

## SHOULD RETIREMENT FUNDS BE NAMED OR IDENTIFIED IN DIVORCE ORDERS?

*Do trust account advocates need a  
mind shift to deal with **FICA**?*

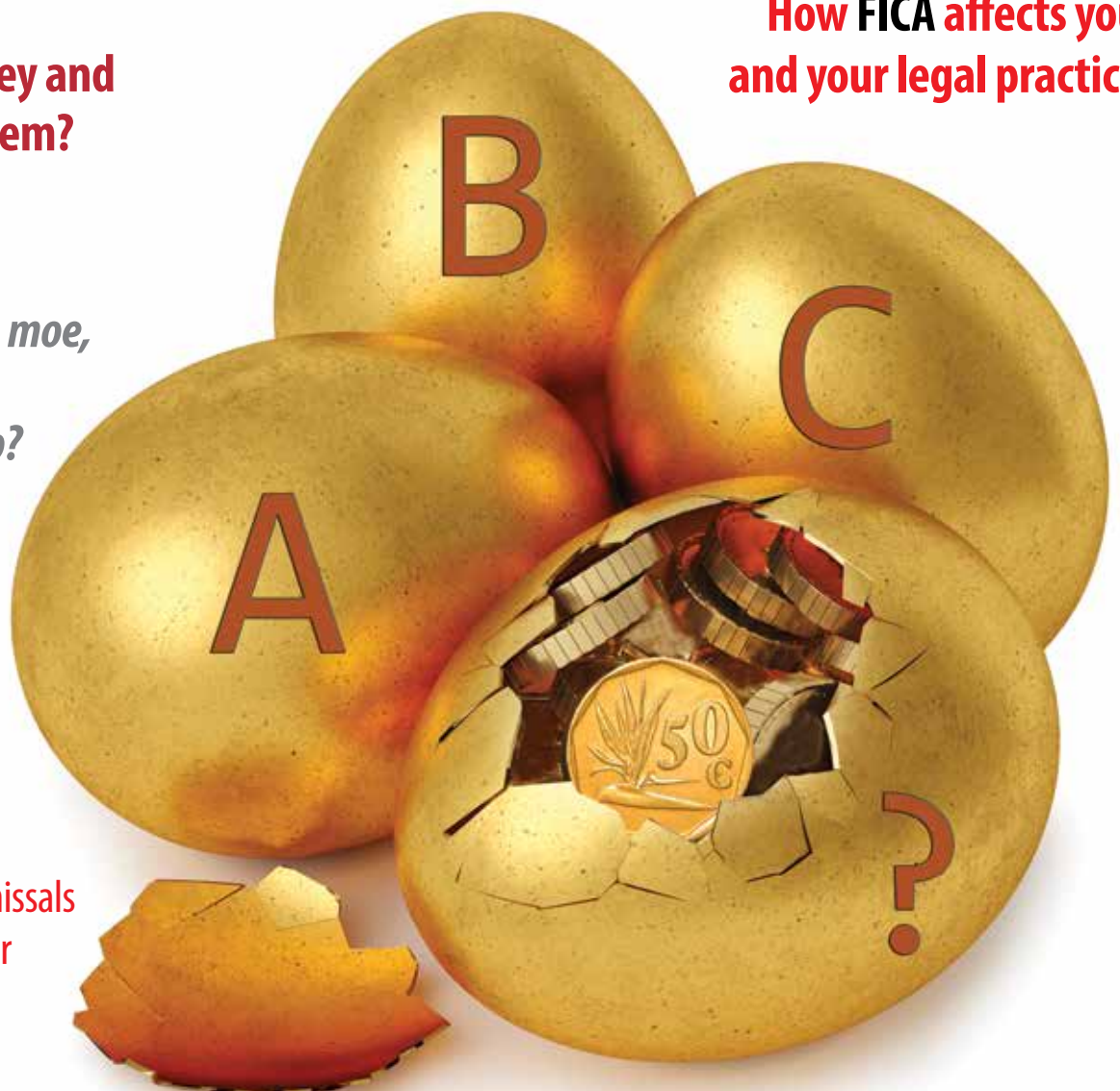
*Jurisdiction of the Labour Court –  
the conundrum continues*

**KPIs: What are they and  
how do we use them?**

**How FICA affects you  
and your legal practice**

*Eeny, meeny, miny, moe,  
to which court  
will **foreclosures** go?*

**Individual employees  
cannot rely on  
s 189(1)(c) of the LRA  
to claim that their dismissals  
are automatically unfair**



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October 2019 | Issue 600

ISSN 0250-0329



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## FEATURES

### 10 Should retirement funds be named or identified in divorce orders?

In practice, non-member spouses whose marriages are either in community of property or out of community of property with the application for the accrual system, continue to be frustrated by many retirement funds. According to legal practitioner, **Clement Marumoagae**, retirement funds generally refuse to pay them their portion of their member spouses' pension interests on the basis that their decrees of divorce do not comply with s 7(8) of the Divorce Act 70 of 1979. The retirement funds' strict and often incorrect application of this provision force non-member spouses to unnecessarily undertake costly post-divorce court processes aimed at 'correcting' divorce orders. This article aims to illustrate that retirement funds regulated by the Pension Funds Act 24 of 1956 (the PFA) are not entitled to reject divorce orders that they deem not in compliance with s 7(8) of the Divorce Act if such orders comply with s 37D(4)(a)(i) of the PFA.

### 13 Do trust account advocates need a mind shift to deal with FICA?

Generally, legal practitioners operate within a given set of specified rules and procedures. With these, come certainty. One such key notable development is the Legal Practice Act 28 of 2014 (LPA), which came into effect last year. The LPA brings with it, various changes and provision has now been made for advocates with trust accounts, who are allowed to accept instructions directly from the general public. This 'new' type of advocate will have to operate a trust accounts on behalf of their client and, as a result will have to be in possession of a Fidelity Fund Certificate. Other than complying with legislative requirements these legal practitioners will have to do administrative work as well. One of the key legislative requirements, which will need to be complied with, is the Financial Intelligence Centre Act 38 of 2001 (FICA). In terms of FICA, attorneys (or legal practitioners, as they are now called, including advocates with trust accounts) are deemed or called accountable institutions and will have to discharge certain responsibilities in terms of FICA writes analyst, **Nkateko Nkhwashu**.

### 16 Jurisdiction of the Labour Court – the conundrum continues

On 4 March, the Labour Court (LC) delivered a seminal judgment in the matter between *Vodacom (Pty) Ltd and Others v National Association of South African Workers and Another* (LC) (unreported case no J256/19, 4-3-2019) (Lagrange J). Essentially, the court found that non-employers are entitled to approach the LC for interdictory relief. In this article, legal practitioner, **Sihle Mdludla**, does not focus on the merits of the case, but on the matter of jurisdiction.

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

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- **Juta**. Go to: [www.jutalaw.co.za](http://www.jutalaw.co.za).

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

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

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

**NEW SUBSCRIPTIONS AND ORDERS:** David Madonsela

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#### SUBSCRIPTIONS:

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

Postage outside South Africa: R 1 700.



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Tel: (012) 366 8800



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# Interpreting Practice Directive 2 of 2019

**I**n July, the Office of the Judge President Gauteng Division of the High Court issued Practice Directive 2 of 2019 ([www.derebus.org.za](http://www.derebus.org.za)). The directive relates to the –

- case management, trial allocation and enrolment of civil trial matters; and
- issuing of process, electronic service and filing of practice notes and heads of argument.

The directive is to be read with r 36, 37 and 37A of the Uniform Rules of Court, as amended, which have been in force since July. The directive applies to both the Gauteng Division of the High Court in Pretoria and the Gauteng Local Division of the High Court in Johannesburg and its provisions prevail over any provision in the practice manuals of either court. All trial matters in which the defendant is the Road Accident Fund or the Member of the Executive Council of Health Gauteng, or the Passenger Rail Agency of South Africa constitutes the category in respect of which paras 6 – 14 of the directive will apply.

Legal practitioners need to fully understand and interpret the principles of the directive correctly because, as the directive states: 'This directive shall be construed and applied in accordance with the principle that notwithstanding the provisions herein providing for judicial case management, the primary responsibility remains with the parties and their legal representatives to prepare properly, to comply with all rules of court, the practice manual and this directive and to act professionally in expediting the matter towards trial and adjudication. The objectives of judicial case management in the interests of justice are to alleviate congested trial rolls and to address the problems which cause delays in the finalisation of cases. Any failure by a party to adhere to these principles may be penalised by way of an adverse costs order on a punitive scale, *de bonis propriis*, and may further include an order disallowing fees to be charged

to a litigant by that litigants own legal practitioners.'

As can be seen from the above, this directive has the potential to cause issues for legal practitioners. In response to the directive and the issues it has caused, on 16 September several legal practitioners filed a notice in terms of r 16A ([www.derebus.org.za](http://www.derebus.org.za)). The applicants raised the following constitutional issues:

- Whether the contents of the directive is contrary to the principle of legality as it does not display a rational connection between the procedures prescribed therein and the ends, which such procedures are intended to achieve, being to alleviate the causes of litigation delay and/or increased costs.
- Whether the contents of the directive unjustifiably breaches the applicants' right of access to courts as protected by s 34 of the Constitution in the following respects –
  - it unfairly limits a litigant's existing right in terms of the rule of party presentation as it is acknowledged within the adversarial system of civil litigation;
  - it does not strike a balance between the rights of litigants in terms of the rule of party presentation and the goals of case management;
  - it unfairly creates delays in the finalisation of damages claims against the state and further unfairly provides the state with grounds on which to create further delays;
  - it unfairly impairs the long-standing and untrammelled right of a litigant to obtain a trial date on the close of pleadings and unfairly creates further obstacles and procedures before a trial date may be obtained; and
  - it introduces a system of case management that provides no remedy to a litigant who believes that they have been unfairly refused a trial date.

In the interest of access to justice, it is imperative that cases are dealt with expeditiously by the courts,



Mapula Sedutla – Editor

however, legal practitioners and litigants should not be prejudiced in the process.

- What experience have you had with applying Practice Directive 2 of 2019? Send your views to [mapula@derebus.org.za](mailto:mapula@derebus.org.za)



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- Please note that the word limit is 2000 words.
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# LETTERS TO THE EDITOR

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

## Responses to #Conveyancingmatters

Passing the conveyancing examination is indeed not easy, not because it is difficult, but because it covers such a vast field of complicated legislation and law, and the work is indeed very technical: There is only one correct outcome.

Is the answer not to create two grades of conveyancers? In grade 1, the candidate is allowed to prepare only run of the mill work, such as transfers and bonds. When more experience is gained, the candidate can write the grade 2 examination, which will allow them to do more complicated work.

In other words, the amount of material to master is spread over two examinations, but grade 1 allows a candidate to get a foot in the door immediately.

**Anville van Wyk BA LLB (Stell)**

*Post Grad Dip Tax (UCT)* is a legal practitioner at van Wyk van Heerden Attorneys in Cape Town.

I refer to your editorial 'Conveyancing examination update: What has the LSSA done so far?' 2019 (Aug) *DR* 3. I want to put it on record that I fully support the transformation of the legal

fraternity to represent the demographics of South Africa (SA).

The Legal Practice Act 28 of 2014 (the LPA) in s 26(2) provides that a legal practitioner qualifies to be enrolled as a conveyancer, if they have passed a competency-based examination or assessment of conveyancers as determined in the rules by the Legal Practice Council (LPC).

The above implies that before one can be enrolled as a conveyancer, one must have been admitted as a legal practitioner. What is the reason for this requirement? I suspect that the reason might have to do with making qualifying as a conveyancer a choice that individual legal practitioners make.

Once that choice is made, one has to sit for the competence-based examination of conveyancers. No one is forced or obliged to take the examination.

The recent Law Society of South Africa (LSSA) conference, in my humble opinion, did not discuss the conveyancing examination matter thoroughly and meaningfully. I do not recall a resolution being taken to establish the LSSA Conveyancing Task Team. This team, I respectfully submit, was established without a mandate from the participants at the conference.

I am of the view that there is no gatekeeping in the conveyancing field. All candidates write the same conveyancing

paper in the same language unlike in the past.

The high failure rate is attributable to a variety of factors and gatekeeping is not one of them. One of the biggest causes of the high failure rate is the sheer volume of work/studying that a candidate has to go through in preparing for the examination. Another contributing factor is the lack of exposure to the conveyancing field by many of the candidates.

There are other matters the legal profession will have to contend with going forward.

There are candidates who complain that the Board Examinations are too strenuous and that they should be changed. They argue that they should be written over a period of at least a month, with one paper written per week. Furthermore, other candidates argue that the notarial examination should be divided into two papers, and written on separate days, with at least a few days between the papers.

There is another school of thought, which calls for the scrapping of the conveyancing exam, as in their opinion, it serves no purpose as any person can appear at the Deeds Office.

As we are all aware, there are some legal practitioners who support Proxi Smart in their ongoing legal battle to take some work from conveyancers.



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What will be the end game?

The conveyancing examination consists of two papers. I submit, the proposed format to write the conveyancing examination as two separate distinct papers is absurd and will lead to the lowering of standards. To pass the examination, candidates must obtain the pass mark for the examination as a whole as it is presently applicable.

I fully support the recommendations to increase the pool of examiners, to make the past examination papers and model answers freely available, to introduce mentorship programmes and for the LSSA to overhaul and improve the Legal Education and Development conveyancing course.

Transformation of the conveyancing field must never equate to the lowering of standards.

The LPC must resist any attempts to tamper with the various competency-based examinations, as provided for in the LPA.

**Matome Lawrence Selepe**

*BSc Dip Higher Education (University of Limpopo) Post Grad Dip Marketing Management LLB (Unisa)* is a legal practitioner at Van Rensburg Attorneys in Pretoria.

## Justice delayed is justice denied

**I** find myself writing out of anger and frustration as I am at my wits' end. My client has – yet again – been denied justice due to an eviction matter being postponed for the sixth time. We have followed all the correct procedures and rules and yet illegal occupants are still living a carefree life on my client's property, while my client has to carry the financial burden.

The property was awarded to my client in accordance with her late mother's will and was registered in her name in May 2018. My client's sister, her husband and their adult children, who have been residing in a wendy house on the same grounds for some time, decided to take occupation of the main house when my client's mother, the previous owner of the property, fell ill. They were never given permission to move into the main house and have never contributed towards the maintenance of the property.

My client, after registration of the property, tried to negotiate with her sister to vacate the property, but the respondents threatened that they would rather burn the house down than move out. She, thereafter, decided to turn to the law for assistance.

The matter was heard for the first time in December 2018 and was postponed for two months to allow the respondents

adequate time to find legal representation. The magistrate warned that if they do not return with legal representation in February 2019, that they would be evicted.

