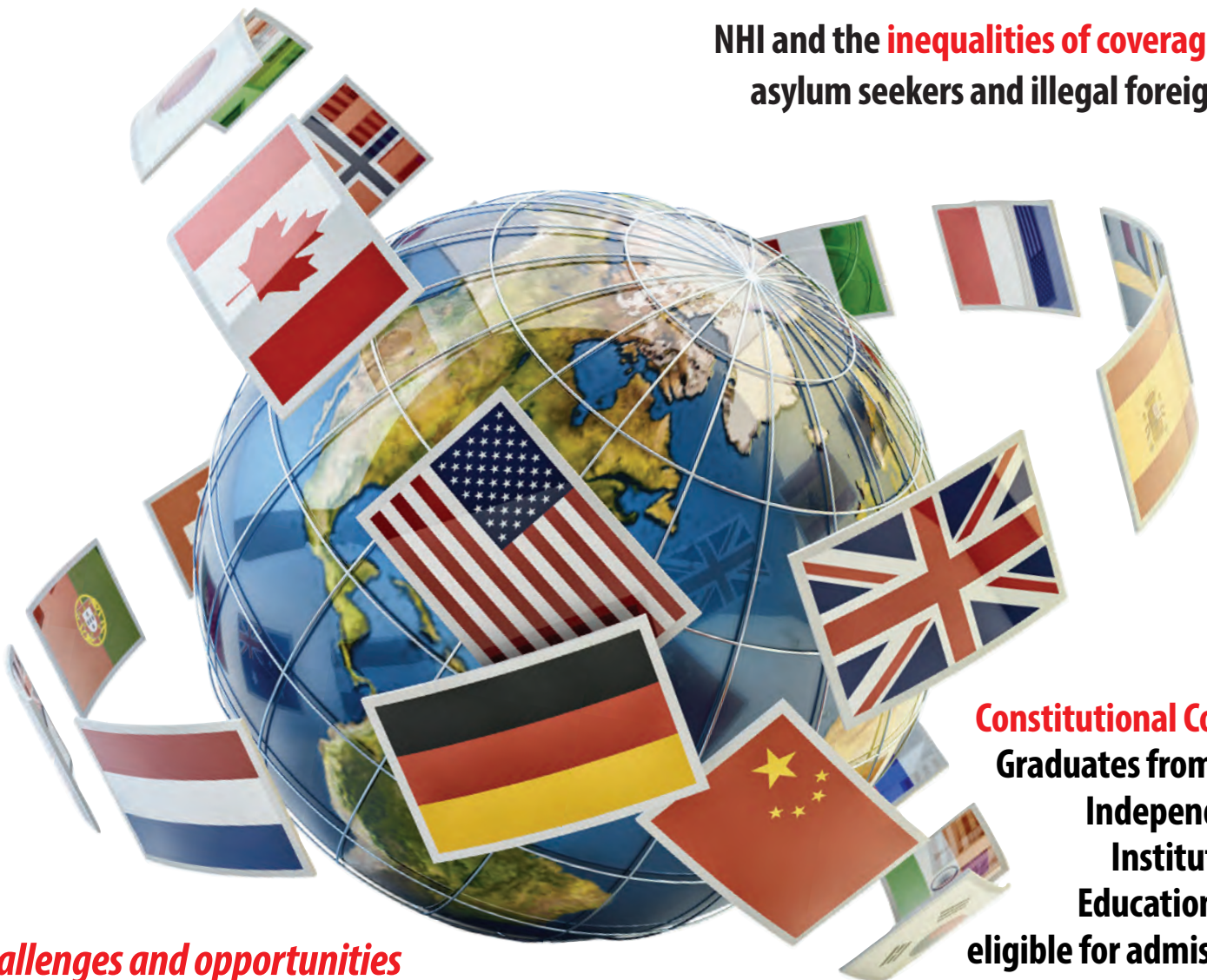


## DECRYPTING THE CLASSIFICATION OF CRYPTOCURRENCY AROUND THE WORLD

**A gap in the law:** Examining how the SCA was constrained in the *Ramolefi* case

Are there limitations on the 'child's best interests' principle?

NHI and the **inequalities of coverage** for asylum seekers and illegal foreigners



**Challenges and opportunities  
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**Constitutional Court:**  
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### In this issue:

	<b>DECRYPTING THE CLASSIFICATION OF CRYPTOCURRENCY AROUND THE WORLD</b>	8
17	<b>A gap in the law: Examining how the SCA was constrained in the <i>Ramolefi</i> case</b>	14
	<b>Are there limitations on the 'child's best interests' principle?</b>	11
	<b>NHI and the inequalities of coverage for asylum seekers and illegal foreigners</b>	
6	<b>Challenges and opportunities for the legal profession</b>	29

### Regular columns

Editorial	3
Letters to the editor	4
Seen on social media	5
Practice management	
• Challenges and opportunities for the legal profession	6
The law reports	20
Case notes	
• Constitutional Court: Graduates from the Independent Institute of Education are eligible for admission and enrolment as legal practitioners in terms of the LPA	29
New legislation	31
Employment law update	
• Dismissal for incapacity on the basis of ill health	33
Recent articles and research	34

### Articles on the *De Rebus* website:

- People and practices - January/February 2020
- LSSA news - January/February 2020
- Ethics and moral fibre of the legal profession discussed at the BLA's AGM
- Fifteen judges appointed to various Divisions of the High Court
- Judge President Legodi promises fair and fearless judgments at the Mpumalanga Division
- UP's Faculty of Law in top 100 world university rankings
- 207 magistrate positions to be filled
- Probono.Org celebrate legal practitioners who go the extra mile in doing *pro bono* work
- Common law defence of reasonable chastisement discussed at Clarks family law conference
- LSSA news - December 2019
- LSSA concerned about unreasonable and unfair increased costs imposed on legal practitioners by regulatory bodies
- LSSA welcomes first LSSA Provincial Attorneys Association
- Law Society congratulates Springboks on Rugby World Cup victory
- Law Society saddened at death of Eastern Cape legal practitioner, Gordon Pope



## FEATURES

### 8 Decrypting the classification of cryptocurrency around the world



Cryptocurrencies are currently being experimented with in multiple commercial disciplines and being used for trading to alternative payment methods. The question many governments face at this point is how to legally classify these digital currencies within their economy. Legal practitioner, **Tanya Language**, writes that the reactions of governments to cryptocurrency to date can be classified into roughly five categories. These range from most favourable to least impressive, looking specifically from the perspective of enhancing international commerce in the global economy.

### 11 NHI and the inequalities of coverage for asylum seekers and illegal foreigners

The National Health Insurance Bill B11 of 2019 (the Bill) has garnered considerable comments, questions and views from laypeople and legal commentators alike. The overarching concerns surrounding the Bill involves its constitutionality. Legal practitioner, **Spheisile Nxumalo**, discusses the noteworthy exclusion of 'asylum seekers' and 'illegal foreigners' from 'health care services' coverage.

### 14 Are there limitations on the 'child's best interests' principle?

The child's best interest principle exists in terms of the Children's Act 38 of 2005. Children and their rights are significant for the security of society and the preservation of humanity. In this article, non-practising legal practitioner, **Nokuthula Ndlovu**, explores the conviction surrounding the best interests of the child and the limitations on the principle.



### 17 A gap in the law: Examining how the SCA was constrained in the *Ramolefi* case

The recent decision of the SCA in *Director of Public Prosecutions Gauteng Local Division, Johannesburg v Ramolefi* (SCA) (unreported case no 705/2018, 3-6-2019) (Gorven AJA (Majiedt and Van der Merwe JJA (concurring)) reveals a *lacuna* in the Criminal Procedure Act 51 of 1977 (CPA), which regulates the appeal process. This lacuna in the CPA creates a wrong impression that the right to a fair trial in terms of s 35(3) of the Constitution is limited to the accused only. Regional magistrate, **James D Lekhuleni**, argues that this gap in the CPA needs to be addressed urgently in order to avoid a failure of justice.

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# CaseLines: Electronic case management system implemented

**A**s we enter a new decade, the Gauteng Division of the High Court, Pretoria and Johannesburg has made technological advances by implementing a digital/electronic case management and litigation system, named CaseLines. By the time you read this editorial, the CaseLines system will be fully implemented, as it was set to be implemented by 27 January. The system will function by way of case creation, party/legal representative invitation, document filing and uploading and case presentation. The system enables litigants to file and upload pleadings and other documents electronically and to present their case and argument during court proceedings.

Judge President of the Gauteng Division of the High Court, Dunstan Mlambo, issued Practice Directive 1 of 2020 detailing the implementation of CaseLines. In terms of this directive, Registrars are directed to create cases on the CaseLines system and, thereafter, invite parties and/or their legal representatives to each created case they are involved in. The directive further states:

‘3.5 The responsibility to upload pleadings and other relevant documents, in cases issued from the beginning of Term 1 of 2020, save for cases initiated in the Urgent Court roll, shall lie with the party responsible for each particular pleading/document in line with the Rules of Court. Electronic uploading of pleadings and other relevant documents in terms of this clause shall amount to filing as contemplated in the Rules of Court. Consequently, from the commencement of Term 1 2020, the filing of pleadings and other relevant documents shall be by way of the uploading of the said pleadings and other relevant documents on the CaseLines system. No hardcopy pleadings and other relevant documents shall be allowed on all cases designated for handling through the CaseLines system and created on the system. The exception shall be where the party(s) is unrepresented.’

In regard to judgments that are

handed down subsequent to proceedings conducted on the CaseLines platform, all judges’ secretaries are to ensure that the judgments to such matters are uploaded onto CaseLines and linked to the cases concerned. The practice directive also states that judges’ secretaries are to ensure that the outcome of each case is recorded on the case’s CaseLines system cover page, to reflect the endorsement on the particular court file. In respect to all cases where a draft order is made an order of court, especially in the unopposed motion and civil trial courts, the Registrar shall stamp each draft order accepted as such by the judge on the same day. The judge’s secretary shall, thereafter, ensure that the stamped draft order is uploaded onto the respective case on the CaseLines system.

During a briefing session with stakeholders late last year, Judge President Mlambo noted that the manual system had many challenges such as the fact that files sometimes disappeared and that there were also instances of fraud taking place. He added: ‘Files will be able to be traced online, the system will also alert us to what happened to the file or who was responsible for the disappearing file’. He pointed out that the aim of CaseLines is to enable the efficiency and effectiveness of court administration by adding value through evidence management in High Courts across South Africa.

Judge President Mlambo said that implementing CaseLines, will be add-



Mapula Sedutla – Editor

ing value by enabling all key role players within the court process to experience similar proceedings and high-quality customer service. ‘We want to ensure quality archiving and record management,’ Judge President Mlambo said. He pointed out that files will be stored on a secure and appropriate cloud storage system. ‘Key to it is that you can create a case on the system, or the Registrar will create the case, but we want the legal practitioners to assist us in uploading the cases on the system, it is a very easy process,’ he added.

- See Kgomoitso Ramotsho ‘Gauteng High Courts on a journey to go paperless’ 2019 (Oct) *DR*.
- To view Practice Directive 1 of 2020 and the reference guide, visit [www.derebus.org.za](http://www.derebus.org.za)



## Would you like to write for *De Rebus*?

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

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

- Please note that the word limit is 2000 words.
- Upcoming deadlines for article submissions: 17 February, 23 March and 20 April 2020.



# 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.

### Property Practitioners Act – incentives

In terms of s 66 of the Property Practitioners Act 22 of 2019 published in the *Government Gazette* (GN1295 GG42746/3-10-2019), a property practitioner 'may not in any way offer or receive financial or other incentive to, or otherwise influence, a person who at the request of a seller or lessor issues a certificate required by law, based on his or her expert opinion, in respect of –

- (a) the condition or defects of electrical wiring;
- (b) the presence of vermin;
- (c) the presence of water or damp; or
- (d) any other relevant matter or condition, which may be provided for in any law.'

A contravention of the above is an offence.

It is interesting that the receipt of financial or other incentive to influence a seller to use a particular conveyancer, is not specifically provided for.

It is well known that conveyancers offer substantial incentives to property practitioners to refer conveyancing to them.

The extent of these incentives must be far more than the incentives offered by electricians and vermin and insect exterminators, or is the reason for the omission

in this particular section because such an incentive amounts to the common law criminal offence of bribery and corruption?

Or perhaps that property practitioners do not even influence the seller, they just appoint the source of the incentive without consulting the seller.

When the seller discovers that their matter has been referred to an unknown conveyancer, they are met with a demand for wasted fees.

A third possibility is that this form of bribery and corruption has now been accepted as standard practice.

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

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

### Superannuation – a common law remedy

Thank you to *De Rebus* and to the authors, Marius van Staden and Stephen Leinberger, for the interesting article on superannuation ('Superannuation – a common law remedy' 2019 (Dec) *DR* 20).

From experience I know that, despite the risks mentioned, clients usually do not want to spend yet more money on dismissing an action that is unlikely to

go ahead. It does mean that the court file and the legal practitioner's file have to be kept open indefinitely in case something happens.

When this problem arose in my office years ago, I urged the authorities, including the local Judge President and the Rules Board to do something about it, but I could not persuade anybody to take action.

There needs to be a superannuation provision in both the uniform rules of court and rules regulating the conduct of the proceedings of the magistrates' courts.

Plaintiffs often institute action in the hope that the other side will be scared off and when that does not happen the matter goes into limbo with consequent inefficiencies and risks. Finality of litigation is, as the article points out, in the public interest.

**Patrick Bracher** is a

legal practitioner at Norton Rose Fulbright South Africa Inc in Johannesburg.

### Legal opinion by Krish Govender

Please take note that the article 'The case for a differentiated rate of payment of



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subscriptions by legal practitioners in SA to the LPC at the rate of 2% of taxable income (arising from the highest levels of income equality in the world)' 2019 (Dec) DR 39 contains an oversight as Mr Govender's calculation is based off of a rate of 0,2% and not 2% as the article title and content suggests.

**Jason de Klerk**

LLB (NMU) is a legal practitioner at Huxtable Attorneys in Grahamstown.

## Erratum

The article 'The case for a differentiated rate of payment of subscriptions by legal practitioners in SA to the LPC at the rate of 2% of taxable income (arising from the highest levels of income equality in the

world)' 2019 (Dec) DR 39 was published incorrectly, and should read: 'The case for a differentiated rate of payment of subscriptions by legal practitioners in SA to the LPC at the rate of 0,2% of taxable income (arising from the highest levels of income equality in the world)'.

The paragraph on p 40 of the article should read: 'It cannot be unjust in the economic climate in SA for a wealthy legal practitioner to pay R 40k as subscription if their taxable income for the year is R 20 million. This works out at the rate of 0,2% of taxable income. The benefit for all the legal practitioners is that this will be tax deductible.'

De Rebus would like to apologise for the mistake and for any inconvenience caused in the matter.



## Seen on social media



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



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I have placed my own ad twice these past six months, and uhm... things have not been turning out as expected.

**Sharon Nelisiwe Skosana,**  
LLB graduate seeking articles

*Legal practitioner, Keith Braatvedt, explains who (the liquidators or the business practitioners) benefits when a company is wound up.*



Thank you, Keith, enjoyed your article.

**Renè Bekker,**  
legal practitioner

*The Law Society of South Africa has voiced its concern about the proposed prescribed fees on legal practitioners by regulatory bodies.*



Yes, it is crazy. More and more legal practitioner's will close their doors.

**Ida van der Schyf,**  
legal practitioner

*Why not add writing an article for De Rebus to your New Year's resolutions?*



Exactly! Good idea!

**Hilgard v Huyssteen,**  
[@Simply\\_Hilgard](https://twitter.com/Simply_Hilgard)

*The Western Cape branch of the BLA held a high tea in October under the theme 'I am not next'. Speakers included Deputy Minister of Justice, John Jeffery and Western Cape High Court Judge, Babalwa Mantame.*



Congrats @bla\_wc and a big thank you to @DeRebusJournal and @DOJCD\_ZA and @JhjSA for the incredible support!

**Diana Mabasa**  
[@DianaMabasa](https://twitter.com/DianaMabasa)

*The Ministry of Justice and Correctional Services announced that it will be filling 207 magistrate positions, and more than half of the new incumbents are female magistrates.*



Haven't read good news in our legal profession in a while. This and the @NPA\_Prosecutes Aspirant Prosecutor Programme returning are definitely good news. 20Plenty right?

**Boitumelo, @Melo\_Mothapo**

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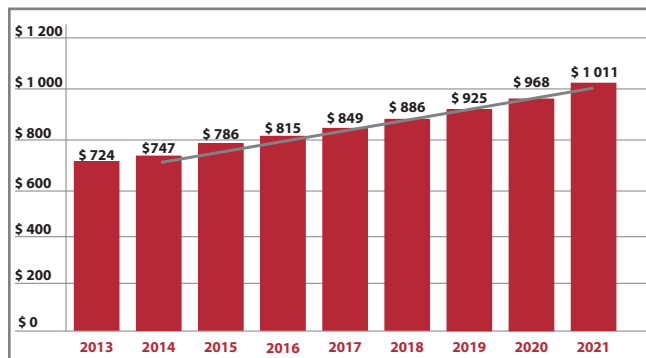
# Challenges and opportunities for the legal profession

The Law Society of South Africa (LSSA) and LexisNexis published a report titled 'Attorneys' Profession in South Africa 2016 Review' (see [www.lssa.org.za](http://www.lssa.org.za)). Legal practitioners, domestically and globally, are faced with a number of new challenges. Some of the challenges create opportunities for growth in the profession (an upside risk), while others will require that law firms need to adapt the manner in which certain areas of practice are conducted. I am not aware of any updated study in South Africa (SA) after the publication of the 2016 report. It has been noted that 3% of the respondents to the Deloitte 'Future Trends for Legal Services Global Research Study' ([www.2deloitte.com](http://www.2deloitte.com)) (referred to below) were from Africa and the Middle East. However, it is not known what number of South Africans, if any, participated in the survey.

## An overview of some published studies

A study by Qian Hongdao, Sugra Bibi, Asif Khan, Lorenzo Ardito and Muhammad Bilawal Khaskheli titled 'Legal Technologies in Action: The Future of the Legal Market in Light of Disruptive Innovations' ([www.mdpi.com](http://www.mdpi.com)) predicts that the growth of the global legal-services market will exceed US\$ 1,011 trillion in 2021. The authors have tracked the predicted growth in the global legal-services market on the table below:

The Deloitte Legal study likewise found that the legal service



es market is growing. The major areas of growth identified in the Deloitte study were regulatory compliance (49%), mergers and acquisitions (42%) and litigation (39%).

