by employers in circumstances in which the actual perpetrators of the primary misconduct cannot be identified. The concept of 'derivative misconduct' was articulated in *Chauke and Others v Lee Service Centre CC t/a Leeson Motors* (1998) 19 ILJ 1441 (LAC) at para 33: 'This approach involves a derived justification, stemming from

an employee's failure to offer reasonable assistance in the detection of those actually responsible for the misconduct. Though the dismissal is designed to target the perpetrators of the original misconduct, the justification is wide enough to encompass those innocent of it, but who through their silence make themselves guilty of a derivative violation of trust and confidence.'

The substantive and procedural fairness of the dismissal of the striking employees was challenged by their trade union, National Union of Metalworkers of South Africa (NUMSA), on their behalf through the Commission for Conciliation, Mediation and Arbitration's (CCMA) dispute resolution mechanisms. The arbitrator, when considering the issue of the substantive fairness of the dismissals, identified three categories of employees, namely –

- those who had been positively identified as having been perpetrators of the violence;
- those who were identified as having been present at the scenes of the violence but who were not identifiable as having committed any violent act; and
- those who were not identified as having either been present at the scenes of the violence, nor participant therein.

The arbitrator found that dismissal of the former two categories of employees had been substantively fair but found there to have been no substantively fair

reason for the dismissal of the last mentioned category. These employees were awarded reinstatement.

On review to the LC by the employer the arbitrator's award of reinstatement was set aside. The Labour Appeal Court equally dismissed NUMSA's appeal against that decision.

On appeal to the Constitutional Court (CC) by NUMSA, the court was required to determine the reasonableness of the arbitrator's decision that the dismissal of the third category of employees had been substantively unfair. In a unanimous judgment handed down on 28 June the CC concurred with the arbitrator and substituted the order of the LC with an order dismissing the review application.

In arriving at its decision, the CC considered whether there was in fact a duty on the part of employees to disclose information pertaining to the misconduct of other employees to their employer. The court distinguished between fiduciary duties, which entail a unilateral obligation to act in the beneficiaries' interest, and the contractual duty of good faith, which is reciprocal in nature and requires no more than that the contracting parties have regard to the interests of the other. The court concluded that our law does not imply fiduciary duties into all employment relationships. The duty generally arising in an employment relationship is a reciprocal contractual duty of good faith, which itself does not impose an obligation on any employee

to disclose information of misconduct of their fellow employees to their employer, in the absence of any reciprocal obligation on the part of an employer itself to give something to the employees in return (such as guarantees for their safety).

The CC pointed out that there are many ways in which employees can both directly and indirectly participate in or associate themselves with whatever primary misconduct has occurred. Evidence of such association or participation may be sufficient to establish complicity in the primary misconduct. On the facts of the matter before it, the CC did not find that the employees who had been awarded reinstatement could all have been identifiable as having been present at the scenes of the violence and accordingly, to dismiss all of them would not be justified.

The CC now having put an end to the notion of 'derivative misconduct', an employer wishing to sustain a dismissal based on collective misconduct is required to demonstrate by way of either direct or compelling circumstantial evidence that the employees in question directly or indirectly associated with or participated in the misconduct in question.

Kelsey Allen BProc LLB (Unisa) is a legal practitioner in Durban. □



By  
Nkosilathi  
Moyo

## Accidentally on purpose? A case study on the fine line between intentional and negligent misconduct

*Drs Dietrich, Voigt and Mia (Pty) Ltd t/a Pathcare v Bennet and Others [2019] 8 BLLR 741 (LAC)*

Where one draws the line on what ought to be considered as intentional or negligent misconduct is often blurred. In the judgment of *Drs Dietrich, Voigt and Mia (Pty) Ltd t/a Pathcare v Bennet and Others* [2019] 8 BLLR 741 (LAC), an employee had been dismissed for falsifying overtime claim forms. The Labour Appeal Court (LAC) was faced with making a determination on whether the commissioner had correctly found the employee to have acted

negligently for certain acts of misconduct as opposed to having acted intentionally as averred by the employer.

The employee had been charged and consequently dismissed for dishonest conduct specifically, it was alleged that –

- during the period from October 2013 to January 2014, on 13 occasions, the employee claimed full overtime hours despite having taken lunch breaks or being off of the company's premises; and
- during July, November and December

2013 the employee claimed overtime at an incorrect hourly rate of 1,5 instead of 1,0, which resulted in an overpayment.

Thereafter, the employee referred a substantive fairness challenge to the Commission for Conciliation, Mediation and Arbitration (CCMA). The commissioner's inquiry was confined to whether the breaches of the rule were intentional. The employee proffered to the commission that he worked for long agonising hours as overtime was scheduled over



the weekend. The employee further stated that due to the limited food options available at the employer's premises, he had to resort to purchasing food elsewhere and return to the workplace to eat while working. He admitted that there was a lack of proper record keeping on his part for the time he spent outside the workplace, during his meal intervals, which he did not deduct from his overtime claims for which he apologised. The employee also admitted that he claimed overtime at the incorrect rate during the months of July, November and December 2013 as a result of human error. The employee apologised once again and paid the overpaid amounts back to the employer prior to the disciplinary hearing.