On return to the court in February 2019, I was informed by the respondents that their application to Legal Aid South Africa (Legal Aid SA) was denied due to the fact that their household income exceeded the minimum threshold. This time the matter was before another magistrate who decided to postpone the matter in order for the respondents to appeal Legal Aid SA's decision and to allow the respondent's time to seek assistance from the Legal Practice Council (LPC), therefore, denying the direction issued by the previous magistrate.

The matter was heard again in April 2019. The respondent's presented the court with a letter from the LPC, dated two days before the date we appeared in court. The letter stated that the respondents sought *pro bono* legal assistance from the LPC, but that no attorney was available to represent them at court. I addressed the court and pleaded that my client was being prejudiced by the constant delay as she was continuously paying towards a property of which she enjoyed no use of. I also brought it to the court's attention that my client had further been prejudiced as she could not provide accommodation to her children although she was the owner of another property to which she had no access. The court, yet again turned a blind eye to my client's prejudice and postponed the matter affording the respondents more time to find legal representation.

We appeared before the court again in June 2019, again before a different magistrate. The respondents presented the court with another letter from the LPC. This time the letter was dated four days before the date we appeared in court. I addressed the court again regarding the merits, the possibility of alternative accommodation, the continuous delays, the threat made to my client and my client's financial position. The first respondent was sworn in and the court established that the first respondent was employed and that no minor children were residing with the first respondent. The magistrate informed me that it would be unreasonable to expect the respondents to pay rent at another property. She also instructed me to liaise with the City of Cape Town and to assist the respondents in securing legal representation as it was my duty as an 'officer of court'. The matter was postponed to the beginning of July 2019.

I followed the magistrate's instructions and presented her with an affidavit confirming same with the relevant e-mails attached thereto in July 2019. The respondents again came to court

without legal representation. The magistrate contacted Legal Aid SA herself and instructed the respondents to return to Legal Aid SA and to secure legal representation before the next date, being the end of July 2019.

We returned to court during the end of July 2019. My concerned client contacted me early that morning. She informed me that the respondents' son had been engaged in criminal activities and that youngsters from the neighbourhood threatened to break her property down as they believed that he was hiding at my client's property. The court commenced and the respondents presented the court with a letter from Legal Aid SA stipulating that their application for legal representation had been completed, but had not yet been approved as a 'merits investigation' had to be done. I yet again pleaded to the court that my client finds herself in a difficult situation and that the court has not assisted her since December 2018. The court delayed justice for my client again and the matter has now been postponed for the sixth time.

I firmly believe that justice delayed is justice denied. This matter has been presided over by three magistrates, who each allowed the respondents more time to find legal representation. I believe that everyone has the right to legal representation, however, you can lead a horse to water but you cannot make it drink. These respondents have been afforded more than enough opportunity to seek legal representation: They never appealed the Legal Aid SA's decision to refuse them legal representation and they did not contact the LPC timeously to enable the LPC to assist them with a *pro bono* attorney. Although a previous application to Legal Aid SA had been refused due to the respondents exceeding the threshold, the magistrate instructed the respondents to go back there. I am convinced that the respondents will return to court on the next date without legal representation. It is a magistrate's duty to adjudicate the law and to let justice be done. It is not a magistrate's duty to fight for a litigant who has no respect for the law and it is simply unjust and unfair to trample on a law-abiding citizen.

**Mariëtte Wright LLB (UP)** is candidate legal practitioner at Welgemoed Attorneys in Cape Town.



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

**Send your letter to:  
derebus@derebus.org.za**





By  
Simthandile  
Kholelwa  
Myemane

# How FICA affects you and your legal practice

All legal practitioners practising for their own account are required, in terms of s 84 of the Legal Practice Act 28 of 2014, to hold a valid Fidelity Fund Certificate (FFC). In support of an application for the FFC by a legal practitioner, the legal practitioner's annual statement on trust accounts is required to be submitted to the Legal Practice Council by the legal practitioners of a legal practice. In terms of this statement clause 2 deals with attorney's compliance requirements, with sub-clauses 2(i) – (n) specifically dealing with the Financial Intelligence Centre Act 38 of 2001 (FICA) requirements.

The Financial Intelligence Centre (FIC) is South Africa's national centre for the receipt of financial data, analysis and dissemination of financial intelligence to the competent authorities ([www.fic.gov.za](http://www.fic.gov.za), accessed 16-8-2019). The FIC was established by FICA and has the mandate to identify the proceeds of crime, combat money laundering and terror financing. It does this by seeking to:

- 'Supervise and enforce compliance with the FIC Act;
- Facilitate effective supervision and enforcement by supervisory bodies;
- Receive financial data from accountable and reporting institutions;
- Share information with law enforcement authorities, intelligence services, the South African Revenue Service, international counterparts and supervisory bodies;
- Formulate policy regarding money laundering and the financing of terrorism;
- Provide policy advice to the Minister of Finance; and
- Uphold the international obligations and commitments required by the country in respect of anti-money laundering and combating financing of terrorism'.

This article seeks to address the salient requirements imposed on the legal practice as an accountable institution and on a legal practitioner as a person who carries on a business or oversees or manages a business or is employed by a business. The FIC has issued several

guidelines dealing with the reporting requirements of the accountable institutions, and these can be accessed from [www.fic.gov.za](http://www.fic.gov.za). It is not the intention of this article to go into detail on what is contained in those guidelines, but all readers are encouraged to read this article together with those guidelines to obtain benefit. I will now consider the specific sections of FICA as contained in the statement.

## Section 43B of FICA

This section requires a legal practice to register with the FIC as an accountable institution. Schedule 1 to FICA lists accountable institutions, and legal practitioners are included on the list. On registration with the FIC utilising the FIC's registration and reporting platform, the legal practice is issued with a unique registration number.

## Section 21 of FICA

This section requires the accountable institutions to establish and verify the identity of their clients, whether for a single transaction or for a business relationship. In addition to the requirements of this section, other specific requirements are as follows:

- Section 21A requires of the accountable institution – when establishing a business relationship with a prospective client – to obtain information to reasonably enable the accountable institution to determine whether future transactions, which will be performed during the course of the business relationship concerned are consistent with the institution's knowledge of that prospective client.
- Section 21B of FICA deals with additional due diligence measures relating to legal persons, trusts and partnerships. The section requires an accountable institution to, in addition to the requirements of ss 21 and 21A, establish the nature of the client's business and the ownership and control of the client. Beneficial ownership of the client becomes the most crucial element of this section. Readers should note that beneficial ownership can only refer to an individual, so irre-

spective of the number of entities that may be involved in terms of structures formed, there is an ultimate individual who benefits, and accountable institutions must establish that individual.

- Section 21C requires an ongoing due diligence of the client in respect of a business relationship by the accountable institution.
- Section 21D empowers the accountable institution to repeat the steps contained in ss 21 and 21B should there be doubts about the veracity of previously obtained information.
- Section 21E deals with the inability by an accountable institution to perform the steps contemplated under ss 21, 21A, 21B and 21C and states under s 21E '[i]f an accountable institution is unable to –
  - (a) ...
  - (b) ...
  - (c) conduct ongoing due diligence as contemplated in section 21C, the institution –
    - (i) may not establish a business relationship or conclude a single transaction with a client;
    - (ii) may not conclude a transaction in the course of a business relationship, or perform any act to give effect to a single transaction; or
    - (iii) must terminate, in accordance with its Risk Management and Compliance Programme, an existing business relationship with a client, as the case may be, and consider making a report under section 29 of the Act.'
- Sections 21F and 21G address how to deal with a prospective client established to be a foreign public official or a domestic public official respectively.
- Section 21H deals with family members and close associates of clients determined under ss 21F and G.

## Section 42 of FICA

At this point I direct the attention of the readers to s 42 of FICA, dealing with the requirement for an accountable institution to prepare and maintain a Risk Management and Compliance Programme. Subsection 42(2) details various things



to be achieved by the Risk Management and Compliance Programme.

With the understanding of the requirements of ss 21 and 42 that has been established in the foregoing paragraphs, I now focus on the reporting requirements of an accountable institution.

## Section 28 of FICA

The section imposes a duty on the accountable institution to report to the FIC, within the prescribed period. Cash paid by or received by an accountable institution to/from the client, a person acting on behalf of the client, or a person on whose behalf the client is acting in excess of the threshold. The threshold is currently set at R 24 999,99 with any amount above that reportable to the FIC in terms of FICA, and is not limited to cash transactions at the office of the legal practice but includes cash transactions where cash is paid directly into the bank account held with a financial institution in the name of the accountable institution. In this regard, both the financial institution at which the bank account is held, and the accountable institution have the duty to report the cash transaction to the FIC.

Section 28A deals with reporting property associated with terrorist and related activities and financial sanctions pursuant to Resolutions of United Nations Security Council.

## Section 29 of FICA

This section imposes a duty on the accountable institution to report suspicious or unusual transactions and activities to the FIC within the prescribed period. Suspicious or unusual activity deals with circumstances where a transaction is not concluded, but there has been an attempt or anticipation for a transaction to take place; whereas suspicious or unusual transaction suggest that a transaction has been concluded and can be traced.

A draft guidance notes, Guidance Note 4A, by the FIC defines:

- Suspicious activity reporting as referring to 'a suspicious or unusual activity report submitted in terms of section 29(1) or 29(2) of the FIC Act in respect of the proceeds of unlawful activities or money laundering where the report relates to an activity which does not involve a transaction between two or more parties or in respect of a transaction or a series of transactions about which enquiries are made, but which has not been concluded, respectively.'
- Suspicious transaction reporting as referring to 'a suspicious or unusual transaction report submitted in terms of section 29(1) of the FIC Act in respect of the proceeds of unlawful activities or money laundering where

the report relates to a transaction or a series of transactions between two or more parties.'

## Scenario 1 – illustration of a suspicious activity

A representative of a prospective client approaches a legal practice for a business relationship. The accountable institution employs the requirements of s 21 to the prospective client. The prospective client fails to satisfy the requirements, by failing to disclose to the legal practice the nature of business that the prospective client engages in and the beneficial ownership of the client despite requests by the legal practice for the information. The legal practice then declines to enter the business relationship with the prospective client as required by s 21E.

In this illustration, no transaction has been concluded, purely an activity has taken place. The accountable institution is, therefore, required in terms of s 29 of FICA to file a suspicious activity report with the FIC.

## Scenario 2 – illustration of a suspicious transaction

On 23 April a prospective client of a legal practice approaches the legal practice and advises that he would like to purchase a property in future, but wishes to make a deposit into the trust account of the legal practice while identifying the property as he would like the legal practice to be involved with the transfer of the property. After deliberations with the legal practitioner at the legal practice, the parties reach an agreement in terms of which the amount paid in by the client would be invested by the legal practice pending the purchase of a property, and subsequently the client deposits an amount of R 2,5 million into the trust account of the legal practice as follows:

- On 24 April the client deposits a cash amount of R 500 000 into the legal practice's trust bank account held with one of the financial institutions within South Africa (SA) – ss 28 and 29(1) reporting by both the financial institution and the legal practice.
- On 24 April the client transfers an amount of R 800 000 from an investment account held with a financial institution within the SA.
- On 26 April an amount of R 600 000 is received into the trust account of the legal practice from a financial institution outside SA.
- On 29 April the client walks into the offices of the legal practice with a bag full of cash to the amount of R 450 000. Sections 28 and 29(1) reporting by both the financial institution and the legal practice.

- On 30 April around 10:00 am a cash amount of R 24 000 is received into the trust bank account of the legal practice, a further R 24 000 is received into the trust bank account of the legal practice around 15:15 pm on the same day. This is an attempt at splitting the amount to fall below the R 24 999,99 threshold. Because the total cash amount of R 48 000 happened within a 24-hour period from each other, the amount is reportable in terms of s 28.
- On 30 April another amount of R 102 000 is received via an electronic funds transfer into the trust bank account of the legal practice.
- On 22 May, the representative of the client approaches the legal practice and advises that the client no longer wishes to continue with the purchase of a property and would, therefore, wish to withdraw the amounts paid into the trust account of the legal practice. The representative provides a bank account into which the refund should be paid. Section 29(1) reporting by the legal practice.

In this entire scenario, indications are that there is potentially an attempt to conceal the proceeds of unlawful activities, and to launder the money using the trust account of a legal practice.

## Conclusion

Legal practitioners are cautioned of ways in which they may find themselves being party to money laundering activities and to protect themselves and their legal practices from such. It is in the best interest of every legal practice to prepare and maintain a Risk Management and Compliance Programme, which guides and protects the legal practice from falling foul of such attempts by potentially corrupt clients. If in doubt regarding a business relationship, terminate that relationship and report your suspicions to the FIC.

- See also Nkateko Nkhwashi 'Do trust account advocates need a mind shift to deal with FICA?' on p 13.

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By  
Carl  
Holliday

# KPIs: What are they and how do we use them?

**K**ey Performance Indicators (KPIs) are management measurement tools, values used to determine the state of the business and typically expressed as a number. The word metric is often used in a similar way and refers to any measurable value used to track and measure performance. KPIs in themselves are not valuable and should be considered tools to be used in the process of reaching business goals. Metrics are typically time, often measured by hours, months, quarters and years. Metrics can also be measured in hard number value, for example, how long does it take a legal practitioner to make x amount of money? KPIs typically have forward looking or historical aspects, in other words, are legal practitioners reporting (historical) or forecasting (predictive)?

KPIs are all around us. We feel the business is doing better and we know the business is growing. Intuitive management is, however, almost always doomed to failure. Adopting defined KPIs places management on an analytical, objective level, which is based on accurate, quantifiable information. Reducing complex business information to simple KPI results allows for easy comparison: Actual to potential, peer-to-peer or year-on-year.

There are no magical or universally applicable KPIs. Certain business requirements appear perennial, but do not necessarily apply universally to all businesses, nor continuously. The easiest application of KPIs is to consider current business goals. The KPIs selected must support our efforts to achieve goals as KPIs are not goals in themselves. Over time, goals may change and using the same KPIs indefinitely reflects a misunderstanding of their purpose and complacency in the status quo.

It is anecdotal that the two most commonly used KPIs are:

- What are my fees for the month?
- How much money do we have in the bank?

Although valid, these KPIs are limited in scope and only reveal limited information. In order to be successful, we need to know more.

## Finding KPIs

KPIs are usually numbers, which represent the answer to defined questions. We can simply and clearly express the answer to questions such as 'what are my fees for the month?' using the KPI 'fees month-to-date' principle as guidance. KPIs do not have special names. Certain concepts have crystallised over time, but a KPI may be given any name, as long as its contents and meaning are clearly understood. Once a legal practitioner knows what they want to manage they can create tools to measure. Once clarity exists on business goals, supporting KPIs can be defined. The practice support systems in use today contain vast amounts of information applicable to a legal practitioner's business. The answers to the questions we seek are contained in those systems. Often it is simply a question of knowing where to look, of how to interpret the information in a manner that makes sense in our business environment.