Patrick Dixon in '10 Key trends that will radically change the future of law, lawyers, law firms, corporate legal, attorneys, legal counsel – If you started out with a blank sheet, how would you design a third Millennial Law Firm?' ([www.globalchange.com](http://www.globalchange.com)) has listed the top ten trends for legal practice depending on geographical location. These trends are of relevance to the legal profession in SA as will be noted from the comments made in respect of each one:

- **Deregulation** – the expected changes include the competition and the manner in which legal services are marketed. The rules relating to the marketing of law firms have – in the last decade – been relaxed in SA. Partnerships in a legal practice is still reserved for legal practitioners (s 34 of the Legal Practice Act 28 of 2014 (the LPA)) and there is a prohibition on the sharing of professional fees (s 34(5)(b) of the

LPA read with para 12.1 of the Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities) with non-legal practitioners. Legal services in SA can only be carried out by legal practitioners in terms of the LPA. This has not, however, prevented other organisations, such as audit firms (through their consulting service divisions), banks (by offering drafting of wills and estate administrative services) and other professions, such as estate agents from making inroads into areas of work previously reserved for legal practitioners.

- **Outsourcing** – this includes the area of document preparation. Legal process outsourcing (LPO), according to the study, is expected to grow rapidly as corporations become more confident that issues relating to confidentiality and security are being dealt with. This shift, according to the report, will see a huge growth of new legal graduates in nations like India, for example, over 20 000 a year. It is not known to what extent LPO has been taken up by SA law firms.
- **Globalisation** – many law firms have globalised in order to keep pace with the requirements of their multinational clients and are offering specialist advice in many different countries, as well as centres of excellence in specialty areas. The South African legal market has also experienced the entry of a number of international and multinational law firms in recent years.
- **Virtual law firms** – law firms have had to reconsider the manner in which talent is drawn. The long-held idea that all the practitioners in a law firm have to be based in the office in order to service clients and generate fees is changing. Many practitioners now work off-site and even on a more flexible basis. This, however, requires an investment in appreciate technological solutions to enable the legal practitioners in the firm to service clients offsite. The recruitment model will need to look for legal practitioners who have the ability and discipline to work unsupervised and also, in many instances, outside of normal working hours.
- **Legal search engines, and other web-based legal services** – legal-technology companies have changed the way in which members of the public access legal services. The Internet and social media have also changed how consumers locate and search for legal practitioners, whether by geographical location or area of specialisation. The report by Qian Hongdao *et al* indicates that between January 2011 and May 2018, a total of just under US\$ 2 billion has been invested globally in the legal technology start-up landscape.
- **Commoditisation** – separating out all repetitive tasks, or those which do not require technical legal knowledge and skills, from those that require a full legal training and experience and the use of computer systems to produce a growing range of sophisticated documents. There are a number of service providers, which now offer technological solutions, which have a host of precedents for various documents and correspondence.
- **Multichannel communications** – many law firms are lagging far behind their clients in respect of the use of social media, video links and other means of digital contact.
- **Growing numbers of lawsuits in every nation** – as citizens



become more aware of their legal rights and opportunities to claim compensation. This observation is in line with the outcome of the Deloitte survey in which the respondents expected growth of 39% in the area of litigation.

- **Reduced public funding for those on low incomes in court cases** – as part of austerity cutbacks.
- **Rapid growth in complexity of legislation and regulations** – particularly those in financial services as a direct result of recent economic crisis. This is also an area highlighted in the Deloitte study with the highest number of respondents (49%) expressing a need for growth in this area of practice. The changes in the regulation of the financial services sector was as a response to the general financial services crisis. The financial services sector in SA has undergone significant changes in the last two years with the introduction of the Twin Peaks model of regulation under the Financial Sector Regulation Act 9 of 2017 and the Solvency Assessment and Management (SAM) regime in terms of the Insurance Act 18 of 2017. The SAM model in SA is similar to the Solvency II model in place in other jurisdictions. Expertise gained in the financial regulation sector will place legal practitioners in good standing to service the financial services in SA and abroad. The new regulatory regime has included the introduction of a number of other considerations such as the Treating Customers Fairly approach. In the two decades, SA had also introduced a number of other pieces of legislation aimed at consumer protection – these include the National Credit Act 34 of 2005 (the NCA) and the Consumer Protection Act 68 of 2008 (the CPA). The introduction of the NCA and the CPA resulted in the emergence of two new areas of practice in which a number of firms have specialised. Similarly, the introduction of the Twin Peaks and SAM models of regulation create new areas of possible specialisation for legal practitioners.

Legal practice needs to evolve in order to meet the unmet expectations of their existing (and potential new) clients. The Deloitte study found that the consumers of legal services had a number of unmet expectations, being –

- the need for integrated, multi-disciplinary services across borders beyond legal advice;
- improved use of technology;
- an increased need for legal services in the area of regulatory and global compliance; and
- a change in the fee pricing model with participants requiring fixed or capped fees and the introduction of some form of value-based pricing.

Technology is a recurring topic in the material published on the challenges facing the legal profession. Clients expect legal practices to increasingly use technology. The report on the 2016 study conducted by the LSSA and LexisNexis noted that: 'The online world has become a central force in almost every industry, and the legal fraternity has eagerly embraced it, especially when it comes to research.'

Online marketing, service provision and the use of social media are now regarded as a priority for many firms, whereas networking remains a firm focus for business growth strategies.

As firms grow their service portfolios, they expand to include further practitioners and seek out new ways to attract and retain clients, they are responding positively to a fast-changing environment.'

Candidates seeking positions in law firms have also raised the importance of technology (see 'What are some of the biggest challenges currently facing law firms?' [www.lawcareers.net](http://www.lawcareers.net)). The article notes that: 'In our ever-changing, always-moving world, one of the biggest challenges faced by law firms, whether big or small, is technology. Technological change can undoubtedly positively impact a firm – for example, technology has sped up international communication considerably and automated basic tasks, thus freeing up solicitors' time for other work. However, since technology changes so fast

and there is so much uncertainty about its potential success, it is often hard for law firms to keep up. If companies do not follow a new technological trend, they risk being left behind. However, if they invest in a new technology that proves to be a hindrance, they lose out. Thus, firms have to perform a difficult balancing act and their choices can impact greatly the company's progress. In addition, with technology comes the ever-increasing threat of cybersecurity, which law firms have to be particularly sensitive to, given the nature of their work.'

There are many articles and reports published on the risks facing law firms. While there may be some variations with regard to the listed risks (based on the data samples, area of focus of the research or the geographical area covered), cyber risk is included in all top ten of all the risk surveys. Readers can, for example, have regard to the following surveys:

- The Aon 2019 Global Risk Management Survey ([www.aon.com](http://www.aon.com), accessed 18-11-2019).
- PWC UK 2019 Annual Law Firms' Survey ([www.pwc.co.uk](http://www.pwc.co.uk), accessed 18-11-2019).
- '7 of the biggest risk management challenges faced by law firms today' (<https://businesstown.com>, accessed 18-11-2019).
- Yvonne Jooste 'Cybercrime: Law firms under threat' ([www.tech4law.co.za](http://www.tech4law.co.za), accessed 18-11-2019).

Cyber threats against law firms and their clients are on the increase internationally. Legal practices must ensure that appropriate measures are implemented to protect themselves and their clients from cyber risks. Cyber risks pose a threat to the funds and the data held by law firms.

## Conclusion

It is hoped that legal practitioners in SA will have regard to the outcomes of the various studies on the challenges facing the profession. The lessons learned will enable the legal profession to identify possible areas of growth in the future and to meet the expectations of clients. In this way, legal practice will remain relevant and sustainable in the long-term.

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# Decrypting the classification of cryptocurrency around the world



By  
Tanya  
Language



Picture source: Gallo Images/Getty

## Governments that have categorised cryptocurrency as legal tender or currency

Japan went all in declaring bitcoin legal tender during April 2017, while Sweden has chosen to declare bitcoin a legal currency.

When considering the issue of legal tender versus legal currency specifically, it is always worthwhile looking at Scotland's banknotes, which are not even legal tender but have been surviving in the economy just fine. A currency is, therefore, perfectly capable of existing without legal tender recognition. Scottish Bank notes are recognised as legal currency by the United Kingdom (UK) Parliament. It is proposed that governments consider the recognition of cryptocurrencies with the

Cryptocurrencies are currently being experimented with in multiple commercial disciplines and being used for trading to alternative payment methods. The question many governments face at this point is how to legally classify these digital currencies within their economy.

In his blog 'Can information (data) be an object of legal rights?' private international law Professor Koji Takahashi comments on the digital nature of cryp-

tocurrency, which results in the risk of them being classified as mere information or even just data. In many legal systems data cannot readily be the object of rights and obligations and only very limited exceptions may exist.

The reactions of governments to cryptocurrency to date can be classified into roughly five categories as proposed below. These range from most favourable to least impressive looking specifically from the perspective of enhancing international commerce in the global economy.



purpose of being an alternative payment method as legal currency.

Further developments in Japan include the experimental MUFJ Coin launched in 2017 by the Mitsubishi UFJ Financial Group. The data collected from the experimental project will assist Japan in launching J-Coin in preparation for the 2020 Tokyo Olympics. J-Coin will be pegged to the Yen and will thus represent a nationally backed stable coin.

Bitcoin is the only cryptocurrency that has ventured this far in its legal recognition.

## Governments that have categorised cryptocurrency as an asset or something less than legal currency

Australia treats cryptocurrencies like money and the purchase of such currencies are no longer subject to goods and services tax, but they class it as property. New Zealand on the other hand sees it as a payment system and, therefore, not a currency.

Estonia declared all cryptocurrencies as an 'alternative payment method' while Germany qualified bitcoin as 'units of account' in terms of the German Banking Act. They are thus not legal tender in these countries but can be used for commercial purposes.

The Philippines recognise only bitcoin as a 'legitimate payment method' and in the UK it is equated with 'private money'. This classification as an alternative payment method or alternative to money is supported for all cryptocurrencies used in legal commerce for payment purposes. It is, however, discouraged to classify cryptocurrency as being mere property leading to barter transactions.

Brazil, Finland and Israel categorised bitcoin as an asset while Canada and the Netherlands have stated that transactions involving bitcoin are barter in nature. Singapore also treats transactions involving any virtual currency as a barter transaction and sees the supply of such currencies as a service. In the United States (US) regulations are currently all over the place with each state approaching the situation independently and diversely from the next. The Internal Revenue Service has, however, categorised cryptocurrencies as property. This classification is not supported as it hampers the digital evolution of money and international commerce and trade due to the barter nature of the transactions.

Norway and Slovenia have confirmed that bitcoin does not meet the requirements for classification as money or currency while Turkey confirmed that bitcoin does not qualify as e-money.

## Governments that have banned the use thereof within its territorial borders

The Financial Action Task Force (FATF) listed the potential considerations of governments that decide to prohibit activities related to virtual currencies based on their own risk assessment and included consumer protection, safety and monetary policy among them in the 'Guidance for a risk-based approach: Virtual currencies'.

The most significantly negative reactions are out of Bangladesh that has warned against the use of any of the cryptocurrencies and threatened users with jail time followed by Venezuela where people are arrested and allegedly tortured if found using bitcoin. Bolivia, Ecuador, Iceland, Kyrgyzstan have all banned the use of bitcoin. Lebanon has a decree they issued in 2000 prohibiting the use of all forms of 'e-money'.

All forms of digital currency are outlawed in Nigeria and trading in any cryptocurrencies is illegal in Iran. According to a global benchmarking study done at Cambridge University, the Nigerian Naira is one of the 30 supported national currencies in the cryptocurrency payment industry and 15% of this industry participated from a country where cryptocurrency is illegal. This begs the question of the success of government regulation in this regard. The FATF in its 2015 guidance note mentioned above urged governments to consider whether prohibition of activities relating to virtual currency would result in them simply being driven 'underground'. It is proposed that regulation will not cure the use of cryptocurrency for illegal purposes just as Anti-Money Laundering/Countering Financing of Terrorism regulations did not cure all forms of abuse in the existing financial industry.

In Russia, the finance ministry developed a draft law banning 'electronic monetary surrogates', which include cryptocurrencies, and transactions involving them. The Central Bank of the Russian Federation warned against the use of cryptocurrencies in exchange for goods and services, or anything. Thus discouraging its use in commerce.

India's Reserve Bank have banned regulated entities including banks and payment gateways from providing any services to cryptocurrency businesses thus disabling their ability to provide deposit and withdrawal services in Rupees. An exchange platform Unocoin has reacted by deploying machines like Automated Teller Machines where Rupees may be deposited and withdrawn directly thus merely and quite elegantly circumventing the ban.

In China, a company Tencent launched QQ Coin to allow users to make payment for goods and services offered by the company in this virtual currency. However, soon QQ Coin was being traded between people directly, being exchanged on gaming platforms and accepted by merchants as a form of payment. The Chinese government decided in 2009 to ban the use of QQ Coin for anything that was not related to Tencent in the fear that it would impact the 'real' financial system. This means that even though QQ Coin was not a decentralised virtual currency, it threatened the financial market enough in the territory of China for its government to react with regulations limiting this effect. Things have since then only gotten worse in China, when in 2013 the People's Bank of China banned bitcoin transactions from being processed with its financial institutions.

Governments must consider the cross-border element of virtual currency payment products and services as part of its risk mitigation strategy. This stresses the importance of universal recognition and regulation of cryptocurrencies in order to avoid international commercial interactions being treated differently in different jurisdictions due to un-relatable regulatory reactions to them.

Let us assume that a Japanese seller and Nigerian buyer enter into a contract of sale where the goods are paid for by way of bitcoin and arrive damaged in Nigeria. The buyer is now not only without recourse in his own country but has committed an offence and risks action being taken against him.

## Governments that have not done anything

Austria, Belgium, Cyprus, France, Greece, Indonesia, Ireland, Lithuania, Pakistan, South Korea have not made any categorisations in this regard. The consequence of not categorising cryptocurrency is that the users thereof are left without any legal protection.

Columbia and Croatia have gone as far as to advise that cryptocurrencies are not illegal but have not proceeded to categorise them in any way.

In South Africa, the South African Reserve Bank (SARB) holds the authority to issue legal tender that is capable of being offered as payment a creditor must accept in discharging an obligation. The SARB issued a Position Paper on Virtual Currencies during 2014, which contains a verbatim definition of virtual currency conceptualised by FATF and is thus not legal tender or e-money in this territory. The SARB acknowledges the interactive potential of cryptocurrency with the real economy and notes the increased acceptance by merchants exerting competitive



pressure on existing payment systems resulting in integration with them.

A South African citizen and/or merchant, therefore, have no recognised protection against the risks of cryptocurrency but are free to use it for commercial purposes as they are not banned. JP van Niekerk and WG Schulze in *The South African Law of International Trade: Selected Topics* (SAGA Legal Publications 2011) advise that from a South African perspective, the buyer's main obligation in a contract of sale relates to the payment of the purchase price, which is required to be in legal tender. This is of course unless the parties agree otherwise. Such agreements to the contrary are usually as a result of trade usages and thus nothing prevents the parties from agreeing that payment be made in cryptocurrency.

The FATF identified lack of regulation and investigation by countries as a barrier to international cooperation on the area of cryptocurrencies. Governments that have not at least categorised cryptocurrency may want to consider investigating the issue more proactively.

### Governments that have launched their own cryptocurrency or have had cryptocurrency launch against them

In 2014, the cryptocurrency Aurora coin was distributed 50% of its coins via airdrop to citizens of Iceland via the unique identification numbers issued to citizens. Aurora coin was, however, not launched by the Icelandic government but by an unknown creator or creators as an alternative to bitcoin in protest against the government's flawed financial system that categorised cryptocurrency as a fringe activity. This was the

*'The FATF identified lack of regulation and investigation by countries as a barrier to international cooperation on the area of cryptocurrencies. Governments that have not at least categorised cryptocurrency may want to consider investigating the issue more proactively.'*

first ever country-based cryptocurrency but unfortunately it was not a great success and only ten percent of the Icelandic population claimed their coins and even those that claimed them did not have a place to spend them in Iceland.

The Marshall Islands government are issuing a cryptocurrency called the Marshall Islands sovereign (SOV) to act as legal tender within the territory.

Venezuela launched the Petro in early 2018, the first cryptocurrency issued by a government in an attempt to circumvent the now worthless Bolívar. The Petro is linked to the country's oil reserves and thus serves as another nationally backed type of stable coin.

Other governments that have allegedly been considering a similar launch of their own cryptocurrency is Iran, Turkey and Brazil. A strange consideration for governments that have outlawed the other cryptocurrencies within their ter-

ritories. Perhaps the ban was really motivated by the preparation and launch of a government cryptocurrency. Great circumspection ought to be given to these national cryptocurrencies as they may be aimed at circumventing sanctions imposed on the countries. The political agenda behind certain government currencies cannot be avoided and for that reason a decentralised cryptocurrency like bitcoin is preferred as an alternative form of payment more likely to be accepted globally.

### Conclusion

From face value, it is easy to highlight a number of future commercial concerns in international trade if this kind of unilateral approach is retained by governments. Of great concern is whether transactions involving cryptocurrency will be classed as commercial transactions or barter transactions given the payment method and its classification within the country in question.

Former US congressman Ron Paul proposes that the requirement for legal tender recognition be abolished completely and for currencies to be allowed to compete against each other. This might be to economically exotic for most governments, but it is suggested that they classify cryptocurrency as at least an alternative form of payment in order to allow for the international commerce to include cryptocurrency among its forms of payment in international trade where it can be most beneficial to the global economy.

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# NHI and the inequalities of coverage for asylum seekers and illegal foreigners



By  
Sphehile  
Nxumalo

The National Health Insurance Bill of 2019 (the Bill) has garnered considerable comments, questions and, views from laypeople and legal commentators alike. The overarching concerns surrounding the Bill involves its constitutionality. These concerns are not arid abstractions. Somewhat banal but noteworthy is the exclusion of 'asylum seekers' and 'illegal foreigners' from 'health care services' coverage. In particular, s 4(2) of the Bill states that asylum seekers and illegal foreigners are only entitled to 'emergency medical services' and 'services for notifiable conditions of public health concern'. Good citizens will pause here and flip through ch 2 of the Bill of Rights contained in the Constitution.

It is trite that our Constitution fares

up there with the most progressive Constitutions in the world because it guarantees the Rolls-Royce of fundamental human rights rooted in the ideals of human dignity, among others.

Section 27(1)(a) of the Constitution states that:

'Everyone has the right to have access to –

(a) health care services' (my italics).

This is where we must ask: Is a law that deliberately excludes a person from access to health care services constitutionally suspect? If so, are there compelling logical policy imperatives for such deliberate exclusion that can be regarded as justifiable limitations under s 36 of the Constitution? These questions, arguably, would make for some interesting jurisprudential tap-dancing in the courtroom.

## Health care services versus emergency medical services

A proper ventilation of the above questions requires a closer look into the scope of health care services in comparison with emergency medical services and 'services for notifiable conditions of public health concern'. The textualists approach is to have regard to the definitions given to these concepts. The Bill defines 'emergency medical services' as 'services provided by any private or public entity dedicated, staffed and equipped to offer pre-hospital acute medical treatment and transport of the ill or injured.' Lexical semantics would open a Pandora's Box for this definition in the Bill. Nevertheless, the Bill then



proceeds to define 'health care service' as –

- '(a) health care services, including reproductive health care and emergency medical treatment, contemplated in section 27 of the Constitution;
- (b) basic nutrition and basic health care services contemplated in section 28(1)(c) of the Constitution;
- (c) medical treatment contemplated in section 35(2)(e) of the Constitution; and
- (d) where applicable, provincial, district and municipal health care services.'