Even though the commissioner found the employee to have committed the acts of misconduct articulated above, the commissioner found the employer to have failed to discharge its onus to prove that the employee acted intentionally. The commissioner was of the view that if the employee's actions were intentional, the employee would not have submitted the incorrect claim forms intermittently, but would have repeated this sequentially. Insofar as the allegation for overtime with regard to the lunch breaks is concerned, the commissioner noted that the employee struggled to justify his actions. The commissioner was of the view that a fraudster would have left less of a trail of evidential material and chalked up the employee's actions to 'merely slapdash or to put it in another way, negligent.' The commissioner could not fathom that fraudulent activity could have been so badly orchestrated.

On review, the Labour Court (LC) held that the employer did not prove the intention to falsify the overtime claim forms. It further held that the commissioner's finding, that the employee was

careless; negligent; and had no intention to defraud the employer, was within the band of reasonableness. This finding was also informed by the fact that the employee's line-manager had checked the overtime claim forms before appending her signature thereto.

Dissatisfied with the LC's finding, the employer took the matter to the LAC. The court had to determine whether the employee acted intentionally or negligently, specifically whether the commissioner's conclusion, that the employee was guilty of negligence and not dishonesty, was reasonable. It was contended for the employer that the employee's unmethodical poor defences to the allegations of misconduct should have led the commissioner to a conclusion that the employer discharged its onus to prove that the employee was guilty of dishonest conduct.

The court held that to a certain extent, the commissioner misdirected himself in holding that the employer was confined to proving whether the breach of the rule was intentional without inquiring or establishing whether there was a rule, which precluded the employee from claiming for his lunch breaks. The court, relying on the precedent set in *Mkhatswa v Minister of Defence* 2000 (1) SA 1104 (SCA), held that whether or not conduct constitutes negligence ultimately depends on a realistic and sensible judicial approach to all the relevant facts and circumstances that bear on the matter at hand. In light of the fact that the claim forms in issue were structured in a way that the overtime rates, that is, both the 1,0 and 1,5 times rates were placed in adjacent columns, the commissioner readily accepted that the employee inserted his overtime in the wrong column because the claim forms were not submitted consecutively. The court concluded that the employee did not exercise the

degree of care, which can reasonably be expected of an employee in his position, and as such, the commissioner's findings could not be faulted.

## Conclusion

This decision seems to create uncertainty when it comes to matters where there is a dispute on the authenticity of the fault element of the alleged misconduct. On the one hand, an employee can possibly pull the wool over the commissioner's eyes by conveniently ascribing seemingly inconspicuous acts of misconduct as having been committed negligently. What this case illustrates is that the employee would not necessarily have to provide a credible explanation to sustain this defence apart from remorsefully crediting the act as pure human error. On the other hand, if an employer can establish a connection between the manner in which the acts of misconduct were orchestrated, however, inadvertently committed, and the perceived benefit stemming therefrom, an employee may very well face a charge of dishonesty or fraud if they proffer an explanation indicative of a mistaken belief of that employee's entitlement to act in whatever manner in question. Such actions would have been committed deliberately. It should follow that inquiring into the reasonableness of the misconduct in question does not necessarily provide a reliable point of departure when there is an allegation of this nature.

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## The interpretation and application of s 7 of the Admission of Advocates Act does not of itself alone raise a constitutional issue

*General Council of the Bar of South Africa v Jiba and Others* 2019 (8) BCLR 919 (CC)

In the case of the *General Council of the Bar of South Africa v Jiba and Others* 2019 (8) BCLR 919 (CC) the Constitutional Court (CC) was tasked to look at a fitness matter, whether the respondents Nomgcobo Jiba, Lawrence Mrwebi and Sibongile Mzinyathi – who are all advocates – were fit to practice. The General Council of the Bar of South Africa (GCB) a body mandated by the Admission of Advocates Act 74 of 1964 to institute disciplinary proceedings against errant advocates. The GCB's statutory duty is to place before the court, evidence of a practitioner's misconduct to enable the court to exercise its inherent powers to discipline advocates. The respondents were admitted and enrolled by the authority of the High Court. They were all senior officials in the National Prosecuting Authority (NPA), established in terms of s 179 of the Constitution and the National Prosecuting Authority Act 32 of 1998 (NPA Act).

The misconduct charge against the respondents – that they were no longer fit and proper to practice – arose from the conduct in litigation where they deposed to affidavits, which were presented to the court as evidence and their failure to comply with court rules and directives. The decision taken by Ms Jiba and Mr Mrwebi in the exercise of public power, gave rise to litigation in which those decisions against General Richard Mdluli were taken by Mr Mrwebi. The Freedom Under Law, a non-profit organisation, instituted a review application, impugning this decision.

Ms Jiba and Mr Mrwebi were cited as parties in those proceedings. At the time the decision was taken, Ms Jiba was the Acting National Director of Public Prosecutions. In opposing the relief sought in those proceedings, Ms Jiba and Mr Mrwebi filed affidavits that sought to justify the decision. But they failed to submit,

to the Registrar of the Gauteng Division of the High Court, a copy of the record of the proceedings that led to the withdrawal, as required by r 53 of the Uniform Rules of Court. This, together with the failure on their part to timeously file opposing papers, caused a long delay in the adjudication of that review application.

In its judgment the High Court was highly critical of the conduct of the respondents in relation to those proceedings. Importantly the High Court found that Ms Jiba and Mr Mrwebi had lied in their affidavits and that they had suppressed information unfavourable to their defence with the objective of misleading the court. Ms Jiba and Mr Mrwebi appealed against the condemning judgment to the Supreme Court of Appeal (SCA). The SCA dismissed the appeal and upheld the factual findings of the High Court. This meant that the respondents were, as advocates, not measuring up to the required standard of integrity and honesty.