The discussion which follows is intended to provide insight into a few of the most common areas affecting law firms, without in any way being exhaustive. Consider KPIs as a basket of options. Based on current business requirements, select a

combination of KPIs that best support achieving those goals. Review those goals and the supporting KPIs periodically.

## Marketing

A new firm may place a very high value on marketing related KPIs. This should support the goals of business growth through new client acquisition. Profitability may in fact be negatively affected by strong growth. Some terms used in marketing, include:

- New client acquisition – the number of new clients recruited in a given amount of time.
- New matter opened – the number of new matters opened in a given amount of time.
- Matters closed – number of matters finalised in a given amount of time.
- Total clients and total matters – a simple count of the total on a date.
- Client acquisition cost – the cost involved in acquiring this client.

## Operations

Operational KPIs deal with how efficiently we work. Given an eight-hour work day, how much of our time was converted into billed hours. These KPIs include:

- Fees month-to-date – a count of value of work done for the month.
- Fees year-to-date – cumulative value of work done for the year.
- Daily billable hours – the number of hours a professional is expected to bill.
- Actual hours billed, or average per client or day – a measure of performance.
- Fees to target – the gap between current fees month-to-date and monthly fee target.

## Human Resources

- Professional staff to support staff ratio – who works in our business and in what roles?
- Professional/support staff churn – how often do we replace staff?

## Profitability

Profitability is a high-level goal of interest to businesses owners. The information contained in these KPIs typically cover longer time frames and deal with the success of the entire business. These KPIs include:

- Income to budget – the difference between budgeted income and actual income.
- Expenses to budget – the difference between budgeted expense and actual expenses.
- Debtor days – the time we wait for clients to pay.
- Fees to cash – the value or rate at which our fees billed are converted to cash in the bank.

## Selecting KPIs to track

When selecting KPIs to track, it is essential to first know why the KPI is needed, and secondly who will use the KPI?

- A junior professional may be given a simple set of KPIs mainly from the operations basket, to encourage dedicated hard work. Fees month-to-date is a very clear measure of productivity, but not profitability. Dealing with matters on a daily basis requires dedication and focus, as well as the ability to convert work done into billable hours. Typically, a legal practitioner is directly responsible for matters under their control. KPIs are short term, should be updated daily and deal with individual performance, for example, 'Productivity: Fees and files.'
- Heads of departments may be tasked with KPIs, such as: New matters opened, fees year-to-date and debtor days. Dealing with issues, such as how effectively a given department is functioning and daily operational control of activities and staff line management. Typically, an experienced legal practitioner in charge of other legal practitioners would be tasked with KPIs that fall in the short to medium term, and would be updated weekly and deal with 'Profitability: People and activities'.
- Partners and business owners should be tasked with human resources, new client acquisition, client acquisition cost, and profitability KPIs. The success of the entire business rests with them. Senior management is responsible for the entire business. KPIs deal with all aspects of the business, but at a higher, more abstract level and should be updated monthly with 'Profitability: Strategy and direction.'

## A KPI productivity example

Monthly fee target	R 20 000
Actual fees month-to-date	R 16 014
Number of files billed or invoices sent	23

These KPIs are closely related. They show the fee earner's expected monthly fee target of R 20 000 and the actual fees written of R 16 014. On the 15th of the month, this would indicate an 80% achievement of target, with time to spare. Reaching target is very likely. But, at the end of the month, the numbers tell a different story of targets not being reached. It also reveals an expected billing rate of R 80 per hour, with an actual billing rate of R 64 per hour. This is based on a 31-day month, and eight-hour work day. In addition, the nett invoice value equals R 696,26 fees per file.

KPIs are often presented in visual format to provide 'at-a-glance' management reports. A common visual tool is the business dashboard.

## Business dashboards

A business dashboard is a graphical display of management information. If a picture does paint a thousand words, a business dashboard may be the display of a master's in business administrations worth of management information.

Even if the system in place does not provide a dashboard, these can quite easily be built using spreadsheets, based on standard information. The simple example below shows new matters and fees, monthly. The strength of a business dashboard is its visual appeal, it should be easy to use and easy to interpret. This may necessarily truncate certain details, but these should be available from supporting documents.

## An example of a simple business dashboard

The table contains three sets of data for the year-to-date; new matters opened; fees month-to-month; and fee target. The fee target column is used to present the fees to target chart. The example visually illustrates a trend: Those months with low numbers of new files, also show lower fees. Reasons for this trend may not be apparent from the business dashboard but

does make it easy to spot. Adding fees year-to-date, year-on-year may reveal annual recurring trends.

Month	New matters	Fee total	Target
March	2	R 20 765	R 20 000
April	4	R 23 490	R 20 000
May	1	R 24 006	R 20 000
June	1	R 16 014	R 20 000
July	3	R 19 056	R 20 000
August	5	R 21 050	R 20 000
September	9	R 22 012	R 20 000
October			R 20 000
November			R 20 000
December			R 20 000
January			R 20 000
February			R 20 000



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# Should retirement funds be named or identified in divorce orders?



By  
Clement  
Marumoagae



Picture source: Gallo Images/Getty

**I**n practice, non-member spouses whose marriages are either in community of property or out of community of property with the application for the accrual system, continue to be frustrated by many retirement funds. Retirement funds generally refuse to pay them their portion of their member spouses' pension interests on the basis that their decrees of divorce do not comply with s 7(8) of the Divorce Act 70 of 1979 (the Divorce Act). The retirement funds' strict and often incorrect application of this provision force non-member spouses to unnecessarily undertake costly post-divorce court processes aimed at 'correcting' divorce orders. This article aims to illustrate that retirement funds regulated by the Pension Funds Act 24 of 1956 (the PFA) are not entitled to reject divorce orders that they deem not in compliance with s 7(8) of the Divorce Act if such orders comply with s 37D(4)(a)(i) of the PFA.

## The legal framework

Section 7(8) of the Divorce Act provides the court granting a divorce, discretion to make an order that a portion of the member spouse's pension interest 'shall' be paid by the member spouse's retirement fund to the non-member spouse when the pension interest accrues to the non-member spouse. This is an extraordinary power that the legislature vested in the courts, which entitles courts to make orders against retirement funds that are usually not parties to divorce proceedings. Naleen Jeram correctly argues that 'it is still necessary to obtain an order in terms of s 7(8) ... if the fund is to be co-opted into payment of any assigned pension interest' ('Is it still necessary to obtain a court order against a fund? A rebuttal' 2017 (June) *DR* 28). I have also argued elsewhere that '[t]he current legal position is indeed that in order for retirement funds to



make payment of portions of their members' pension interest to non-member spouses, they should be served with court orders, which direct them to make such payment' ('Enforceable orders against retirement funds after divorce: A rejoinder' 2017 (June) *DR* 34). In other words, without a court ordering a retirement fund to pay to the non-member spouse a portion of the member spouse's pension interest, the retirement fund can refuse to make such payment notwithstanding, the fact that the fund has satisfied itself that the member spouse is its contributing member.

Not only do retirement funds refuse to make payment of pension interests to non-member spouses on the basis that divorce orders are 'defective' because they do not order them to make such payments, they also refuse to pay when their names are incorrectly cited in divorce orders. I have argued elsewhere that:

'This strict approach negatively affects litigants who are instituting divorce proceedings either on their own or with the assistance of legal practitioners who lack the necessary expertise in this area of law. In most "do it yourself" divorces wherein the instituting party will be given a *proforma* divorce summons to fill out for themselves or with the assistance of the Registrar of the court, chances of failing to properly make out a case for a pension interest remains high and can be disastrous leading to such a party not being able to claim his or her share of the member spouse's pension interest. It could not have been the intention of the Legislature for legally unassisted or poorly assisted divorce litigants to be prejudiced by the requirement that they must ensure that the names of retirement funds are stated in their divorce decrees' (C Marumoagae 'Prejudice emanating from non payment of pension interests due to what is contained in or omitted from divorce decrees' (2018) 51.1 *De Jure* 102).

I note that there are judicial officers who – when realising that the manner in which the pension interest has been pleaded or dealt with in the settlement agreement may lead to retirement funds refusing to pay – may attempt to assist either the legally unassisted litigants or legal practitioners who might have dealt with this aspect in a manner that might prejudice their clients. This assistance might be borne out of the frustration relating to many post-divorce applications intended to vary divorce orders where retirement funds have refused to pay former non-member spouses' their entitled portions of their former non-member spouse's pension interests. Retirement funds continue to force former non-member spouses to make such applications despite the fact that these former non-member spouses are entitled to their former non-member spouses' pension interests (*GN v JN* 2017 (1) SA 342 (SCA) at para 25).

Section 7(8) of the Divorce Act is an effective legislative tool that empowers retirement funds to frustrate non-retirement fund members, because as the law stands, this provision must be complied with. It is interesting to note that nowhere in this provision is it stated that when exercising its discretion, the court must either state the name of the retirement fund concerned or must precisely state the name of the retirement fund that it orders to pay to the non-member spouse their portion of the member's pension interest. However, context is provided by s 37D(4)(a)(i)(aa) of the PFA, which mandates that for the purposes of s 7(8) of the Divorce Act the portion of the member spouse's pension interest that accrues due to the divorce and thus, should be paid to the non-member spouse 'must be deducted by –

(aa) the pension fund or pension funds named in or identifiable from the decree'.

It can be argued that this provision – at least in part – illustrates that retirement funds that have been rejecting divorce orders on the basis that they are not specifically named in the divorce orders were empowered by legislation to do so. However, that argument loses the fact that s 37D(4)(a)(i)(aa)

*'Not only do retirement funds refuse to make payment of pension interests to non-member spouses on the basis that divorce orders are 'defective' because they do not order them to make such payments, they also refuse to pay when their names are incorrectly cited in divorce orders.'*

of the PFA is twofold. First, and most preferably, this provision requires that the name of the retirement fund that will be ordered to pay in accordance with s 7(8) of the Divorce Act must be named in the divorce order. Secondly, if such a retirement fund is not named, at the very least, it should be identifiable from the order. It is easier to identify a retirement fund in a settlement agreement that will be made an order of court as opposed to where there is no settlement agreement. It is nonetheless, possible to identify the relevant retirement fund in the pleadings and request the court to state some of the identifying features of the fund in the divorce order such as the member's employment or retirement fund number if it is known. In short, notwithstanding, the fact that they are not precisely stated in divorce orders, retirement funds have no legislative basis to reject divorce orders that identifies them as retirement funds that member spouses involved in divorce litigations are contributing to. In other words, it does not make sense to force non-member spouses to make applications to court to vary orders at great costs, where retirement funds have satisfied themselves that they are the relevant funds that will eventually make payment to non-member spouses. In *Dosson v Cape Municipal Pension Fund* [2009] 1 BPLR 12 (PFA) para 5.13, the Adjudicator correctly noted that:

'It is true that the present position may lead to much hardship. The many complaints before this tribunal indicate that pension funds are frequently incorrectly cited, or not mentioned by name at all, although they can usually be identified from the context. In circumstances where the fund is clearly identifiable, although not named, it seems unduly onerous to require a party whose claim has fallen due to make formal application for rectification of the divorce order'.

I am of the view that the relevant retirement fund will always be identifiable. In my view, the fact that the member spouse is cited on the divorce order, there can be no better identifying feature than that. It is possible for the member spouse not to know the name of their retirement fund, because in most instances, members' payslips merely indicate their contribution to either a pension fund or provident fund without stating the full names of the members' retirement fund. The second most obvious identifying feature that would be stated in the pleading as opposed to the divorce order is the member spouse's workplace or profession. If there is a standalone fund, umbrella fund or industry related fund that the employer participates in, then by virtue of employment, the member spouse will belong to that fund and the employer should provide relevant information thereto. Divorce as a contingent event makes non-member spouses beneficiaries of their member spouses' pension interests. In terms of s 7D(1)(c) of the PFA, one of the duties of the board is to 'ensure that adequate and appropriate information is communicated to ... beneficiaries of the fund informing them of their rights, benefits and duties in terms of the rules of the fund'.

Assuming that it might be difficult to identify the relevant retirement fund, particularly when the relevant fund is neither named nor identifiable from the divorce order – as the law stands – retirement funds will be within their rights to refuse

*'Divorce practitioners should, however, note that they need to comply with the law as it is currently applied and make adequate provision of the member spouses' pension interests in order for retirement funds to pay portions thereof to non-member spouses.'*

to make payments to non-member spouse. This assumption leads to the strict application of s 7(8) of the Divorce Act that without an order that the retirement fund must pay to the non-member spouse a portion of the member spouse's pension interest the affected retirement fund cannot make such payment. This is despite the fact that the non-member spouse is entitled to receive that payment (*GN v JN* at para 25). The issue in almost all pension interest related disputes has never been the fact that the non-member spouse struggled to identify the relevant fund, but that such a fund was either not named in the divorce order or incorrectly cited.

I submit that the legislature must honestly assess how the fact that 'retirement savings', which are contributed from member's salaries and invested on their behalf by their retirement funds are not 'real' assets is prejudicing non-member spouses (C Marumoagae 'An argument for necessary amendments to the legislative provisions regulating the sharing of retirement savings upon divorce in South Africa' (2018) 30 *SA Merc LJ* 280). Should 'retirement savings' be elevated to the status of ordinary assets, there will be no need for them to first be deemed to be assets in terms of s 7(7) of the Divorce Act and

then be ordered to be paid to the non-member spouse in terms of s 7(8) of the Divorce Act. In other words, 'as ordinary assets' retirement savings will automatically constitute part of the joint estate when members are married in community of property and part of the member's accrual if the accrual system is applicable to the parties' marriage. I submit that the legislative burden created by s 7(8) of the Divorce Act is unnecessary and the practical hardships that results from its strict application by retirement funds makes it clear that amendments to the Divorce Act are necessary to repeal this provision. In order to lessen the burden, the legislature should also amend s 37D(4) (a)(i)(aa) of the PFA to simply read 'the pension interest should be deducted by the member spouse's retirement fund'. In other words, I submit that it should not be a legislative requirement that in order to pay there should first be reference to the affected retirement fund in the divorce order.

## Conclusion

Divorce practitioners should, however, note that they need to comply with the law as it is currently applied and make adequate provision of the member spouses' pension interests in order for retirement funds to pay portions thereof to non-member spouses. In other words, practitioners should assist the court to either name or identify the relevant fund in divorce decrees. I recommend that the following clause to be inserted either in the pleadings or settlement agreement, which I believe will enable the court to exercise its discretion in terms of s 7(8) of the Divorce Act:

'The plaintiff/defendant is a member of ABC pension/provident fund (whichever is applicable). The defendant/plaintiff is entitled to be paid 50% of the defendant/plaintiff's pension interest held by ABC pension/provident fund.'