Again, this definition does not contribute to our understanding of the health care services purported to be covered by the National Health Insurance Fund (NHI Fund), which will be established, as much as towards our asking: 'What is health care services for purposes of the Bill?' As regards 'services for notifiable conditions of public health concern', the Bill is mum on this – thereby most likely leaving it to the discretion of the NHI Fund to decide on a case-by-case basis.

The White Paper on 'National Health Insurance Policy' (GN627 GG40955/30-6-2017) recognises that the South African health system is organised into three areas of health care service delivery, namely –

- primary health care services;
- hospital and specialised services; and
- emergency medical services.

Health coverage for asylum seekers and illegal foreigners starts and stops with emergency medical services. At a

general level, primary health care and hospital and specialised services include continuum coverage for sexual and reproductive health, rare diseases and dread diseases. Emergency medical services coverage include pre-hospital care for, in Madala J's words in *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), a 'dramatic, sudden situation or event which is of a passing nature in terms of time.'

This contextual setting is vital in measuring the degree of exclusion of asylum seekers and illegal foreigners from access to health care services. In particular, these classes of persons will not be covered and will not have the privilege of the NHI Fund's backing in accessing sexual and reproductive health, rare diseases and dread diseases health care services, among the matrix of health care services. At the very least, primary health care level coverage for asylum seekers and illegal foreigners would be sensible. Primary health care level is the first point of contact with the health system and associated with fewer visits to specialists and to emergency rooms. This would allow asylum seekers and illegal foreigners to present at the primary health care level with any health care requirement (whether for promotive, preventive, curative; rehabilitative, palliative or community-based mental health). At this stage, the Bill remains mum about the scope of 'services for notifiable conditions of public health concern', being what it promises to asylum seekers and ille-

gal foreigners in addition to emergency medical services. One can reasonably deduce that whatever these services are, they are not health care services as defined above, otherwise this would be in expressed terms in the Bill.

## Everyone as passenger

The s 27 omnibus has many passengers. But its most famous passenger is 'everyone' who was born in Sharpeville on 10 December 1996. The Cambridge Dictionary defines this passenger as 'every person'; I might add, irrespective of creed, nationality and even legality of being in South Africa (SA). This much can be gleaned from Sachs J's seminal judgment, *S v Makwanyane and Another* 1995 (3) SA 391 (CC), wherein he noted that 'everyone' includes, in the context of that case, the most abominable of human beings. The venerable reasonable person (revered by courts for centuries) would, therefore, struggle for reason not to extend the same attitude or thinking in the context at hand, that is: Political refugees and illegal foreigners are ticket holders in the s 27 omnibus.

The objective of the Bill is illustrative. It succinctly and judiciously provides that it is intended to achieve universal access to quality health care service in SA in accordance with s 27 of the Constitution through the NHI Fund. The Bill also cites two notable international law instruments to bolster its objective. In the first instance, it draws from art 12 of the International Covenant on Economic,

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Social and Cultural Rights 1966, which provides for the right of 'everyone' to the enjoyment of the highest attainable standard of physical and mental health. Secondly, it draws from art 16 of the African Charter on Human and People's Rights 1981, that is couched in substantially similar language to art 12 of the International Covenant. South Africa is bound to both of these international instruments. Any crevice in local legislation or policy framework that does not incorporate the ideals articulated in these international instruments and the Constitution deserves due scrutiny.

Viewed through these lenses, any legislative provision or policy framework that suggests that we have not reached that high plane of constitutional morals that permit us to extend the same privileges to the people of the earth who are in SA illegally that we extend to those within SA legally should and ought to be constitutionally questioned. Simply put, a deliberate exclusion of a person, any person, from access to health care services is constitutionally suspect.

### Justifiable exclusion

Constitutionally speaking, the rights enshrined in the Bill of Rights can be limited. In terms of s 36(1) of the Constitution, the general requirements for the limitation of any right is that it may be limited only in terms of law of general application 'to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. The reference to 'law of general application' gives effect to the formal aspects of the rule of law or legality, namely that all limitation must be authorised by legal rules. In investigating the second part of the general test that refers to the reasonableness and justifiability of a limitation of the right, the factors in s 36(1)(a) to (e) of the Constitution must be taken into account.

It is conceivable that in the interrogation of the justifiability of the exclusion of a person from accessing health care services, one may not even need to reach as far as s 36 of the Constitution. It is accepted as a truism that the obligations imposed on the state by s 27 are dependent on the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources.

From a cost perspective, National Treasury's projections as set out in the Green Paper on 'Policy on National Health Insurance' (GN657 GG34523/12-8-2011), which were derived from a model of aggregate costs built on projected utilisation based on demographic trends, cast the National Health Insurance (NHI) costs in 2025 in the region of R 256 billion (in 2010 terms). The escalation is 6,7%.

This is of relevance in this discus-

sion because one could argue that the NHI Fund cannot accommodate asylum seekers and illegal foreigners above and beyond emergency medical services due to cost implications. For conservatists, this would represent a compelling policy imperative for the deliberate exclusion. After all, Chaskalson P in *Soobramoney* noted that the state's primary obligations under s 27 should be considered within the context of its 'available resources'. As such, where there is a lack of resources and/or an undue burden on the state's fiscus, as a result of widening certain guaranteed rights to a broader population, this would be a justifiable limitation of the right to have access to health care services under s 36 of the Constitution. That said, this tested argument would, arguably, be unsustainable in light of the funding structure envisaged for the NHI, which will be made up of a 'tax mix', among other things. Under the tax mix are tax instruments that can be classified as direct or indirect taxes. A direct tax is a tax imposed on a source of income (eg, personal income tax, corporate income tax). An indirect tax is imposed on the use of income (eg, consumption expenditure), such as goods, services or financial flows.

In light of this and while I do not seek to downplay the significant costs associated with the NHI, clearly an envisaged workable funding structure is intended to accommodate a significant number of the population in SA. Statistics South Africa shows that 4% of the population in SA constitutes migrants, of this percentage, approximately 1,8% are undocumented (the so-called illegal foreigners). The debate of this short piece centres on the 1,8%, which could be accommodated by the NHI Fund, at most, for capped primary health care. Any open and democratic society based on human dignity, equality and freedom would have upheld these values if any contention that the carving out of asylum seekers and illegal foreigners from a constitutionally guaranteed right is at all constitutionally sustainable and we should turn a blind eye.

The right of everyone to have access to health care services is not a cosmetic right; it is a fundamental right whose limitation should not come lightly. Any policy framework and law that holds otherwise is on a collision course with the s 27 omnibus.

**Sphehile Nxumalo LLB (Wits) is a legal practitioner at Baker McKenzie in Johannesburg. This article was written in his personal capacity and the views expressed herein do not represent the opinions of his employer or any organisation whatsoever with which he is associated.**

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## Are there limitations on the 'child's best interests' principle?



By  
Nokuthula  
Ndlovu

**T**he child's best interest principle exists in terms of the Children's Act 38 of 2005 (the Children's Act). Children and their rights are significant for the security of society and the preservation of humanity. This article explores the conviction surrounding the best interests of the child and the limitations on the principle.

South Africa (SA) ratified the United Nations Convention on the Rights of the Child (resolution 44/25 of 20 November 1989) (CRC) on 16 June 1995. The CRC was the first international treaty ratified by democratic SA. The preamble of the CRC states that by reason of a child's physical and mental immaturity, children must be safeguarded and provided with legal protection prior to and after birth. This is in agreement with the provisions of the Constitution, particularly the rights to human equality, dignity, life, citizenship, education and the rights of the child as stipulated in s 28.

A child, according to art 1 of the CRC is 'every human being below the age of eighteen years unless ... majority is attained earlier'. This is confirmed by the Organisation of African Unity (OAU) African Charter on the Rights and Welfare of the Child 11 July 1990 (the African Charter on the Rights and Welfare of the Child) and it is in line with the premises within the preamble of the CRC to safeguard and provide appropriate legal protection for children before and after birth.

Personhood, child registration and adoption are matters at the heart of the welfare of a child. Conviction around the principle of the best interests of the child is weighed against practice and application of the three. The aim of this article is to explore whether the best interests of the child are reflected and also whether there is any discrimination and/or expression of the child's rights in these three instances. Appreciation and recognition of a child as a human being with rights determines



Picture source: Gallo Images/Getty

the distance to which the law will stretch to protect the child. The registration of a child at birth regulates the security of the child's future and the alternative of adoption permits children who would otherwise not have the opportunity to flourish in a safe and loving environment.

The African Charter on the Rights and Welfare of the Child art 3 advocates for non-discrimination against children on the basis of parentage, language, birth, nationality and social origin. Article 4 calls for the best interests of the child to be the paramount consideration to the point of allowing the child to find expression directly or through a representative. Mhlantla J in *Nandutu and Others v Minister of Home Affairs and Others* 2019 (5) SA 325 (CC) held that although s 28(2) of the Constitution provides that a child's best interests are paramount, jurisprudence provides that the rights of the child do not supersede other rights as rights can be limited. However, the point of the child's best interest principle is to ensure that in the application of s 36 limitation clause the interests of the child are not just considered but prioritised.

Personhood is highly debated in philosophy, religion and culture. Legal perspective provides that to become a legal subject and as such a bearer of rights and responsibilities (CJ Davel and RA Jordaan *Law of Persons* 4ed (Cape Town: Juta 2005) at p 3) one must first be born because legal subjectivity begins at birth (A Skelton and K Hannaretha (eds) *The Law of Persons in South Africa* 2 ed (Oxford University Press, 2018)). Every human being in SA is recognised, but not every human being has legal capacity. The child's best interests principle essentially applies where persons with legal capacity exercise choice to pursue the best interests of the unborn child. The unborn child only exists in law as far as an individual with legal capacity is willing to give them legal recognition and ordinarily that would be the expectant mother. A legal limitation exists in respect of the unborn child's rights in that the unborn child's rights begin and end with the parents' rights. The Choice on Termination of Pregnancy Act 92 of 1996 as amended does not consider or

speak of adoption as an alternative or in the best interests of the child. Perhaps this is justifiable as the legislation enables and or empowers the right to choice. It cannot be ignored that choice in this instance is one sided in favour of those with legal capacity only even where there is no risk to life in continuing with the pregnancy.

The Births and Deaths Registration Amendment Act 18 of 2010 and the South African Citizenship Amendment Act 17 of 2010 have been amended so that it permits only children who can prove citizenship by immediate origin registration and acknowledgement as a South African citizen. A child cannot acquire citizenship in SA by birth alone and certainly not based on either parents' permanent residency status. In terms of s 2(3) of the South African Citizenship Act 88 of 1995 the child of a permanent resident may qualify as South African by birth if they live within the country from the date of birth to the date on which they become majors and if their birth is registered in accordance with the Births and Deaths Registration Act 51 of 1992. Citizenship by birth is denied and not guaranteed until they reach the age of majority. These children and their parents endure a long process that involves a series of applications, financial cost and administration before being acknowledged as South African. This process compelled by law creates secondary citizens born and bred in SA but not belonging. In spite of art 6(2) and (3) of the African Charter on the Rights and Welfare of the Child, which provides that every child shall be registered immediately after birth and every child has the right to acquire nationality. The discrimination of children who are South African by birth alone prevents the fulfilment of art 6(2) and (3).

*Daily Dispatch* (an East London newspaper) reported on the deportation of 90 children in April (S Maliti '90 children, from age 5, face deportation' *DispatchLive* 2 April 2019). These children were reported to be from Lesotho and were said to be undocumented. Looking at the changes in law and practice where birth no longer grants citizenship, the question is whether re-



moving minors from the protective umbrella of the child's best interests is justified by the government goal being pursued. The Constitution clearly stipulates under the Bill of Rights that no citizen may be deprived of citizenship. It does not discriminate a citizen by birth from a citizen by descent nor prefer the latter from the former. Promoting, protecting and applying the best interest of the child without a doubt calls for the law to fall in line with the spirit and purport of the Constitution in respect of children and citizenship.

Nthakoana Ngatane reported for *Eye Witness News* in April 2019 that the Minister of the Department of Education, Angie Motshekga, issued a directive that schools should not send away migrant learners without documents (N Ngatane 'Motshekga: Schools shouldn't turn away migrant learners without proper documents' *EWN* 9 April 2019). It was noted in the same report that it was not only migrant children that were undocumented, but also native South African children. In view of this, how is it that children born in SA are entitled to education but not entitled to recognition as a South African citizen by way of birth? Is there any rational in compelling these children to register citizenship with the country of parental origin and later to apply for residency and subsequently citizenship in the country of their birth to an overwhelmed Home Affairs Office? It would be in the best interests of the child to acknowledge and register children born and descendant in SA alike as opposed to segregating South Africans by birth from South Africans by descent. Parental descent cannot be used to discriminate citizenship by birth because parents may have South African roots.

Adoption is a progressive route for providing stable families for children who would otherwise be deprived. It is an option where the rights to equality, dignity and life of parties concerned are preserved without discriminating based on legal capacity. More importantly adoption is in the best interests of

the displaced child who more often than not has no real legal voice of their own to express themselves. The Children's Amendment Bill 2019 proposes changes to the Children's Act in respect of adoptions. The proposed changes would result in no fees being paid and a restriction on professionals that can provide services in facilitating the adoption processes. Excluding the private sector in adoptions, is likely to slow the process, increase the chances of children being placed in impermanent homes and ultimately not finding stable homes. It is not in the best interest of children to assume all displaced children will be reunited with their families. Diligence is in preparing for the worst outcome and assisting the process of adoption to continue existing more efficiently.

Article 3 of the CRC requires that private social welfare, courts and legislative bodies consider the best interests of the child as paramount. This is not the case where the unborn child's rights are dependent on the rights the mother wishes to invoke, it is not the case where citizenship by birth is inferior to citizenship by so called parental origin and it certainly is not the case where the process of adoption in SA is limited to the government. In some instances, South African children who cannot be reunited with their families are also unregistered because they cannot prove that they are South African by descent and so are destined to be in limbo. Limiting the adoption process to government also goes against art 4 of the African Charter on the Rights and Welfare of the Child, which requires all appropriate legislative and administrative measures to be taken to the maximum extent for the child's best interests.

Article 8 of the CRC requires that a child's identity including nationality and family relations are preserved. A child born in SA is compelled to register as a citizen of another country if they have no immediate parent to claim descent from. Apart from descent being a loose term that could easily refer to birth and origin by virtue of a different generation, it has been argued that this allows the child to follow the citizenship of the parent. However, the place of birth, ordinary residence and in some cases the status of the parent as a permanent resident indicate that naturalisation is the goal. In the *Nandutu* case Mhlantla J held that compelling spouses and children to separate from their immediate families on grounds of applications for a change of status or conditions attached to a temporary visa created an onerous burden on families that directly encroached on their right to dignity. Surely compelling families to register children as citizens of other countries and give up or hold in abeyance citizenship to SA by birth till the age of majority also creates an onerous burden directly encroaching on the right to dignity.

Article 9 of the CRC requires that state parties ensure children are not separated from their parents against their will. This touches on the deportation of children by the Department of Home Affairs on grounds that they are undocumented a result created by mandates from Home Affairs disregarding citizenship by birth. The African Charter on the Rights and Welfare of the Child provides that the promotion and welfare of the child's rights implies performance of duties on the part of everyone.

It is apparent that the best interests of the child are lacking in gestation, at birth and childhood. It is understood that no right is absolute, but the problem is children are discriminated against in favour of subjective rights without fully securing and exploring alternative measures.

- For further reading on the child's best interests principle see Marici Corneli 'What is the "voice of the child" and why should we adhere to it?' 2019 (July) *DR* 29.

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# LAW

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By  
James D  
Lekhuleni

## A gap in the law: Examining how the SCA was constrained in the *Ramolefi* case

Section 35(3) of the Constitution guarantees the right to a fair trial. The Constitution mentions 15 aspects of the right to a fair trial in terms of s 35(3). In *S v Zuma and Others* 1995 (2) SA 642 (CC) the Constitutional Court (CC) held that the list in the section is not exhaustive and that the section is broader than the list of specific rights set out in paras (a) to (o) of the subsection. The right to a fair trial is not only limited to an accused person. It applies equally to the state, which represents the public. The recent decision of the SCA in *Director of Public Prosecu-*

*tions Gauteng Local Division, Johannesburg v Ramolefi* (SCA) (unreported case no 705/2018, 3-6-2019) (Gorven AJA (Majiedt and Van der Merwe JJA (concurring)) is a classical case, which reveals a *lacuna* in the Criminal Procedure Act 51 of 1977 (CPA), which regulates the appeal process. This *lacuna* in the CPA creates a wrong impression that the right to a fair trial in terms of s 35(3) of the Constitution is limited to the accused only. I will argue below that this gap in the CPA needs to be addressed urgently in order to avoid a failure of justice similar to the one experienced in the *Ramolefi* case.

The *Ramolefi* case suggests that where a High Court imposes a wrong sentence on appeal the right of the state to appeal to the SCA against such a sentence is nonexistent. This state of affairs is with respect, worrying and unconstitutional.

### Summary of the case

In the *Ramolefi* case, the accused was convicted by the Regional Court in Alexandra on a charge of murder. The incident that led to the deceased's death was very unfortunate. Two years before the incident, the accused caught the deceased and accused's wife *in flagrante*

*delicto*. Despite this, the accused and his wife reconciled. On the day of the incident, the accused and the deceased were at a carwash. Two state witnesses who testified at the trial did not see the start of the altercation between the accused and the deceased. They only saw the events when the deceased was fleeing out of the gate of the carwash and the accused was chasing him holding a knife. At that time, the deceased was bleeding from his back. While fleeing, the deceased stumbled and fell, whereupon the accused stabbed him once in his neck. The accused then said that he would 'finish off' the deceased. The deceased bled profusely and was transported to the hospital and eventually died from his injuries. The deceased sustained two stabbed wounds, one in the neck and one to the back. The post-mortem report revealed that the fatal wound was the one in the neck. According to the accused, the deceased was the aggressor in that when he was at the carwash, he went to pay and suddenly someone patted him on his back and when he turned around, the deceased hit him. He fell and the deceased was on top of him and assaulted him. He managed to get his knife and he stabbed the deceased once in the back. The deceased jumped up and ran away. He denied stabbing the deceased in his neck. He also denied that he stabbed the deceased for having an affair with his wife. The regional court accepted the version of the state witnesses and rejected the version of the accused. It found that the version of the accused was inconsistent with the proven facts and gave persuasive reasons for its findings. The trial court found the accused guilty of murder. The court did not find any substantial and compelling circumstances to deviate from the prescribed minimum sentence and it sentenced the accused to 15 years imprisonment. The accused applied for leave to appeal against the conviction and sentence. He was granted leave to appeal his sentence and his application for leave to appeal his conviction was unsuccessful.