The second decision taken by Ms Jiba to authorise the laying of charges against Major General Johan Booysen under the Prevention of Organised Crime Act 121 of 1998 (*Booyesen v Acting National Director of Public Prosecution and Others* [2014] 2 All SA 391 (KZD)). This decision too was challenged in a review application that was instituted in the KwaZulu-Natal Local Division in Durban. Ms Jiba was cited as a respondent and in that matter too, she failed to submit the relevant record to the Registrar as was required by r 53. In opposition to the review, she deposed to an affidavit. Following an analysis of the evidence, the High Court's judgment suggested that Ms Jiba was found to have been untruthful in some aspects of her evidence.

Mr Mrwebi and Mr Mzinyathi took no part in the *Booyesen* matter and the adverse credibility findings made there did

not apply to them. The same applies to the matter concerning former President Jacob Zuma (*Zuma v Democratic Alliance and Others* [2014] 4 All SA 35 (SCA)). Further litigation ensued in which the contest revolved around the ambiguity of the order. The litigation commenced in the Gauteng Division of the High Court in Pretoria (GP) and ended in the SCA. It was in the second judgment of the SCA that strong criticism was levelled against Ms Jiba. She was described as having been deliberately unhelpful and having 'been less than truthful'. Following the judgment of the SCA in *Freedom under Law v National Director of Public Prosecutions and Others* [2013] 4 All SA 657 (GP) (the *Mdluli* case) the NPA approached the GCB with a request that it should institute disciplinary proceedings in the High Court against the three advocates. The credibility findings made against them in that matter were cited as basis for disciplinary proceedings.

Having acceded to the NPA's request, the GCB instituted these proceedings in the GP in April 2015. The relief sought by the GCB was that the respondents should be struck off the roll of advocates, or that they be suspended from practising as advocates for a period determined by the High Court. In support of the claim the GCB relied mainly on the judgment in the *Mdluli*, *Booyesen* and *Zuma* matters. The GCB's founding affidavits quoted copiously from each of those judgments and cited credibility findings made against each respondent. On the strength of the findings to the effect that the respondents lacked integrity and had given false evidence under oath, the GCB asserted that the respondents were not fit and proper persons to continue to practice as advocates as contemplated in s 7(1)(d) of the Admission of Advocates Act.

The respondents opposed the application and all of them filed papers in

answer to the case pleaded by the GCB. The matter was heard by two judges. The High Courts' judgment was written by Legodi with Hughes JJ concurring. In a comprehensive judgment, the High Court identified the test applicable to the determination of whether an advocate should be suspended or struck from the roll on the ground that they are 'not a fit and proper person to continue to practice as an advocate'. Having identified the right test, the High Court proceeded to evaluate the evidence placed before it. Special attention was paid to the remarks and factual findings made against each advocate in the explanation furnished by each advocate in relation to the misconduct raised. With regard to Ms Jiba, the High Court held that no misconduct was established in respect of the *Booyesen* and *Zuma* matters.

However, the High Court found that misconduct was established against her in relation to the *Mdluli* matter. The court held that she had given false evidence under oath and that in some respects she tendered evidence that was misleading to the court. The High Court described her as an 'unrepentant and dishonest person'. Arising from the *Mdluli* matter, the High Court found that misconduct had been proven against Mr Mrwebi. The court held that he was untruthful in asserting that he took the decision to withdraw charges against General Mdluli on 5 December 2011.

Mr Mrwebi was found to have lied in some aspects of his evidence. The court concluded by observing that Mr Mrwebi was patently dishonest in his testimony before a disciplinary inquiry where he was called as a witness. The High Court did not only find that misconduct was established against Ms Jiba and Mr Mrwebi but also concluded that they were not fit and 'proper persons' to continue to practice. Because both advocates were shown to be dishonest and without integrity, the High Court ordered that their names be struck from the roll.

With regard to Mr Mzinyathi, the High Court found that, though Murphy J in the *Mdluli* matter had made negative observations about his conduct, no misconduct was established. The High Court ordered the GCB to pay his costs of application. Ms Jiba and Mr Mrwebi appealed to the SCA and the GCB cross-appealed against the costs order granted in favour of Mr Mzinyathi. As regards Ms Jiba, the majority held that misconduct was not established. Mr Mrwebi was concerned that the majority accepted that misconduct was established against him. However, the majority held that there was no proof of dishonesty on his part, because he did not gain from the misconduct.

In determining whether Mr Mrwebi should be struck off the roll, the High Court took into account General Mdluli's personality. The majority held that the

High Court 'did not bring its unbiased judgment to bear on the question before it, and materially misdirected itself'. Consequently, the majority held that Mr Mrwebi should have been suspended from practice and ordered that he be suspended for a period of six months, antedated to 15 September 2016 on which the High Court delivered its judgment. Regarding Mr Mzinyathi, the GCB did not challenge the High Court's conclusion that no misconduct was established against him. In the SCA, the GCB's cross appeal was restricted to the question of costs. The GCB argued that, owing to the fact that the litigation was initiated in the interest of the public and its members, the High Court was wrong to apply the normal rule that costs follow the result. The GCB sought to have the costs order reversed.

Mr Mzinyathi countered this argument by submitting that the High Court had correctly exercised its discretion on costs and the fact that the application acted as *custos morum* of the profession did not insulate it from paying costs. The minority held an opposite view on all issues. They too, however, endorsed the three-stage standard followed by the High Court in adjudicating the matter. The only material point of difference between the minority and the majority in the SCA was on the assessment of facts, pertaining to the merits of the matter.