If the name of the relevant retirement fund is unknown, rather than incorrectly citing such retirement fund, it is ideal to draft the pension interest clause using known information with a view to identify such a fund. I propose the following:

'The plaintiff/defendant is employed at Marumoagae Enterprises and contributes to a retirement fund (a neutral term) which his/her employer participates, which is administered by A/B/C (applicable underwriter). The defendant/plaintiff is entitled to be paid 50% of the plaintiff/defendant's pension interest held by the retirement fund which plaintiff/defendant is a contributing member.'

Where the practitioner is unsure of the type of fund to which the member spouse belongs, I submit that the phrase 'retirement fund' should be used. This is a general phrase that adequately captures different kinds of funds such as: Pension funds; provident funds; preservation funds; deferred funds and retirement annuity funds.

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## Did you know?

- In 2016 statistics showed that four in ten divorces, in South Africa, were marriages that lasted less than ten years.
- According to a report by Statistics South Africa, men tend to marry younger women. More than 76% of bridegrooms were older than their brides, compared to nearly 16% who were younger than their brides. Only 8% were the same age as their brides. Men are also more likely to marry women who had never been married before.



# FICA

Picture source: Gallo Images/Getty

## Do trust account advocates need a mind shift to deal with FICA?



By  
Nkateko  
Nkhwashu

Generally, legal practitioners operate within a given set of specified rules and procedures. With these, come certainty. Thus, the preference for legislation to be captured in writing, as well as gaps in law to be settled in court, in judgment form. This obsession of having everything spelled out in writing or captured in 'black and white', shapes and reinforces a certain mind shift in every legal practitioner. Although, there are benefits to it, it is not always the case. There are developments underway within the legal field, which are going to require legal practitioners to tweak or shift their minds with regard to certain things or how they conduct and run their practices.

One such key notable development

is the Legal Practice Act 28 of 2014 (LPA), which came into effect last year. The LPA brings with it, various changes, some stemming from its key overriding objectives. One such objective is to ensure transformation, as well as 'greater access' to the legal profession. Greater access refers to those seeking admission into the legal profession and practise, as well as the accessing of legal services by the general public. In relation to the former (access by prospective legal practitioners), and taking into account some of the known barriers to enter the legal profession, the LPA seeks to unite attorneys and advocates. Provision has now been made for advocates with trust accounts, who are allowed to accept instructions directly from the general public. This is in contrast to the previous regime where advocates could only be engaged



on a referral basis through the services of an attorney. This 'new' type of advocate will have to operate a trust accounts on behalf of their client and, as a result will have to be in possession of a Fidelity Fund Certificate. Additionally, the advocate will have to have completed, among others, Practice Management Training. Again, as the advocate will be looking after their clients' funds and operating accounts they will have to comply with some of the legislative requirements, which are now within the purview of attorneys.

Other than complying with the aforementioned legislative requirements these legal practitioners will have to do administrative work as well, which was previously never carried out by the traditional advocate. One of the key legislative requirements, which will need to be complied with, is the Financial Intelligence Centre Act 38 of 2001 (FICA). In terms of FICA, attorneys (or legal practitioners, as they are now called, including advocates with trust accounts) are deemed or called accountable institutions and will have to discharge certain responsibilities in terms of FICA in order to, among others -

- assist in combating money laundering and terrorist financing activities by for example carrying out customer due diligence;
- have internal controls; and
- train staff and others to address vulnerabilities in their systems or firms.

Thus, often at times they are referred to as gatekeepers in this regard and held to a high standard.

Previously it was easy for attorneys to comply. This was largely due to the fact that the provincial law societies and other relevant stakeholders, traditionally issued what was termed a 'FICA Manual'. This manual discussed each relevant provision of FICA, which legal practitioners had to comply with. This was largely a tick-box exercise, which arguably and perfectly suited the mind set of traditional legal practitioners. The Financial Intelligence Centre Amendment Act 1 of 2017 (Amendment Act) has significantly changed the regulatory landscape and will require a mind shift by all legal practitioners with trust accounts and the Legal Practice Council (LPC), among others. One of the key reasons for this, is the new regulatory framework envisaged within the FIC Amendment Act, namely the risk-based approach system.

Under a risk-based approach system threats and vulnerabilities are dealt with and addressed based on assessed risks, because the way one legal practitioner or firm deals with its own assessed risk/s or vulnerabilities will differ from the next. It is for that reason why a 'one-size-fits-all' approach, which used to be the norm under the previous FICA Man-

ual will no longer suffice going forward. There is no doubt that this is going to be challenging for some legal practitioners. Under the previous rules-based system, there were legal practitioners and/or law firms that never really understood their obligations under FICA. With the advent of the current amendments, I was engaged by one of the top ten boutique law firms as to how they could better position themselves in future under the new framework. From some of the engagements with their FICA Officer, it was established that not much attention was given to their FICA obligations. Some directors in the firm readily admitted that they knew nothing about FICA matters and that all queries had to be directed to the FICA Officer.

*'With the advent of the current amendments, I was engaged by one of the top ten boutique law firms as to how they could better position themselves in future under the new framework. From some of the engagements with their FICA Officer, it was established that not much attention was given to their FICA obligations.'*

Legal practitioners should move away from the tick box mentality to one, which will, among others, require risk management skills. Directors of law firms will no longer have the luxury of hiding behind their staff or FICA Officers when it comes to complying. The Amendment Act makes provision of what is termed the Risk Management and Compliance Programme. This programme is very instrumental in successfully implementing a risk-based approach system by accountable institutions. It also calls for a hands-on approach by the directors of a law firm, for instance, in approving much of its content and relevant policies. In terms of the new requirements within the Amendment Act, it is the responsibility of directors or top management to ensure compliance with the Amendment Act and failure to do so will result in directors or top management being held personally liable.

After the promulgation of the Amendment Act the Law Society of South Africa recognised the importance of the Risk Management and Compliance Programme for legal practitioners and published the specific section on their website ([www.LSSA.org.za](http://www.LSSA.org.za)). Although this did not go into much detail to provide

guidance or analysis, it did, however, note some of the fundamentals of the Risk Management and Compliance Programme, which are:

- governance architecture;
- risk assessments;
- customer due diligence;
- reporting; and
- monitoring, etcetera.

Due to these developments and other on-going engagements between the Financial Intelligence Centre (FIC) and the legal profession there appears to be a consensus among them that the legal profession stands in a unique position compared to other accountable institutions when it comes to, among others, discharging their legislative duties and thus being FICA compliant. This was also acknowledged and noted within the FIC issued Guidance Note 7, which was followed by the FIC's invitation to the legal profession for public consultation in relation to the new requirements. A proposed solution being discussed in this regard is to issue a separate guidance note in order to assist legal practitioners in carrying out their legal duties. I would like to submit and caution, however, that such a guidance note will not prove to be a silver-bullet for all compliance challenges. One reason for this is the various services offered by legal practitioners, as well as the size of their law firms. It is also important to note that even under the united profession it is not all legal services or legal practitioners who will fall within the purview of FICA.

Internationally the legal profession has been thrown into the spotlight as being ineffective, as well as aiding criminals launder ill-gotten gains. Take the *Paradise* and *Panama Papers* as examples. Recently the G20 has recognised this fact and pleaded with the legal profession to play its part in this regard. The International Bar Association and the Secretariat of the Organisation for Economic Co-operation and Development has issued an interesting report titled: 'Report of the Task Force on the Role of Lawyers and International Commercial Structures'. Partly this report urges self-regulatory bodies (like the LPC) to take their regulatory duties seriously or else run the risk of the government taking over. The Financial Action Task Force (FATF) (under the presidency of Argentina) took a very important initiative to educate and capacitate prosecutors and judges in relation to anti-money laundering and counter terrorist financing efforts. This is an important initiative as more often than not, criminals get away with various deeds owing to the fact that the prosecutor or magistrate in question did not really understand how to deal with such. Finally, and important to note for the LPC was the recently issued FATF 'Guidance for a Risk-Based



Approach - Legal Professionals'. I submit that as this guide is aimed at appealing to smaller law firms. It could also be instrumental in assisting the LPC to come up with its own guide.

## Conclusion

In short, the message sought to be conveyed by this article is that all legal practitioners who fall within the purview of FICA will need a mind shift in order to meaningfully comply with the new risk-based approach system requirements. The regulator - being the LPC - will need to be well-capacitated on the new monitoring requirements as they are more demanding as opposed to the previous tick-box regime. Under the previous regime it seems regulation was lax as noted by the FATF. The new breed of advocates with trust accounts must also be up to the challenge and comply meaningfully. They also need to be cautioned that compliance failures carry with them dire consequences. Ignorance of the law or one's obligation is not an

excuse. Their customer due diligence must be up to scratch and where they cosy up to the political elite they need to be cautioned that the full might of the law reaches even that far. Besides, there are new mandatory requirements for dealing with politically exposed persons. The courts, recently by various judgments or ongoing cases, have shown that they are not shy to punish those who aid and abet criminals to launder illicit money. For example, the case of John Block case (*Scholtz and Others v S* [2018] 4 All SA 14 (SCA)) or that involving the previous head of the Independent Communications Authority of South Africa. What is shockingly interesting about the latter case ((Specialised Commercial Crimes Court, Pretoria) (unreported case no 111/86/2012)), which is being taken on appeal is (justifiably or not) the sentence given to the legal practitioner involved. There are various factors other than deterring someone when it comes to sentencing. Be that as it may, let that sound caution to the new breed of ad-

vocates that where the LPC may be lenient the courts are willing to look at the framework, which comprises of FICA, the Prevention of Organised Crime Act 121 of 1998, the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004, etcetera, in order to ensure that those who are found to be guilty will be held to account. This is especially bad for legal practitioners as they are held to a high standard.

**Nkateko Nkhwashu LLB (Univen) LLM (UJ) Cert in Legislative Drafting (UP) Cert in Compliance Management (UJ) Cert in Money Laundering Control (UJ) Cert in Policy Development (ProActive College) is an analyst at the Financial Sector Conduct Authority in Pretoria.** □

## SEEN ON SOCIAL MEDIA



# Seen on social media



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

*Legal practitioner, Meshack Fhatuwani Netshithuthuni, discusses the duty to consult affected and interested parties before awarding mining and prospecting rights in this month's case notes column.*



Interesting read. The issue of meaningful consultation and negotiating access to land is always a thorn in the mining industry.

**Sibongile Booi,**  
**@BooiMsuthukazi**

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



May her soul rest in perfect peace.

**Adeboboye Adekunle,**  
**Principal Partner at**  
**BathoPele Chambers**

*NADEL held a women's talk session under the theme #TIMESUP - Sexual Harassment in the Legal Profession: It's Time for Change.'*



The things we have to do for our principals while under the period of clerkship are disgusting really. Candidate attorneys have subject themselves to hideous relationships so be able to complete these terms or face being fired and as they're not protected under the 'Act'.

**Senzi,**  
**@Senzi23946887**

*Minister of Justice and Correctional Services, Ronald Lamola, provided legal advice to members of the public at Legal Aid South Africa's Advice Line.*



Great work Minister. Looking forward to seeing more developments in the access to justice issue especially for those less fortunate.

Phambili.

**Sibongile Booi,**  
**@BooiMsuthukazi**

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# Jurisdiction of the Labour Court – the conundrum continues



By  
Sihle  
Mdludla

**O**n 4 March, the Labour Court (LC) delivered a seminal judgment in the matter between *Vodacom (Pty) Ltd and Others v National Association of South African Workers and Another* (LC) (unreported case no J256/19, 4-3-2019) (Lagrange J). Essentially, the court found that non-employers are entitled to approach the LC for interdictory relief.

In brief, the facts of the matter relate to the National Association of South African Workers members, an unregistered union, (the Union) who entered the premises of Vodacom to meet and communicate with its members. The members of the Union were employed by Bidvest Facilities Management (Pty) Ltd (Bidvest) who were contracted by Vodacom to provide cleaning and gardening services on Vodacom's premises.

Vodacom was unhappy with the meetings and alleged that the meetings were disruptive. In addition, it was alleged that Union members were not holding the meetings at the designated areas that had been previously agreed on between the parties. On 25 January Mpho Morolane, the General Secretary of the Union, entered Vodacom's premises without prior notice

or agreement and held a meeting with the Bidvest employees. As a result of the above Bidvest – through its lawyers – demanded a written undertaking from the Union by 1 February that Union officials should stop entering the premises and cease from holding meetings with its members. On 4 February, the Union's attorneys wrote to Vodacom's attorneys advising them that the Union was unable to give the undertaking sought by Vodacom, because it would effectively dissociate the Union from the workers. Consequently, Vodacom launched an urgent interdict against the Union and Mr Morolane.

In this article, I shall not focus on the merits of the case. I will only deal with the matter of jurisdiction. In the *Vodacom* case, Vodacom was not the employer of the Union members. Bidvest was the employer and the Vodacom premises was the site at which Bidvest employees executed their duties.

Section 157 of the Labour Relations Act 66 of 1995 (LRA) provides for the jurisdiction of the LC as follows:

'(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.

(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from –

(a) employment and from labour relations.' In considering the above, s 157(1) of the LRA provides that the LC has exclusive jurisdiction over matters that are specifically conferred to it in terms of the LRA or any other legislation. In the case of *Gcaba v Minister for Safety and Security and Others* 2010

(1) SA 238 (CC) at para 70, the Constitutional Court (CC) interpreted s 157(1) as follows:

'Section 157(1) confirms that the Labour Court has exclusive jurisdiction over any matter that the LRA prescribes should be determined by it. That includes, amongst other things, reviews of the decisions of the CCMA under section 145.'

From the above, Vodacom could not rely on s 157(1) as it does not empower the LC to adjudicate such matters. Section 157(1) strictly empowers the LC to hear matters that are explicitly assigned within its exclusive jurisdiction in terms of legislation.

On the other hand, s 157(2)(a) bestows on the LC concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in ch 2 of the Constitution, which arises from employment and labour relations. Accordingly, for a proper interpretation of the above, the highlighted portions ought to be considered further.

## Concurrent jurisdiction

In the ordinary course, the concept of concurrent jurisdiction can be defined as follows:

'Overlapping jurisdiction; jurisdiction exercised by more than one court at the same time over the same subject matter and within the same territory, the litigant having the initial discretion of choosing the court that will adjudicate the matter' (see Bryan A Garner *A dictionary of modern legal usage* 2ed (Oxford University Press 2011)).



Picture source: Gallo Images/Getty

Insofar as the LC is concerned, the above interpretation cannot coexist with the clearly intended objectives of the LRA. In this regard, the above interpretation culminates in a position whereby an applicant would 'forum shop' for a court to adjudicate a matter. In the case of *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC) at para 124 the CC made the following observation:

'It could not have been the intention of the legislature to allow an employee to raise what is essentially a labour dispute under the LRA as a constitutional issue under the provisions of s 157(2). To hold otherwise would frustrate the primary objects of the LRA and permit an astute litigant to bypass the dispute resolution provisions of the LRA. This would inevitably give rise to forum shopping simply because it is convenient to do so or as the applicant alleges, convenient in this case "for practical considerations".'

Considering the above, it is then appropriate to ascertain the proper context in terms of which the term 'concurrent jurisdiction' ought to be construed considering the objectives of the LRA. In determining the objective purpose of particular words in legislation, the case of *Secretary for Inland Revenue v Brey* 1980 (1) SA 472 (A) at 478 provides guidance as follows:

'[T]he meaning of particular words is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used and the object that is intended to be attained.'

Accordingly, the objective meaning of the above phrase may not lie in its popular everyday use. In the case of *Manyathi v MEC for Transport, KwaZulu-Natal, and Another* 2002 (2) SA 262 (N) the court found that the word concurrent jurisdiction in s 157(2) must be construed to mean 'jurisdiction equivalent with' and that for matters falling within paras (a), (b) and (c) of s 157(2), the LC has exclusive jurisdiction, and the jurisdiction of the High Court is excluded.

I submit that the above interpretation is correct. This position was further confirmed in the case of *Jones and Another v Telkom SA Ltd and Others* [2006] 5 BLLR 513 (T) where the court found that s 157(2) does not confer jurisdiction on the High Court that it does not otherwise have. It confers jurisdiction on the LC, which it would not otherwise have had.

### Alleged or threatened violation of a fundamental right

Although the LRA is primarily concerned with giving effect to s 23 of the Constitution, s 157(2) seems to extend the jurisdiction of the LC to that of equal status to the High Court, provided the dispute arises out of employment and labour relations. Put differently, the LC is endowed with the status of the High Court where alleged or threatened violation of a fundamental right is as a result of labour relations. This would follow where, for example, an employee's right to dignity is threatened in the workplace. The LC would have the same powers as the High Court in adjudicating such a matter.

### Employment and labour relations

According to s 157(2)(a), the LC will have concurrent jurisdiction with the High Court provided that the matter arises from employment and labour relations. Section 213 of the LRA defines 'employee' as follows:

'(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

(b) any other person who in any manner assists in carrying on or conducting the business of an employer, and "employed" and "employment" have meanings corresponding to that of "employee".'

In interpreting the term 'employment', the case of *Vodacom* the LC found at para 23 as follows:

'However, the section [s 157(2)(a)] does not specify that the parties to the litigation must be in an employment relationship.

If the legislature wanted to restrict the interpretation solely to disputes concerning infringement of fundamental rights arising between employers and their employees, it would surely have stated this explicitly, rather than using a phrase which essentially describes a context from which the alleged infringement arises.'

It is my view that the court erred in the above interpretation. Had the court had regard to the definition of 'employee' as set out in s 213 of the LRA, it would have been clear that the term should be construed to mean that an employment relationship must exist.

The LRA does not define the concept of labour relations, however, in my view, it encompasses all such matters that arise as a consequence of the establishment of an employment relationship. In the *Vodacom* matter, the judge further makes a finding that employment and labour relations ought to be read conjunctively. In this regard, the court makes the following finding:

'The union's submission is that the terms "employment" and "labour relations" are distinct and both criteria must be met. In my view, proper interpretation of the phrase "employment and labour relations" is that it describes an entire sphere of relations embracing both issues of employment and labour relations.'

I am of the view that the judge erred in reaching this conclusion for the following reasons:

- First, as referred to above, if regard is had to the term 'employee' and its definition as contained in s 213 of the LRA, it would have been clear that it ought to be read separately from the term 'labour relations'.
- Secondly, the use of the word 'and' clearly, in the context of interpretation, requires that the terms be read as two disjunctive requirements.

Accordingly, I am of the view that the matters focussed on above show that the conclusion of the court that a non-employer may approach the LC to seek relief is misplaced. One would have to watch case development in this regard, including whether the Union challenges this decision further.

**Sihle Mdludla LLB (UNIZULU) is a legal practitioner at Ndzabandzaba Attorneys in Johannesburg. Mr Mdludla acted on behalf of the first and second respondents in the matter.**



*Cyril Muller Attorneys*

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# THE LAW REPORTS



By  
Merilyn  
Rowena  
Kader

August [2019] 3 All South African Law Reports (pp 321 – 672); 2019 (8) Butterworths Constitutional Law Reports (pp 919 – 1047)

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

## Abbreviations:

- CC: Constitutional Court
- GJ: Gauteng Local Division, Johannesburg
- GP: Gauteng Division, Pretoria
- LAC: Labour Appeal Court
- LCC: Land Claims Court
- SCA: Supreme Court of Appeal

## Civil procedure

**Settlement agreement an order of court:** Weiner AJA at para 32 held: 'Our courts have a duty to ensure that they do not grant orders that are *contra bonos mores*, or that amount to an abuse of process. Section 173 of the Constitution specifically empowers the Court to prevent any such abuses.'

In the case of *PM v Road Accident Fund* [2019] 3 All SA 409 (SCA), a mother sued the Road Accident Fund (RAF) on behalf of her minor child, averring that the child's father had been killed in a collision and that the sole cause of the collision was the negligence of the insured driver, the minor child being deprived of maintenance and support. On the date of the trial, the court was requested to make a settlement agreement an order of court. The agreement provided that the RAF was liable to pay the appellant 100% of her proven or agreed damages.

Not satisfied that the agreement should be made an order of court, because there was no indication that the insured driver was negligent at all, the court declined to make the agreement an order of court. The trial proceeded and was postponed after one witness gave evidence.

The appellant then applied for the abandonment and annulment of the part-heard trial, and for a declaration that the *lis* between the parties had been fully and finally settled in terms of the

settlement agreement. The dismissal of the application led to the present appeal.

The appellant's case was that once they had concluded the settlement there was no longer a *lis* between the parties. The effect was to deprive the judge of jurisdiction to adjudicate that non-existent *lis*. Her jurisdiction extended only to making the order that the parties asked her to make. Accordingly, when she refused to make the settlement an order of court and required evidence to

*'... courts have a duty to ensure that they do not grant orders that are contra bonos mores, or that amount to an abuse of process. A court cannot act as a mere rubber stamp of the parties. Public funds are being disbursed and the interests of the community as a whole demand that more scrutiny be involved in the disbursement of such funds.'*

be led on the question whether the insured driver had been negligent to any degree, she overstepped the limits of her jurisdiction. The majority of the court on appeal disagreed. It was held that when the parties arrive at a settlement, and wish it to be made a consent order, they do not withdraw the case, but ask that it be resolved in a particular way. The jurisdiction of the court to resolve the pleaded issues does not terminate when the parties arrive at a settlement of those issues.

The court held that our courts have a

duty to ensure that they do not grant orders that are *contra bonos mores*, or that amount to an abuse of process. A court cannot act as a mere rubber stamp of the parties. Public funds are being disbursed and the interests of the community as a whole demand that more scrutiny be involved in the disbursement of such funds. The appeal was dismissed.

## Consumer law

**Consumer information with credit bureau:** In *National Credit Regulator v Southern African Fraud Prevention Services NPC* [2019] 3 All SA 378 (SCA), the National Credit Regulator (NCR), acting in terms of s 140(1) of the National Credit Act 34 of 2005 (the Act), lodged a complaint with the National Consumer Tribunal (the Tribunal) against the Southern African Fraud Prevention Services NPC (SAFPS).

SAFPS, a registered credit bureau, was accused of various contraventions of provisions of the Act and the regulations made thereunder. A settlement agreement disposed of all but one of the contraventions. The Tribunal was left to determine an alleged contravention of s 70(2)(f) of the Act, read with reg 17.

The issue was whether SAFPS was retaining information for longer than permitted by the Act. The NCR contended that the information in question was consumer credit information as defined in s 70(1) and that it could not be retained for longer than one year. SAFPS said that it was what it described as 'fraud information', which was not regulated and which it was entitled to keep for the period determined by it, namely ten years. The Tribunal upheld the contentions of the NCR that SAFPS had contravened s 70(2)(f). SAFPS successfully appealed to the High Court. The present further appeal related to the issue of the contravention and the imposition of an administrative fine.



The court, per Wallis and Schippers JJA, held that an obligation to expunge consumer credit information arises under s 70(2)(f). The obligation to expunge information arises in relation to any consumer credit information that is so prescribed. Any information not so prescribed is not subject to compulsory expungement. The issue was whether the fraud information was so prescribed. That required a determination of whether fraud information fell within the term 'adverse classification of consumer behaviour' – in which case it had to be expunged after one year. The court could not find that fraud information fell within the relevant category and it was, therefore, not subject to the time limit.

Confirming that there was no obligation on SAFPS to expunge the fraud information in its possession, the court dismissed the appeal.

## Costs

**Costs de bonis propriis.** In *Ebenhaeser Communal Property Association and Others v Minister of Department of Rural Development and Land Reform and Others* [2019] 3 All SA 530 (LCC) the claim, by agreement, was to be heard over a three-week period. The LCC *mero motu* raised the question of costs *de bonis propriis* at a pre-trial conference and gave notice to both the plaintiff's attorney and the State Attorney to show cause why costs *de bonis propriis* should not be awarded against them. The third to the 26th defendants (the landowner defendants) claimed such costs against plaintiff's attorney on the basis that her non-compliance, *inter alia*, with the Practice Directions and her failure to get the files properly indexed, paginated and ready for trial, was the cause of the trial not proceeding.

It was held that the procedure in r 38 of the Land Claims Court Rules is to be followed once a claim for restitution of rights in land is referred to the court. The court detailed a litany of instances of non-compliance with its request for compliance with the rules and the Prac-

tice Directive by the plaintiff's attorney. The files were found to be in a shambolic state and had not been indexed and paginated in accordance with the practice directions. Costs *de bonis propriis* are awarded against erring attorneys only in reasonably serious cases such as cases of dishonesty, wilfulness or negligence in a serious degree. The plaintiff's attorney persistently failed to comply with Practice Directions 8 and 10, which required her to index and paginate the court files as prescribed, and file the requisite practice note from the time of her appointment, and that she continued not to comply thereafter, notwithstanding a direction from the court to make amends. A court direction is tantamount to a court order and failure to comply is not only disrespectful to the court and other parties but can be contemptuous. The cumulative effect of the plaintiff's attorney failure to comply on multiple occasions, notwithstanding various admonishments by the court, was a flagrant disregard for the rules, practice directions and further directions of the court. That ultimately constituted the sole cause for the trial being adjourned. The conduct of the plaintiff's attorney, substantially and materially, deviated from the standard expected of legal practitioners, was irresponsible, grossly negligent and displayed lack of care. The circumstances of this case warranted punitive costs to be paid *de bonis propriis* by plaintiff's attorney on an attorney and client scale so that the landowner defendants would not be out of pocket.

## Delict

**Defamation:** The facts in *Manuel v Economic Freedom Fighters and Others (judgment and appeal)* [2019] 3 All SA 584 (GJ) were as follows: In the wake of the removal of the former Commissioner of the Revenue Services (Sars), a new Commissioner had to be appointed. The President of South Africa appointed a panel, headed by Trevor Manuel to shortlist interviewees. Mr Manuel recused himself from the interview of one of the

*'The court found that Mr Manuel had met the requirements for an interdict and issued a declaratory order in favour of Mr Manuel, ordered the respondents to apologise to him, and awarded R 500 000 damages payable by the respondents.'*

candidates (Mr Kieswetter) because he had previously worked at Sars, while Mr Manuel was the Minister of Finance. Mr Kieswetter was duly appointed by the President as the Commissioner of Sars, as being the most suitable and preferred candidate.

The Economic Freedom Fighters, a political party, published a tweet on its official Twitter account, criticising the interview process and referring to nepotism and corruption. Mr Manuel sought final interdictory relief against the respondents relating to the publication of the alleged defamatory statement. The court found that Mr Manuel had met the requirements for an interdict and issued a declaratory order in favour of Mr Manuel, ordered the respondents to apologise to him, and awarded R 500 000 damages payable by the respondents.

On application for leave to appeal, the court referred to s 17(1)(a) of the Superior Courts Act 10 of 2013, which provides that a judge may only grant leave to appeal if they are of the opinion that the appeal would have a reasonable prospect of success. The court rejected the applicants' claim that the respondent was obliged to specify the defamatory portions of the statement. It was confirmed that the defamatory meaning was explicit, and that there was no need to have them pointed out. The applicants had accused the respondent of corruption and nepotism, and the likelihood of serious harm to reputation was plain.

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All the grounds of appeal were dismissed as lacking in merit and the court confirmed the reasonableness of the quantum awarded as damages.

## Environment

**Waste disposal site:** Navsa ADP at para 1 held: 'This case demonstrates how, if litigating parties misconceive their rights and misidentify the main issue for adjudication, the decision by the court before which it is presented, inevitably, will be flawed.'

The appeal in *Gauteng Department of Agriculture and Rural Development and Others v Interwaste (Pty) Ltd and Others* [2019] 3 All SA 344 (SCA) concerned the validity of a compliance notice issued by an environmental management inspector, under s 31L of the National Environmental Management Act 107 of 1998. The High Court at the instance of Interwaste reviewed and set aside the decision of an environmental management inspector employed by the Gauteng Department of Agriculture and Rural Development (GDARD), to issue the compliance notice. That led to the present appeal.

Interwaste operated a waste disposal site in Gauteng, pursuant to a waste management licence issued in terms of the Act. The licence was to be renewed within a period of four years from date of issue, but was not. In the intervening period, the GDARD amended the licence, mainly increasing the total daily and annual tonnage of waste that the site was entitled to receive. Interwaste, in opposing the compliance notice, first of all denied that there was a four-year renewal period stipulated and submitted that even if it was stipulated, an amendment to the licence meant that the four-year renewal period ran from that date, and not from the date of first issue of the licence. In its view, the licence was still valid at the time of the issuing of the compliance notice.

The court held that in terms of the compliance notice showed confusion as to its purpose. The period for renewal had passed. Compliance could thus not be enforced. In the circumstances set out above, the compliance notice was superfluous. It served no practical purpose. Instead, the validity of the licence terminated because of the effluxion of time. The High Court ought not to have granted Interwaste any relief at all and ought to have concluded that there was no purpose or profit to be gained in dealing with the question of the propriety of the compliance notices. The appeal was upheld.

## Family law

**Rule 43 applications:** In *E v E and related matters* [2019] 3 All SA 519 (GJ) three applications brought in terms of r 43(1)

of the Uniform Rules of Court were referred for hearing before the Full Court as a result of two conflicting judgments in the division. The parties were found to have departed from delivering a statement in the nature of a declaration and a reply in the nature of plea, having regard to r 43(2) and (3). The referral to the Full Court was intended to address the question of whether the court has a discretion to permit the filing of applications that have departed from the strict provisions of r 43(2) and (3). If such discretion did exist, the question was whether the Practice Manual should direct that all r 43 applications conform to a specific form, particularly regarding length. Finally, if the court had a discretion, the factors necessary for the reasonable exercise of the discretion had to be identified. The applicants sought relief *pendente lite* for interim maintenance, custody and contribution to costs pending the finalisation of their divorce actions.

It was held that r 43 as it presently reads provides an interim remedy to assist an applicant to obtain –

- relief speedily and expeditiously in respect of interim care, residency and contact with the child/children;
- maintenance for a spouse and/or child/children;
- enforcement of specified necessary payments; and
- contribution towards legal costs of the divorce action.

The procedure envisaged in r 43 is not that of a normal application commenced by way of notice of motion. It is a succinct application, aimed at providing the applicant interim relief, speedily and expeditiously. In all three applications, one or two respondents applied for the dismissal of the application or for a punitive costs order on the basis of prolixity and failure to comply with the strict provisions of r 43(2) and (3). The question to be answered related to the interpretation of r 43, which would ensure a speedy and efficient resolution of the application, while at the same time protecting the rights of women and children vulnerable in r 43 applications. The court decided that the best solution was for the judge allocated to such a matter to issue a directive to the parties in terms of r 43(5) calling on the parties to file a supplementary affidavit making a full and frank disclosure of their financial and other relevant circumstances to the court and to the other party. The affidavits in question must be accompanied by a financial disclosure form. Finally, affidavits filed in terms of r 43(2) and (3) shall only contain material or averments relevant to the issues for consideration.

## Immigration

**Visitor's visa status:** The case of *Nan-*

*'The court held that the government had not shown why it was necessary that spouses and children of South African citizens or permanent residents must leave the RSA to apply for a change of visitor's visa status.'*

*dutu and Others v Minister of Home Affairs and Others* 2019 (8) BCLR 938 (CC) challenged the constitutionality of reg 9(9)(a) of the Immigration Regulations made in terms of the Immigration Act 13 of 2002 (the Act). The applicants applied for a change in status attached to a visitor's visa. Section 10(6)(b) of the Act provides that such application shall not be made by the visa holder while in the Republic of South Africa (RSA), except in prescribed exceptional circumstances. The applicants challenged the regulation on the basis that the rights accorded by means of the 'exceptional circumstances' contemplated in s 10(6)(b) were not extended to a foreign spouse or child of a citizen or permanent resident. Applicants applied directly to the CC after the High Court dismissed their application.

The majority (Mhlantla J with Cameron, Jafta, Khampepe, Madlanga, Theron JJ and Nicholls AJ concurring) held that the impugned provision was unconstitutional. The CC observed that the right to dignity is extended to include the right to family life and referred to *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 (8) BCLR 837 (CC). The court held that the government had not shown why it was necessary that spouses and children of South African citizens or permanent residents must leave the RSA to apply for a change of visitor's visa status. An order was made declaring reg 9(9)(a) of the Immigration Regulations to be inconsistent with the Constitution and, therefore, invalid to the extent that the rights accorded by means of the exceptional circumstances contemplated in s 10(6)(b) of the Act are not extended to the foreign spouse or child of a South African citizen or permanent resident. The declaration of invalidity was suspended for 24 months and during this period, the following words are to be read into reg 9(9)(a) of the Immigration Regulations: '(iii) is the spouse or child of a South African citizen or permanent resident'.

## Legal practice

**Removal from the roll:** In *General Coun-*

*cil of the Bar of South Africa v Jiba and Others* 2019 (8) BCLR 919 (CC) the case concerned a High Court application by the General Council of the Bar of South Africa (the GCB) for the removal of Ms Jiba, Mr Mrwebi and Mr Mzinyathi, who were senior officials in the National Prosecuting Authority, from the roll of advocates due to misconduct.

The High Court found that Ms Jiba and Mr Mrwebi were not fit and proper persons to continue to practice and ordered that their names be struck from the roll of advocates. Costs were awarded in favour of Mr Mzinyathi against the GCB. Ms Jiba and Mr Mrwebi appealed to the SCA. By a majority (Shongwe ADP with Seriti and Mocumie JJA concurring) the SCA upheld the appeal of first and second respondents and dismissed the GCB's cross-appeal. The minority (Leach and Van der Merwe JJA) would have dismissed the appeals of Ms Jiba and Mr Mrwebi and upheld the cross-appeal of the GCB in relation to the costs order granted to Mr Mzinyathi.

The GCB approached the CC. The CC in a unanimous judgment, per Jafta J, observed that jurisdiction is determined on the basis of the pleadings and not the substantive merits. It must be clear from the claim advanced that a constitutional issue or an arguable point of law of general public importance is raised. The GCB

sought to have the respondents' names removed from the roll of advocates on the grounds that they were no longer fit and proper persons to continue to practise as advocates. Reliance was placed on the making of false statements under oath, the suppressing of information to mislead the court and the abuse of powers of the office they held. This did not raise any constitutional issue, nor was there an arguable point of law, so the appeal could not be entertained.

Regarding the dismissal by the SCA of GCB's cross-appeal in respect of the

*'An application by the GCB aimed at removing an advocate from the roll of advocates for misconduct is not in the nature of ordinary civil proceedings. In such proceedings the GCB is not in the position of an ordinary litigant; it is performing a public duty aimed at enabling the court to exercise its disciplinary powers.'*

costs order, however, the CC had jurisdiction. An application by the GCB aimed at removing an advocate from the roll of advocates for misconduct is not in the nature of ordinary civil proceedings. In such proceedings the GCB is not in the position of an ordinary litigant; it is performing a public duty aimed at enabling the court to exercise its disciplinary powers. An order of costs against such a body should not be made except in circumstances where the body has conducted itself in a manner unacceptable to the court before which proceedings were brought.

- See law reports 'advocates' 2017 (Jan/Feb) *DR* 40 for the GP judgment and 'advocates' 2018 (Dec) *DR* 26 for the SCA judgment.
- See also Kgomo Tso Ramotsho 'The interpretation and application of s 7 of the Admission of Advocates Act does not itself alone raise a constitutional issue' 2019 (Sept) *DR* 26.

## Property

**Labour tenants:** In the case of *Kubheka v Adendorf and Others* [2019] 3 All SA 566 (LCC), the plaintiff, a pensioner residing on a farm owned by the first defendant, sought a declaratory order to the effect that he was a labour tenant, as well as an award of land in terms of s 16 of the Land Reform (Labour Tenants) Act 3 of



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1996 (the Act). Section 1 of the Act defines a labour tenant as –

- a person who is residing or has the right to reside on a farm;
- who has or has had the right to use cropping or grazing land on the farm in exchange for providing labour to the owner or lessee; and
- whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner in exchange for providing labour to the owner or lessee.

The plaintiff bore the onus of proving that he was a labour tenant. In terms of s 2(5) of the Act, once a plaintiff proves that he complies with the definition of a labour tenant, then the onus shifts to the defendant to prove that the plaintiff is a farmworker.

The plaintiff had resided on the farm since 1975 with cropping and grazing rights, providing labour to successive owners of the farm. However, it was argued that from 1986 to 1995, the plaintiff worked for a person who was neither the owner nor the lessee of the farm, he did not comply with para (b) of the definition during that period and was, therefore, not a labour tenant. The main problem with that argument was that it failed to adopt a holistic and continu-

ous approach to the definition of labour tenant. The plaintiff provided labour to the other owners and lessees of the farm for a cumulative period of 18 years. On a holistic and continuous interpretation of the labour tenant definition, that constituted compliance with para (b). The evidence further established that the plaintiff complied with the third part of the definition as his parents lived on the farm, had cropping and grazing rights on the farm and provided labour to the owner. Furthermore, it was not proven that the plaintiff was a farm worker.

In terms of s 16 of the Act, a labour tenant may apply before the cut-off date for the award of land, which he was entitled to occupy in terms of s 3. The court was satisfied that the plaintiff had made a valid application for the award of land and was thus entitled to the award of the land he was using and occupying as at 2 June 1995.

### Other cases

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

- cancellation of agreement due to breach;
- claim for damages – unlawful arrest and detention;
- division of joint estate;
- *inter vivos* trust;
- litigation test in shipping;
- obligations of political parties under the Electoral Code of Conduct;
- r 43 order – application for rescission;
- refurbishment of terminal at port;
- Road Accident Fund passenger claim;
- s 13(1)(g) of the Sectional Titles Schemes Management Act;
- security arrest made in terms of s 5(3) of the Admiralty Jurisdiction Regulation Act;
- summary judgment existence of *bona fide* defence;
- taxation of decision by taxing mistress; and
- termination of lease agreement.

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By  
Nadia  
Froneman

# Individual employees cannot rely on s 187(1)(c) of the LRA to claim that their dismissals are automatically unfair

*Jacobson v Vitalab (LC) (unreported case no JS 1042/19, 28-5-219) (Van Niekerk J)*

**V**an Niekerk J recently held that s 187(1)(c) of the Labour Relations Act 66 of 1995 (LRA), which provides that a dismissal is automatically unfair if the reason is ‘a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer’, cannot be relied on by individual employees.

## Facts

Jacobson (the applicant) was a founding director and shareholder of Vitalab (the respondent), as well as an employee thereof. He was also, a director and shareholder of a property-owning company, Strawberry Bush, the owner of the premises in which Vitalab is situated.

During 2016, the directors and shareholders of Vitalab implemented a retirement age of 70 years. Jacobson sought to continue working until the age of 75 – subject to his good health. To effect this wish, the parties agreed to conclude various fixed term contracts of employment, the first of which, would be terminated on 30 June 2018. During 2017, Jacobson resigned as a director of Vitalab and Strawberry Bush but remained a shareholder. A dispute arose regarding the value of Jacobson’s shares in Strawberry Bush.

In May 2018 Vitalab offered Jacobson another agreement, which suggested a settlement of the dispute regarding his shareholdings in Vitalab and Strawberry Bush. Jacobson did not accept the offer and, instead, continued working at Vitalab on the same terms.

On 9 July 2018 Vitalab sent a second

proposed agreement to Jacobson in terms of which –

he would agree to retire from active practice and resign as an employee of Vitalab;

- he would sell his shares in Vitalab for a stipulated price; and
- Vitalab would reemploy him until 31 May 2019 at a stipulated nett salary.
- Jacobson refused the offer.

On 26 July 2018, Jacobson was advised that unless he signed the agreement by 30 July 2018, his services would be terminated. Jacobson did not accept the offer and Vitalab terminated his services on 1 August 2018, with effect from 31 August 2018.

Jacobson argued that his dismissal was automatically unfair in that the main cause of his dismissal was his refusal to accept a demand in respect of a matter of mutual interest between himself and Vitalab.

## Court findings

The court had to determine whether s 187(1)(c) of the LRA finds any application in a dismissal dispute concerning an individual employee. The court found that it did not because of the following:

- Before 2014, the section provided that it was automatically unfair to dismiss an employee if the reason for the dismissal was to compel the employee to accept a demand in respect of a matter of mutual interest between employer and employee.
- In 2014 the section was amended to provide that a dismissal is automatically unfair if the reason is ‘a refusal by employees to accept a demand in

respect of any matter of mutual interest between *them* and *their employer*’ (my italics).

- The purpose of the amendment – according to the Explanatory Memorandum that accompanied the Amendment Bill – was to ‘protect the integrity of the process of collective bargaining under the LRA’. That process, by definition, contemplates combined action and participation by more than one employee.
- The new section’s wording refers to more than one employee. This demonstrates that the prohibition only applies when employers seek to force employees (plural) to extract a concession by employees to demands made in the collective context.

As such, the s 187(1)(cc) only applies where –

- an employer makes a demand;
- more than one employee is involved;
- the employees refuse to accept the demand made; and
- as a result, they are dismissed.

In the circumstances, the court held that the dispute before it did not fall within the realm of s 187(1)(c) of the LRA.

This judgment is important given that a number of individual employees legitimately relied on the pre-amendment version of the section. This is no longer possible since the advent of the new section and this recent judgment.

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## Bills

National Health Insurance Bill B11 of 2019.

## Commencement of Acts

Financial Sector Regulation Act 9 of 2017. Amendment and correction of commencement: See notice for various amended dates. GN1130 GG42677/30-8-2019 (also available in Sesotho).

## Promulgation of Acts

**Administrative Adjudication of Road Traffic Offences Amendment Act 4 of 2019.** *Commencement:* To be proclaimed. GN1080 GG42648/19-8-2019 (also available in Afrikaans).

**Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019.** *Commencement:* To be proclaimed. GN1082 GG42647/19-8-2019 (also available in Tshivenda).

**National Credit Amendment Act 7 of 2019.** *Commencement:* To be proclaimed. GN1086 GG42653/19-8-2019 (also available in isiZulu).

**National Qualifications Framework Amendment Act 12 of 2019.** *Commencement:* To be proclaimed. GN1078 GG42646/19-8-2019 (also available in isiZulu).

**Appropriation Act 24 of 2019.** *Commencement:* 12 August 2019. GN1061 GG42632/12-8-2019 (also available in Setswana).

## Selected list of delegated legislation

**Basic Conditions of Employment Act 75 of 1997**

Amendment of sectoral determination 9: Wholesale and retail sector, South Africa. GN R1036 GG42615/2-8-2019.

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

Transfer of administration, powers and functions entrusted by legislation to certain cabinet members into s 97. Proc 49 GG42657/23-8-2019 (also available in isiZulu).

**Council for Medical Schemes Levies Act 58 of 2000**

Levies on medical schemes. GenN418 GG42622/8-8-2019.

**Council for the Built Environment Act 43 of 2000**

Scope of work for categories of registration of Quantity Surveying Profession. GN1025 GG42608/2-8-2019.

**Immigration Act 13 of 2002**

Determination of places of detention of illegal foreigners pending deportation. GN1046 GG42622/8-8-2019.

**Labour Relations Amendment Act 8 of 2018**

List of commissioners to be considered for facilitation of disputes before the Labour and Business Advisory Arbitration Panel. GN R1035 GG42614/2-8-2019.

Bargaining councils and statutory councils accredited by the Commission of Conciliation, Mediation and Arbitration for conciliation and/or arbitration and/or inquiry by arbitrator from 1 August 2019 to 31 August 2021. GenN455 GG42669/30-8-2019.

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

Amendment of the Legal Aid Manual. GN R1108 GG42663/27-8-2019 (also available in Afrikaans).

**Marine Living Resources Act 18 of 1998** Abolishment of the Fisheries Transformation Council. GN1021 GG42608/2-8-2019.

**Public Finance Management Act 1 of 1999**

Statement of revenue, expenditure and borrowings as at 31 July 2019. GenN461 GG42671/30-8-2019.

**Public Service Act 103 of 1994**

Amendment of sch 2: Limpopo and North West Provinces. Proc 50 GG42669/30-8-2019 (also available in Afrikaans).

**Recognition of Customary Marriages Act 120 of 1998**

Period for registration of customary marriages: Extended to 30 June 2024. GN1045 GG42622/8-8-2019.

## Draft delegated legislation

- Proposed amendments to regulations in terms of the Banks Act 94 of 1990 for comment. GenN425 GG42634/14-8-2019 and GenN433 GG42642/16-8-2019.

- Proposed amendment of the regulations under s 17 of the Development Bank of Southern Africa Act 13 of 1997 for comment. GenN428 GG42636/16-8-2019 and GenN439 GG42657/23-8-2019.

- Draft NERSA rules for licensable distribution areas of supply in terms of

the National Energy Regulator Act 40 of 2004 for comment. GN1083 GG42650/19-8-2019.

- Non-detriment findings for black rhinoceros in terms of the National Environmental Management: Biodiversity Act 10 of 2004 for comment. GN1104 GG42660/22-8-2019.

- Non-detriment findings for white rhinoceros in terms of the National Environmental Management: Biodiversity Act 10 of 2004 for comment. GN1105 GG42660/22-8-2019.

- Non-detriment findings for aloe ferox (bitter aloe) in terms of the National Environmental Management: Biodiversity Act 10 of 2004 for comment. GN1106 GG42660/22-8-2019.

- Proposed amendment of regulations for the Accounting Standards Board in terms of the Public Finance Management Act 1 of 1999 for comment. GenN438 GG42657/23-8-2019.

- Draft general discharge authorisation in terms of s 69(2) of the National Environmental Management: Integrated Coastal Management Act 24 of 2008 for comment. GN1089 GG42657/23-8-2019.

- Revised programme accreditation policy in terms of the Project and Construction Management Professions Act 48 of 2000 for comment. BN157 GG 2676/30-8-2019.

- Repeal of regulations relating to inspection of premises in a dust control area in terms of the National Environmental Management: Air Quality Act 39 of 2004 for comment. GN1115 GG42669/30-8-2019.

- Repeal of the smoke control regulations and smoke control zone orders in terms of the National Environmental Management: Air Quality Act 39 of 2004 for comment. GN1114 GG42669/30-8-2019.

- Proposed regulations relating to coffee, chicory and tea and related products for sale in South African in terms of the Agricultural Product Standards Act 119 of 1990 for comment. GN1112 GG42669/30-8-2019.
- Repeal of regulations regarding fuel burning appliances in dwelling houses in terms of the National Environmental Management: Air Quality Act: 39 of 2004 for comment. GN1113 GG42669/30-8-2019.

## Draft Bills

Housing Consumer Protection Bill, 2019 for comment. GN1118 GG42669/30-8-2019. □



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## Striking in support of a demand for equal pay

In *Comair Ltd v National Union of Metalworkers of South Africa and Others* [2019] 8 BLLR 812 (LC), Comair had established an Employment Equity Forum (the EEF) in accordance with the provisions of the Employment Equity Act 55 of 1998 (the EEA) to deal with, *inter alia*, issues relating to allegations of discrimination in the workplace. The National Union of Metalworkers of South Africa (NUMSA) raised an equal pay grievance with the EEF, claiming pay differentiation on the basis of race or ethnicity. NUMSA demanded that Comair eliminate the alleged unfair discrimination and referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).

At the CCMA, the parties reached an agreement that the matter would be dealt with by an internal working committee. At the first meeting of the working committee, Comair tabled several proposals to deal with the pay differentiation dispute, but NUMSA rejected the proposals and demanded that the wages of the majority of the employees be increased to those of the highest paid employees. The parties in the meantime entered into a two-year wage agreement. Notwithstanding this, NUMSA again referred a pay differentiation dispute, as a dispute of mutual interest, to the CCMA. After an unsuccessful conciliation of the

dispute, NUMSA served a notice of intention to strike on Comair.

Comair approached the Labour Court (LC) on an urgent basis seeking an order declaring the strike action by NUMSA unprotected and further interdicting them from participating in such strike action. Comair contended that the strike action was unprotected for three reasons:

- The true nature of the dispute was that of an equal pay dispute, which is to be resolved by way of adjudication or arbitration in terms of the provisions of the EEA.
- The dispute was regulated by the wage agreement entered into between the parties.
- In the absence of a secret ballot, NUMSA's members could not engage in strike action.

NUMSA claimed in turn that, pursuant to Comair disclosing its pay information, it was satisfied that the pay differences were not in fact based on race or ethnicity and accordingly, the dispute did not fall within the scope of the EEA. The dispute was rather a matter of mutual interest relating to the terms and conditions of employment. Moreover, the wage agreement between the parties did not regulate the issue of pay differentiation.

The LC held that the starting point was to determine the true nature of the dispute from all the relevant facts. In these circumstances, the court must have regard to the substance and not the form of the dispute and the court is not bound by the CCMA's characterisation of a dispute. Having regard to the history of the matter, the court noted that NUMSA had publicly declared that the majority of Comair's white workers were paid more

than its black workers and had accused Comair of being a 'racist company', labelling the pay discrepancies as 'modern day Apartheid'.

An assessment of NUMSA's case showed that it demanded that employees who perform the same work in the bargaining unit should receive the same pay. Although the difference in pay was no longer alleged to be based on race or ethnicity, what NUMSA asserted was that there was no substantively good reason or justification for the difference. Accordingly, the court held that the essence of the dispute was equal pay for equal work.

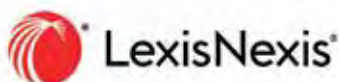
A demand for equal pay for equal work falls squarely within the scope of s 6(4) of the EEA and has to be referred to the LC for adjudication or, by consent, to the CCMA for arbitration. As NUMSA was no longer alleging that the discrimination was based on the grounds of race or ethnicity, the court found it must, therefore, be alleging discrimination on an 'arbitrary ground'. That being so, NUMSA would have to prove that the pay differentiation was based on an arbitrary ground before the LC or the CCMA in terms of s 10 of the EEA.

Since the dispute giving rise to the strike could be resolved by way of adjudication or arbitration, the strike was precluded by s 65(1)(c) of the Labour Relations Act 66 of 1995, which section provides that no person may take part in a strike if the issue in dispute is one that a party may refer to arbitration or to the LC.

The strike action was declared unprotected and NUMSA was interdicted from participating in strike action over the demand.

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## Non-payment of a retention bonus

In *Solidarity obo Scholtz v Gijima Holdings (Pty) Ltd* [2019] 8 BLLR 774 (LAC), Mr Scholtz (Scholtz), employed by Gijima Holdings as a programmer, concluded an Employee Loyalty Incentive Scheme agreement (ELIS agreement) with Gijima Holdings. In terms of the ELIS agreement, Scholtz would be paid a retention bonus equal to 50% of his annual salary in September of each year and would be required to remain in the employ of Gijima Holdings for a period of 12 months in respect of each retention bonus already paid.

Gijima Holdings later notified Scholtz of its intention to terminate the ELIS agreement. Scholtz, dissatisfied with Gijima Holdings' decision, received his final retention bonus in September 2014 and, thereafter, tendered his resignation with effect from November 2014. Gijima Holdings deducted the retention bonus from Scholtz's termination payments.

Solidarity, acting on behalf of Scholtz, instituted proceedings in the Labour Court (LC) claiming payment of the retention bonus. Gijima Holdings opposed the proceedings and argued that it was entitled to effect the deduction in terms of the provisions of the ELIS agreement as Scholtz was bound to remain in its employ for a period of 12 months following the payment of the retention bonus. Solidarity, on the other hand, argued that the deduction ought not to have been made because Gijima Holdings had unilaterally terminated the ELIS agreement and Scholtz was consequently no longer bound by its terms.

The LC held that Gijima Holdings was entitled to deduct the retention bonus because it had complied with the terms of the ELIS agreement and that the deduction did not breach s 34 of the Basic Conditions of Employment Act 75 of 1997 (the BCEA) because it had been made by agreement.

Aggrieved by the outcome, Solidarity took the LC's decision on appeal and contended that the LC erred in holding that the deduction was based on an agreement because the ELIS agreement had been unilaterally terminated by Gijima Holdings. It also argued that assuming that Gijima Holdings was entitled to make the deduction, it could not have deducted more than a quarter of Scholtz's remuneration as this is precluded in terms of s 34(2)(d) of the BCEA.

The key issue on appeal was whether Gijima Holdings was entitled to deduct the retention bonus from Scholtz's termination payments following his resignation. The Labour Appeal Court (LAC) noted that it had not been part of Solidarity's pleaded case that the deduction of the bonus was impermissible in terms of s 34 of the BCEA, as Solidarity contended on appeal. The court was of the

view that Solidarity's argument on the applicability of s 34 of the BCEA was misplaced and unsustainable. A deduction in terms of s 34 is made to reimburse an employer for loss or damage in circumstances set out in s 34(2) and was not applicable in Scholtz's case.

The purpose of the ELIS agreement was to encourage employees to remain in service for the period covered by the retention bonus. The LAC found that the retention bonus created reciprocal obligations: Scholtz was not entitled to claim payment of the bonus unless he had performed by working for Gijima Holdings for a period of 12 months after receipt of the bonus. The provisions of the ELIS agreement made it clear that employees were to repay the whole of the bonus if they terminated their services before the expiry of the retention period. Scholtz had failed to produce evidence to prove his claim that Gijima Holdings had compromised its right to claim counter-performance from him by terminating the ELIS agreement.

The LAC held that Scholtz had acted in bad faith by accepting the retention bonus and resigning a month later. Scholtz ought to have appreciated that the consequence of accepting the retention bonus meant that he was obliged to remain in the employ of Gijima Holdings for a further 12-month period.

The appeal was dismissed with costs.



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<i>ADRY</i>	African Disability Rights Yearbook	Pretoria University Law Press (PULP)	(2018) 6
<i>AHRLJ</i>	African Human Rights Law Journal	Centre for Human Rights, Department of Law, University of Pretoria	(2019) 19.1
<i>EL</i>	Employment Law Journal	LexisNexis	(2019)35.4
<i>ITJ</i>	Insurance and Tax Journal	LexisNexis	(2019) 34.2
<i>JCLA</i>	Journal of Comparative Law in Africa	Juta	(2019) 6.1
<i>Obiter</i>	Obiter	Nelson Mandela University	(2019) 40.1
<i>PER</i>	Potchefstroom Electronic Law Journal	North West University, Faculty of Law	(2019) 22
<i>PW</i>	Pensions World	LexisNexis	(2019) 22.2
<i>SAJBL</i>	South African Journal of Bioethics and Law	Health and Medical Publishing Group	(2019) 12.1
<i>SAJHR</i>	South African Journal on Human Rights	Taylor & Francis	(2018) 35.2
<i>TPCP</i>	Tax Planning Corporate and Personal	LexisNexis	(2019) 33.4
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**De Villiers, B** 'The duty on organs of state to cooperate: *Bundestreue*, cooperative government and the supply of electricity in a culture of non-payment' (2019) 3 *TSAR* 605.

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## Civil procedure

**Mabeka, Q and Songca, R** 'The interpretation and evaluation of legislative provisions relating to South African civil procedure processes in the age of electronic technology' (2019) 82.3 *THRHR* 429.

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**Cassim, R** 'The removal of directors of state-owned companies – *SOS Support*

*Public Broadcasting Coalition v South African Broadcasting Corporation SOC Limited* (81056/14) [2017] ZAGPJHC 289' (2019) 40.1 *Obiter* 147.

**Madlala, V** 'The unqualified right of access to company records by non-holders of the company's securities under South African company law – *Nova Property Group Holdings Ltd v Cobbett (M and G Centre for Investigative Journalism NPC as amicus curiae)* 2016 (4) SA 317 (SCA)' (2019) 40.1 *Obiter* 173.

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**Sonnekus, JC** 'Voortdurende inbreukmaking op 'n watergebruiksreg – verjaring, maar van welke remedie?' (2019) 3 *TSAR* 575.

**Swart, WJC** 'Section 41(3) of the Companies Act 71 of 2008 and treasury shares – something just does not add up – *Reezen Ltd v Excelerate Holdings Ltd*' (2019) 82.3 *THRHR* 517.

## Constitutional law

**Ballot, DE; Ramdin, TD; White, DA and Dhali, A** 'Ethical dilemmas in paediatric intensive care in the South African public healthcare sector' (2019) 12.1 *SAJBL* 44.  
**Chagopa, A; Makuwa, A; Shezi, N; Mhiribidi, R; Ndelu, S and Kathi, T** 'Constitutional Court statistics for the 2017 term' (2018) 35.2 *SAJHR* 237.  
**Jogee, F** 'The effect of the protecting life in Global Health Assistance policy in South Africa: Possible implications for local HIV/AIDS non-governmental organisations' (2019) 12.1 *SAJBL* 38.  
**Shai, I** 'The right to development, transformative constitutionalism and radical transformation in South Africa: Post-colonial and de-colonial reflections' (2019) 19.1 *AHRLJ* 494.

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**Van Wyk, JS** 'A comparative analysis of the "regulatory independence" of the Financial Sector Conduct Authority and the National Credit Regulator' (2019) 82.3 *THRHR* 392.

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**Prinsloo, J** 'The constitutionality of the Fee Exemption Regulations in South African schools: A critical analysis of *Michelle Saffer v Head of Department, Western Cape Education Department*' (2019) 19.1 *AHRLJ* 534.  
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By  
Ciresh  
Singh

## Eeny, meeny, miny, moe, to which court will foreclosures go? A brief analysis of recent foreclosure proceedings and a consideration of the need for specialised foreclosure courts in SA

**T**he foreclosure against a home involves a delicate balancing of homeowner and creditor rights, in particular, the creditor's contractual security rights and the homeowner's constitutional rights. Foreclosure against a home has the potential to infringe on several constitutional rights of a homeowner, *inter alia* –

- s 26 of the Constitution, which provides that 'everyone has the right to have access to adequate housing'; and
- s 34 of the Constitution, which provides for the right of access to courts.

In the context of foreclosure, s 34 entitles a homeowner with the right to have their foreclosure dispute heard in an open and accessible court. The Universal Declaration of Human Rights and several other international charters and conventions recognise the right of access to courts as a fundamental human right, which is a vital element in the protection and enforcement of other human rights. Over the decades, the right of access to courts have evolved into a basic human right under international law and is protected by most constitutions of democratic countries across the world. Due to the intricate and sensitive nature of foreclosure disputes, namely the balancing of the homeowner's constitutional rights versus the creditor's contractual rights, foreclosure proceedings in South Africa (SA) have historically always been heard in the High Court. However, the question has recently been raised as to whether or not foreclosure proceedings should be heard in the magistrate's court, which is generally more accessible to disadvantaged homeowners, in order to promote the right of access to justice in s 34 of the Constitution.

### *Nedbank v Thobejane*

On 26 September 2018, the Gauteng Division of the High Court in Pretoria delivered judgment in *In re: Nedbank Limited v Thobejane and related matters* [2018] 4 All SA 694 (GP), which found, *inter alia*, that foreclosure proceedings falling within the monetary jurisdiction of the magistrate's court (ie, below R 400 000) must be referred to the magistrate's court. In this case, Nedbank and several other creditors were questioned over the practice of initiating foreclosure proceedings at the High Court, as opposed to the magistrate's court, which was geographically located closer to the defendants. It was argued that such a

practice of proceeding out of the High Court as opposed to the magistrate's courts, which were generally more accessible and more financially viable, denied homeowners of their right of access to justice and amounted to an abuse of process.

The creditors, however, argued that it was a long-established principle that where more than one court had jurisdiction to hear a matter, the plaintiff was entitled to choose in which court to institute action. Furthermore, the creditors argued that the magistrate's court lacked the efficiency and uniformity to adjudicate complicated foreclosure issues, and it was, therefore, to the benefit of both homeowners and creditors that such cases be heard before the High Court.

The Full Bench of the Gauteng Division of the High Court found that the advent of the Constitution introduced access to justice as a primary consideration during court proceedings and this approach required the High Court to regulate their own processes with regard to access to justice. The right of access to justice, must be in accordance with constitutional imperatives, in a broader context and the rights of the plaintiff, as well as that of the defendants must be taken into consideration, as well as the roles and functions of the different courts. In principle, a plaintiff has the right to choose any court, which has jurisdiction in the dispute, but this choice should not be at the expense of access to justice. If impecunious litigants are denied proper access to justice and the High Court is unnecessarily overburdened, it would constitute an abuse of process.

Hence, it was an abuse of process to allow a matter, which could be decided in the magistrate's court to be heard in the Provincial Division simply because it had concurrent jurisdiction. If a party is of the view that a matter, which falls within the jurisdiction of the magistrate's court, should be more appropriately heard in the High Court, an application must be made setting out reasonable grounds why the matter should be heard in the High Court. The inefficiency of other courts, whether real or perceived, and the convenience of the plaintiff, will not constitute such reasonable grounds. The Full Bench further held that there is an obligation on all litigants, not only financial institutions, to consider the question of access to justice when actions are issued, and the courts have a duty to en-

sure that access to justice is ensured, by exercising the appropriate judicial oversight.

The effect of the *Thobejane* case meant that foreclosure proceedings below R 400 000 had to be brought before the magistrate's court. A Practice Directive was accordingly adopted to the effect that all civil applications, within the monetary jurisdiction of the magistrate's courts should be instituted in the magistrate's court. Many academics and legal practitioners have criticised the *Thobejane* decision arguing that the Full Bench based its findings on the over clogging of the High Court rolls and the concurrent jurisdiction of the Gauteng Courts. The court failed to take into account the complexity of foreclosure matters and the competing constitutional rights and issues that may arise. Accordingly, at the time of writing this article, the *Thobejane* judgment was brought on appeal before the Supreme Court of Appeal, and the effect of the Practice Directive was suspended.

### *Nedbank v Gqirana*

The issue of whether or not foreclosure proceedings should be heard before the magistrate's court was recently heard again by the Eastern Cape Division of the High Court in Grahamstown in *Nedbank Limited v Gqirana NO and Another; First Rand Bank Limited v Cornelliison and Another; Standard Bank of South Africa Limited v Msutu and Another; Nedbank Limited v Gcina; Firststrand Bank Limited t/a Wesbank v Twynham; FFS Finance SA (Pty) Limited t/a Ford Credit v Jabanga; FFS Finance SA (Pty) Limited t/a Ford Credit v Rolomane* (ECG) (unreported case no 1203/2018; 1298/2018; 1777/2018; 3434/2018; 3706/2018; 49/2019; 264/2019, 31-7-2019) (Lowe J and Hartle J concurring) (Jolwana dissenting). The Eastern Cape Division considered the Full Bench decision in *Thobejane*, which had found that all civil applications falling within the monetary jurisdiction of the magistrate's court should be instituted in the magistrate's court, and not the High Court.

The court found that the defendants in matters involving credit transactions (applicable to the National Credit Act 34 of 2005 (NCA)) were usually historically disadvantaged individuals. Given the category of these defendants the right of access to court has become important, as generally the magistrate's courts would be the most appropriate forum for such



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individuals to access justice. Accordingly, the common law practice that a plaintiff as *dominus litis* was entitled to choose which court to litigate from must be reconsidered in light of fundamental constitutional principles and the right of access to justice. Section 34 of the Constitution and NCA affords equality and access to justice to financially and previously disadvantaged persons, thus proper access to justice in all NCA matters (including foreclosures) falling within the monetary jurisdiction of the magistrate's court, must be brought in the magistrate's court save only if there are exceptional circumstances justifying otherwise. In other words, the court found that the NCA, properly interpreted through the prism of the Constitution, provided that the magistrate's courts be the court of first adjudication of all NCA matters to the exclusion of the High Court. The *Gqirana* judgment can thus be interpreted to have extended the jurisdiction of the magistrate's court in all matters falling within the ambit of the NCA, regardless of the amount involved.

### A need for clarity and consideration of a specialised 'Foreclosure Court'

The decisions in *Thobejane* and *Gqirana* can be applauded for being progressive in developing the common law and acknowledging the deep-seated inequalities in our society by recognising that access to justice is better served when courts are made accessible to the majority of society. Nevertheless, it is important to acknowledge that the foreclosure against a home requires strict judicial scrutiny. This fact has been emphasised by several Constitutional Court (CC) judgments and court rules (see *Jaftha v Schoeman and Others*; *Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC); *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC); r 46A of the Uniform Rules of Court; and C Singh *A critical analysis of the home mortgage foreclosure requirements and procedure in South Africa and proposals for legislative reform* (unpublished PhD thesis, UKZN, 2018)). The involvement of the court is paramount in the foreclosure process and this was emphasised by the CC in *Gundwana* where the court confirmed that judicial oversight is 'a must' during foreclosure proceedings. The foreclosure against a home involves a complex analysis of legal, financial and factual circumstances coupled with the interaction of competing constitutional rights of homeowners and creditors. Accordingly, such complex issues justify these cases being heard before specialised courts and judges. It is thus questionable whether or not our current

magistrate's courts have the capability and capacity to adjudicate such matters. Foreclosure jurisprudence has recently become uncertain due to several recent conflicting judgments and rules and there is need for certainty to be established (see *Nkata v FirstRand Bank Ltd* 2016 (4) SA 257 (CC) and *ABSA Bank Ltd v Mokebe and related cases* 2018 (6) SA 492 (GJ)). Unfortunately, South African law has not provided clarity on the balancing of homeowner and creditor rights during the foreclosure process, nor has it provided a structured or uniform framework for foreclosure practice. This *lacuna* has resulted in much inconsistency and opened the door for abuse of process.

Accordingly, I submit that the time has come for government and the legislature to consider the implementation of specialised courts to adjudicate foreclosure matters, namely 'Foreclosure Courts'. The implementation of specialised foreclosure courts and judges to hear foreclosure applications will be advantageous to both homeowners and creditors. Although foreclosures are generally negatively perceived as being the process of executing against one's home, the foreclosure process in a country also plays an important role of promoting foreign mortgage investment and capital growth in the economy (see *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA), and Niall Ferguson *The Ascent of Money: A financial history of the world* (The Penguin Press HC 2008)). Thus, the foreclosure process of a country has deeply rooted socio-economic traits that require specialised analysis and should not be trivialised. Consequently, it is recommended that every regional and district High Court and/or magistrate's court establish a 'Foreclosure Court' (ie, specialised and separate court rooms) specifically for foreclosure applications. This will create a specialised court structure for foreclosure applications and would provide the necessary priority, uniformity and expertise for adjudicating these important matters. Such a structure will further reduce the time delays and litigious costs attached to foreclosure proceedings. Most importantly, a specialised Foreclosure Court structure will provide ordinary South Africans with the ability to achieve their constitutional right of access to justice and endeavour to ensure that homeowners are on an equal legal footing with creditors during the foreclosure process (see Singh (*op cit*) for a detailed review of the proposal for a specialised Foreclosure Court structure).

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Incorporating the 2020 editions of *SAIT Compendium of Tax Legislation* and *Juta's Indirect Tax*, this value-bundle provides the content and tools you need to negotiate the complex tax landscape with confidence. These comprehensive annual publications together provide consolidated sources of direct and indirect tax Acts as well as relevant supplementary material. Relevant promulgated and proposed legislative amendments have been incorporated, updated for the 2020 editions as envisaged by the 2019 Amendment Bills as at 1 January 2020. Unique to *Juta's Tax Annuals* is the incorporation of Prelex and Pendlex presenting a comprehensive view of historic and proposed amendments of the legislation at a glance.

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The Absa Legal Claims Trust is committed to offering efficient and innovative processes for administering Road Accident Fund and Medical Negligence Claims trusts. With more than 400 attorneys nationwide using our services, our success is defined by our effective processes, and a team of experts who consistently execute their duties in the best interest of the beneficiaries, putting value first in meeting the fiduciary needs of the attorneys.

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- Administer the trusts consistently
- Apply compliance standards to administer trusts in accordance with regulations.

**For more information, contact our Regional Manager, Thobile Maphosa, on (011) 225 8453, or [thobile.maphosa@absa.africa](mailto:thobile.maphosa@absa.africa)**

We are tackling trust administration with innovation.



## Classified advertisements and professional notices

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• Vist the *De Rebus* website to view the legal careers CV portal.

**Rates for classified advertisements:**  
A special tariff rate applies to practising attorneys and candidate attorneys.

#### 2019 rates (including VAT):

Size	Special tariff	All other SA advertisers
1p	R 8 868	R 12 730
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1–30 words	R 448	R 653
every 10 words thereafter	R 150	R 225
Service charge for code numbers is R 150.		

# DE REBUS

**Closing date for online classified PDF advertisements is the second last Wednesday of the month preceding the month of publication.**

Advertisements and replies to code numbers should be addressed to: The Editor, De Rebus, PO Box 36626, Menlo Park 0102.

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Docex 82, Pretoria.

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## Vacancies



## PATON PERSONNEL

### INTELLIGENT RECRUITMENT

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Largest law firm in Africa seeks a resilient and self-starter individual to join their successful team. A primary focus on drafting, legal advisory, stakeholder engagement, conducting due diligence and sound knowledge of the relevant legal frameworks. Must be an admitted attorney with a minimum of two years' post-qualification experience, in banking and finance. Preference will be given to candidates who come from reputable international law firms with excellent academics.

#### COMPETITION SECRETARY – EE ONLY

Reputable law firm seeks a skilled competition secretary to be part of their team. This individual will be responsible for dicta-phone typing, conducting legal research, preparing accounts, file management (electronically and manually) as well as making sure the relevant systems are kept up to date at all times. Must have the ability to multi-task with a high attention to detail and excellent interpersonal skills (written and verbal). Minimum ten years' experience as a legal secretary within the competition, commercial and litigation department, relevant secretarial diploma is required, knowledge on FileSite is advantageous.

#### LEGAL ADVISER – EE ONLY

Leading bank is looking for a seasoned legal adviser within their wealth division. The successful candidate will be responsible to provide complex strategic legal solutions and business challenges to mitigate against legal risk and partner with the business. Must have demonstrated experience implementing

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#### SENIOR LEGAL MANAGER (CREDIT) – EE ONLY

Banking giant is looking for a Senior Legal Manager to join their credit team. The successful candidate must have demonstrated experience in drafting complex agreements in relation to mergers and acquisitions, project finance, structured finance, leveraged finance and debt capital markets. Cross border experience is essential. Admitted attorney, minimum of five years' post-qualification experience. Masters qualification is advantageous. Banking experience is preferred.

#### SENIOR LEGAL MANAGER – EE ONLY

Exciting opportunity to be part of a driven team. Reputable bank is looking for a senior legal manager with robust experience in transactional products and services. Primarily focused on drafting complex agreements, providing legal advice, developing and implementing processes, risk mitigation and stakeholder engagement. Cross border experience is essential. Admitted attorney, minimum eight years' post-qualification experience in a similar role. Masters qualification is advantageous. Banking experience is preferred.

**Call Tarryn on (011)325 5400 or**

**e-mail: [tarryn@paton.co.za](mailto:tarryn@paton.co.za)**

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### WANTED LEGAL PRACTICE FOR SALE

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**Contact: Donald Arthur**

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📍 12<sup>th</sup> Floor • Libridge Building (East Wing) • 25 Ameshoff Street • Braamfontein • Johannesburg

## ITALIAN LAWYERS

For assistance on Italian law (litigation, commercial, company, successions, citizenship and non-contentious matters), contact

**Anthony V. Elisio**

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

**Rome office**

Via Aureliana 53  
00187 Rome, Italy

**Milan office**

Galleria del Corso 1  
20122 Milan, Italy

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

Tel: 0039 02 7642 1200  
Fax: 0039 02 7602 5773  
Skype: Anthony V. Elisio  
E-mail: a.elisio@alice.it



## LAND CLAIMS COURT Correspondent

We are based in Bryanston Johannesburg only 2,7km from LCC with over ten years' experience in LCC related matters.

**Zahne Barkhuizen: (011) 463 1214**

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Nel Van der Merwe & Smalman Inc  
ATTORNEYS - CONVEYANCERS - NOTARIES

# Drafting of Wills Administration of Deceased Estates



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### FEE

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- The Administration of a Deceased Estate is dealt with in a professional, fast and efficient manner.

### AREAS

- Drafting of Wills in the Pretoria and Johannesburg areas.
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**FOR MORE INFORMATION, CONTACT ARIZA VERMEULEN**

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**Est 1978**

## Did you know?

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

As a free service to candidate legal practitioners, *De Rebus* will place your CV on its website. Prospective employers will then be able to contact you directly. The service will be based on a first-come, first-served basis for a period of two months, or until you have been appointed to start your articles.

**Go to the *De Rebus* website  
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