## Appeal to the High Court

On appeal, the Gauteng Local Division of the High Court per Molahlehi and Van der Linde JJ concurring, upheld the appeal on sentence. The High Court set aside the sentence imposed by the regional court and imposed a sentence of five years' imprisonment, which was wholly suspended for a period of five years on condition that the accused is not found guilty of an offence committed during the period of suspension for which he is sentenced to a period of imprisonment without the option of a fine. The High Court set aside the sentence imposed by the regional court as it was of the view, among others, that the accused was acting under extreme provocation because of the adulterous affair that the deceased had with the accused's wife. It found that the accused lost control over his emotions and acted completely irrationally.

## Appeal to the SCA

Not satisfied with the sentence imposed by the High Court, the state was granted special leave to appeal the sentence to the Supreme Court of Appeal (SCA). On the facts, the SCA found that the findings of the High Court in setting aside the sentence imposed by the regional court were not supported by the evidence before the trial court. The SCA found that the findings of the High Court, in particular, that the accused was acting in circumstances of extreme provocation were at odds with the specific factual findings of the trial court. The SCA found that the High Court made these findings despite the fact that there was no evidence before court that the alleged provocation of the accused related to the adulterous affair between the deceased and the accused's wife. The evidence before the court was that the accused chased the deceased because he was angry and that the deceased hit him without a reason. The SCA found that the High Court erred by making wrong observations, which eventually necessitated the setting aside

of the sentence imposed by the regional court. The SCA held that the judgment of the High Court on sentence was replete with serious misdirections and that the wholly suspended sentence imposed by the High Court was 'shockingly lenient'.

However, the court was hamstrung to set aside the order of the High Court as its jurisdiction to hear the appeal was challenged especially when regard is had to s 316B of the CPA. This section provides that: '(1) Subject to subsection (2), the attorney-general may appeal to the Appellate Division against a sentence imposed upon an accused in a criminal case in a superior court.' This section, the court found, refers to appeals where the High Court was sitting as a court of first instance not a court of appeal. In considering whether the court had jurisdiction to consider an appeal by the state against the sentence imposed by the High Court on Appeal, the SCA reviewed a number of judgments dealing with appeals from the High Court to the SCA. Despite the fact that the SCA was satisfied that the High Court erred and that there was an injustice that occurred, the SCA found that it had no jurisdiction to hear the appeal because the High Court was not sitting as a court of first instance when it imposed the sentence. The court eventually struck the appeal from the roll leaving the glaring injustice intact.

## Analysis and submissions

The injustice that occurred in this case is beyond measure. The accused got away with a slap on the wrist. Murder is a serious offence. The right to life is sacrosanct in terms of our Constitution. The accused escaped a lengthy period of imprisonment because of the gap in the CPA.

It is appreciated that the SCA struck the appeal from the roll reluctantly especially taking into account the facts of this case. However, in my view, there was a remedy available for the appeal court. The SCA should have noted that justice must not only be done but must be



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seen to be done. The court should have noted that the limitation of the rights of the state in terms of the CPA to appeal against a sentence imposed by the High Court on appeal cannot be justified in an open and democratic society based on human dignity, equality and freedom. It is trite that courts must defer legislation to the legislature and must respect the legislation enacted by the legislature as long as the legislation is not in conflict with the Constitution. In my view, the limitation of the right of the state to appeal under these circumstances offends against the Constitution and the court had a duty to remedy the injustice.

Section 311 of the CPA allows the state to appeal against a judgment on a question of law. The limitation of the right of the state to appeal against both conviction and sentence is underpinned by constitutional and policy considerations. These constitutional principles are contained in s 35(3)(m) of the Constitution, which prohibits that an accused person be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted. The policy considerations in my view are based on the notion that, to allow the state to appeal would be to subject the accused to double jeopardy.

In my view, the right of the accused to a fair trial must not be viewed in isolation. It must be viewed against the right

to fairness to the general public and the family of the deceased as they are represented by the state. In *Jaipal v S* 2005 (5) BCLR 423 (CC) at para 29, the CC per Van der Westhuizen J, held that the right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the state. The court stated that this right has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime. The court went on to say that the provisions of the CPA must be interpreted in line with s 35 of the Constitution and that its provisions must be interpreted to promote the 'spirit, purport and objects of the Bill of Rights'.

From the guideline set out by the CC above, I submit that the decision of the SCA to strike the appeal off the roll notwithstanding its findings that the High Court misdirected itself in its approach on sentence, does not instil confidence in the public, especially those distressed by the horror of the murder committed by the accused. It is of concern what the deceased's family and the general public will say of our justice system pursuant to this injustice.

### Conclusion

From the above discussion, there is a lesson to be learnt. Our courts should bear

in mind that the right to a fair trial is like a double-edged sword. It applies to the accused and it also applies to the state. The right of an accused person not to be tried for an offence for which they were convicted or acquitted is not absolute. Like all other rights in the Bill of rights, it can be limited in terms of s 36 of the Constitution.

I submit that the legislature should urgently remedy the gap as discussed above. While the status quo remains, I submit that the courts should deal with each matter on a case by case basis. I further submit that where the interests of justice demand that the SCA consider an appeal by the state against a sentence imposed by the High Court on appeal, as it was in *Ramolefi*, the state must be allowed to appeal against that judgment.

**James D Lekhuleni BProc LLB (UL)  
LLM LLM (UP) LLD (UWC) is a regional  
magistrate in Cape Town.**



### Fact corner

- In Hong Kong, a wife may legally kill a cheating husband — but only if she can do it with her bare hands.

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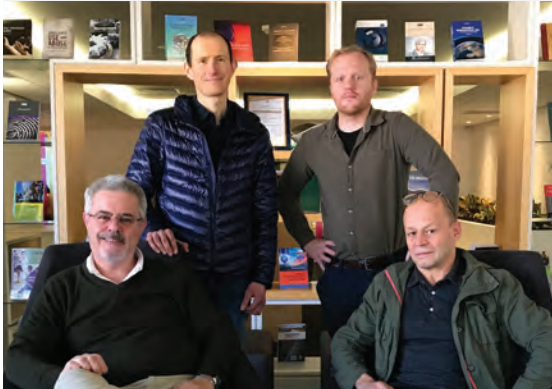
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# THE LAW REPORTS



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

November 2019 (6) South African Law  
Reports (pp 1 – 326); November 2019 (2)  
South African Criminal Law Reports  
(pp 469 – 582)

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

## Abbreviations

CC: Constitutional Court  
ECG: Eastern Cape Division, Grahamstown  
GJ: Gauteng Local Division, Johannesburg  
GP: Gauteng Division, Pretoria  
KZP: KwaZulu-Natal Division, Pietermaritzburg  
SCA: Supreme Court of Appeal  
WCC: Western Cape Division, Cape Town

## Banking

**Failure to comply with FICA – proper interpretation of its provisions and regulations imposing administrative sanctions:** In *South African Reserve Bank v Bank of Baroda (South Africa)* 2019 (6) SA 174 (WCC) the South African Reserve Bank (the Reserve Bank) made a number of findings against the respondent bank (Baroda) – of non-compliance with the provisions of the Financial Intelligence Centre Act 38 of 2001 (FICA) and the Money Laundering and Terrorist Financing Control Regulations promulgated in terms of FICA (the regulations). The Reserve Bank imposed administrative sanctions against the bank under s 45C of FICA. Baroda, however, successfully appealed against these to the Appeal Board established under FICA.

This case concerns the Reserve Bank's appeal against the Appeal Board's findings. The main issue was the proper interpretation of the penal provisions of FICA and the regulations. The Appeal Board had held that it was to be interpreted in accordance with the common-law principle that provisions giving rise to criminal and administrative penalties

must be interpreted restrictively in cases of doubt and ambiguity.

The Reserve Bank submitted that, even if the restrictive-interpretation principle was applicable, purposive interpretation could not be discarded. The former was merely one interpretive principle, which had to be applied together with and mindful of the other interpretive principles, including a strong emphasis on the need for purposive interpretation. Here, so the argument went, that would require taking into account that FICA was enacted to secure vital national objectives and that its principal aim was combating money laundering and the financing of terrorist and related activities.

The court, per Louw J (Langa AJ concurring), held that the Appeal Board had correctly held that the matter could not be distinguished from the CC's endorsement of the common-law presumption in favour of interpreting ambiguous penalty provisions restrictively; and that, therefore, the penal provisions in FICA had to be interpreted restrictively. This, it further held, would also apply to the regulations. Accordingly, it dismissed the Reserve Bank's appeal.

## Companies

**No business rescue if liquidation proceedings already initiated:** In *Tjeka Training Matters (Pty) Ltd v KPPM Construction (Pty) Ltd and Others* 2019 (6) SA 185 (GJ) the question was whether mere issue of liquidation papers constituted the 'initiation' of liquidation proceedings, thereby barring business rescue. The applicant, a creditor of the respondent company, had issued liquidation papers against the respondent.

The respondent's directors, unaware of this, filed a resolution to begin business rescue. Sometime thereafter the applicant served the papers.

The creditor, prompted by an imminent meeting in the business rescue process, challenged the validity of the resolution to begin business rescue. The question before the court was whether issue of the liquidation papers was 'initiation' of liquidation proceedings as intended in s 129(2)(a) of the Companies Act 71 of 2008. The court found that mere issuance would not constitute 'initiation' as contemplated by the section, but that service of the liquidation papers was required.

- See Gavin Schär 'Timing is everything when liquidation proceedings are initiated' 2019 (Dec) *DR* 14.

## Costs

**Costs awards against public officials, namely the Public Protector:** The case of *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) concerned a report issued by the Public Protector, Busisiwe Mkhwebane, into a 1980s loan by the Reserve Bank to an institution called Bankorp. The report recommended a constitutional amendment and the reopening of an investigation into the Bankorp loan.

The bank later, in first review proceedings in the GP, obtained the setting aside of the first recommendation; and in a second review in the same court, of the second. In the second review it also obtained a costs order against the Public Protector in her personal capacity, on the attorney and client scale.

The Public Protector applied for the CC's leave to appeal against the GP's costs order, and in the course of the majority judgment, the court considered, *inter alia* –

- the nature of a court's costs discretion;
- when a personal costs order may be made against a public official;
- when costs should be ordered on the attorney and client scale; and
- whether a personal costs order would breach the principle of separation of powers.

In his minority judgment the Chief Justice set out factors that ought to be taken into account when any costs order is made, and, specifically, when a personal costs order is warranted against a representative litigant.

- See Heinrich Schulze law reports 'Banking law' 2018 (Jan/Feb) DR 36 for the GP judgment.

## Criminal law

**Different treatment accorded to first person convicted of participating in gang rape to that of subsequently convicted participants:** In *S v Ndlovu* 2019 (2) SACR 484 (KZP) the appellant brought an appeal against a conviction in a regional magistrates' court for rape and a sentence of life imprisonment. The magistrate found that the complainant had been raped several times by the ap-

pellant and his companions, acting with a common purpose, after they had kidnapped her from her home. The appellant was the only one who was arrested and prosecuted. The identities of his co-perpetrators were unknown. The magistrate subsequently determined that the prescribed minimum sentence was life imprisonment in terms of s 51(1) of the Criminal Law Amendment Act 105 of 1997 read with part 1 of sch 2. Having found that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence, he imposed such a sentence.

The matter came before the full court of three judges who agreed that the appeal against the conviction had to be dismissed. In respect of the sentence, however, two members of the court (Ploos van Amstel J and Bezuidenhout J) were of the opinion that the court was bound by the decision of the SCA in *S v Mahlase* (SCA) (unreported case no 255/13, 29-11-2013) (Lewis, Tshiqi and Theron JJA) despite the anomalous situation it created (in that matter it was found that where the other person who had raped the victim was not before the trial court and had not yet been convicted of the rape, the minimum sentence for rape was not applicable). The sentence of life imprisonment was accordingly set aside and replaced with 15 years' imprisonment.

In a dissenting judgment on sentence,

Hadebe J, after considering various case and legal authorities, was of the view that the matter was one where the obligation to be bound by a decision of the SCA could be avoided, and the magistrate's decision to sentence the appellant on the basis that the victim had been raped more than once ought to be upheld.

## Elections

**Political parties' duty to safeguard journalists:** The case of *Brown v Economic Freedom Fighters and Others* 2019 (6) SA 23 (GJ) focussed on a case of intimidation of a journalist by members of a political party, and remedies available to her under the Electoral Code of Conduct.

The facts were that, during the run-up to the 2019 national elections, Karima Brown (the applicant), a well-known political journalist, mistakenly sent a message to a WhatsApp group run by the Economic Freedom Fighters (EFF) (the first respondent), a political party. The EFF's leader, Julius Malema (the second respondent) then published a screenshot of the message – which contained Ms Brown's personal telephone number – on his personal Twitter profile, which had over 2,3 million followers. The upshot was that Ms Brown was subjected to a torrent of abuse and threats of violence – including rape and death – from self-professed EFF supporters. In their defence the EFF and Mr Malema contended



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that since Ms Brown was not a legitimate journalist but an undercover African National Congress (ANC) or a government agent who was deliberately targeting the EFF, the normal rules and protections applying to journalists did not apply to her. They argued that her established bias against the EFF was a reasonable ground for the publication of the message. Mr Malema made no attempt to prevent EFF supporters from harassing Ms Brown, nor did he issue any instruction to them to desist. When specifically requested to intervene, both the EFF and Mr Malema did nothing.

Ms Brown, alleging various breaches of the Electoral Code of Conduct, referred a complaint to the Independent Electoral Commission (IEC) in which she sought remedy against both respondents under s 96(2) of the Electoral Act 73 of 1998 (the Act). Section 96(2) lists penalties for contraventions of the Act (which includes the Code as sch 2). When the IEC declined Ms Brown's request on jurisdictional grounds, she launched the present urgent application in the GJ for orders –

- granting her leave to institute High Court proceedings;
- declaring that the respondents had contravened s 94 of the Act by failing to comply with various provisions of the Code; and
- issuing the respondents with fines or a formal warning under s 96(2).

Ms Brown alleged that the respondents had contravened the following provisions of the Code –

- those relating to political parties' obligation to promote and comply with the Code (items 2 and 3);
- those securing the role of women in the political process (item 6); and
- those safeguarding the role of the media (item 8), in particular the respondents' failure to 'take all reasonable steps to ensure that journalists are not subjected to harassment, intimidation, hazard, threat or physical assault by any of their representatives or supporters' (item 8(c)).

The GJ, per Dippenaar J, found that the application had to be seen in the context of the constitutional right to freedom of the press and the importance of the role of the mass media in a democratic society. The respondents were well aware that their posting would foster mistrust in Ms Brown and elicit a response from EFF supporters. Their obligation under item 8 of the Code to take reasonable steps to prevent harm to journalists of the Code were extended to both members and supporters of the EFF, and their bold denial that their allegations that Ms Brown was a member or agent of the ANC had triggered the barrage of abuse was untenable. Reasonable steps they could have taken included admonishing their supporters and instructing them to refrain from their offending conduct.

The conduct complained of fell well short of what would have been reasonable in the circumstances, and exhibited scant regard for the fact that Ms Brown, as a woman, was especially vulnerable to threats of rape and violence. If the respondents did not deliberately intend the consequences of their actions, they were at least reckless in respect of them. They failed to comply with items 3, 6 and 8 of the Code, thereby contravening s 94 of the Act.

The GJ concluded that policy considerations favoured the granting of declaratory relief. The imposition of a formal warning under s 96(2)(a) of the Act was an appropriate and effective sanction, which would serve as a guideline to the respondents for their obligations and future conduct. The GJ considered that an additional fine was not called for in the circumstances.

## Family law

**Allowing a parent to leave the country with a child when it is against the wishes of the other parent:** In *RW v CS* 2019 (6) SA 168 (GJ) the parties were the youthful, unmarried mother and father of a four-year-old boy. The mother, with whom the child lived, had decided to leave the country with him in order to relocate to New Zealand, a move, which she felt would be in the child's best interests. She had then, pursuant to ss 18(3)(c)(iii) and 18(5) of the Children's Act 38 of 2005, asked the father for his consent to her doing so. Those sections provide, respectively, that 'a parent ... who acts as guardian of a child must ... give or refuse any consent required by law in respect of the child, including ... consent to the child's departure or removal from the Republic'; and that '[u]nless a competent court orders otherwise, the consent of all the persons that have guardianship of a child is necessary in respect of matters set out in subsection (3)(c)'.

The father refused, and this prompted the mother to ask the GJ to waive this requirement. The issue for the court was how it was to exercise its discretion under s 18(5). The court, per Van der Linde J, proceeded to consider the *bona fides* and reasonableness of the mother's decision, both of which it found unimpeachable, with the result that it waived the consent requirement. The GJ pointed out, in considering reasonableness, that the mother had been given a rare opportunity, and that if she failed to take advantage of it for the benefit of both herself and her son, she would miss the chance to establish a solid future in New Zealand for the two of them.

## Housing

**Community Schemes Ombud – locus standi to apply for dispute resolution:** The case of *Durdac Centre Body Corpo-*

*rate v Singh* 2019 (6) SA 45 (KZP) concerned a body corporate's appeal against a ruling by the Community Service Ombud (COS). One of its grounds of appeal was that the COS had erred in finding that the respondent, Mr Singh – the manager of a company, which owned a number of units in the scheme concerned – enjoyed the necessary *locus standi* to bring a dispute before the tribunal.

The court, per Steyn J (Madondo DJP concurring), held that he did not. This was because the right to lodge a dispute was prescribed by s 38(1) of the Community Schemes Ombud Service Act 9 of 2011 as accruing to owners of units who were materially affected by a community-scheme related matter; and Mr Singh was neither the owner of the units, nor did he have a material interest in the existing scheme. The court accordingly upheld the appeal.

## Jurisdiction

**The competency of the High Court to hear matters falling within the monetary jurisdiction of the magistrates' court:** The GP recently ruled that actions and/or applications should be instituted in the magistrates' court where the value of the claim fell within its monetary jurisdiction, unless the High Court had specifically granted leave for the matter to be heard before it. This finding was necessitated by the practice of parties, especially financial institutions – despite their matters falling within the monetary jurisdiction of the magistrates' court – launching proceedings in the High Court on the basis of its sharing jurisdiction. Considering the costs involved in litigating in the High Court, such practice had negative implications for litigants' right to access to justice protected in terms of s 34 of the Constitution. In the matter of *Nedbank Ltd v Gqirana NO and Another, and Similar Matters* 2019 (6) SA 139 (ECG), the ECG was tasked with deciding whether the GP's approach should be adopted within its jurisdiction.