The CC said that for leave to be granted in that court, the applicant must meet two requirements -

- that the matter must fall within the jurisdiction of the CC; and
- that the interest of justice warrants the granting of leave.

For the CC's jurisdiction to be engaged, the matter must either raise a constitutional issue or an arguable point of law of general public importance.

The CC, however, added that the interest of justice inquiry, on the other hand, involves the weighing up of varying factors. These include reasonable prospects of success which, although not determinative, carry more weight than other factors.

The CC said the difference outlined between the majority and the minority in the SCA, taken together with the decision of the High Court impelled the granting of leave. The antecedent question that was raised was whether the GCB had established jurisdiction. The GCB claimed for the first time in the CC that the matter concerning the respondents raised constitutional issues and an arguable point of law of general public importance. The submission that issues are raised was premised on the sole assertion that the matter requires the interpretation and application of the NPA Act which is a legislation contemplated in s 179 of the Constitution.

The CC said that there was no merit in the contention that the matter involved

the interpretation of the NPA Act. And that the claim advanced by the GCB does not require the interpretation and application of the NPA Act. The court added that the claim was a self-standing claim, based as it is within the four corners of the Admission of Advocates Act. The NPA Act does not regulate the admission of advocates. The court said a careful reading of the GCB's pleading revealed that its claim was based solely on s 7(1) (d) of the Admission of Advocates Act, and the GCB sought to have the respondent's names removed from the roll of advocates on the ground that they were not fit and proper persons to continue to practice as advocates.

The court said none of these matters raised a constitutional issue. The interpretation and application of s 7 of the Admission of Advocates Act does not of itself alone raise a constitutional issue. Nor did the applicant require that s 7 be constructed in terms of s 39(2) of the Constitution which demands that legislation be constructed in a manner that promotes the objects of the Bill of Rights. The CC held that the GCB had not established that the matter fell within its jurisdiction and, therefore, said the appeal cannot be entertained.

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

## Fact corner

- **Irene Antoinette Geffen** was the first female barrister in South Africa in 1923.
- **Leonora van den Heever** was the first female judge in South Africa in 1969.
- **Navanethem Pillay** was the first Tamil-Indian female appointed as a Judge of the High Court of South Africa in 1995. She was also the first female lawyer to start a law practice in the Natal Province.
- **Desiree Finca** was the first Black female lawyer in South Africa.
- **Lynita Conradie** was the first blind female lawyer in South Africa.
- **Yvonne Mokgoro** and **Kate O'Regan** were the first females appointed as Justices of the Constitutional Court of South Africa in 1994. Mokgoro is as the first Black female judge in South Africa.





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

## Suspension in the context of allegations of racism

In *Solidarity obo Barkhuizen v Laerskool Schweizer-Reneke and Others* [2019] 7 BLLR 725 (LC), a primary school teacher was suspended after a photograph of a black child seated apart from white children in the class was circulated on social media. This sparked outrage and protests outside the school, which caused the school to temporarily close.

In this case, four photographs of the two Grade R classrooms were taken by the applicant employee and posted on a WhatsApp group. The reason for the message was that it was the first day of school and the applicant had received numerous calls and messages from anxious parents, and the purpose of the photographs was to alleviate concerns. The applicant had previously explained to the parents the seating arrangements in the class and her approach to address communication difficulties arising from language barriers. This was particularly in light of the fact that this was an Afrikaans medium school and the services of the interpreter had recently been terminated. The applicant then received a call from one of the parents expressing unhappiness that his child and other black learners were separated from white learners in the classroom. The ap-

plicant explained that the children are moved around the classroom throughout the day to accommodate individual needs and different daily activities. She also explained that the photograph in question was not of her classroom, but of another classroom where she had not determined the seating arrangements. The other three photographs clearly demonstrated that there was no separation on the basis of race. The applicant was unable to placate the parent and advised him to escalate the matter to the principal.

A meeting was held between the principal and the two Grade R teachers where they explained the situation and were told that everything was in order and that the complaints would be properly ventilated and addressed. The next day there was a protest outside the school and the applicant was informed that she would be placed on suspension by the Minister of Education with full benefits. An announcement of her suspension was then made and circulated on various social media platforms. This caused the applicant to suffer trauma and public humiliation as she was labelled a racist.

The applicant launched an urgent application to set aside the suspension. The Member of the Executive Council (MEC) admitted that he did not have the authority to suspend the employee and thus the suspension was found to be unlawful as the MEC had exceeded his powers. Furthermore, it was found that the MEC had showed no appreciation for the context in which the photograph was

taken and that it was the first of many photographs, the rest of which portrayed the children in a different light. It was held that the applicant should have been given an opportunity to make representations as this would have cleared up the misunderstanding. It is noteworthy that this decision was made prior to the Constitutional Court decision in *Long v South African Breweries (Pty) Ltd and Others* [2019] 6 BLLR 515 (CC) in which it was held that it is not a requirement to give an employee an opportunity to make representations before being placed on precautionary suspension. However, the suspension must be for a fair reason and it must not cause undue prejudice to the employee. Thus, even if the approach in the *Long* case had been followed, the MEC had not been able to properly consider whether there was a fair reason for the suspension without properly appreciating all the facts and thus failing to consider representations by the employee went to the heart of the fairness of the reason for the suspension. The Labour Court further criticised the employer's hasty reaction and found that the employer had caused the applicant unnecessary trauma and humiliation. She had also not been given any reasons as to why she was suspended.

Prinsloo J held that there can be devastating consequences where an employer reacts to unsubstantiated rumours, complaints and media reports. It was held that while racism should be eliminated, it should not be found where it does not exist. The suspension was set aside.

# Employment law update



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## Unfair discrimination on the basis of race and gender

In *Sun International Ltd v South Africa Commercial, Catering and Allied Workers Union obo Ramerafe and Others* [2019] 7 BLLR 733 (LC), the Labour Court (LC) had to consider whether a salary difference amounted to unfair discrimination. In this case, the respondent employee was promoted to the position of surveillance auditor as part of a restructuring and her remuneration had been adjusted upwards to ensure that she was in the appropriate salary band. Another employee was later recruited for the position of surveillance auditor approximately two years later at almost double the salary. The respondent employee alleged that she was discriminated against on the basis of race and gender because the comparator was a white male.

The employer alleged that the male employee had been recruited from a security company and had better qualifications and more experience than the respondent employee. Furthermore, he was earning in excess of the respondent employee at his former employer at the time and thus the employer had to match his salary and add an additional amount to compensate him for the costs of compulsory benefit schemes of which he had to become a member. The matter was referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) and the CCMA found that there was no justification for the difference in salary. The employer was ordered to place the respondent employee on the same grade as the male employee and to pay her the same remuneration.

The matter was taken on review to the LC. It was held that the requirements for an unfair discrimination claim of this nature was that the employee must perform the same work as a comparator and

the work must be substantially the same or of equal value. In this case, a comparator had been identified and the employees performed the same work.

It was found that the CCMA decision was reviewable because the arbitrator made material errors in law and his reasoning had showed a lack of understanding of the law on equal pay. In this regard, the arbitrator found that it was the employee who needed to establish and prove – on a balance of probabilities – that the employer's conduct was not rational and amounted to unfair discrimination. He failed to appreciate that when the discrimination is alleged on a listed ground such as race and gender the onus is on the employer to prove on a balance of probabilities that the discrimination did not occur or that it was rational and not unfair.

The employer's justification was that it had to match the male employee's net salary when it recruited him and that his higher qualifications and experience came at a premium. The employer used a 'market forces' defence and the commissioner did not consider any case law on this defence. He also failed to take into account the factors in reg 7 of the Employment Equity Regulations of 2014, which justify a difference in remuneration such as seniority and experience. He failed to consider the employee's 30 years' experience in the security sector and limited experience to the surveillance auditor role finding that other experience was irrelevant.

It was found that the commissioner committed a material error of law as he did not properly consider whether there was a rational, fair or other justifiable reason for the difference in remuneration. Furthermore, the commissioner exceeded his powers when he ordered that the employer must eliminate all forms of salary disparity starting with this dispute.

## Exception to unfair discrimination claim

In *Gmagara Local Municipality v Independent Municipal and Allied Trade Union obo Mzuza and Others; In re: Independent Municipal and Allied Trade Union obo Mzuza and Others v Gmagara Local Municipality* [2019] 7 BLLR 696 (LC), the Labour Court (LC) was required to consider whether it was unfair discrimination to pay employees in a different geographical location more remuneration. In this case, the four employees were employed as electricians by the municipality in Kathu. The municipality also employed electricians at Oliphantshoek on higher grades with higher salaries.

The Kathu employees alleged that they performed substantially similar work and were discriminated on the basis of geographical location. The municipality excepted to the claim on the basis that it alleged that the work was not similar as the Oliphantshoek employees performed low and high voltage work whereas the Kathu employees only performed low voltage. It was also alleged that the applicants had disclosed no cause of action under the Employment Equity Act 55 of 1998.

The LC considered the exception and found that the statement of case would be excipiable if the applicants did not make out a case of unfair discrimination. This is because the employees relied on an arbitrary ground and thus the onus was on the employees to prove that they were unfairly discriminated against.

It was found that the employees had alleged that they performed the same or similar work as comparator employees and they had relied on geographical location as a ground for discrimination, which may be a basis for an unfair discrimination claim. It was held that the statement of claim did in fact disclose a cause of action and the exception was dismissed.



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## Bargaining Council varying the time period, as set out in the LRA, in which to refer disputes – lawful or not?

*Appels v Education Labour Relations Council and Others* (LAC) (unreported case no JA19/18, 10-7-2019) (Waglay JP with Jappie and Coppin JJA concurring).

Section 191(1)(b)(ii) of the Labour Relations Act 66 of 1995 (LRA) states that an employee has 90 days in which to refer an unfair labour practice dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) or bargaining

council. The question before the Labour Appeal Court (LAC) was whether parties to a bargaining council could conclude a collective agreement, which reduced the 90-day period in which to refer an unfair labour practice dispute, to a 30-day period.

Having unsuccessfully applied for the post of a principal at a particular school, the appellant referred an unfair labour practice dispute to the first respondent, the Education Labour Relations Council (ELRC).

The ELRC is a bargaining council established in terms of the LRA and has jurisdiction over educators in the public sector. Therefore, when a public sector teacher is dismissed or alleges an unfair

labour practice, their disputes are referred to and heard at the ELRC.

The appellant's referral was made 30 days after the decision not to promote him was taken, but before the expiry of the 90-day period.

On the fact that the ELRC's constitution (which is a collective agreement as defined in the LRA) required an employee to refer an unfair labour practice disputes within 30 days of the act or omission; the ELRC directed the appellant to file an application to condone the late filing of his dispute. The appellant refused to do so and turned to the court for an order declaring the 30-day period in the ELRC's constitution, of no force and effect as the bargaining council could not vary the time periods as set out in the LRA.

The Labour Court dismissed the application, finding that –

- the LRA did not, directly or indirectly, prevent a bargaining council from varying the time limits set out in the LRA; and
- the LRA empowered a bargaining council to establish its own procedures in respect of resolving disputes referred to it.

On appeal, the LAC focussed on the tension between, s 191(1)(b)(ii) of the LRA (which stipulates a 90-day period in which to refer an unfair labour practice dispute) and s 51(9)(a) (which empowers a bargaining council to develop procedures to resolve disputes).

The appellant argued that there was a conflict between the ELRC's constitution and the LRA. This conflict, according to the appellant, should be resolved on the basis that the ELRC's constitution is subordinate legislation when lined up against the LRA. Therefore, subordinate legislation cannot amend or alter any

right as contained in the empowering legislation, that being the LRA *in casu*. On this understanding, the appellant sought an order declaring clause 9.1.3 of the ELRC's constitution – which provides for the 30-day period – unlawful.

The ELRC, in opposing the application, sought to distinguish between a right and a procedure to enforce that right. The time periods set out in the LRA are procedural issues and not a substantive right and therefore, in keeping with s 51(9)(a), the ELRC has a right to determine its own procedures. In explaining the rationale for reducing the 90-day period to 30 days, the ELRC argued that it was in the best interest of learners and the Department of Education that educators' disputes be resolved expeditiously so that vacancies are not left open pending the finalisation of promotion disputes.

Assessing both arguments, the LAC held:

'Since subordinate legislation is always subject to empowering legislation, it cannot take away any rights entrenched in the empowering legislation. A distinction must, however, be drawn between a right and the process to enforce that right. The substantive right that is of relevance in this matter that is guaranteed by the LRA and which cannot be compromised by the subordinated legislation is the right not to be a victim of an unfair labour practice. This is guaranteed by the Constitution of the ELRC. The issue of time limits relates to the process. While it is correct that the LRA provides that disputes about unfair labour practice must be referred to a bargaining council which has jurisdiction to entertain the dispute "within 90 days...", this, in my view, would apply where the bargaining council has not itself provided a

procedure which has to be followed to refer the unfair labour practice to be determined by it.

The LRA specifically provides in s 51(9)(a) that the bargaining council may by collective agreement establish the procedure to resolve any dispute. What this section contemplates is that there has to be a collective agreement which sets out the procedure to be followed in resolving a dispute, but more than that, implicit in this section is the recognition that procedures may differ between councils and between the CCMA and councils and that councils must put into place procedures that will best suit the sector it serves while giving effect to the principal objects of the LRA which is to resolve disputes effectively, efficiently and swiftly and do this without compromising the rights enshrined in the LRA'.

The court held further that by reducing the time period as set out in the LRA, the ELRC did not infringe on the appellant's right to have his dispute heard. The ELRC's reasons to introduce a 30-day period in which to refer such disputes was in response to a need to expedite the resolution of disputes in the best interest of all stakeholders.

The court found the ELRC had not acted *ultra vires* and dismissed the appeal with no orders as to costs.



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By  
Kathleen  
Kriel

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<i>AYIHL</i>	African Yearbook on International Humanitarian Law	Juta	(2018) 1
<i>BTCLQ</i>	Business Tax and Company Law Quarterly	SiberInk	(2019) 10.1 March (2019) 10.2 June
<i>EL</i>	Employment Law Journal	LexisNexis	(2019) 35.3
<i>ILJ</i>	Industrial Law Journal	Juta	(2019) 40
<i>JCCLP</i>	Journal of Corporate and Commercial Law and Practice	Juta	(2018) 4.2
<i>JCLA</i>	Journal of Comparative Law in Africa	Juta	(2018) 5.2
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By  
Luphumlo  
Mahlinza

# Nasciturus fiction: Relics of outdated perspective

**T**he desire to prevent ante-natal harm and the need to pre-empt foetal mortality has universally necessitated legal protection of unborn children. To achieve this goal, scientific and legal mechanisms designed to fortify the security and well-being of a foetus have been developed not only on a national level, but also internationally. In this opinion piece I endeavour to prove that modern scientific jurisprudence and legal developments favour the recognition of unborn children and their respective interests. By relying on international and scientific advancements, the conclusion that I reached is that unborn children must enjoy the legal status and fall under the scope of legal subjectivity.

Legal protection was traditionally accorded only to human beings and corporate entities. However, the increasing demand for the protection of other different entities such as companies, animals and artificial intelligence has gradually led to the recognition of a separate legal personality for such other entities. This novel approach has shifted the orthodox-based dichotomy and, as such, entities that were once viewed as objects now enjoy legal recognition and protection (Lisette ten Haaf 'Unborn and future children as new legal subjects: An evaluation of two subject-oriented approaches – the subject of rights and the subject of interest' (2017) 18(5) *GLJ* 1091 at 1092).

The scientific individualisation of an unborn child of a pregnant woman justifies the call for the law to recognise the foetus' independent legal status. This approach views a pregnant woman and the unborn child as entities of distinctive value with separate needs (Camilla Pickles 'Approaches to pregnancy under the law: A relational response to the current South African position and recent academic trends' (2014) 47(1) *De Jure* 20). Indeed, even medical practitioners readily make medicinal and nutritional recommendations for the avoidance of prenatal harm and/or foetal mortality. This is because life, science and the law demand the protection of unborn children from any form of harm. But why?

Does this imply that unborn children enjoy full legal status? Or must a foetus be protected to the extent of its advantageous claim?

## Science and technology: Approach to unborn children

The annals of history tell us that it was somewhat difficult in past days to determine whether a foetus was alive or dead inside the womb of a pregnant woman. Doctors had to use foetal dopplers and stethoscopes to listen to a baby's heart-beat, and they used a tape-measure to measure the foetal length and make sure the foetus was growing. This paradigm has, however, progressively shifted to more reliable scientific developments.

Accordingly, modern health institutions (public and private) rely on scientific inventions so as to ascertain the factual existence, living, health, together with the well-being of a foetus. Ultrasound machines and other technological inventions are an example in this respect. Theirs is to determine and confirm pregnancy; to monitor the child's growth and position; to check the age of a child, identify its gender and so forth. Here the foetus is simply recognised as a living person with gender, gestational age, size, and so forth, but only unable to act on an external world.

## Universal Declaration of Human Rights

Though not a binding instrument under international law, the United Nations Universal Declaration of Human Rights (GA Res 217A (III), UN Doc A/810 at 71 (1948)) (UDHR) has been profoundly considered as a foundational document, which inspired the subsequent conventions and declarations based on human rights. Its preamble envisions equal and inalienable rights for all members of the human family. 'All members' must be so construed it is argued that it encompasses unborn children, irrespective of any status of the child (Patrick J Flood 'Does international law protect the unborn child?' <http://www.uffl.org>, accessed 8-10-2018)).

Article 3 of the UDHR further postulates that 'everyone has a right to life'. 'Everyone' it is argued, must be interpreted in a manner that will be inclusive to foetuses to the full recognition of legal status. Article 6 further decrees that '[e]veryone has the right to recognition everywhere as a person before the law'. The declaration contains no expressed limit as to the meaning of 'everywhere' and, therefore, is subject to interpretation. I propose that 'everywhere' must be logically understood to include even inside a pregnant woman's womb.

## International instruments

### • International Covenant on Civil and Political Rights (1966)

Being one of the binding international instruments, the International Covenant on Civil and Political Rights (ICCPR) has foreshadowed the protection of unborn children from State punishment. Paragraph 5 of art 6 firmly reiterates that '[s]entence of death shall not be imposed ... on pregnant women'. This provision unambiguously expresses the shared understanding that an unborn child is a separate human being who cannot be arbitrarily punished for crimes committed by another separate human person (mother/parent). The protection granted therein makes no distinction pertaining the viability of a child outside its mother's womb and, thus, 'every pregnant woman' is construed in its ordinary sense, irrespective of the child's gestational age or other status.

### • Convention on the Rights of the Child (1989) (UN Doc A/Res/44/25 (1989))

The Convention on the Rights of the Child (CRC) is the binding international instrument embodying the legal protection of human children. The definition of children refers to human beings below the age of 18, and does not preclude foetuses or unborn babies. This definition is qualified by art 1, read with the preamble and art 24(2) of the CRC. These parts seek to recognise foetuses as part of a human family capable of legal protection, as proclaimed in the Declaration of the Rights of the Child. They place an

obligation on the Member State to take appropriate measures to ensure prenatal care, thereby realising human life capable of protection ensues prior birth. The African Charter on Rights and Welfare of the Child imitates the CRC in this regard. Other international and regional instruments *in lieu* the child conforms with this standard definition.

Its preambular provides children with 'special safeguards and care, including appropriate legal protection, before as well as after birth'. To achieve this goal, art 2 provides a protective edge against discrimination on grounds of 'disability, birth or other status'. Suffice to outline that this demonstrates the eagerness of the law to attach legal recognition to unborn children. However, South African courts have opted to adopt a more stringent approach in determining the legal recognition of the unborn child's status.

### Courts' reluctance

Statute does not assign a definition to the 'viability' of the unborn child, but case law, relying on the courts' discretion, attempts to ascertain the meaning of the term. In *S v Mshumpa and Another* 2008 (1) SACR 126 (E) the court accepted that the unborn child's capability to

live outside its mother's womb begins at 25 gestational weeks. However, this judgment was overturned in *S v Molefe* 2012 (2) SACR 574 (GNP) at 578 where the court deemed it necessary to give a verdict that foetal viability commences at 28 gestational weeks.

For this reason, the distinction made by the courts between unborn children who have reached the viability stages and those who have not is insignificantly a technical (and not substantial) issue as I am of the view that the assertions made by our courts (ie, the assertion that life begins after birth, or at a certain number of 'minimum' weeks, or at a certain viability stage) do not outweigh the clear legal obligation of a state to recognise human life prior to birth. This duty is substantiated by the internationally (and domestically) expressed realisation that children need legal protection even before birth and is in no way permissible in terms of the international instruments referred to. It simply demonstrates the common understanding that unborn children are human beings capable of legal protection and recognition.

### Conclusion

For the most part, I have argued that

scientific developments have shown us that unborn children are human beings who individually live and exist inside their mother's womb. For this reason, I argued, international instruments (such as the ICCPR and the CRC) and other unmentioned instruments do extend legal protection to unborn children. This extended protection relating to a prenatal state recognises the status of unborn children as human beings, without discrimination of birth or any other status.

Our courts have been merely wrestling with the technicality of the conceptualisation of a foetus, resulting in an unnecessary and unsubstantial distinction being made between viable and non-viable foetuses. As such, legislative measures such as the enactment of 'The Recognition of Unborn Children as Human Beings Act' must be adopted in order to give effect to the literal and purposive aim of the aforementioned instruments, and to make scientific advancements beneficial to the family of human beings.

Luphumlo Mahlinza is a final-year law student at the University of Fort Hare in East London. □

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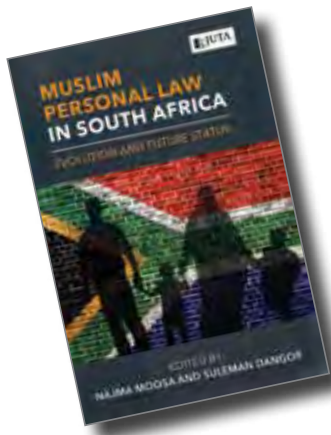
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# Muslim Personal Law in South Africa: Evolution and Future Status



By Najma Moosa and  
Suleman Dangor (eds)  
Cape Town: Juta  
(2019) 1st edition  
Price R 695 (incl VAT)  
465 pages (soft cover)

When South Africa (SA) crossed the Rubicon to an open and democratic society, it seemed that the legislation of Muslim personal law was simply a question of 'when' and not 'if'. Since then, the enthusiasm appears to have dissipated. A light has, however, emerged from the darkness, in the form of the 2018 decision in *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2018 (6) SA 598 (WCC), which was decided by the Western Cape Division of the High Court.

This was a landmark case in which the court gave the legislature two years within which to enact legislation recognising Muslim marriages. This judgment placed Muslim personal law and Muslim marriages in particular, back onto the agenda.

The book *Muslim Personal Law: Evolution and Future Status*, edited by Najma Moosa and Suleman Dangor, appears to come at the appropriate time to add substance to the debate and impetus surrounding pertinent Muslim personal law issues.

The central question explored in the book is how and whether Muslim personal law should legally be recognised in SA, within the context of the road that has already been travelled thus far. The editors curated individual contributions on the topic from lauded academics and lawyers but seem to have overlooked the voice of the traditionally trained Islamic scholar.

The contributions include, *inter alia*, a detailed history of the status of Muslim personal law, various perspectives of the Muslim Marriages Bill, including an analysis of –

- the Recognition of Religious Marriages Bill;
- the considerations of the contentious issues in Muslim personal law (including, succession and inheritance, polygyny, divorce, custody of children, and marital property regimes);
- the role of secular institutions, such as courts;
- constitutional and human rights perspectives; and
- a range of proposed solutions to the difficulties of enforcing and regulating Muslim personal law.

The primary focus is on Muslim marriages and the contributions provide a nuanced understanding on the attempts at recognition to date. Legal practitioners who encounter issues relating to Muslim personal law in their practice will benefit from the succinct summary of the history and progress of the fight to have Muslim personal law recognised, but not compromised. Legal practitioners will be more equipped and knowledgeable of the relevant issues and many of the existing perspectives on the topic after reading this book.

A tension, which appears as a theme throughout the book, is

whether the right to religious freedom and its gendered effects should be subordinated to constitutional considerations of equality and human dignity or *vice versa*. The book highlights the way in which the non-recognition of Muslim marriages has resulted in challenges, especially for Muslim women. By way of example, Islamic divorces have always been a source of significant disputes before South African courts when they interact with civil and constitutional law. The extent to which these difficulties have been ameliorated by court cases decided in favour of Muslim spouses, giving limited recognition to Muslim marriages in circumscribed situations, is extensively discussed. However, it is also recognised that continued ad hoc developments are not desirable to the uniform protection of Muslim women's rights in particular.

Importantly the authors discuss a range of alternatives to the Muslim Marriages Bill as the way to regulate Muslim personal law. The reader has the opportunity to consider the practicality of options such as arbitration in marital disputes or divorce and pre-marriage contracts incorporating Islamic principles. What is clear is that the road ahead for the recognition of Muslim personal law remains paved with obstacles, notwithstanding the directive to the legislature by the Western Cape Division in the *Women's Legal Centre Trust* case. The need for all interested parties to be actively involved in considering the various possibilities is obvious.

The book will be be captivating for a myriad of interest groups, including religious scholars, university students and individuals interested in Muslim personal law or the recognition of religious marriages generally. It is an especially useful read for legal practitioners working in the areas of divorce law or estates. Furthermore, it is certainly a must read for the Muslim community at large given the impact any decision regarding the recognition and regulation Muslim personal law will have.

The book, rather than attempting to answer the important questions which exist, serves a much greater purpose – it equips the reader in forming their own opinions on these complex and deeply personal issues. It is an ideal starting point for the robust and meaningful engagement required around the interface between religion and secular regulation. However, the opinion of the traditional Islamically trained scholar would have been a valuable addition to this collection.



Walid Brown is a legal practitioner, he was assisted by Saarah Coenraad a candidate legal practitioner. They both practise at Werksmans in Cape Town.





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# Basic Diploma in Legal Practice and Civil Procedure

Presented by Frans Haupt

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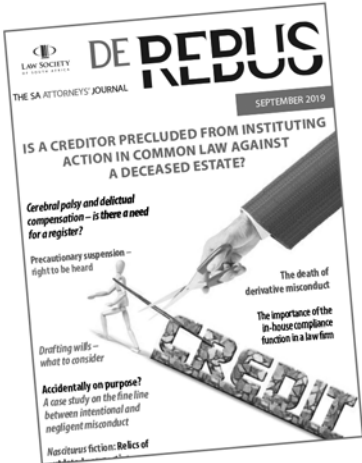
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