The court examined the common law principle that the High Court had jurisdiction to hear matters falling within the monetary jurisdiction of the magistrates' courts. The court found that while this position had not, generally speaking, been altered by the passing of the Constitution, a different approach was called for in respect of matters falling within the scope of the National Credit Act 34 of 2005 (NCA). The NCA, the court (per Louw J, with Hartle J concurring) noted, was designed to assist and protect the previously disadvantaged section of the population, who would ordinarily constitute many of the respondents/defendants in matters involving credit transactions. It provided for specific structures and procedures to enable this group to benefit from its provisions. With this

in mind, it extended jurisdiction to the magistrates' court in respect of all matters, whatever the monetary sum, falling within the ambit of the NCA.

The court concluded that, when interpreted through the prism of the Constitution – which in terms of s 34, read with the s 9 equality right, guaranteed persons practical, reasonable and effective access to courts – the NCA required that civil actions falling within its ambit be instituted in the magistrates' court having jurisdiction, unless there were unusual factual or legal issues raised, which instead first warranted them being heard in the High Court.

**Note:** It should accordingly be noted that the reach of the order in *Gqirana* was narrower than that in the decision of *Nedbank Ltd v Thobejane and Similar Matters* 2019 (1) SA 594 (GP); [2018] 4 All SA 694 (GP) – the requirement that proceedings be instituted in the magistrates' court was limited to those civil matters falling within the scope of the NCA.

- See Cires 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' 2019 (Oct) *DR* 31.
- See Heinrich Schulze law reports 'Civil procedure law' 2019 (March) *DR* 21.
- See 'Letters to the editor' 2018 (Dec) *DR* 3.

## Legal practitioners

**Admission as advocates of legal practitioners enrolled as attorneys:** Section 115 of the Legal Practice Act 28 of 2014 provides that '[a]ny person who, immediately before [1 November 2018] was entitled to be admitted and enrolled as an advocate, attorney, conveyancer or notary is, after that date, entitled to be admitted and enrolled as such in terms of this Act'.

In *Alves v Legal Practice Council and Similar Matters* 2019 (6) SA 18 (WCC) nine admitted attorneys applied under s 115 for enrolment as advocates. The High Court dismissed the Legal Practice Council's ground of opposition – that s 115 only applied to applicants that were new in the profession and have never been admitted as legal practitioners. The court held that s 115, properly interpreted, allowed for the enrolment as advocates of legal practitioners already enrolled as attorneys.

## Trusts

**The validity of a resolution, varying a trust deed, passed by trustees and corporate trustees whose appointment is not authorised by Master:** In the matter of *Joubert and Others v Joubert and Others* 2019 (6) SA 51 (WCC) the original beneficiaries of an *inter vivos* trust had

instituted an application in the WCC to set aside a purported resolution by the trustees varying the trust deed by adding a further beneficiary.

One of the grounds on which the applicants argued that the resolution was invalid was that two of the trustees – a Mr Tubb; and C2M Trust Management Services (Pty) Ltd, a corporate trustee, represented by one Mr Nel – had lacked the requisite capacity to pass it, meaning that the required quorum as per the trust deed was not present. At the time of the resolution's passing, the appointments of Mr Tubb and C2M's nominee Mr Nel had not yet been authorised by the Master in terms of s 6(1) and (4) of the Trust Property Control Act 57 of 1988. This fact, the applicants argued, rendered the acts of Mr Tubb and C2M at such time void.

The court, per Bozalek J, confirmed that acts performed by a trustee who had been appointed in terms of a trust deed, but whose appointment had not yet been authorised in writing by the Master, were null and void and could not be cured retrospectively by the trustees themselves after receiving authorisation, or by the Master or the court. The same consequence, the court added, followed acts performed by a corporate trustee whose chosen nominee had not yet been authorised in a letter of authority issued by the Master.



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The court, however, disagreed with the applicants' interpretation of the trust deed as to the minimum of trustees required to pass a valid resolution. It found that those remaining trustees in the present case met the requirements for a properly constituted quorum and concluded that the resolution in question was properly passed.

The applicants also argued that the resolution was invalid because it had been passed without their consent as beneficiaries, which consent was necessary, in their view, in circumstances in which they had already accepted the benefits under the original trust deed. The court rejected this argument on the basis that no case had been made that all the beneficiaries had in fact accepted the benefits by the passing of the resolution. Despite this finding, the court made some interesting comments on whether the consent of the original beneficiaries

would in any event have been necessary for the valid passing of the resolution varying the trust deed. It remarked that there was persuasive argument suggesting that such consent was not required. For one, it was, in the very nature of a *stipulatio alteri* that the third party who accepted the benefit of the contract between the *stipulans* and the *promittens* could not do so selectively, but subject to any limitations and/or onerous provisions. Thus, here, where the founder bestowed certain benefits on members of his family through the trust deed but reserved to the trustees a wide power of variation of its terms, the beneficiaries would accept their benefits subject to that limitation, that is, along with the risk that their benefits could be diminished pursuant to a subsequent variation in the trust deed.

The court, in conclusion refused, the relief sought.

## Other cases

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

- administrative law – liquidator duties and insolvency;
- business rescue;
- income tax assessments;
- prohibition on appeal against interim relief in matrimonial matters;
- revenue – fiscal legislation; and
- validity of Land Affairs General Amendment Act 61 of 1998.

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By  
Merilyn  
Rowena  
Kader

## December [2019] 4 All South African Law Reports (pp 635 – 1020); 2019 (12) Butterworths Constitutional Law Reports (pp 1425 – 1537)

### Abbreviations:

CC: Constitutional Court  
SCA: Supreme Court of Appeal  
WCC: Western Cape Division, Cape Town

### Administrative law

**Water services providers:** In *Umgeni Water v Sembcorp Siza Water (Pty) Ltd and Others and a related matter* [2019] 4 All SA 700 (SCA) the first appellant was a water board established in terms of s 28 of the Water Services Act 108 of 1997. In terms of s 29 of the Act, its primary duty, as a bulk water provider, was to provide water services to other water services institutions within its service area. The municipalities receiving water from Umgeni Water are water services authorities, which, in terms of s 19 of the Act, may perform the functions of a water services provider, or enter into a contract with another water services provider to provide such services.

Sembcorp Siza Water (Siza) was a water services provider that purchased bulk water from Umgeni Water, which decided to impose a tariff increase on bulk water supply of 37,9% for Siza, a private entity, as opposed to an increase of 7,8% for its other customers, all of

which were municipalities. As the tariffs had to be determined in accordance with the Act, the process was essentially statutory and subject to review as administrative action. Siza's review was based on the Promotion of Administrative Justice Act 3 of 2000.

Umgeni Water drew a distinction between Siza and its other customers on the basis that Siza was a private sector company with a profit motive, while the municipalities were public entities that ploughed any surplus from the provision of water to consumers back into service delivery. No provision in the empowering legislation justified the discrimination between municipal and non-municipal water services providers, more particularly when they were both performing a municipal function. Penalising Siza for its ability to generate a profit through its efficiency would be irrational. Umgeni Water's motivation to end cross-subsidisation was also found to be unsupported.

Finding no rational basis for the distinction, the court dismissed the appeal against the High Court order setting aside the tariff increase applicable to Siza and amended the order to remedy a *lacuna*.

### Constitutional and administrative law

**Application for permanent residence:** In *Director-General, Department of Home Affairs and Others v Link and Others* [2019] 4 All SA 720 (WCC), the

respondents were two German couples, who, after living in South Africa under non-resident permits for several years, applied for the grant of permanent residence. They received no response to their applications. Each of the couples then brought an application to compel the Department of Home Affairs to take the necessary decision. In both applications, an order was taken by agreement whereby the first appellant (the Director General) was directed to consider the applications for permanent residence within 30 days. That too was simply ignored.

Eventually, the Deputy Director-General addressed identically worded letters to the couples informing them that their applications for the issue of permanent residence permits had been refused on the ground that they had failed to produce adequate proof that they met the prescribed financial requirements and they consequently failed to qualify for permanent residence. The respondents launched an application for review.

The appellants contended that s 7 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) made it mandatory, unless there were exceptional circumstances present, for an applicant to exhaust all internal remedies prior to proceeding to court for relief. The application for review was thus premature as the respondents had failed to exhaust their rights of appeal or review in terms of s 8 of the Immigration Act 13 of 2002.

The court held that there were exceptional circumstances present, which justified the respondents being granted



exemption from having to first exhaust their internal remedies and granted the review application. The present appeal was then brought.

The court, per Sher J, held that the consideration of the respondents' applications for the issue of permanent residence permits, and the rejection thereof, constituted administrative action. In terms of s 33(1) of the Constitution, the respondents, therefore, had the constitutional right to demand that such action was carried out in a lawful, reasonable and procedurally fair manner. As the decision to refuse to grant permanent residence adversely affected their rights, the respondents also had a constitutional right in terms of s 33(2), to be provided with written reasons for it. Furthermore, s 5(1) of PAJA provides that a person whose rights have been materially and adversely affected by administrative action and who has not been given reasons, therefore, at the time has a right to request them. The reasons supplied must be adequate.

The appellants' explanation that the respondents' applications were rejected because they had failed to produce adequate proof of the prescribed financial requirements was not good enough. There were consequently no decisions as contemplated in subs 8(3) of the Immigration Act, which were subject to review or appeal in terms of s 8(4) at their instance, and the respondents were not under any obligation to exhaust the domestic remedies, which were provided for in terms of those subsections, before approaching the court.

The appeal was dismissed with costs.

**Judicial Inspectorate of Correctional Services:** In *Sonke Gender Justice NPC v President of the Republic of South Africa and Others* [2019] 4 All SA 961 (WCC) the applicant was a non-governmental organisation, which played an active role in prison-related work in South Africa's correctional centres. It brought an application challenging the constitutionality of Chapters IX and X of the Correctional

Services Act 111 of 1998 (the Act), which deals with the establishment of the Judicial Inspectorate of Correctional Services (the inspectorate), its structure and its functionality.

The applicant's case was that the state is obliged, under s 7(2) of the Constitution, to create a prison inspectorate with sufficient independence to enable it to function effectively. It alleged that the inspectorate, as the primary institution tasked with monitoring and overseeing South Africa's correctional system, as presently constituted, lacked the necessary structural and operational independence.

One of the strongly contested provisions, which formed the basis of the applicant's complaint, was s 91 of the Act, which provides that the Department of Correctional Services (the department) is responsible for all expenses of the inspectorate – allowing for intrusion by the department. Central to the applicant's case was that, because of the current structure of the Act, the inspectorate was in material respects beholden, or susceptible to being beholden, to the department. Section 91 was cited as an example. It was submitted that the provisions of the section were undesirable, as it might cause the inspectorate's staff not to act solely to protect inmates' rights, but to serve or protect the interests of the very department that the inspectorate ought to monitor and oversee.

The first question was whether there is a constitutional obligation to establish and maintain an independent inspectorate. Although the Constitution does not specify the creation of an inspectorate with the necessary independence, given the scheme of the Constitution, read with the international obligations South Africa has committed itself to, and the objects of the Act, the most reasonable and effective interpretation of s 7(2) of the Constitution is that it does impose an obligation for the creation of an independent institution, as part of its duties to provide reasonable and effective mechanisms to promote human rights.


The next question was whether the inspectorate had the operational and structural features of independence. The Constitution does not envisage absolute independence, as that may not be attainable having regard to the South African context. What is envisioned is adequate independence, which should be demonstrated by the structure of the institution and its operation.

Of the various provisions challenged by the applicant, the court – per Boqwana J – upheld the challenge in respect of three of the statutory provisions.

Section 88A(4) requires any matters relating to misconduct or incapacity of the Chief Executive Officer (CEO) to be referred, by the inspecting judge, to the National Commissioner. The CEO is meant to be independent of the department, which is the body administratively in charge of the correctional centres and under the control of the National Commissioner. The process of referral from the inspectorate, which is an office that is meant to be independent, to the National Commissioner, may undermine the independent role that the CEO had to play. In terms of s 88A(1)(b) the CEO was accountable to the National Commissioner for all the money received by the inspectorate. Section 91 provided that the department was responsible for all expenses of the inspectorate. The court found that s 88A(1)(b), read with s 91, dealing with the funding of the inspectorate being under the control of the department, and s 88A(4), which refers matters relating to misconduct or incapacity of the CEO to the National Commissioner by the inspecting judge, to be inconsistent with the Constitution. The sections were declared invalid, as they did not provide the inspectorate with adequate independence.

The declaration of invalidity was suspended for a period of 24 months from the date of judgment in order to afford Parliament the opportunity to remedy the defect.

**Removal of Deputy National Director**



There is no  
*Supreme Constitution*  
A Critique of Statist-individualist Constitutionalism

None of the articles of faith of the South African Constitution is plausible. The Constitution is not supreme and entrenched. Vulnerable to potent socio-political forces it changes continuously and often profoundly regardless of stringent amendment requirements. The trite threefold separation of powers is more metaphorical than real and therefore unable to secure effective checks and balances. Though institutionally separated with their own personnel and functions, the three powers are ordinarily integrated in a single dominant political leadership, committed to achieving the same ideological goals. The bill of individual rights cannot guarantee justice, because rights are subject to the ideologically-driven exercise of judicial interpretation, often with damaging consequences for those relying on the bill of rights. This situation does not only apply to South Africa, but to all Constitutions premised on the same articles of faith, in this book described as the doctrine of statist-individualist constitutionalism. An improved mode of constitutionalism is called for - one which is equipped with a sounder system of checks and balances and better endowed towards the achievement of justice through a balanced constitution.

Koos Malan

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**of Public Prosecutions (DNDPP):** The applicant was removed by the DNDPP. The President's decision was based on court judgments calling into question the integrity and fitness of the applicant and was preceded by the holding of an inquiry in terms of s 12(6) of the National Prosecuting Authority Act 32 of 1998 (the NPA Act).

In *Jiba v President of the Republic of South Africa and Others* [2019] 4 All SA 742 (WCC) the applicant launched an application by way of notice of motion on an urgent basis, seeking interim relief in Part A (the present proceedings), pending final determination of Part B of the application. What was sought in the present proceedings was mainly, a declaration that the decision of the President and the National Prosecuting Authority (NPA) to remove her from office was in violation of the Constitution and unlawful. The relief sought in Part B dealt with the constitutionality of s 12(6) of the National Prosecuting Authority Act. In the alternative, the applicant challenged the constitutionality of the inquiry referred to above.

A point raised by the respondents was that the applicant had in her replying affidavit, introduced a new basis for her relief in the proceedings, averring that the President acted in violation of an order granted by another court where the court directed the President to institute disciplinary inquiries against the applicant regarding her fitness to hold office, but suspended the implementation of the order pending the outcome of an appeal in another case. The objection was that the applicant was bound by her pleaded case in the founding affidavit and she could not make out a new case in reply. The court agreed with the respondents in this respect, which left for consideration the allegation that it was wrong for the President and the NPA to remove her from office before the conclusion of the parliamentary process, which according to the applicant was based on a wrong interpretation of the provisions of s 12(6) of the National Prosecuting Authority Act.

It was clear from the wording and the manner in which s 12(6) was constructed, that it envisaged two distinct and separate procedures when a National Director of Public Prosecutions (NDPP) or DNDPP is removed from office. An NDPP or DNDPP shall not be suspended or removed from office except in accordance with the provisions of ss 12(6), (7) and (8). In terms of subs (6)(a), the function to suspend or remove clearly resides with the President and no one else. The Act does not give Parliament such powers and it does not state that the removal is conditional on the approval of Parliament. It is only after the removal by the President comes into operation or takes effect, that Parliament plays a role. The

President was found to have followed all required processes in arriving at his decision. The applicant accordingly failed to show that she had a clear right not to be removed by the President and the NPA prior to the conclusion of the parliamentary process. To uphold the applicant's contentions, the court would have to usurp the functions and duties of Parliament.

The application was dismissed with costs.

For more reports pertaining to the *Jiba* matter, see:

- David Matlala 'Law reports - advocates' 2017 (Jan/Feb) *DR* 40;
- David Matlala 'Law reports - advocates' 2018 (Dec) *DR* 26;
- Kgomo Ramotsho 'The interpretation and application of s 7 of the Admission of Advocates Act does not of itself alone raise a constitutional issue' 2019 (Sept) *DR* 26; and
- Marilyn Rowena Kader 'Law reports - legal practice' 2019 (Oct) *DR* 18.

**Transgender rights:** The applicant was incarcerated in a correctional centre after being convicted of murder, theft and attempted theft. The applicant was born male but wished to pursue treatment to affect a gender transition to female. In *September v Subramoney NO and Others (Gender Dynamix as amicus curiae)* [2019] 4 All SA 927 (WCC) the applicant sought, in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act), to be allowed to express her gender identity while in prison. In addition, the court was requested to order just and equitable relief for the violation of her fundamental constitutional rights to equality and human dignity. She alleged that, since her incarceration, the respondents denied her permission to express her gender identity.

Section 12 of the Constitution guarantees the right to freedom and security of person, which includes in s 12(1)(e) the right not to be treated or punished in a cruel, inhuman or degrading way. What had to be determined in this matter, was whether the respondents complied with the basic standard laid down in s 12. Accepting that the applicant was being caused severe mental suffering, and that her treatment resulted in feelings of fear, anguish and inferiority leading to humiliation, the court concluded that her punishment and treatment fell foul of s 12(1)(e).

Furthermore, the right to dignity implies protection from conditions or treatment, which offends a person's sense of worth in society. If the state undermines a person's self-worth through condemnation of conduct that forms part of a person's experience of being human, the state violates that person's right to dignity. Even though 'transgender' is

not a listed ground under the Constitution or the Equality Act, it was the right to equality that lay at the centre of this matter, and in particular how it relates to the right to dignity and the right to freedom of expression. The right of dignity included the applicant's right to her gender identity. The court emphasised the constitutional imperative on the state to respect, protect, promote and fulfil the rights in the Bill of Rights in line with s 7(2) of the Constitution.

In considering effective relief, the court stated that there were a variety of reasonable steps open to government to accommodate the applicant. Such steps had to balance the competing interests raised, and should allow for gender expression, but also not undermine the safety of the applicant or detention facilities. It was held that the respondents' failure to apply the principle of reasonable accommodation to the applicant and to allow her to express her gender identity rendered the discrimination against her manifestly unfair. Such refusal was declared unlawful and unconstitutional, with the court making ancillary orders aimed at entrenching the applicant's rights.

## Criminal law and procedure

**Extradition:** In *Kouwenhoven v Minister of Police and Others* [2019] 4 All SA 768 (WCC), the applicant was a Dutch national who was residing in South Africa on a visitor's visa. He was convicted on two criminal charges in his home country, after which Interpol in The Hague despatched a notice to Interpol Pretoria with a request to provisionally arrest the applicant. Also included was a letter from the Advocate General of the Netherlands confirming the intention to submit a request to the South African authorities for the applicant's extradition. The South African authorities decided to wait for an extradition request before attempting arrest. However, when it became likely that the applicant was a flight risk, he was arrested and taken before the Cape Town Magistrate.

The applicant sought to have the Pretoria Magistrate's decision to issue a warrant for the applicant's arrest in terms of the Extradition Act 67 of 1962 to be unlawful and invalid. One of the averments made by the applicant was that the warrant was issued unlawfully as his arrest was in breach of an undertaking given by the South African Police Service (SAPS) represented by a Warrant Officer, who, when applying for the warrant, failed to disclose that undertaking. The undertaking was that the applicant would not be arrested until the extradition request was received.

The court, per Cloete J, held that the undertaking could not extend to a situ-



ation where the applicant had become a flight risk. Once that risk arose, the SAPS was obliged, despite any prior undertakings, to apply without notice to the applicant for a warrant for his arrest. The Warrant Officer's failure to disclose to the Pretoria Magistrate the 'so-called' undertaking given months earlier was not a material non-disclosure.

The warrant, the applicant's arrest, and the proceedings before the Cape Town Magistrate were confirmed as lawful. The review application was dismissed.

## Education (university)

**Language policies:** The appeal of *Gelyke Kanse and Others v Chairperson of the Senate of the University of Stellenbosch and Others* 2019 (12) BCLR 1479 (CC) had its roots in 2016 when the Senate and Council of Stellenbosch University took decisions to adopt a new language policy. In *Gelyke Kanse v Chairman of the Senate of Stellenbosch University* 2018 (1) BCLR 25 (WCC) a number of applicants challenged the decisions to adopt the new language policy, which dispensed with Afrikaans as a primary language of instruction, contending that it fell to be set aside on constitutional and administrative law grounds.

The High Court dismissed the application with costs. Section 29 of the Constitution, which guaranteed the right 'to receive education in the official language or languages of [one's] choice in public education institutions' was qualified by the words 'where such education is reasonably practicable'. In regard to the right to education in the language of choice, the SCA had held in *University of Free State v AfriForum* 2017 (4) SA 283 (SCA) ([2017] 2 All SA 808 (SCA))

that what is 'reasonably practicable' is determined by an assessment of equity and the need for historical redress; that courts should be extremely hesitant to interfere with a university's determination of what is 'reasonably practicable'; and that it is rational for a university to conclude that it is not 'reasonably practicable' to teach in Afrikaans where that will result in an unconstitutional situation on its campus, such as, for example, segregated classrooms. (By the stage of the High Court's judgment, the CC had not yet delivered its judgment in *AfriForum v University of the Free State* 2018 (4) BCLR 387 (CC) (2018 (2) SA 185 (CC)) in which it dismissed an appeal against the SCA's judgment in *University of Free State v AfriForum*.) The High Court held that the new policy could not be found to be irrational. The University had decided that its multiple purposes of preventing exclusion, promoting multilingualism, ensuring integration, and fostering Afrikaans were best served by the new policy that it adopted. It had considered many factors and weighed them all. The court could not second-guess that extremely difficult process. Accordingly, the court could not interfere. The applicants approached the CC seeking a direct appeal against the High Court's judgment. The CC granted leave to appeal but dismissed the appeal. It made no order as relating to the costs of the proceedings in the CC but set aside the costs order made in the High Court.

- See David Matlala 'Law reports - fundamental rights' 2018 (April) DR 60 for the WCC judgment.

## Liquor and gambling

**Bookmakers and horseracing:** In a dispute between bookmakers and totalisa-

tor operators, the issue was whether bookmakers, in addition to their right to take bets on horse racing, possess the sole right to take bets on other sports, to the exclusion of totalisator operators, who were alleged by the appellants to be confined to taking bets on horse racing. In *KwaZulu-Natal Bookmakers' Society and Another v Phumelela Gaming and Leisure Ltd and Others* [2019] 4 All SA 652 (SCA) the appellants were voluntary associations whose members held bookmaker's licences. They contended that on a proper interpretation of the Lotteries Act 57 of 1997 (the Lotteries Act), the legislature has prohibited totalisator betting on sports other than horse racing in the absence of a sports pool licence, issued in terms of the Lotteries Act. They argued that totalisator betting on sports other than horse racing, fell within the definition of a 'sports pool' in s 1 of the Lotteries Act.

The respondents operated totalisator betting in relation to horse racing and other sports events. The bookmakers challenged the validity of the licences held by the respondents, issued by provincial gambling boards, on the basis that the relevant provincial statutes did not authorise the holder of a totalisator licence to take bets on sporting events, other than horse racing.

The court examined the meaning of a 'sports pool' as defined in the Lotteries Act and of 'totalisator betting' as defined in the National Gambling Act 7 of 2004. It had to be determined whether totalisator betting on sports other than horse racing, fell within the definition of a 'sports pool' in the Lotteries Act. The court found that a sports pool is any scheme in which any person is invited or undertakes to forecast the result of any series, or combination of sporting events in competition with other participants and a prize is awarded to the competitor



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who forecasts the said result correctly, or whose forecast is more nearly correct than the forecasts of other competitors. Against that definition, the court held that totalisator betting on horse racing and other sports does not fall within the definition of 'sports pool' in the Lotteries Act. Totalisator betting on sports is regulated in terms of the National Gambling Act and the provincial legislation. The provincial licences were validly issued by the provincial gambling boards, to the tote respondents, in accordance with the provincial legislation.

The appeal was dismissed with costs.

## Pensions

**Special Pensions Act:** To recognise people who had made substantial sacrifices, both personal and financial, in the struggle to fight Apartheid, Parliament passed legislation in the form of the Special Pensions Act 69 of 1996, providing for the payment of special pensions to such people. The Act came into operation on 1 December 1996.

Several years later, the appellant applied to the Special Pensions Board for a pension. His application was refused, as were internal appeals to the Special Pensions Appeal Board. An application for review was dismissed by the High Court, leading to the present appeal of *Sewper-*

*sadh v Minister of Finance and Another* [2019] 4 All SA 668 (SCA).

The Act required that for a five-year period prior to 2 February 1990, an applicant for a special pension must have been engaged full-time in the service of a political organisation. The appellant had been a member of both the African National Congress and its armed wing, *Umkhonto WeSizwe*. The principal dispute between the parties was whether the appellant had been engaged full-time in their service as envisaged in s 1(1)(a)(i) during that period.

The Special Pensions Board's decision that the appellant was not entitled to a special pension was based on its view that during the five-year period, he had held down full-time employment. The court took into account the political climate at the relevant time, and the need for anti-Apartheid operatives to operate clandestinely. The appellant's job at a jewellery workshop was found to have been a cover for his activities on behalf of the political organisations.

The appeal was upheld with costs, and the lower court's order was replaced with one in terms of which the appellant was awarded a special pension.

## Other cases

Apart from the cases and material dealt

with or referred to above, the material under review also contained cases dealing with –

- appealability of order and urgency;
- application for permanent stay of prosecution;
- income tax – valuation of trading stock;
- liquidation of company and liquidators' fees;
- procurement and tender award by municipality;
- service of applications and stay of execution of writ;
- time-bar clause in arbitration agreement; and
- zoning and by-laws relating to cell-phone towers.

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# Constitutional Court: Graduates from the Independent Institute of Education are eligible for admission and enrolment as legal practitioners in terms of the LPA



By  
Kgomo  
Ramotsho

*Independent Institute of Education (Pty) Limited v KwaZulu-Natal Law Society and Others (CC)*  
(unreported case no CCT 68/19, 11-12-2019)  
Mogoeng CJ (Jafta J, Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, and Victor AJ concurring) Theron J (Foreman J concurring)

**T**he Constitutional Court (CC) declared that a Bachelor of Laws graduate of the Independent Institute of Education (Pty) Limited (the Institute) is eligible for admission and enrolment as a legal practitioner in terms of the Legal Practice Act 28 of 2014 (the LPA). This was one of the orders the CC made after an application was brought to the court after the KwaZulu-Natal Law Society (the Law Society) took the position that it would not register articles of clerkship of aspirant attorneys with LLB degrees from the likes of the Institute. The Law Society's reasons were that s 26 of the LPA states that:

'(1) A person qualifies to be admitted and enrolled as a legal practitioner, if that person has –

(a) satisfied all the requirements for the LLB degree obtained at any university registered in the Republic, after pursuing for that degree –

(i) a course of study of not less than four years; or

(ii) a course of study of not less than five years if the LLB degree is preceded by a bachelor's degree other than the LLB degree, as determined in the rules of the university in question and approved by the council ...'

The Law Society contended that the words 'any university registered in the Republic' exclude the Institute. This is said to be so because, although the LPA does not define the word 'university', the Higher Education Act 101 of 1997 does so but in a way that excludes institutions like the Institute. It defines a 'university' as – 'a higher education institution providing higher education and with a scope and range of operations, including undergraduate and postgraduate higher education programmes, research and community engagement, which meets

the criteria for recognition as a university as presented by the Minister under section 69(d) and –

...

(b) registered as a private university, in terms of this Act.'

The Institute is a duly registered private higher education institution. It has also been accredited to offer and confer a four-year Bachelor of Laws (LLB) degree on its graduates. It is common that its LLB programme meets the same requirements and standards set for public universities. When the South African Qualifications Authority (SAQA) gave accreditation to the Institute's LLB programme, it pointed out that one of the degree's stated objectives was to equip prospective graduates for 'the professional practice of law and the administration of justice in the modern South African constitutional state' and that 'graduates will be able to apply for admission as legal practitioners'.

The Minister of Higher Education has not yet set 'criteria for recognition as a university' to be met by a private university or private institution of higher learning desirous of being accordingly registered. In the absence of that criterion, the Institute cannot, so it argued, be said to have met unknown registration criteria. For this reason, it is not a 'university' within the meaning of the Higher Education Act by extension s 26(1)(a) of the LPA.

As a result of this, the Institute challenged the constitutionality of s 26(1)(a) of the LPA on the grounds that it is inconsistent with ss 9, 22 and 29(3) of the Constitution. It did so in the KwaZulu-Natal Division of the High Court in Pietermaritzburg (the High Court). Relying on the definition of 'university' in the Higher Education Act, the High Court

concluded as follows: 'For these reasons the answer to the question whether "university" can be read to include the [Institute], must be [answered] in the negative. The KZN Law Society can, therefore, not be faulted for its failure to give a different and wider meaning to the concept of university. The "decision" did not ignore the provisions of the Higher Education Act, it in fact applies [to] them, given that the Act maintains the distinction between various types of higher education institutions.' The High Court went on to say: 'I find that, having shown that the applicant meets the criteria set out in section 29(3) and those in Chapter 7 of the Higher Education Act, the applicant enjoys the same rights to offer the accredited four-year LLB as public universities, and its exclusion from section 26(1)(a) of the [LPA], limits this right.'

The CC said the High Court went on to hold that s 26(1)(a) of the LPA was constitutionally invalid by reason of its inconsistency with ss 9, 22 and 29(3) of the Constitution. This was said because it was satisfied that the word 'university' in s 26(1)(a) of the LPA clearly excludes private higher education institutions, duly registered and accredited to offer the LLB degree. The CC added that the High Court correctly referenced the meaning of the word 'university' in the Oxford English Dictionary. There it is defined as 'a high-level educational institution in which students study for degrees and academic research is done.' But, even after referring to a collation of interpretive principles in *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC), that is not the meaning it gave to 'university' in s 26(1)(a) as it concluded that the applicant did not fall within that meaning.

The CC said it would be impermissible

to use as a standard to be adhered to or attach more weight to a word in a statute. The CC pointed out that the Constitution is the standard to be complied with in determining the constitutionality of any legislation. More importantly, where the ascertainment of the meaning or constitutionality of a provision may be enabled by direct guidance from the Bill of Rights as in this case, then that superior interpretive aid or measurement of constitutionality should render unnecessary any reference to whatever legislation might appear to be relevant. The CC added that put bluntly, if when considering the constitutionality of a particular legislation it becomes apparent that its provisions are consistent with the Bill of Rights, there would be no need to still ascertain whether its provisions are consistent with those of another related legislation.

The CC pointed out that more tellingly, the Higher Education Act opens its definition section where it states, unless the context otherwise indicates – ‘university’ means any university established, deemed to be established or declared as a university under this Act. The CC added that this follows that the special meaning given to ‘university’ in that Act is confined to instances where the Higher Education Act opens itself applies. But, even then, the definition applies subject to context. Room is less for the word ‘university’ to be given a meaning that is at variance with that specially defined one even where the Higher Education Act applies.

The CC said to concretise that approach, the following must never be lost sight of:

- A special meaning ascribed to a word phrase in a statute ordinarily applies to that statute alone.
- Even in instances where that statute applies, the context might dictate that the special meaning be departed from.
- Where the application of the definition, even where the same statute in which it is located applies, would give rise to an injustice or incongruity or absurdity that is at odds with the purpose of the statute, then the defined meaning would be appropriate for use and should, therefore, be ignored.
- A definition of a word in the one statute does not automatically or compulsorily apply to the same word in another statute.
- A word or phrase is to be given its ordinary meaning unless it is defined in the statute where located.
- Where one of the meanings that could be given to a word or expression in a statute, without straining the language, ‘promote the spirit, purport and objects of the Bill of Rights’, then that is the meaning to be adopted even if it is at odds with any other meaning in other statutes.

The CC pointed out that the Higher Education Act does not itself have a fixed

general meaning of ‘university’ that necessarily applies to the Act in its entirety. The CC added that Parliament knows all pieces of legislation it has passed. The CC said had Parliament wanted to ascribe to ‘university’ in the LPA the same meaning it gave to it in the Higher Education Act, it would have been all too easy for it to do so. But it chose not to. The CC noted this, despite the fact that Parliament knew that words carry their ordinary meaning unless a special meaning is ascribed to them. Absent a defined special meaning in the LPA, ‘university’ must thus be given its ordinary meaning.

The CC said that the LPA exists to facilitate entry into the legal profession by all who have acquired a four-year LLB degree of a standard acceptable to SAQA. It bears repetition that in accrediting the Institutes’ LLB degree SAQA said that the degree would equip the graduates ‘for the professional practice of law’ and enable them ‘to apply for admission as legal practitioners.’ The CC added that s 26(1)(a) was declared constitutionally invalid, not because it defined ‘university’ in a way that excludes the Institute and thus inconsistent with the Constitution. But because it did not include certain words contained in the definition of ‘university’ in the Higher Education Act.

The CC pointed out that that approach gives rise to the injustice and absurdity alluded to in *Liesching v The State* 2017 (4) BCLR 454 (CC). The CC added that this was so because there is nothing in or about the LPA that compels that the definition of ‘university’ in the Higher Education Act must apply to it. The CC said an ordinary meaning of ‘university’ accords with the provisions of s 29 of the Constitution and promotes the very essence of the Bill of Rights. The CC noted that the Institute is an ‘independent educational institution’ envisaged by s 29(3) of the Constitution, that it is registered with the state and the accreditation of its LLB programme confirms that it is of a standard that is not inferior to that of public university.

The CC said the establishment of a constitutionally-compliant institution, such as the Institute, promotes the spirit, purport and objective of s 29 of the Constitution and it increases the pool wherefrom higher education of an appropriate standard could be made accessibly to many. The court held: ‘We must guard against our judgment mistakenly undermining or frustrating the essence of the Bill of Rights’. The CC pointed out that the Law Society took the view that an accredited LLB degree from a duly registered ‘private higher educational institution in which students study for degrees’ is not a university for the purpose of s 26(1)(a). The CC added that the Law Society’s mistake was, therefore, a problem and effectively unsuccessful. The CC supported

the conclusion that was reached in the first judgment by the High Court regarding the meaning of ‘university’ in s 26(1)(a) of the LPA.

The following order was made:

‘1. The order by the KwaZulu-Natal Division of the High Court, Pietermaritzburg that s 26(1)(a) of the Legal Practice Act 28 of 2014 is constitutionally, invalid, is not confirmed.

2. It is declared that a Bachelor of Laws graduate of the Independent Institute of Education (Pty) Limited is eligible for admission and enrolment as a legal practitioner in terms of the Legal Practice Act 28 of 2014.

3. The KwaZulu-Natal Law Society must pay the costs of the Independent Institute of Education (Pty) Limited in this Court and in the High Court, including costs of two counsel.’

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

## Fact corner

- Public universities in South Africa are divided into three types: traditional universities, which offer theoretically-oriented university degrees; universities of technology (‘technikons’), which offer vocational oriented diplomas and degrees; and comprehensive universities, which offer a combination of both types of qualification.
- International university rankings indicate that South Africa’s university system is the strongest on the continent: It is home to five of the six highest ranked African universities.
- As of September 2019 only South African public degree-granting institutions may call themselves a ‘university’, whereas other accredited private degree-granting institutions tend to call themselves colleges, institutes or business schools.





# New legislation

Legislation published from  
1 November – 31 December 2019

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

## Bills

National Environmental Management Laws Amendment Bill B14D of 2017.  
Taxation Laws Amendment Bill B18A of 2019.  
Taxation Laws Amendment Bill B18B of 2019.  
Military Discipline Bill B21 of 2019.  
Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Bill B22 of 2019.

## Promulgation of Acts

**Traditional and Khoi-San Leadership Act 3 of 2019.** *Commencement:* To be proclaimed. GN1550 GG42865/28-11-2019 (also available in Afrikaans).  
**Traditional Leadership and Governance Framework Amendment Act 2 of 2019.** *Commencement:* 28 November 2019. GN1552 GG42867/28-11-2019 (also available in Siswati).  
**Critical Infrastructure Protection Act 8 of 2019.** *Commencement:* To be proclaimed. GN1551 GG42866/28-11-2019 (also available in isiXhosa).  
**Special Appropriation Act 25 of 2019.** *Commencement:* 22 November 2019. GN1525 GG42852/22-11-2019 (also available in isiXhosa).

## Commencement of Acts

**Electronic Deeds Registration Systems Act 19 of 2019, s 2.** *Commencement:* 2 December 2019. Proc59 GG42871/29-11-2019 (also available in Afrikaans).  
**Labour Laws Amendment Act 10 of 2018, ss 1 to 7.** *Commencement:* 1 January 2020. GN R1699 GG42925/23-12-2019 (also available in Setswana).  
**Refugees Amendment Act 33 of 2008.** *Commencement:* 1 January 2020. Proc R60 GG42932/27-12-2019 (also available in Afrikaans).

## Selected list of delegated legislation

**Agricultural Pests Act 36 of 1983**  
Amendment of control measures relating to honey-bees. GN R1511 GG42850/22-11-2019.

**Allied Health Professions Act 63 of 1982**

Allied Health Professions Council: Registration and other fees for 2020. BN193 GG42861/29-11-2019.

**Animal Diseases Act 35 of 1984**

Control measures relating to Foot and Mouth Disease in certain areas. GN1565 GG42883/4-12-2019.

**Architectural Profession Act 44 of 2000**

Specified categories of registration. BN189 GG42849/22-11-2019.

**Carbon Tax Act 15 of 2019**

Regulations on carbon offsets. GN1556 GG42873/29-11-2019.

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

Scope of work for categories of registration of property valuers profession. GN1537 GG42861/29-11-2019.

**Deeds Registries Act 47 of 1937**

Amendment of regulations. GN R1418 GG42813/1-11-2019 (also available in Afrikaans).

**Firearms Control Act 60 of 2000**

Declaration of an amnesty in terms of s 139. GN1527 GG42858/27-11-2019.

**Government Employees Pension Law**

Amendment of the rules of the Government Employees Pension Fund. GenN596 GG42819/1-11-2019.

**Health Professions Act 56 of 1974**

Amendment of regulations relating to qualifications which entitles psychologists to registration. GN R1490 GG42843/15-11-2019 (also available in Sesotho).

**Income Tax Act 58 of 1962**

Agreement between South Africa and the Commonwealth of Dominica for exchange of information relating to tax matters. GN1573 GG42887/6-12-2019 (also available in Afrikaans).

**Labour Relations Act 66 of 1995**

Bargaining councils and statutory councils accredited by the Commission for Conciliation, Mediation and Arbitration for conciliation and/or arbitration and/or inquiry by arbitrator from 1 November 2019 to 31 December 2023. GenN627 GG42861/29-11-2019.

**Land Survey Act 8 of 1997**

Offices of the Chief Surveyor-General and the Surveyors-General: Fees to be charged for products and services. GN1541 GG42861/29-11-2019.

**Legal Practice Act 28 of 2014**

Amendment to r 54.7 of the rules published under ss 95(1), 95(3) and 109(2). GN1432 GG42829/8-11-2019.

**Liquor Act 59 of 2003**

Memorandum of understanding between Broad-Based Black Economic Empowerment (B-BBEE) Commission and the National Liquor Authority. GN1411 GG42812/1-11-2019.

**Military Pensions Act 84 of 1976**

Determination of amounts. GN R1485 GG42840/15-11-2019 (also available in Afrikaans).

**Mineral and Petroleum Resources Development Act 28 of 2002**

Housing and living conditions standard for minerals industry, 2019. GN R1590 GG42899/11-12-2019.

**National Forests Act 84 of 1998**

Protected tree species. GenN635 GG42887/6-12-2019.

**National Ports Act 12 of 2005**

Memorandum of understanding between B-BBEE Commission and the Ports Regulator of South Africa. GN1410 GG42812/1-11-2019.

**Nursing Act 33 of 2005**

Regulations relating to the approval of and the minimum requirements for education and training of learners leading to registration in the category midwife. GN1497 GG42849/22-11-2019.

**Occupational Health and Safety Act 85 of 1993**

Ergonomics Regulations, 2019. GN R1589 GG42894/6-12-2019.

**Petroleum Pipelines Act 60 of 2003**

Amendment of the Petroleum Pipeline Rules. GN1463 GG42837/13-11-2019.

**Pharmacy Act 53 of 1974**

South African Pharmacy Council: Fees payable in 2020. BN188 GG42845/15-11-2019.

Regulations relating to continuing professional development. BN201 GG42895/10-12-2019.

Amendment of the rules relating to good pharmacy practice (GPP). BN205 GG42906/13-12-2019.

**Project and Construction Management Professions Act 48 of 2000**

Scope of services for professional building inspectors. BN190 GG42853/22-11-2019 and BN191 GG42856/25-11-2019. Fees and charges from 1 January 2020. BN195 GG42868/28-11-2019 and BN200 GG42893/6-12-2019.

### Property Valuers Profession Act 47 of 2000

Rules for the Property Valuers Profession, 2020. GenN653 GG42902/13-12-2019.

### Refugees Act 130 of 1998

Regulations. GN R1707 GG42932/27-12-2019.

### South African Weather Services Act 8 of 2001

Regulations regarding fees for provision of the aviation meteorological services. GN1526 GG42855/25-11-2019.

### Unemployment Insurance Act 63 of 2001

Amendment of Unemployment Insurance Act regulations. GN R1421 GG42821/4-11-2019.

### Draft delegated legislation

- Draft National Botanical Garden Expansion Strategy 2019 - 2030 in terms of the National Environmental Management: Biodiversity Act 10 of 2004 for comment. GenN607 GG42839/15-11-2019.
- Bovine Brucellosis Control Policy in terms of the Animal Diseases Act 35 of 1984 for comment. GN1464 GG42839/15-11-2019.
- Draft Major Hazard Installation Regulations, 2019 in terms of the Occupational Health and Safety Act 85 of 1993 for comment. GN R1483 GG42840/15-11-2019.

- Revised national norms and standards for funding technical and vocational education and training colleges in terms of the Continuing Education and Training Act 16 of 2006 for comment. GenN615 GG42849/22-11-2019.
- Draft amendment regulations in terms of the Financial Sector Regulation Act 9 of 2017 for comment. GN R1555 GG42872/29-11-2019 (also available in Setswana).
- Draft Public Administration Management Regulations on Conducting Business with State and the Disclosure of Financial Interests and Ethics, Integrity and Discipline Technical Assistance Unit, 2019 and the Office of Standards and Compliance, 2019 in terms of the Public Administration Management Act 11 of 2014 for comment. GN1536 GG42861/29-11-2019.
- Guideline for the removal of pharmacy registration/recording as a result of non-compliance with the GPP and other pharmacy legislation in terms of the Pharmacy Act 53 of 1974 for comment. BN196 GG42875/29-11-2019.
- Draft Mine Community Resettlement Guidelines, 2019 in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 for comment. GN1566 GG42884/4-12-2019.
- Rules for continuing professional development and renewal of registration in terms of the Nursing Act 33 of 2005

for comment. GN1569 GG42887/6-12-2019.

- South African Pharmacy Council: Restoration requirements and process for pharmacists who have been removed from the register in terms of the Pharmacy Act 53 of 1974 for comment. BN202 GG42895/10-12-2019.
- Intention to deem persons in the film and television industry as employees for purposes of some parts of the Basic Conditions of Employment Act 75 of 1997, National Minimum Wage Act 9 of 2018, Labour Relations Act 66 of 1995 and the Compensation for Occupational Injuries and Diseases Act 130 of 1993 for comment. GN R1591 GG42900/11-12-2019.
- The South African Geomatics Council: Draft tariffs or fees guidelines: Land surveying in terms of the Geomatics Profession Act 19 of 2013 for comment. BN203 GG42902/13-12-2019.

### Draft Bills

- Draft National Sport and Recreation Amendment Bill published on 11-12-2019.
- Draft Constitution Eighteenth Amendment Bill, 2019. GenN652 GG42902/13-12-2019.
- Draft Upstream Petroleum Resources Development Bill. GN1706 GG42931/24-12-2019.



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## Dismissal for incapacity on the basis of ill health

In *Parexel International (Pty) Ltd v Chakane and Others* [2019] 11 BLLR 1245 (LAC), an employee was absent from work due to ill health for nine months after having suffered an injury on duty whereby she hit her head. The employee was initially absent for six months and unsuccessfully applied for ill health retirement as her medical report indicated that she would recover with time. At this point the employer stopped paying the employee's salary as her sick leave had been exhausted, but continued to contribute to medical aid, provident fund and life cover. The employer held a number of incapacity hearings in an attempt to ascertain when the employee would be fit to return to work. At each hearing it was found that she would recover over time.

The employee eventually returned to work but a few days later the employee's husband communicated that she could not work due to back pain that had caused a headache. She then submitted a further medical certificate. The employer then required the employee to submit a medical report with full details of the nature of the illness, the prospect of recovery and whether she would be able to resume her duties. No medical report was forthcoming, and an incapacity hearing was then scheduled. The employee's husband then communicated to the employer that the employee would not attend the final hearing and accepted that it would proceed in her absence. Given the fact that she failed to attend and failed to give the employer an indication as to when she would be fit to resume her duties, the employer dismissed her for incapacity with immediate effect.

The matter was referred to the Commission for Conciliation Mediation and Arbitration and it was found that the dismissal was substantively unfair in that the employee was able to perform some tasks and her circumstances, therefore, could have been adapted in order to reasonably accommodate her. It was found to be procedurally unfair because the

employee was not given an opportunity to participate fully in the process. Reinstatement with ten months' back pay was ordered.

On review, the Labour Court agreed that the employer had not considered possible alternatives short of dismissal. Furthermore, the employee had been on unpaid sick leave and it was, therefore, no undue financial hardship for the employer. The review application was dismissed.

On appeal, the employer argued that the employee's absence had been unreasonably long and there was no indication of when she would be fit to resume her duties and, therefore, there were no alternatives to consider. The Labour Appeal Court (LAC) held that an employer is not required to keep the job open indefinitely and cannot be expected to tolerate an employee's prolonged absence for ill health. The employee had provided a number of medical certificates, which gave different versions and reasons for her absence. It was found that it was accordingly justifiable for the employer to request the employee to provide another medical report, which she then failed to do. There was also no evidence that her illness related to the injury on duty.

It was held by the LAC that whether an employee is willing and able to work and when she may be in a position to do so are material considerations when considering an employee's incapacity, as well as whether the absence has been for an unreasonably long period of time and whether alternatives to dismissal exist. It was held that in this case the employer's failure to consider alternatives short of dismissal was not unfair and the dismissal was accordingly fair. The appeal was upheld.

## Dismissal for incapacity on the basis of poor work performance

In *Ubuntu Education Fund v Paulsen NO and Others* [2019] 11 BLLR 1252 (LAC), the employee was employed as a supply chain coordinator and was subject to a six month probationary period. During the probationary period, her key performance areas were reduced. After two months of her employment she was advised that there were concerns about her performance and five performance appraisals were conducted in which she was found to have performed poorly.

A poor work performance hearing

was convened, and she was dismissed for poor work performance approximately seven months after commencing employment with the employer. At the performance hearing the employer made representations regarding the employee's performance and demonstrated that she lacked the understanding and ability to carry out her assigned tasks despite been given assistance and a reasonable opportunity to improve.

The Commission for Conciliation, Mediation and Arbitration (CCMA) found that the dismissal was substantively unfair because the probation period had ended, and the employer did not consider alternatives short of dismissal. The CCMA placed a lot of emphasis on the fact that the employee's employment had been confirmed after the end of the probationary period and was, therefore, under the impression that her performance had been acceptable. The employee was awarded reinstatement retrospectively. This was upheld on review by the Labour Court.

On appeal, the employee argued that her workload was too much, and the employer should have considered alternatives short of dismissal as dismissal is a last resort. The Labour Appeal Court (LAC) found that an employer cannot be expected to amend the requirements of the advertised position to accommodate limitations of a probationary employee who proved unsuitable. The LAC found that when the probationary period expired the employee still underwent ongoing review and evaluation processes, so it could be inferred that the probation period was extended. It was held that the commissioner had erred in assuming that the employee had become permanently employed when the probation period ended. It was also irrational to find that the performance was satisfactory because the employee had been kept on beyond the probation period. It was held that the purpose of probation is not only to assess an employee's competence but also to assess the employee's diligence, compatibility and character. It was also confirmed that the standard for dismissing probationary employees is lower. It was held that it was clear that the employee was not meeting the performance standard and it was sufficient to justify the termination of her employment because there had been extensive evaluation, consultation and counselling. The appeal was upheld.







By  
Kathleen  
Kriel

# Recent articles and research

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Abbreviation	Title	Publisher	Volume/issue
<i>CILSA</i>	Comparative and International Law Journal of Southern Africa	Juta	(2019) 52.1
<i>ITJ</i>	Insurance and Tax Journal	LexisNexis	(2019) 34.4
<i>LitNet</i>	LitNet Akademies (Regte)	Trust vir Afrikaanse Onderwys	(2019) 16.3
<i>Obiter</i>	Obiter	Nelson Mandela University	(2019) 40.2
<i>PER</i>	Potchefstroom Electronic Law Journal	North West University, Faculty of Law	(2019) 22
<i>PW</i>	Pensions World	LexisNexis	(2019) 22.4
<i>SAJHR</i>	South African Journal on Human Rights	Taylor & Francis	(2019) 35.3
<i>SALJ</i>	South African Law Journal	Juta	(2019) 136.3
<i>SAYIL</i>	South African Yearbook of International Law	Juta	(2018) 43.1

## Access to information

**Ashukem, JCN** 'Revisiting the interpretation of s 50 of the Promotion of Access to Information Act – *Mahaeeane and Motlajsi Thakaso v Anglogold Ashanti Limited* (85/2016) [2017] ZASCA 090' (2019) 40.2 *Obiter* 363.

## Access to justice

**Klaaren, J** 'What does justice cost in South Africa? A research method towards affordable legal services' (2019) 35.3 *SAJHR* 274.

## Administrative law

**Titus, A** '*Pienaar Bros (Pty) Ltd v CSARS*, retroactive fiscal legislation and the rule of law: Has South Africa just taken a step back in its constitutional democracy?' (2019) 136.3 *SALJ* 404.

## Bilateral agreements

**Van der Walt, R** 'Treaties' (2018) 43.1 *SAYIL* 173.

## Company law

**Cassim, R** 'A critical analysis of the grounds of removal of a director by the board of directors under the Companies Act' (2019) 136.3 *SALJ* 513.

**Cassim, R** 'The suspension and setting aside of delinquency and probation orders under the Companies Act 71 of 2008' (2019) 22 *PER*.

**Mupangavanhu, BM** 'Impact of the Constitution's normative framework on the interpretation of provisions of the Companies Act 71 of 2008' (2019) 22 *PER*.

## Constitutional law

**Coutsoudis, A and du Plessis, M** 'We are all international lawyers now: The Constitution's international-law trifecta comes of age' (2019) 136.3 *SALJ* 433.

## Constitutional law – expropriation of land

**Anstey, M** 'Negotiating elusive justice:

Dilemmas of land distribution in Southern Africa' (2019) 40.2 *Obiter* 240.

## Constitutional litigation

**Chamberlain, L** 'A costly blunder: *South African History Archive Trust v The South African Reserve Bank*' (2019) 35.3 *SAJHR* 288.

## Consumer law

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**Vessio, ML** '*In duplum* and the lump-sum loan: The common law and s 103(5) of the National Credit Act' (2019) 136.3 *SALJ* 463.

## Criminal law and procedure

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**Roberts, S** 'No double-dipping: Rethinking the tests for duplication of convictions' (2019) 136.3 *SALJ* 489.

### Customary law

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**Sibisi, S** 'Breach of promise to marry under customary law' (2019) 40.2 *Obiter* 340.

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**Mukheibir, A and Mitchell, G** 'The price of sadness: Comparison between the Netherlands and South Africa' (2019) 22 *PER*.

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**Vinti, C** 'The right to mine in a "protected area" in South Africa: *Mining and Environmental Justice Community Network of South Africa v Minister of Environmental Affairs*' (2019) 35.3 *SAJHR* 311.

### Estate planning and wills

**De la Harpe, L** 'Divorce and death - the impact of s 2B on your Will' (2019) 34.4 *ITJ*.

**Van der Poll, K** 'Section 4(p) and the apportionment of estate duty' (2019) 34.4 *ITJ*.

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Muslim family law: The case of Tunisia' (2019) 22 *PER*.

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**Botes, A** 'Seksuele teistering in die Suid-Afrikaanse werkplek vanuit 'n menseregterlike perspektief' (2019) 16.3 *LitNet*.

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**Dube, A and Nxumalo, N** 'When lawyers lie, cheat and steal: Understanding the role of the Bar – *Ndleve v Pretoria Society of Advocates* [2016] ZACC 29' (2019) 40.2 *Obiter* 353.

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**Mujuzi, JD** 'The principle of non-refoulement in South Africa and the exclusion from refugee status of asylum seekers who have committed offences abroad: A comment on *Gavric v Refugee Status Determination Officer, Cape Town and Others*' (2018) 43.1 *SAYIL* 20.

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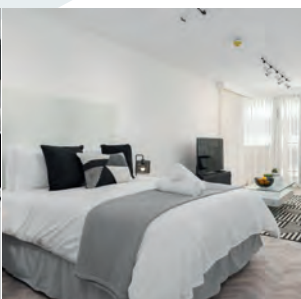
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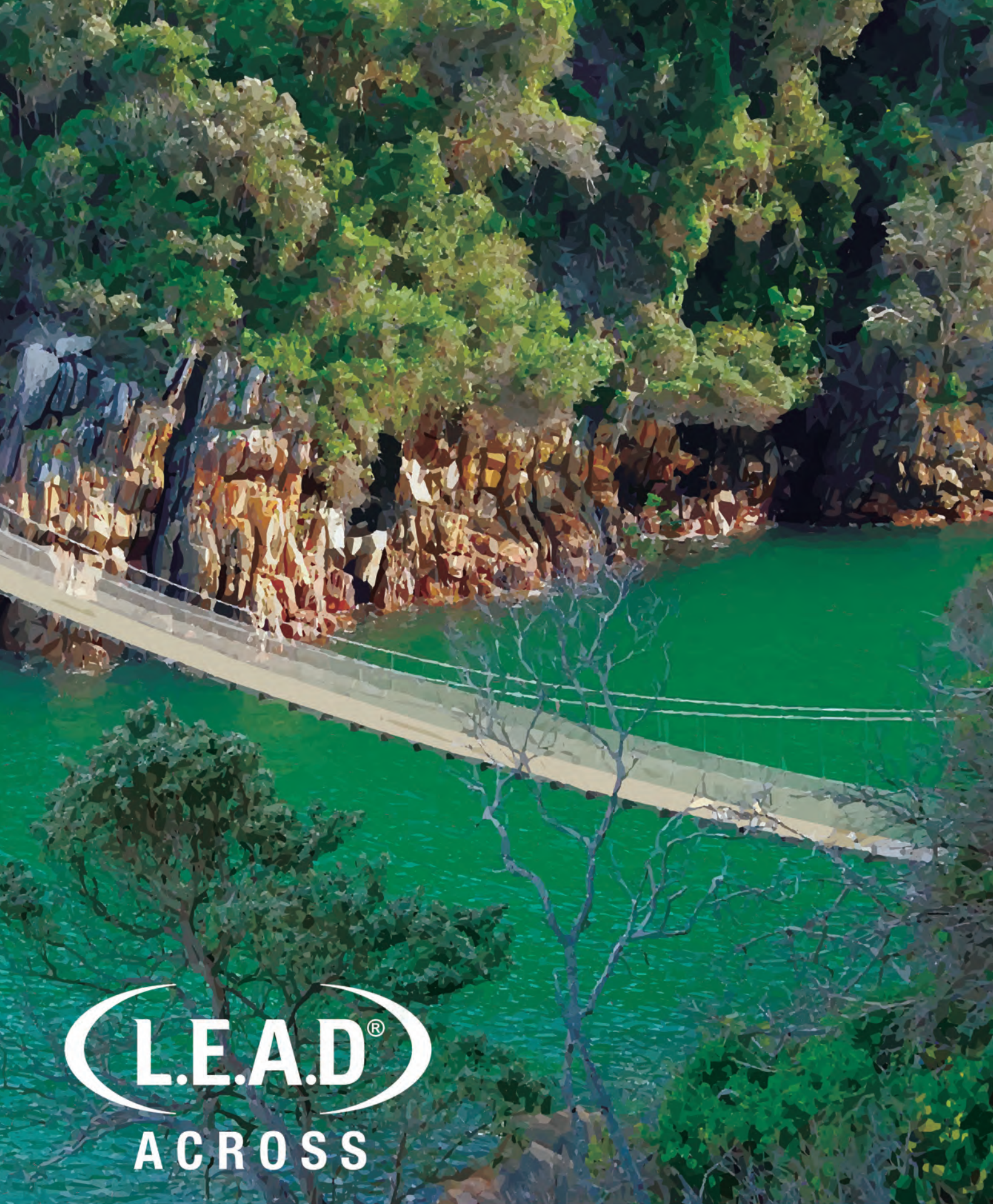
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### Index Page

Vacancies.....	1
For sale/wanted to purchase.....	1
To Let/Share.....	1
Services offered.....	2
Smalls.....	4
Courses.....	5

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# RISKALERT

FEBRUARY 2020 NO 1/2020

## IN THIS EDITION

### RISK MANAGEMENT COLUMN

- Time to rethink and reassess the approach to risk management 1

### GENERAL PRACTICE

- A warning of the potential implications of a lack of diligence on the part of legal practitioners - by Ayanda Nondwana and Zinhle Mokoena 3
- The revised LPIIF risk assessment questionnaire 4

## RISK MANAGEMENT COLUMN

### A NEW YEAR – TIME TO RETHINK AND REASSESS THE APPROACH TO RISK MANAGEMENT

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**DISCLAIMER**  
Please note that the Risk Alert Bulletin is intended to provide general information to legal practitioners and its contents are not intended as legal advice.

By the time this edition of the Bulletin is published, many practices will be well into the implementation of their strategic plans for the year. As part of the strategic planning, an assessment must be done on the risks that may affect the achievement by the practice of its strategic goals. Improving the way risks are managed must be one of the goals for every practice in 2020.

In the unfortunate event that risk management was not given the appropriate priority in the past, the beginning of the new year is an opportune time to rethink your approach. A prudent approach is to constantly evaluate the efficacy and efficiency of the risk management practices and policies in place in the firm.

A number of organisations have published what are predicted to be the main risk focus areas in 2020. Some these surveys have focussed on certain aspects of legal practice in other jurisdictions. I am not aware of a survey conducted in South Africa which looks into the proverbial crystal



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ball on what 2020 holds in store for legal practitioners in this country. While these surveys are based on the mandate and area of focus of the respective organisations, several general observations can be gleaned from the publications. These include:

- (i) The importance of constantly scanning the operating environment holistically (internally and ex-



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## RISK MANAGEMENT COLUMN continued...

- ternally) in order to identify the risks faced by an enterprise;
- (ii) A risk management plan must assess the potential impact of a risk materialising and the development and implementation of a risk management plan appropriate for the identified risks;
  - (iii) The increase in various forms of cyber related risks;
  - (iv) The numerous risks arising from the changing regulatory and economic environment;
  - (v) Embedding the risk management plan within the enterprise; and
  - (vi) Concerns regarding the sustainability of legal practices and how certain areas of practice are affected by the identified risks.

Management of risks requires constant action on the part of practitioners. It cannot be assumed that risks will 'auto-correct'. Practitioners must make a concerted effort to identify the risks applying to their respective environments and then develop measures to deal with the risks. Practical measures must be taken to manage risk. Such measures will include the risk treatment options (accept, avoid, mitigate or transfer). The risk management plan must address the unique circumstances of the practice concerned. No legal practice is totally immune from risk. The obligation to have a risk management plan has its genesis in the regulatory and governance requirements applicable to law firms. The legislation, rules and professional duties of a legal practi-

tioner impose certain risk management obligations on practitioners. Risk management over all aspects of the practice is an absolute necessity and cannot be seen merely as a tick-box exercise, applicable only to some areas. The benefits to the practice and all other stakeholders of the risk management will depend on the attitude taken by the senior members of the practice and the amount of effort put into the exercise. When addressing younger practitioners, I often suggest that in an increasingly competitive market, the manner in which risk is managed in the firm may be the distinguishing factor that sets one practice apart from the competition.

The Legal Practitioners' Indemnity Insurance Fund NPC (the LPIIF) provides risk management assistance to insured legal practitioners at no cost to the practice. Please contact either Henri van Rooyen (our Practitioner Support Executive) or me should you require any assistance with risk management. We can be contacted on (012) 622 3900 or email us at [Risk.Queries@LPIIF.co.za](mailto:Risk.Queries@LPIIF.co.za).

The annual completion of completion of the risk management self-assessment questionnaire is prescribed by the rules and the LPIIF policy. For your convenience, we have included a copy of the questionnaire in this edition of the Bulletin. A copy can also be downloaded from the LPIIF website. The rationale behind the completion of the questionnaire is set out in the note accompanying it. We must add that the information required is important in order to give the LPIIF, being the primary

professional indemnity insurer of all practitioners with Fidelity Fund certificates (see section 77 of the Legal Practice Act 28 of 2014), the underwriting information required in order to assess the risk pool.

We look forward to ongoing engagement with the profession with regards to risk. The LPIIF, the Legal Practitioners' Fidelity Fund, the Legal Practice Council (as the regulator), every member of the profession and all other stakeholders have a common interest to ensure that risk is properly managed by all practitioners. In this regard, we encourage members of the profession to inform us of any risk related topic they wish us to address and to bring any new developments to our attention. To this end, we are also going through a process of assessing our various publications in order to ensure an improved offering to readers. We look forward to your input. Keep a look out for further communication from the LPIIF in this regard.

Our publications this year will cover topical risk matters and we will, as far as possible, attempt to provide members of the profession with practical suggestions on how to avoid or mitigate risks.

Embed risk management in every aspect of your firm, make it part of the DNA of the practice and we trust that you will have a claim-free 2020. All stakeholders in the firm will reap the benefits of a properly developed and implemented risk management plan.



## GENERAL PRACTICE

### AN ATTORNEY'S LACK OF CARE AND DILIGENCE CAN HAVE ADVERSE COSTS CONSEQUENCES

*"....There comes a time when a diligent attorney has to leave the comfort zone of his or her air-conditioned office and venture out to do some fieldwork in order to safeguard the interests of a client...."* (per Rampai J in **Mlenzana v Goodrick & Franklin Inc** 2012 (2) SA 433 (FB) at paragraph [99]).

It is trite that an expert witness is required to assist, and not to usurp, the function of the court. Expert witnesses are required to lay a factual basis for their conclusions and their opinions must be underpinned by proper reasoning in order to enable the court to assess the cogency of the opinion proffered and the conclusions reached. The court must be able to satisfy itself as to the correctness of the expert's reasoning. Absent any reasoning, the opinion is inadmissible. An expert opinion which lacks proper reasoning is not helpful to the court.

In **Ndlovu v Road Accident Fund** 2014 (1) SA 415 (GSJ), the court held that in order for a comprehensive medico-legal report to continue being accepted as complying with the rules pertaining to expert evidence in modern practice, and for the plaintiff not to be potentially prejudiced by a failure to distinguish assumptions from fact and opinion, the following is pertinent:

- A clear distinction must be made between the primary source data relied upon, secondary sources and the plaintiff's say-so. The primary source would inevitably be the treating hospital's records from the time of the accident until discharge.
- The medico-legal report should also clearly indicate whether the plaintiff's assertions are accepted or merely assumed.



Authors (from left): Ayanda Nondwana, Director at Lawtons Africa and Zinhle Mokoena, Candidate Attorney at Lawtons Africa

Accordingly, the court ruled that much will depend on how the experts distinguish between objective originating data on the one hand and the plaintiff's say-so or unsubstantiated hearsay on the other. In this way a clear line can be drawn between expert opinion evidence on the one hand and the acceptance of the plaintiff's mere say-so on the other.

In a matter wherein the writers were involved\*, and judgement handed down in November 2019, the apt advice given by the court in **Mlenzana** was not heeded by one of the parties, with dire consequences to the attorney who was representing the plaintiff.

Briefly, the facts were: the defendant, an incorporated firm of attorneys, had acted on behalf of the plaintiff in a claim against the Road Accident Fund (RAF) for damages arising out of a motor vehicle accident. The claim became prescribed in the hands of the defendant and, as a result, the plaintiff instituted a claim against the firm for professional negligence.

The parties reached a settlement save for the costs of three experts engaged

by the plaintiff. The defendant contended that it was not necessary or reasonable for the plaintiff to have engaged their services and as a result, their reports were not opinions as prescribed by the law and therefore the defendant was not liable for these costs. On the other hand, the plaintiff's attorney contended that it was necessary for him to investigate the head injury based on the version of the plaintiff that he had lost consciousness at the scene of the accident. In short, the plaintiff's attorney accepted the say-so of the plaintiff without demur in deciding to brief the said experts. Similarly, the said experts, relying on the say-so of the plaintiff and in absence of objective evidence or data to support their conclusion, opined that there was a head injury.

In granting judgement in favour of the defendant, the court, reminiscent of **Mlenzana**, profoundly remarked as follows:

*"However, faced with the plaintiff who alleges to have been knocked unconscious at the time of the accident and hospital records which do not show anything or a complaint relating to a*

## GENERAL PRACTICE continued...

head injury, not even showing the recording of the Glasgow Coma Scale on admission or any MRI scan results, I am unable to comprehend why the clinical notes of the first treating doctor were not obtained.

Further, it is incomprehensible why a statement was not obtained from the plaintiff's employer as to the state in which he found the plaintiff when he took him to the private doctor on that day. I am of the respectful view that a diligent attorney would have obtained this information to ascertain whether the plaintiff was in fact knocked unconscious on the day of the accident before embarking on a costly exercise to engage the services of experts. The ineluctable conclusion is therefore that the referral

of the plaintiff to the experts as part of the investigation of the head injury was unreasonable and unnecessary in the circumstances of this case." (At paragraph 8 of the judgement, emphasis added)

As a result of the court disallowing these costs, the plaintiff's attorney absorbed the costs as his expense.

The above judgement is a welcome reminder to all attorneys who specialise in personal injury matters that care and diligence are required prior to the engagement of medical experts. The reliance on the say-so of the client does not meet the basic standard of reasonableness. The attorney is required to do some leg-work for a change, otherwise the consequences will be costly.

(This article was originally published in the Lawtons Africa **Insurance Law Newsletter** on 17 December 2019 and is reproduced with the kind permission of the authors.)

\*Note by the editor: Mr Nondwana and Ms Mokoena acted on the instructions of the Legal Practitioners' indemnity Insurance Fund NPC (the LPIIF), the professional indemnity insurer of the defendant, in this matter. The judgement by Twala J in the matter of **Miquessewe Isaias Ndlovu v Nozuko Nxusani Incorporated** (Gauteng Local Division, Johannesburg Case No: 5803/2017) was delivered on 15 November 2019.

## LPIIF RISK MANAGEMENT SELF-ASSESSMENT QUESTIONNAIRE



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The annual completion of this questionnaire will assist legal practitioners in:

- Assessing the state of the risk management measures employed in their practices;
- Focusing their attention on the appropriate risk management measures to be implemented;
- Providing a means of conducting a gap analysis of the controls the firm needs to have in place; and
- Collating the information that may be required in the completion of the proposal form for top-up insurers and the application for a Fidelity Fund certificate.

### IMPORTANT NOTES AND FREQUENTLY ASKED QUESTIONS

#### A. How often must the questionnaire be completed?

Clauses XXIV and 23 of the Legal Practitioners Indemnity

Insurance Fund NPC (the LPIIF) Master Policy read with the South African Legal Practice Council rules (the rules) prescribe that every insured legal practitioner must complete this questionnaire annually. The LPIIF will not provide indemnity in respect of a claim where the insured has not completed this questionnaire in the applicable insurance scheme year. Attorneys must have regard to point 15 of the application for a Fidelity Fund certificate form (schedule 7A of the rules) which provides that this form must be completed. Advocates with trust accounts rendering legal services in terms of section 34(2)(b) of the Legal Practice Act 28 of 2014 (the Act) must also complete this questionnaire annually (see point 13 of the application for a Fidelity Fund certificate form for advocates (schedule 7B of the rules)). A Fidelity Fund certificate will not be issued to a legal practitioner who has not complied with this requirement. Any reference to a firm in this form includes advocates practicing in terms of section 34(2)(b) of the Act.



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## LPIIF RISK MANAGEMENT SELF-ASSESSMENT QUESTIONNAIRE

You may complete the questionnaire at any time, even if your firm does not have any claims pending. (In order to make it easier and save time, you might wish to complete it at the time when you complete your top-up insurance proposal or Fidelity Fund Certificate application. In that way, you will have much of the information at your fingertips.)

The questionnaire is aimed at practices of all sizes and types.

### B. Why is the risk information required?

The information which we ask for in this assessment will be treated as strictly confidential. It will not be disclosed to any other person, without your practice's written permission. It will also not be used by the LPIIF and the Fidelity Fund in any way to affect your practice's claims records or individual cover. An analysis of information and trends revealed by your answers may be used by the LPIIF for general underwriting and risk management purposes. The risk information is required:

- To assist the LPIIF when setting and structuring deductibles and limits of indemnity for the profession, deciding on policy exclusions, conditions and possible premium setting.
- To raise awareness about risk management and to get practitioners thinking about risk management tools/procedures for their practices.
- To obtain relevant and usable general information and statistics about the structure of the firm, areas of practice, risk /practice management measures in place and claims history.
- To assist in the selection and formulation of the most effective risk management interventions.
- To assist the LPIIF in collating underwriting data on the profession.

## 1. SECTION 1

### 1.1. General practice information:

1.1.1. Name under which practice is conducted

1.1.2. Practice number

1.1.3. Under which Provincial Council (s) does your practice operate? (see section 23 of the Act)

1.1.4. Is your practice a Sole Practice/Partnership/

Incorporated Company/ Advocate referred to in section 34(2)(b) of the Act?

### 1.2. Principal office details:

1.2.1. Address and postal code

1.2.2. Telephone number

1.2.3. Email

1.2.4. Docex

1.2.5. Website

1.2.6. Details of any other physical address at which the practice will be carried on and name of practitioner in direct control at each office

### 1.3. Composition of the practice:

1.3.1 Partners/directors

1.3.2 Professional Assistants/ Associates/ Consultants

1.3.3 Candidate Attorneys

1.3.4 Paralegals

1.3.5 Other staff including secretaries

1.3.6 Total

1.4. In the table below, list all partners/directors by name, together with their number of years in practice and their areas of specialisation. Should there be more than 10, please add a separate list.

Partner/ director's name	Partner's practice no	Years in practice	Area of specialisation

15. For the past financial year, please provide approximate percentages of total fees earned in the following categories of legal work:



## LPIIF RISK MANAGEMENT SELF-ASSESSMENT QUESTIONNAIRE



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Are of practice	Percentage	Are of practice	Percentage
Conveyancing		Commercial	
Criminal		Debt collection	
Estates - trustees/executors/administrators		Insurance	
Investments		Liquidations	
Marine		Matrimonial	
Patents & Trademarks		Personal injury (RAF claims)	
Medical malpractice		General litigation	
Other (please specify any type of work that makes up a significant percentage of your fees)			

## 2. SECTION 2

### 2.1. Risk Management Information

Risk Question		Yes	No
2.1.1	Do you have a dedicated risk management resource/ a person responsible for risk management and/or quality control?		
2.1.2	Are all instructions recorded in a letter of engagement?		
2.1.3	Does your practice screen prospective clients?		
2.1.4	Do you assess whether or not you have the appetite, the resources and the expertise to carry out the mandate within the required time?		
2.1.5	Has your firm registered all time barred matters with the LPIIF's Prescription Alert unit?		



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## LPIIF RISK MANAGEMENT SELF-ASSESSMENT QUESTIONNAIRE

Risk Question		Yes	No
2.1.6	Are regular file audits conducted?		
2.1.7	Is the proximity the prescription date taken into account when accepting new instructions and explained to clients?		
2.1.8	Is a peer review system implemented in the firm?		
2.1.9	Is advice to clients always signed off by a partner/ director?		
2.1.10	Do you have a dual diary system in place for professionals and support staff?		
2.1.11	Do you have a formal handover process when a file is transferred from one person to another within the firm?		
2.1.12	Is more than one contact number obtained for clients?		
2.1.13	Are instructions, consultations and telephone discussions confirmed in writing?		
2.1.14	Does your firm have documented minimum operating standards/ standard operating procedures?		
2.1.15	Does your practice have effective policies on uniform file order?		
2.1.16	Is there a formal structure and process for supervision of staff and delegation of duties?		
2.1.17	Do you have a formal training program in place?		
2.1.18	Does the training program include risk management training?		
2.1.19	Do you have any executor bonds of security issued by the LPIIF?		
2.1.20	If yes, have the estate funds been audited as part of your annual regulatory audit? Please provide a copy of the annual audit report		
2.1.21	Are background checks (including criminal records and professional history) conducted on new employees?		

## LPIIF RISK MANAGEMENT SELF-ASSESSMENT QUESTIONNAIRE



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Risk Question		Yes	No
2.1.22	In respect of the financial functions, has an adequate system been implemented which addresses:		
2.1.22.1	Segregation of duties?		
2.1.22.2	Checks and balances?		
2.1.22.3	The internal controls prescribed by Rule 54.14.7 with regards to the safeguarding of trust funds?		
2.1.22.4	Compliance with FICA and the investment rules?		
2.1.22.5	The verification of the payee banking details and any purported changes as required by Rule 54.13?		

2.2. What other insurance policies does your firm have in place? (for example – cyber risk, misappropriation of trust funds, top-up professional indemnity, fidelity guarantee, commercial crime, public liability etc)

2.3. Are you aware of the risks associated with cybercrime in general and risks associated with phishing/ cyber scams and the scams involving fraudulent instructions relating to the purported change of beneficiary banking details?

Yes ☐ No ☐

2.4. Does your practice have appropriate insurance in place to cover cyber related claims (Cybercrime related claims are excluded from the Master Policy- see clause 16(o))?

Yes ☐ No ☐

2.5. Does your practice have regular meetings of professional staff to discuss problem matters?

Yes ☐ No ☐

2.6. Does your practice have formal policies on file storage and retrieval? (Procedures to ensure that files are not lost or misplaced or overlooked)

Yes ☐ No ☐

2.7. Have you read the Master Policy and are you (and all others in your practice) aware of the exclusions

(including the cybercrime exclusion)?

Yes ☐ No ☐

2.8. Have you and your staff had regard to the risk management information published on the LPIIF website (<https://lpiif.co.za/risk-management-2/risk-management-tips/>)?

Yes ☐ No ☐

2.9 Would your firm like to receive risk management training?

Yes ☐ No ☐

2.10. Should you require a risk management training session for the professional and/or support staff in your firm, please contact either:

- **Henri Van Rooyen (Practitioner Support Executive)**  
Email: [henri.vanrooyen@LPIIF.co.za](mailto:henri.vanrooyen@LPIIF.co.za)
- **Thomas Harban (General Manager)**  
Email: [thomas.harban@LPIIF.co.za](mailto:thomas.harban@LPIIF.co.za)

NAME

CAPACITY:

SIGNATURE:

DATE OF COMPLETION: