

WALKING A TIGHTROPE: THE BUSINESS RESCUE PRACTITIONER'S CHALLENGE OF SERVING COMPETING INTERESTS

COVID-19: *Force majeure* and the effect it has on rental contracts

Making sense of the *demerit points system* as a juristic person

Clarifying the term *pension fund* in the Divorce Act and the Pension Fund Act

Surrogacy and the courts' criteria for being suitable

The protection of consumers under the NCA

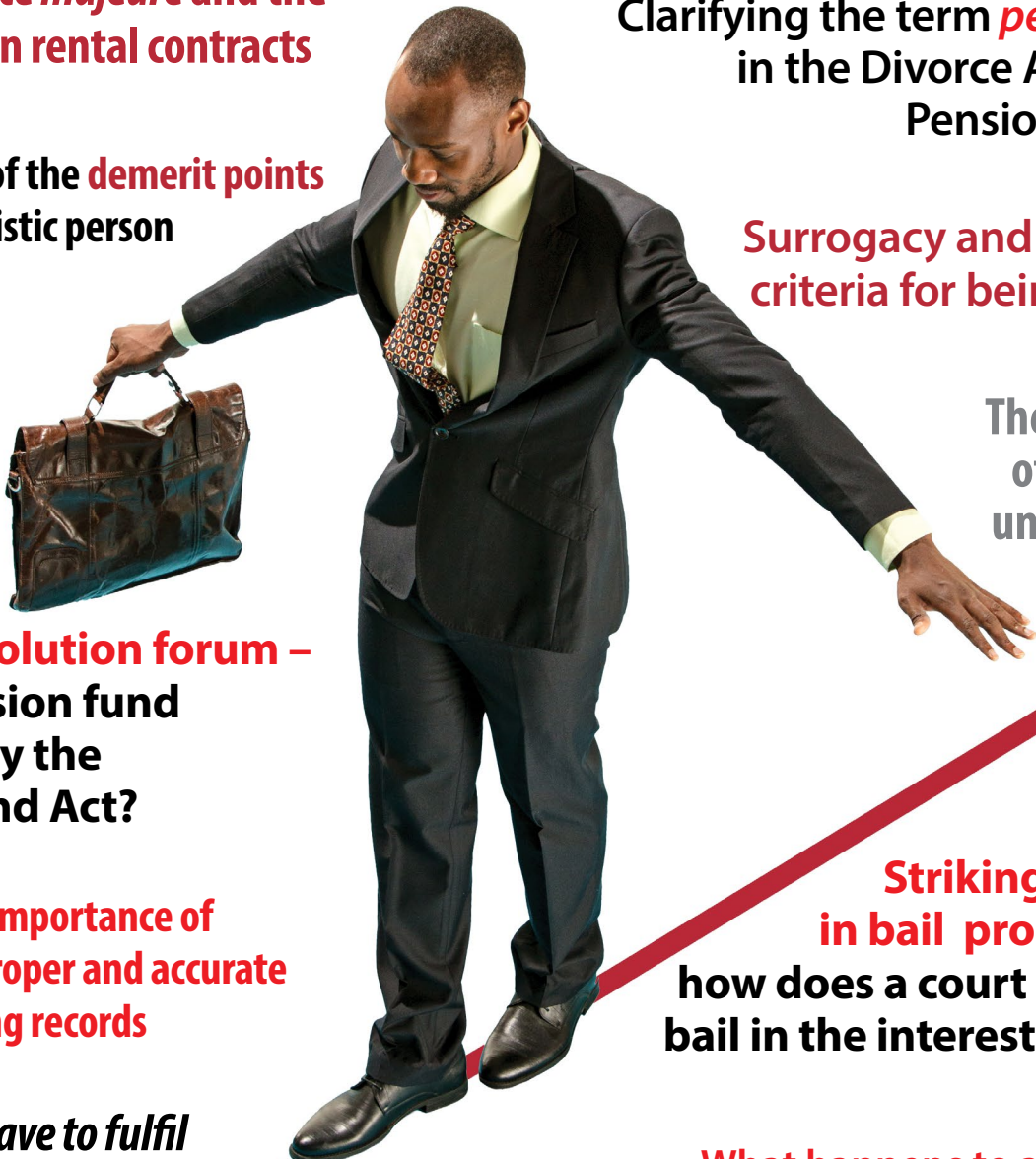
Dispute resolution forum – is your pension fund regulated by the Pension Fund Act?

The increased importance of maintaining proper and accurate trust accounting records

Will the RAF have to fulfil its obligation to its panel of attorneys?

Striking a balance in bail proceedings – how does a court determine bail in the interest of justice?

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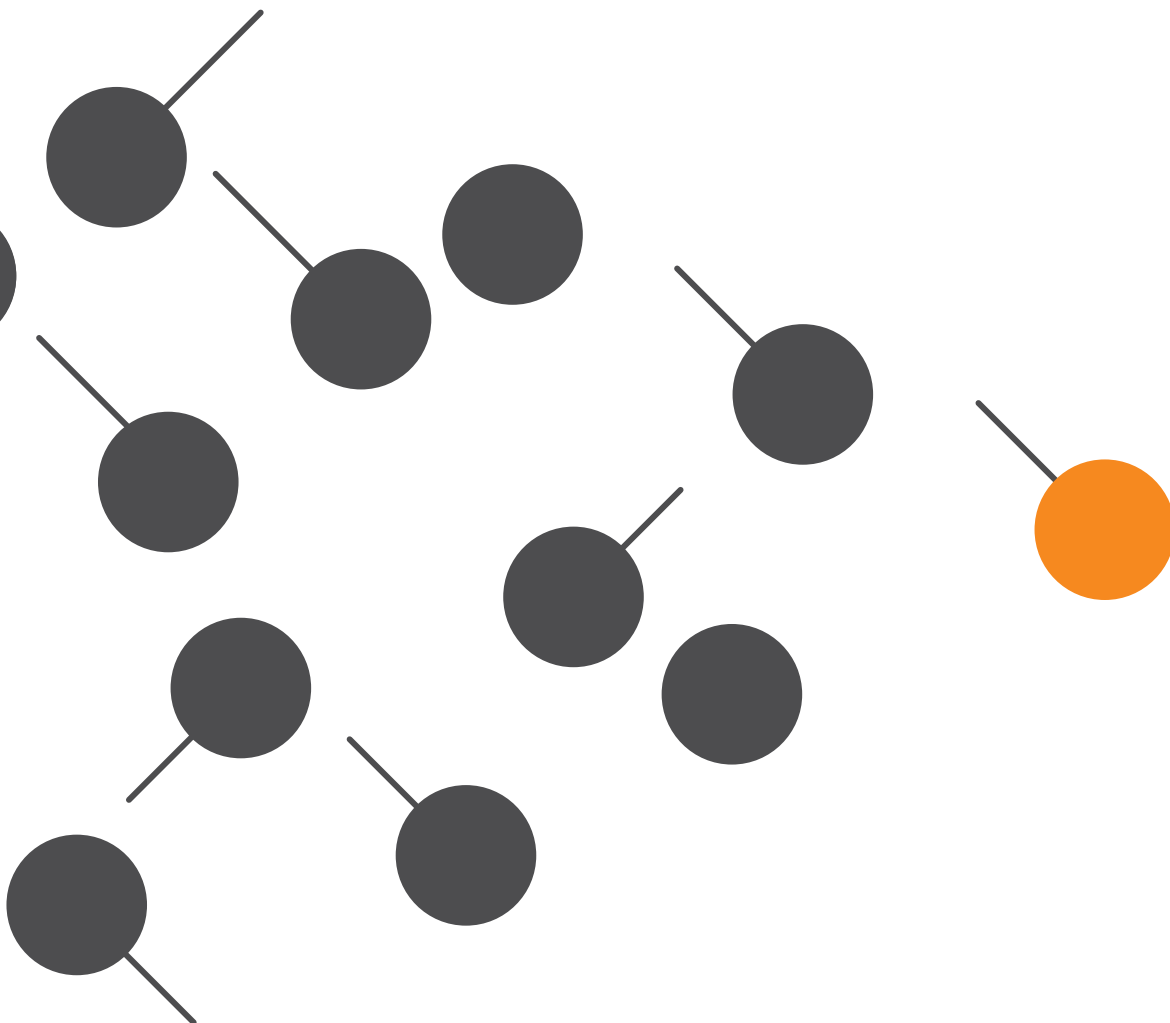
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Due to its novel nature, some aspects of the business rescue process have yet to be properly explained or tested in court. One such aspect is the precise role of an appointed business rescue practitioner. Candidate legal practitioner, **Ricky Kloppe** explains that this has left many unable to properly assess the performance and effectiveness of the business rescue practitioner and its unique role.

13 COVID-19: Force majeure and the effect it has on rental contracts

Vis maior means a superior power or force, which cannot be resisted or controlled. *Casus fortuitus* is an exceptional or extraordinary occurrence not reasonably foreseeable. Thus for an occurrence to constitute *force majeure* it must be both uncontrollable and unforeseeable. In the case of rental contracts, the unforeseeable will depend on the norms of experience in the locality in which the hired property was situated at the time the parties contracted. Senior Magistrate, **Mohammed Moolla** writes about the specific circumstance that need to be met for *force majeure* to be relied on to suspend obligations under a contract.

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16 Surrogacy and the courts' criteria for being suitable

Surrogacy agreement confirmation applications have become exceedingly voluminous, often as a result of an extensive clinical psychologist's report on the suitability of the intended surrogate mother. 'Suitability' is not a psychological concept nor is its criteria provided for in the Children's Act 38 of 2005, leaving the authors of these applications shooting in the dark. PhD Fellow, **Tamanda Kamwendo** sheds some light on the subject in an effort to better guide those dealing with the complex issue of surrogacy agreements.

18 Striking a balance in bail proceedings - how does a court determine bail in the interest of justice?

If the court in carrying out its legislative duties fails to strike a balance in each and every bail proceeding, then the 'interest of justice' principle would be meaningless and ineffective. Law lecturer, **Mahlubandile Ntontela** explores this role of the courts in determining on what basis the interest of justice permits the release of a person on bail and the role that courts should play in interpreting the concept of the interests of justice in bail proceedings.

20 Making sense of the demerit points system as a juristic person

A juristic person is a body recognised by law as being entitled to rights and duties in the same way as a natural person. This applies to the ownership and use of vehicles, which can be involved in traffic violations. With the amendments to the Administrative Adjudication of Road Traffic Offences Act 46 of 1998 that will introduce a demerit points system, legal researcher, **George Pelser** asks how this will impact a juristic person?

22 Dispute resolution forum: Is your pension fund regulated by the Pension Fund Act?

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25 Clarifying the term pension fund in the Divorce Act and the Pension Fund Act

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Commencement of certain sections of the Protection of Personal Information Act

On 22 June President Cyril Ramaphosa announced the commencement of certain sections of the Protection of Personal Information Act 4 of 2013 (POPIA), which aims to –

- promote the protection of personal information processed by public and private bodies;
- introduce certain conditions so as to establish minimum requirements for the processing of personal information;
- provide for the establishment of the Information Regulator to exercise certain powers and to perform certain duties and functions in terms of POPIA and the Promotion of Access to Information Act 2 of 2000 (PAIA);
- provide for the issuing of codes of conduct;
- provide for the rights of persons regarding unsolicited electronic communications and automated decision making;
- regulate the flow of personal information across the borders of South Africa; and
- provide for matters connected therewith.

According to the statement by the Presidency, POPIA gives effect to s 14 of the Constitution, which provides that ‘everyone has the right to privacy’. Certain sections of POPIA have been in operation since April 2014, some of which include those relating to the establishment of the Information Regulator. The members of the Information Regulator took office on 1 December 2016. Many of the remaining provisions of POPIA could only be put into operation at a later stage as the provisions required the Information Regulator to first assume its powers, functions and duties in terms of POPIA. Sections 2 to 38; ss 55 to 109; s 111; and s 114(1), (2) and (3) will commence on 1 July. Sections 110 and 114(4), which deal with the transfer of the enforcement of

PAIA from the South African Human Rights Commission to the Information Regulator will come into effect on 30 June 2021.

The commencement of these sections of POPIA will provide data subjects with a remedy in instances when their personal information is abused. In a statement, the Information Regulator has noted that POPIA gives it effective enforcement powers for non-compliance. These powers include, the issuing of an administrative fine of up to R 10 million and the institution of a civil action by the Information Regulator on behalf of a data subject. In addition, the contravention of certain sections of POPIA attracts a fine or imprisonment for a period not exceeding ten years or both a fine and imprisonment. Since POPIA grants public and private bodies a grace period of one year (until 1 July 2021) to comply with POPIA, the Information Regulator has requested that public and private bodies use this period to comply.

The sections, which will commence on 1 July, pertain, *inter alia*, to –

- the conditions for the lawful processing of personal information;
- the regulation of the processing of special personal information;



Mapula Sedutla – Editor

- codes of conduct issued by the Information Regulator;
- procedures for dealing with complaints;
- provisions regulating direct marketing by means of unsolicited electronic communication; and
- general enforcement of POPIA.

Legal practitioners are privy to sensitive information, the importance of safeguarding that information goes without saying. Legal practitioners are advised to implement mechanisms that ensure lawful processing of personal information.



Would you like to write for *De Rebus*?

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- Please note that the word limit is 2000 words.
- Upcoming deadlines for article submissions: 20 July and 17 August and 21 September 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.

Business rescue: Learning opportunities for young practitioners

'Business rescue' is a term that has been on the minds of the South African public recently with companies, such as Comair Limited and Edcon applying for business rescue. I could not help but notice that the term appears to be synonymous with 'liquidation', however, it is not the same concept. It would seem that the term 'business rescue' is the politically correct way of saying 'liquidation'. It may take time but the public needs to be educated on the 'rescue' part of business rescue.

The public are not the only ones who require education pertaining to business rescue, but professionals as well. To be more specific, young legal practitioners – who are looking for business opportunities – would be ideal apprentices for any business rescue practitioner tasked to rescue a company.

I believe the art of business rescue, is just that, an art. Considering the restructuring of the business, as well as stakeholder relations and balancing employee rights, the practice of business rescue is an exciting learning ground. This is where young legal practitioners can be exposed to various elements of business, learn how things can go wrong in business, as well as understanding the requirements

and more often than not the demands of creditors.

Many businesses will close shop due to COVID-19 and most businesses will not be big brands, which would make headlines. However, these will be companies, which may need to restructure, sell or re-trench employees and legal expertise will be required. I want to link this call as an opportunity where business rescue practitioners can demonstrate to young legal practitioners the charm and intricacies of the commercial world, even if on a voluntary basis. This could be the stage where business rescue practitioners could afford young legal practitioners to be in the forefront of assisting businesses.

Prior to the pandemic, young legal practitioners found entering the legal profession challenging. Senior legal practitioners have also been known to criticise the educational background of these young legal practitioners. This new era has demanded that we rethink what is normal. This is an opportune time for young legal practitioners to shadow, get their hands dirty and learn from senior business rescue practitioners. There is an added advantage for a student who understands business when representing a commercial client. I believe it would be an incredible boost if legal practitioners could provide students and young legal practitioners with the opportunity to shadow them when they assist business-

es in not only business rescue but also professional rescue.

Mapule Pule BCom LLB (Wits) is a legal consultant in Cape Town.

• See p 9.

Redefining the right to parental care

Article 7 of the United Nations Convention on the Rights of the Child (the convention) declares that a child must have 'as far as possible, the right to know and be cared for by his or her parents'.

What is missing from the convention, is the definition for the term 'parent'. Who does the convention consider a 'parent' for the purpose of art 7: A genetic/biological/natural parent, a gestational parent, an intended parent, an adoptive parent? The use of the plural 'parents' indicates that the article is referring to the genetic parents, as the assumption is that there are more than one parent. Surely, this cannot have been the intention of the article, but rather an oversight in its drafting.

It would be unfair discrimination to the child's rights to be cared for by genetic parents, regardless of the child's relationship with the genetic parents.

In order to rectify this problematic article, I would suggest two measures, namely:



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- The first is to amend art 7 to the following: 'be cared for by their parent or parents (whichever is applicable)'. This wording acknowledges a one parent family structure. I use the term 'one parent' instead of 'single parent'. The latter has associations with the absence of a romantic partner, or relationship status, rather than being relative to the child.

- The second is to include a definition of 'parent' in relation to the context of the convention, as is usually the case in legislation.

I would suggest the following:

- Any individual who is completely responsible for the child – whether jointly or singly – it must be emphasised that responsibility is not conferred on an individual who has undertaken activities at the request of another. A parent should have had to make sacrifices for the child. A sacrifice is defined as 'giving something up with no gain for oneself'.

This approach would be in keeping with the best interests of the child. Namely, it is in the child's best interests to be cared for by a parent, or parents, who takes responsibility for the child, rather than a parent, or parents, by genetics alone.

Louise Scrazzolo BTech Marketing
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By
Simthandile
Kholelwa
Myemane

The increased importance of maintaining proper and accurate trust accounting records

It is common knowledge that attorneys practising for own account, either as a director, partner or sole practitioner and s 34(2)(b) advocates are required in terms of s 86 of the Legal Practice Act 28 of 2014 (the LPA) to operate a trust account. Just to recap, we will be going through the various trust accounts that these legal practitioners can operate, and which accounts must be opened with a financial institution (bank) within South Africa (SA), including the banks that have an arrangement with the Legal Practitioners' Fidelity Fund (the Fund).

Various trust accounts include:

- A trust account opened in terms of s 86(2) and used for clients' funds placed with the legal practice as deposits for legal services rendered by the legal practice. Interest earned on this account vests within the Fund.
- A trust savings or other interest-bearing account opened in terms of s 86(3) for purposes of investing excess funds sitting in an s 86(2) account to generate more interest. Interest earned on this account vests within the Fund.
- A trust savings or other interest-bearing account opened in terms of s 86(4) for purposes of investing funds for specific clients at the instruction of the clients. Interest earned on this account is for the client, provided that 5% of the interest is paid to the Fund and vests within the Fund.

The Fund entered into banking arrangements in terms of s 63(1)(g) of the LPA with the following banks:

- ABSA
- Grindrod Bank
- HSBC Bank PLC
- Al Baraka Bank
- Grobank (previously Bank of Athens)
- Investec Bank
- FNB
- Habib Overseas Bank
- Mercantile Bank
- GBS Mutual Bank
- HBZ Bank Limited
- Nedbank
- Standard Bank

Trust account practices are required in terms of s 87(1) of the LPA to keep proper accounting records containing particulars and information in respect of –

- money received and paid on its own account;
- any money received, held, or paid on account of any person;
- money invested in a trust account or other interest-bearing account referred to in s 86; and
- any interest on money so invested, which is paid over or credited to it.

Rule 54.6 of the final rules as per ss 95(1), 95(3) and 109(2) of the LPA (the Rules) provides further clarity in terms of the accounting requirements. The various trust accounting records kept by a trust account practice must be updated monthly as contained in r 54.10 and retained for a period of seven years after the last entry recorded in each particular book or other document of record or file as provided under r 54.9. The accounting record includes all files and documents relating to matters dealt with by the trust account practice on behalf of the client.

In the article 'Determining a trust position' 2020 (March) *DR* 10, I extensively dealt with various trust accounting records that a trust account practice must maintain, specifically those used in the determination of a trust position. I, therefore, urge readers to read this article together with the article 'Determining a trust position' (*op cit*) for a clearer understanding on trusts. We will now look at the various trust accounting records that a trust account practice is expected to keep.

For the purpose of this article, reference to 'client' must be understood to mean a trust creditor or a client on whose behalf a deposit is held by the trust account practice.

• Individual trust ledgers

An individual trust ledger refers to a record of transactions that the trust account practice maintains for each client. This record keeps a trail of all receipts into and payments from the trust account for each client, and records the balance remaining in trust per client following each transaction.

The individual client balances recorded in the trust creditors listing dealt with in 'Determining a trust position' (*op cit*) should be the same as the balances in the trust ledgers per client. Should these differ, the trust account practice must

investigate the cause for the difference and rectify. The trust account practice, therefore, maintains various individual trust ledgers equivalent to the number of clients that the trust account practice has.

• Trust cashbook

The trust cashbook was explained in 'Determining a trust position' (*op cit*). The main difference between the individual trust ledger and the trust cashbook is that the trust cashbook records all trust transactions for all clients of the trust account practice, while the individual trust ledger records transactions per client, separately. The trust account practice, therefore, maintains one trust cashbook reflecting all transactions for all clients.

• Trust creditors listing/list of balances

Again, the trust creditors listing was explained in 'Determining a trust position' (*op cit*). As indicated in the foregoing paragraphs, the balances listed in this document must be the same as the balances reflecting on the individual trust ledgers for the various clients.

• Trust bank reconciliation statements

The trust bank reconciliation statements was explained in 'Determining a trust position' (*op cit*). All reconciled items should be properly investigated and clearly recorded for the trust cashbook and the trust bank account to reconcile correctly.

• Trust trial balance

The trust trial balance records the cash balances reflected in the cashbook per month and trust creditors balances reflected in the trust creditors listing per month. It is important that the debits and credits reflected in this record balance out. This record can also be used as a snapshot to determine a trust's surplus or deficit position. Where cash balances and/or trust creditors balances reflected on the trust trial balance differ from those recorded in the trust cashbook and/or trust creditors listing respectively, these should be investigated and rectified.

• Trust journals

Trust journals record any reallocations

between two or more individual trust ledgers and are susceptible to abuse by fraudsters. The funds do not leave the trust bank account, but allocations of funds change. I urge readers to read the article written by the Practitioner Support Unit of the Attorneys Fidelity Fund 'Exposed through passing of journal entries?' 2018 (April) *DR* 15 for better and in-depth understanding. It is important to note that trust journals must always be passed at the instruction of the client and must be authorised by a senior legal practitioner.

• Fee journals

Fee journals record fees transferred from trust to business. These transfers must identify the individual trust ledgers from which they were raised, and in the same manner, they must be identifiable from those ledgers with a clear narration. Fees must only be transferred from matters with sufficient funds and not result in a debit balance.

• Schedule of interest and bank charges

Whether a trust account practice has an automated monthly transfer system with their banks or not, the trust account practice is still responsible for ensuring that the correct amount due is swept through or paid over. Trust account practices can make use of a schedule of interest and bank charges per month to determine the amounts due and to ensure that the correct amount was swept or paid to the Fund. For determination of which bank charges are recoverable and which are not recoverable, trust account practitioners can visit the Fund's website at www.fidfund.co.za. Readers are advised to read the article that 'Have you paid your dues?' 2014 (April) *DR* 23. Determination of nett interest due to the Fund is determined per trust bank account and not aggregated between the trust bank accounts held with different financial institutions.

• Accounting to clients

Rule 54.12 requires of trust account practices to, within a reasonable time after the performance or earlier termination of any mandate, account to its client in writing and retain a copy of each such account. I urge readers to also read the following articles –

- Forensic Investigation Team of the Attorneys Fidelity Fund 'Accounting to clients: How transparent are you?' 2014 (Aug) *DR* 20; and
- Risk Management and Prosecutions Unit of the Attorneys Fidelity Fund 'Leave no doubts in your client's mind' 2017 (April) *DR* 14.

For trust account practices using tested trust accounting systems, there may be more records that they are able to produce due to the capabilities of their

systems, the foregoing is the bare minimum that each trust account practice should maintain.

Impact for not maintaining proper and accurate records

As has always been the case, failure to maintain proper and accurate trust accounting records leads to a qualified audit report for the trust account practice. Audit reports are submitted to the Legal Practice Council (LPC) and are used as part of the requirements, which are met by a trust account practice, for legal practitioners to be issued with a Fidelity Fund Certificate (FFC). Qualified reports often lead to non-approval of the report by the LPC, resulting in refusal of the FFC to the legal practitioner. Readers are again urged to read the article by the Practitioner Support Unit of the Attorneys Fidelity Fund 'The clock is ticking... time to start applying for Fidelity Fund Certificates' 2017 (Sept) *DR* 21.

With the promulgation of the LPA, the LPC and the Board are empowered through s 87(2)(a) of LPA to inspect the accounting records of any trust account practice in order to satisfy itself that the provisions of s 86 and subs (1) are complied with. The LPC or Board may achieve this by conducting inspections itself or through its nominee. Rule 50.1.1 also deals with this.

The new inspection powers conferred on the Board requires that the Fund determine instances when the Board may require to conduct inspections at trust account practices. To achieve this and for the Board to fulfil its responsibility in respect of these inspections, the Fund is developing systems that will collate information and assist with the profiling of trust account practices and/or legal practitioners. Profiling of trust account practices and legal practitioners will consider a wide spectrum of issues, including how trust accounts are managed in trust account practices, which may point to elevated risks to the Fund. Risks to the Fund are risks relating to theft or misappropriation of trust funds and professional negligence that is covered through the Legal Practitioners' Insurance Indemnity Fund (LPIIF).

Trust account practices are faced with the reality that they employ individuals to provide certain services to their client, and at times employ people with ulterior motives – whose main intent is to enrich themselves by committing illegal acts – which may ultimately lead to claims lodged against the trust account practice for misappropriation or theft of trust money. Improper and/or inaccurate trust accounting records resulting in qualified audit reports and claims lodged against a trust account practice

are some of the elements to be considered for determining whether to conduct an inspection at a trust account practice.

For this reason, trust account practices need to develop internal controls that will direct how things are done at the trust account practice, including how to prepare, maintain and oversee proper and accurate trust accounting records, and how to ensure proper segregation of duties between employees. Where the size of the trust account practice is so small that it does not allow for proper segregation of duties, the legal practitioners must ensure close monitoring of transactions and activities within the trust account practice.

It is important that trust account practices do not merely develop internal controls to deal with trust account issues but also monitor the effectiveness thereof. Readers are referred to the article 'Adequate and effective internal controls' 2019 (March) *DR* 8 to read more about internal controls.

Conclusion

Trust account practices should ensure that proper and accurate trust accounting records are maintained. Failure to maintain these leads to qualified audit reports, which in turn may result in denial of an FFC to legal practitioners linked with the trust account practice and may also result in claims for theft or misappropriation of funds. With the inspections responsibility conferred on the Fund, failure of a trust account practice to receive a clean audit report negatively impacts the profiling of the trust account practice, and may result in the trust account practice subjected to an inspection as the risk posed on the Fund may be elevated. This affects the reputation of the trust account practice and should be prevented. Legal practitioners must ensure that the internal controls put in place are adequate to manage any potential risks before they materialise, thus preventative.

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What happens to a permanent replacement employee when the dismissed employee wins their case of unfair dismissal against the employer?



By Khwezi Mqoboli and Mziwamadoda Nondima

It is not unusual when an employee has been dismissed and the employee is still challenging such a dismissal through the relevant fora that the employer then fills the vacancy. That is not a problem, as the work that the employee performed is not going to wait for someone who is still busy fighting battles. However, the contract between the replacement employee and the employer may create issues if it is not carefully drafted. There seems to be no issue when such a contract stipulates, for example, that the replacement is temporary. Both parties know that it will end, perhaps, when the proceedings are done. However, issues arise when, according to the contract of employment, the replacement employee is employed permanently. What happens to this permanently employed replacement employee when the dismissed employee wins their unfair dismissal and becomes entitled to reinstatement? What remedies does the replacement employee have under these circumstances?

Reinstatement in terms of the s 193(2) of the Labour Relations Act 66 of 1995 (LRA)

According to s 193(2) of the LRA, if it is found that an employee was found to have been (substantively) unfairly dismissed, the Labour Court (LC) or the arbitrator, must make an order that the employee be reinstated, unless:

- the employee does not wish to be reinstated;
- the circumstances surrounding the dismissal are so that a continued em-

ployment relationship would be intolerable;

- it is not reasonably practicable for the employer to reinstate the employee; or
- the dismissal is unfair only because the employer did not follow a fair procedure.

The employer cannot simply say that they are not going to reinstate the employee on the basis that they have employed someone else. In this regard, the court in *Mashaba v SA Football Association* (2017) 38 ILJ 1668 (LC), at para 13, held that '[t]he right which the LRA provides by virtue of s 193(2) is the right of an employee to be reinstated if their dismissal is found to be substantively unfair and provided none of the subsections are applicable. [As such], an order of reinstatement pays no heed to other contractual arrangements that might have come into existence between the employer and a replacement. That is of no concern to the arbitrator or the court and the employer is left to its own devices to sort out the mess it finds itself in having employed someone and then being ordered to re-engage someone in the same position.'

It happens that once there is an order of reinstatement, the dismissed employee and the employer would negotiate to either pay the employee or create another position for them. However, if the dismissed employee wants to be reinstated in the position where they were in before dismissal, what then happens to the replacement employee who was employed on a permanent basis because the employer was convinced that the dismissed employee would not come back?

In *Mashaba*, the court goes on to say

that, 'if the employer does not take suitable steps in its contract with the replacement, it ought to realise that it runs the risk that it will be faced with the possibility of terminating that relationship or of trying to renegotiate the replacement's contract if the former incumbent is reinstated'.

Paragraph 115 of the Commission for Conciliation, Mediation and Arbitration: Guidelines on Misconduct Arbitration provides that: 'The fact that another employee has been appointed in place of the unfairly dismissed employee is not in itself a reason to deny reinstatement, as the reinstatement of an unfairly dismissed employee may constitute a ground for terminating the employment of the newly appointed employee on the grounds of the employer's operational requirements'. This guideline suggests retrenchment as the solution for the employer.

Retrenchment of replacement employee

Retrenchment will not be an easy way out for the employer. The replacement employee must be satisfied that the process of retrenchment has been properly followed. Here we are referring to someone who was never told that they may lose their job if the dismissed employee had to return. For individual employees, the retrenchment procedure is found in s 189 of the LRA.

Section 189 of the LRA does provide that:

'(1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult -

(a) any person whom the employer is required to consult in terms of a collective agreement;

(b) if there is no collective agreement that requires consultation -

(i) a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and

(ii) any registered trade union whose members are likely to be affected by the proposed dismissals;

(c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed

dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals; or

(d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.’

Section 189 provides for a process of consultation with the employee potentially facing retrenchment based on operational requirements. With regard to consultation, the court in *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC) stated that ‘[t]he ultimate purpose of s 189 is thus to achieve a joint consensus seeking process. In this manner the section implicitly recognises the employer’s right to dismiss for operational reasons,

but then only if a fair process aimed at achieving consensus has failed. This is also apparent from s 189(7) which provides that the employer must select the employees to be dismissed on criteria either agreed to, or if that is not possible, on criteria that are fair and objective’.

As such, the permanently employed employee who now faces retrenchment must be consulted with the aim of achieving a consensus. However, such consultations may not yield a favourable outcome for the employee – retrenchment might be justified. In that case, the question would be, based on the fact that the employer failed to provide for such eventuality in the employment contract, would it then be fair to dismiss the permanently employed employee based on operational requirements?

Conclusion

Considering that the replacement employee (permanently employed) may end up being unemployed if the retrenchment process appears to be justifiable, it is not clear what other remedies there are to protect them against job loss. It is, therefore, imperative that employers cater for this in the employment contract where there is still a pending unfair dismissal proceeding.

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By
Elli
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Business rescue proceedings – the other side of the coin

In the uncertain economic times that South Africa (SA) is facing, combined with the financial strain that the worldwide COVID-19 pandemic is placing on most businesses, business rescue will unfortunately be the next course of action for most companies. It is a well-known fact that business rescue, which is set out in ch 6 of the Companies Act 71 of 2008 (the Act), entails the legal process that when a company suffers financial difficulties, it be restructured in such a manner to be able to carry on with business as a successful going concern, in other words, rescuing the business. However, there are two sides of the coin when it comes to business rescue proceedings.

Section 128(1)(b)(iii) of the Act entails a primary and secondary objective for business rescue proceedings to commence, and either one of those must be met for legal business rescue proceedings to commence. The primary objective is that the company’s debts, liabilities, assets etcetera, be restructured in such a manner that the company can continue to exist on a solvent basis. The secondary objective is that if the primary objective cannot be met, the restructuring of the company will provide affected persons with a better return than the

liquidation of the company would have. The court confirmed in *Collard v Jataka Connect (Pty) Ltd and Others* [2017] JOL 38032 (WCC) that s 128(1)(b)(iii) of the Act contemplates two objectives for business rescue and that the achievement or fulfilment of any of these two objectives will constitute valid business rescue proceedings.

For a company to fully comply with business rescue proceedings, the company must either be –

- financially distressed; or
- unable to pay its debts.

The process to file for business rescue can be found on the Companies and Intellectual Property Commission’s website at www.cipc.co.za.

It is, however, important to remember that business rescue proceedings should not be abused or used as a ruse. In *ABSA Bank Limited v Newcity Group (Pty) Ltd and Another Related Matter* [2013] 3 All SA 146 (GSJ) the court held that the sole shareholder’s application to place his company in business rescue amounted to an abuse of the process. It held that the test to determine if a company should be placed in business rescue is if there is a reasonable prospect or a reasonable possibility of achieving a rescue of the company through the statutory

objectives, in other words, the Act. Thus, the creditors and/or shareholders or any other affected person ought to receive a better return with business rescue proceedings than that of liquidation proceedings.

The outcome of business rescue is thus one of two options –

- either the company is ‘rescued’ and can continue to conduct business as a successful going concern due to the fact that it has been restructured; or
- the company will be liquidated.

Liquidation is an extreme recourse for companies that face severe financial difficulties. Business rescue can grant a company some much-needed breathing space to restructure its affairs and continue to, once again, conduct business as a successful going concern. However, in the event that a company cannot achieve that, business rescue might provide affected persons with a better return than liquidation would.

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Walking a tightrope: **The business rescue practitioner's challenge of serving competing interests**



By
**Ricky
Klopper**

The legal framework for business rescue was introduced to South African law with the promulgation of the Companies Act 71 of 2008 (the Companies Act) to 'provide for the efficient rescue and recovery of financially distressed companies' (s 7(k) of the Companies Act). This legislation borrowed aspects particularly from American (Chapter 11 of the United States Bankruptcy Code Bankruptcy Reform Act 11 USC 1978) and British (Enterprise Act 2002) legislation on the restructuring of distressed corporations with the result that South Africa (SA) now has a modern corporate restructuring regime that compares favourably to any of its kind in the world.

Considering the novel nature of the business rescue process in South African law, it is unsurprising that some aspects thereof are yet to be properly explained or tested in our courts. The precise role of an appointed business rescue practitioner is one such aspect, which remains relatively unexplained by our courts and relatively misunderstood by the lay busi-

nessperson. Often commentators, courts and people watching from the side-lines tend to forget or even completely overlook certain practical realities and legal provisions surrounding a business rescue with the result that they are unable to properly assess the performance and effectiveness of the business rescue practitioner. Accordingly, this article will attempt to shed light on the unique role that a business rescue practitioner is required to play in successfully guiding a company through the business rescue process, while also considering examples from recent case law, which illustrates how seemingly proficient observers can, and do, get it wrong.

Section 140(3)(b) of the Companies Act provides that the business rescue practitioner has the responsibilities, duties and liabilities of a director of the company during its business rescue proceedings. The Companies Act also provides that the business rescue practitioner has full management control of the company during business rescue proceedings



in substitution for its board and pre-existing management (s 140(1)(a) of the Companies Act). Based on this, many conclude that the business rescue practitioner is essentially a temporary new managing director, and therefore, that a business rescue practitioner's duties are substantially the same as that of a director. What is, however, often overlooked is that, in practice, managing a company under normal circumstances and managing a financially distressed company are entirely different beasts, so to speak. Furthermore, and perhaps more importantly, the business rescue practitioner owes their duties to a broader group of stakeholders, while a director owes their duties predominantly to the company and its shareholders.

Fiduciary duties are based on principles, such as trust, confidence, loyalty, good faith, and avoidance of conflicts of interest. Both a director and business rescue practitioner can be viewed as

distressed, the interests of the creditors and shareholders will usually conflict and the nature of business rescue proceedings is that, invariably, certain stakeholders will be dissatisfied with the outcome.

A recent judgment handed down in the Gauteng Division of the High Court, Pretoria illustrates the precarious tightrope that a business rescue practitioner has to walk in having to remain independent, while simultaneously trying to serve the competing interests of the various stakeholders in a business. In *Gupta v Knoop NO and Others* (GP) (unreported case no 84095/2018, 13-12-2019) (Ledwaba DJP) the business rescue practitioners of certain companies owned and controlled by the Gupta family were removed from their posts. In the view of the court, the business rescue practitioners had failed to execute their duties with the highest level of good faith, objectivity and impartiality. This was so, according to the court, because the business rescue practitioners had failed to conclude the business rescue proceedings timeously and had continued to earn fees and commissions while selling off the assets of the companies without having a plan regarding how the business would operate once the creditors of the companies had been paid. The court also took issue with the fact that one of the business rescue practitioners had been the appointed business rescue practitioner of two related, but different, companies. Furthermore, the court criticised the business rescue practitioners for raising allegations of criminal unlawfulness against the companies' directors despite not having reported their suspicions of such criminal activity to the relevant authorities at an earlier stage despite being required to do so by law.

I submit that the above judgment has not taken cognisance of the practicalities surrounding a business rescue, which make it very rare, if not impossible, for business rescue proceedings to be concluded within the three-month period prescribed by the Companies Act.

Further, the court raised the issue of conflict that a business rescue practitioner of two related companies may potentially find adversely impacts one's ability to remain impartial and independent. There may certainly be circumstances in which being a business rescue practitioner of two related companies simultaneously may negatively affect the business rescue practitioner's independence, but that is not so *per se*. In fact, it often makes commercial and practical sense to have the same business rescue practitioner appointed in related matters in order to ensure that interests are aligned. The notion of a 'conflict of interest' is often expressed by academics and the judiciary alike without consider-

ing the enormous cost duplication and impracticalities that multiple appointments bring about.

Most notably, however, the court appears to have been unaware that the successful rescue of a company – as provided for in s 128(1)(b)(iii) of the Companies Act – does not necessarily mean that the company is brought to a position where it is able to continue on a solvent basis, but that a successful rescue may also occur where creditors are provided with a better outcome than would have been the case with a liquidation. The court's non-recognition of this second possible outcome of a successful business rescue appears to have resulted in it over-emphasising the business rescue practitioner's duties towards the shareholders and board of a company at the expense of its creditors. The court's presumption at para 32 that business rescue is 'for the ultimate benefit of the ... board and shareholders' is telling in this regard.

Although the shareholders of the companies in this case may have been dissatisfied by the selling off of their companies' assets, it is possible that such an approach was the only possible way for the companies' creditors to be placed in a better position than would have been the case under a liquidation and that the continued trading of the companies on a solvent basis was never an attainable outcome.

One aspect where the court was correct was in questioning why the business rescue practitioners brought up allegations of criminal unlawfulness against the directors of the companies in their answering affidavits, but had failed to earlier report such suspicions to the relevant authorities. This does constitute a failure by the business rescue practitioners to uphold their duties as provided in the Companies Act at s 141(2)(c)(ii) and probably constitutes a ground to have the business rescue practitioners removed.

It may be that the business rescue practitioners had not upheld their duties as officers of the court due to their failure to report their suspicions of criminal activity by the directors, but this case nonetheless illustrates how courts and laypersons alike have tended to forget that the business rescue process requires a delicate balancing of interests of all stakeholders. While it seems easy to cast judgment on the handling of a certain business rescue, particularly when called on by a partial stakeholder to do so, one may fail to recognise that the dissatisfaction of a particular stakeholder, who may even be acting in good faith, does not necessarily mean that the business rescue practitioner has failed at their task.

LM Jacobs ('Die Vertrouensverpligtinge van Ondernemingsreddingspraktisyne: 'n

Picture source: Gallo Images/Getty

fiduciaries, but while it is clear that a director of a company is a fiduciary in respect of that company, it is not as clear to whom the business rescue practitioner is a fiduciary. The Companies Act aims to provide for the 'efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders' (s 7(k) of the Companies Act) (my italics).

Therefore, the business rescue practitioner has the difficult task of acting in the interest of all stakeholders, for as far as possible. In practice, 'as far as possible' is the operative phrase. Various parties such as creditors, shareholders, employees and the broader community surrounding a company all have an interest in its business rescue proceedings and their interests do not always align. In fact, where a company is financially

Regsvergelykende Studie' (LLD thesis, University of the Free State 2015) at 260) suggests that the business rescue practitioner's fiduciary duties are owed to the following parties, with the following order of preference –

- creditors;
- employees;
- shareholders; and
- the broader community.

Although the above list may be a good starting point, in practice it is not always that simple. In different cases, these different groups may need more or less protection depending on the circumstances. Accordingly, a business rescue practitioner's fiduciary duties may oscillate depending on which stakeholders in the business require protection in a particular case.

An analogous example may be found in the UK's Companies Act 2006 in s 172, where the primary duty of the directors of a solvent company is to act in the interest of its members. However, if a company is clearly insolvent, its directors are duty bound to act primarily in the creditors' interests (*West Mercia Safetywear Ltd (In Liquidation) v Dodd* (1988) 4 BCC 30, CA). In between the extremes of a clearly solvent company and a clearly insolvent company, there remains a large grey area and it is difficult to know

precisely at which point a director's duty shifts towards creditors as a whole.

The fact that a director has to look after the interests of creditors 'as a whole' is important, as depending on the circumstances, a company may be factually solvent, but still unable to meet its short-term liabilities. In such a case, where a company faces immediate concerns over liquidity and cash flow, it will be necessary for the director to act immediately and offer a restructuring proposal to short-term creditors in terms of which those creditors may have to compromise some of their debts. The directors' duty to creditors 'as a whole' may thus force them to require that some creditors suffer larger losses than others so that the business remains a going concern that can service its debts to some extent. Similarly, circumstances may force a business rescue plan to require that some stakeholders suffer greater losses than others to advance the interests of stakeholders in the company 'as a whole'.

What is certain, is that the most successful business rescues have occurred in cases where the business rescue practitioner has managed to get the four groups of stakeholders mentioned above to work for one common purpose in everyone's shared interest, to save the business, even if some groups may

suffer greater losses than others. Where creditors are not interested in saving a business and cannot be convinced otherwise, the business rescue process is doomed and the task of the business rescue practitioner becomes almost impossible. However, if the business rescue practitioner and the management of a business develop a strong professional working relationship and develop a level of trust between themselves and creditors, it becomes more likely that a successful outcome may be reached.

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Did you know?

A business rescue practitioner is a person appointed, or two or more persons jointly appointed, to oversee a company during business rescue. While the Act defines a business rescue practitioner as one or more persons, the business rescue provisions of the Act do not necessarily refer to or support joint appointment.

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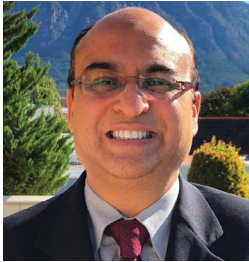
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COVID-19: *Force majeure* and the effect it has on rental contracts



By
Mohammed
Moolla

CCOVID-19 will have far-reaching ramifications for South Africa (SA). In order to 'flatten the curve', the President, Cyril Ramaphosa, duly advised by his cabinet, declared a total lockdown in order to prevent the spread of COVID-19. The regulations were set up to keep citizens at home and safe for at least 21 days in order to prevent the uncontrolled spread of the virus. If citizens did not heed the call, the pandemic could reach proportions that the South African health

system would not be able to contain and in turn, not be able to treat those infected. Italy, Spain and Iran are examples where the pandemic ravaged the population. As a result, most shops except supermarkets, pharmacies and spaza shops selling food and necessities remained closed during this period (see GN R450 GG43208/6-4-2020).

Force majeure

Vis maior means a superior power or force, which cannot be resisted or controlled. *Casus fortuitus* (a class of *vis maior*) is an exceptional or extraordinary occurrence not reasonably foreseeable. Thus to constitute *force majeure* (*vis maior* or *casus fortuitus*) the occurrence must be uncontrollable and unforeseen. Examples of *vis maior* are earthquakes, fire, locusts, plague, abnormal weather conditions (abnormal storms, floods, frost, snow, heat, drought). For a natural phenomenon to be *vis maior* it must be of a magnitude, which could not reasonably have been foreseen or guarded against. What is unforeseen will depend on the norms of experience in the locality in which the hired property was situated at the time the parties contracted (HR Hahlo and E Khan *The Union of South Africa: The development of its*

laws and Constitution (Cape Town: Juta 1960). It follows that a lessee who leases a premises, well knowing that *vis maior* may make it impossible for the lessee to enjoy beneficial occupation and the lessee will not be entitled to claim remission of rent.

The impact of the pandemic will have long lasting effects on the systems that keep our economies running. Globally, the COVID-19 virus has affected schools, churches, mosques and businesses being closed down and inevitably affecting contractual obligations nationally and internationally.

South African law

The court in *Peters, Flamman and Co v Kokstad Municipality* 1919 AD 427 held that '[i]f a person is prevented from performing his contract by *vis maior* or *casus fortuitus* ... he is discharged from liability'. The terms *force majeure*, *vis maior* and *casus fortuitus* are used interchangeably and refer to an extraordinary event or circumstance beyond the control of the parties, including a so-called 'act of God'.

South African law is, however, quite strict in the sense that it does not excuse the performance of a contract in all cases of *force majeure* (see *Glencore Grain*

Africa (Pty) Ltd v Du Plessis NO and Others [2007] JOL 21043 (O)).

There are certain conditions that must be fulfilled in order for a *force majeure* to trigger the type of impossibility that extinguishes a party's contractual obligations. These include –

- the impossibility must be objectively impossible;
- it must be absolute as opposed to probable;
- it must be absolute as opposed to relative, in other words if it relates to something that can in general be done, but the one party seeking to escape liability cannot personally perform, such party remains liable in contract;
- the impossibility must be unavoidable by a reasonable person;
- it must not be the fault of either party; and
- the mere fact that a disaster or event was foreseeable, does not necessarily mean that it ought to have been foreseeable or that it is avoidable by a reasonable person.

If performance of a contract was at its inception objectively impossible, then the contract is void. The only relief available is restitution (see *Wilson v Smith and Another* 1956 (1) SA 393 (W) and *Bekker, NO v Duvenhage* 1977 (3) SA 884 (E)).

Circumstances falling within ambit

There are specific circumstances that need to be met for *force majeure* to be relied on to suspend obligations under a contract. Businesses should be careful to not simply rely on *force majeure* to escape their contractual obligations. Doing so could result in specific performance or damages claims being brought against that party.

In the case of *Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA), the court held that one must look to the 'nature of the contract, the relation to the parties, the circumstances of the case and the

nature of the impossibility involved by the defendant' to see whether the contract should be discharged.

Having regard to the above, it appears that a *force majeure* event must be a legal or physical restraint and not merely an economic one.

In order to avoid the potential ambiguity of the common law in these circumstances, most well advised contracts contain a *force majeure* clause, which deals with the consequences of an event causing performance to become impossible. Parties to an agreement must ensure that *force majeure* is not only included as a clause in the agreement, but must make certain that the clause is extensive. The risk of a poorly drafted clause is that parties are bound to the agreement and will not be able to escape its obligations, alternatively, will be forced to rely on the common law principle of impossibility which has strict requirements.

In the case of *Airports Company of SA Limited v BP Southern Africa (Pty) Limited and Others* [2015] JOL 34127 (GJ), the court held that as the parties had made provision for this contractually, the consequences stipulated in the contract would take precedence over the common law. A contract can thus specify a list of excluded events, or contain a closed list of events that would trigger the *force majeure* clause and extinguish the parties' obligations under the contract. Well-drafted clauses also generally contain time limits during which, a party unable to perform pursuant to *force majeure* can be excused from performance, stipulating that after the impossibility has prevailed for a certain period. The remaining contracting parties would, notwithstanding the presence of *force majeure* be entitled to cancel the contract.

Application to present circumstances

If the lockdown makes the performance of obligations under a commercial con-

tract impossible this is an 'Act of State' and would fall under the South African common law understanding of *force majeure*. The South African government declared a state of national disaster on 15 March, giving the national executive certain powers to implement regulations in an effort to curtail the spread of COVID-19. In the instance where companies had the foresight to include a *force majeure* clause with general terms such as 'disease' or 'illness' or more specific terms such as 'epidemic' or 'pandemic', it is possible that COVID-19 has already triggered this clause.

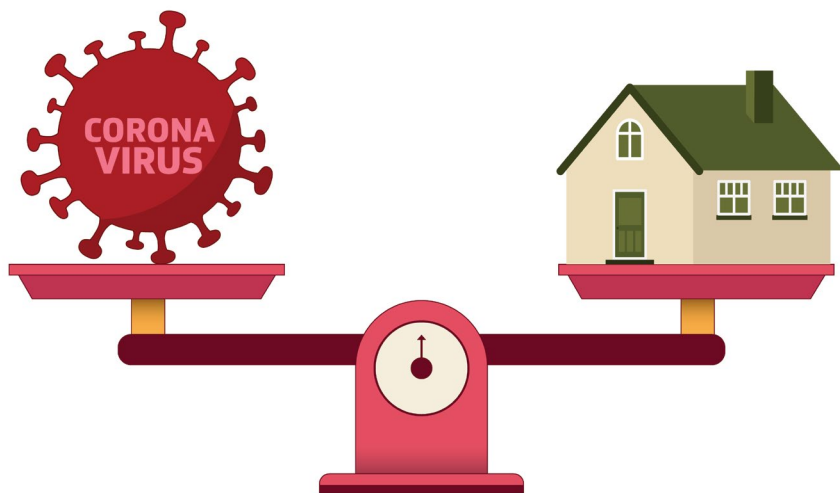
It is important to ensure that the *force majeure* clause has indeed been triggered, before making such a declaration to the other contracting party. This is because the un-evidenced declaration of a *force majeure* could lead to a breach of contract, or in the case where it appears that the party no longer intends to perform its duties under the contract, it could lead to repudiation of the contract. This is especially pertinent in the case of lease agreements, in the absence of a *force majeure* clause specifically allowing for the termination of a lease, a lessee cannot invoke COVID-19 to escape their obligation to pay rent. In the event that a company fears that it may struggle to make rental payments in upcoming months, a renegotiation of the lease agreement should rather be considered – especially if the alternative is not being able to pay rent at all.

Agreement that does not contain a *force majeure* clause

If the agreement does not contain a *force majeure* clause in a contract or if a *force majeure* clause does not describe the potential unforeseen event contemplated in such a clause, then the contracting party may be able to rely on the common law principle of 'supervening impossibility of performance' to suspend their obligations under the contract provided that it has become objectively impossible for them to perform under the contract as a result of an unforeseeable or unavoidable event.

In the case of *Bischofberger v Van Eyk* 1981 (2) SA 607 (W), the court held that when it has to decide on the effect of impossibility of performance on a contract, the court should first have regard to the general rule that impossibility of performance does in general excuse performance of contract but does not in all cases and must look at the nature of impossibility to see whether the general rule ought in a particular case apply.

In the case of *Oerlikon South Africa (Pty) Ltd v Johannesburg City Council* 1970 (3) SA 579 (A) at 585 the court held that if performance of a contract be-



There are specific circumstances that need to be met for *force majeure* to be relied on to suspend obligations under a contract. Businesses should be careful to not simply rely on *force majeure* to escape their contractual obligations. Doing so could result in specific performance or damages claims being brought against that party.

comes impossible through no fault of the debtor, the obligation is extinguished unless the debtor agreed to accept the risk of impossibility.

It may also be imperative that the *force majeure* clause should be detailed and specifically list the *force majeure* events that the parties agree will suspend the performance of the contract (such as, the pandemic).

As far as partial impossibility of performance in concerned, South African law sets out that the creditor has a choice between accepting partial or defective performance or to regard the contract as cancelled (see *Bedford v Uys* 1971 (1) SA 549 (C) and *Joubert v Bester* 1977 (4) SA 560 (T)).

Remedies in the event of a *force majeure*

The consequences of the parties – where a valid *force majeure* event has occurred – will depend on the nature of the affected parties' obligation under the contract,

as well as the consequences and remedies expressly contemplated by the *force majeure* provision.

Contractual remedies for *force majeure* includes the extension of time to perform those obligations or suspensions of contractual performance for the duration of the *force majeure* event.

If the *force majeure* extends over a longer period, some provisions may entitle a party to terminate the contract.

Onus of proof

In the case of *Grobhelaar, NO v Bosch* 1964 (3) SA 687 (E), it was held that the party relying on the impossibility presumably bears onus to show that the impossibility was not caused by his fault.

In the case of a lease the onus of providing proof that they have not had beneficial occupation because of *vis maior* rests on a lessee. A lessee who alleges the leased premises were destroyed through *vis maior* must prove how the destruction occurred and that it was not caused through fault of their own. Any lessee who claims remission of rent, because *vis maior* caused him to vacate the premises must prove –

- they were compelled to do so, for example, occupation was prohibited by legislative act (health regulations) or they were deported; and
- they had reasonable grounds for doing so for example, the pandemic.

To be entitled to remission of rent, loss of beneficial occupation must be the direct and immediate result of the *vis maior*, not merely indirectly or remotely connected therewith. A lessee who conducted a business will not be entitled to remission where it has caused a drop in their trade.

If a property is destroyed by *vis maior*, the lessee is entitled to a total remission of rent from the date of destruction. The same applies if the *vis maior* compels the lessee to vacate the premises or prevents them from using the premises for the purpose for which the premises was let.

However, if despite the *vis maior*, the lessee makes use of the premises, they must compensate the lessor therefor.

If *vis maior* reduces a lessee's use and enjoyment of property let to them, they are entitled to a remission of rent proportionate to the loss sustained by them, but only if the loss is substantial. In assessing, reduced use and enjoyment a lessee's profit the whole property must be taken into account. A lessee who is prevented by *vis maior* from using the premises for the purpose for which they were let is entitled to a remission of rent, although he could have used the premises for some other purpose because he was not obliged to do so (*WE Cooper Landlord and Tenant* (Cape Town: Juta 1994) at p 205).

A lessee who has paid rent in advance and is thereafter deprived of beneficial occupation by *vis maior* is entitled to a remission of rent proportionate to the period of their loss of occupation.

Conclusion

When President Ramaphosa announced the two week extension of the original lockdown to halt the spread of COVID-19, he appealed to businesses in SA to pay suppliers and in the interests of the country's economy not to opt for *force majeure*. He said: 'I would like to call on all businesses to continue to pay their suppliers, to the extent that they can, to ensure that those suppliers can also continue to operate and pay their staff and suppliers'. He added: 'I would like to appeal to all large businesses not to resort to *force majeure* and stop paying their suppliers and their rental commitments, as such practice has a domino effect on all businesses dependent on that chain.'

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Surrogacy and the courts' criteria for being suitable



By
Tamanda
Kamwendo

Surrogacy agreement confirmation applications have become voluminous. This is often caused by the extensive nature of the clinical psychologist's report on the suitability of the intended surrogate mother. The reason why these reports have grown into novels is that their authors are shooting in the dark. Chapter 19 of the Children's Act 38 of 2005 (the Children's Act) requires that a surrogate mother must be a 'suitable person' but does not provide any criteria to determine 'suitability'. Suitability is not a psychological concept, but an undefined legal requirement. Psychologists are, therefore, required to provide an opinion to the court without any guidance as to how

they should construct such an opinion. Consequently, in an apparent attempt to cover all their bases, psychologists' reports have become quite exhaustive – sometimes even including an analysis of psychometric tests performed on the intended surrogate mother. The problem is compounded by the fact that a particular judge does not necessarily share a particular psychologist's opinion about what kind of person a surrogate mother should be.

This problem was vividly illustrated in *Ex Parte KAF and Others* (GJ) (unreported case no 14341/17, 10-8-2017) (Modiba J) (*Ex Parte KAF I*) where the court rejected the clinical psychologist's conclusion that the intended surrogate mother – a 20-year-old, stay-at-home mother of two

young children – is 'suitable'. The court's reason was that the intended surrogate mother had a teenage pregnancy four years before the application. The court held that the intended surrogate mother did not possess the maturity to appreciate the implications of her life decisions. In the absence of objective criteria for determining a surrogate mother's suitability, these kind of subjective differences in opinion can be expected. However, this hardly makes for legal certainty. In the highly emotive world of reproductive legal practice, this is a recipe for tears.

The same parties approached the court again on supplemented papers in *Ex Parte KF and Others* 2019 (2) SA 510 (GJ) (*Ex Parte KAF II*). This time around, the applicants' legal strategy was explicitly to develop the law by requesting the court to adopt objective criteria for determining a surrogate mother's suitability.

They did this by commissioning a joint expert opinion from three clinical psychologists who all have experience in assessing the suitability of surrogate mothers and requesting the three clinical psychologists to propose – with reasons – objective criteria for assessing the suitability of a surrogate mother. The joint expert opinion suggested eight distinct criteria for assessing the suitability of a surrogate mother. A fourth clinical psychologist was then commissioned to assess the intended surrogate mother by using the criteria. The clinical psychologist applied the criteria and concluded that the intended surrogate mother was indeed suitable. The court in *Ex Parte KAF II* accepted this conclusion and confirmed the surrogacy agreement. Importantly for future surrogacy agreement confirmation applications, the court accepted and incorporated, with some reformulations, the criteria as per the joint expert opinion in its judgment.

The objective criteria for assessing the suitability of a surrogate mother

- According to DW Thaldar 'Criteria for assessing the suitability of intended surrogate mothers in South Africa: Reflections on *Ex Parte KAF II*' (2019) 12(2) *SAJBL* 61 '[a] suitable surrogate mother must understand the nature of surrogate motherhood.' An intended surrogate mother must demonstrate that she fully understands that she

will be carrying the pregnancy for the commissioning parents and that once the baby is born, such child will legally not be hers, but that of the commissioning parents.

- There must be an agreement between the parties regarding selective reduction. Selective reduction is perhaps one of the more sombre issues that must be addressed in surrogacy agreements depending on the number of children the commissioning parents wish to have. In some instances, the commissioning parents may not wish to have a multiple pregnancy, and the surrogate mother may be asked to undergo 'selective reduction', which is the termination of multiple embryos that have already been successfully implanted in the uterus to the desired number. Under this criterion, all the parties have to be in perfect alignment about the potential use of selective reduction, and the intended surrogate mother must understand the concept of selective reduction and all the risks involved.
- Thaldar (*op cit*) states: 'A suitable surrogate mother must be motivated by wanting to help the commissioning parents without expectation of reward.' Under this criterion, the court concentrated on the budget for out-of-pocket expenses that would be expected of the commissioning parents to reimburse the surrogate mother as the only relevant consideration on which to judge altruism. It is important to note that while out-of-pocket expenses can be reimbursed and how much of these expenses can be reimbursed may differ from case to case, the figures accepted by the court in the *Ex Parte KAF II* case can be seen as an authoritative yardstick. In *Ex Parte KAF II*, notwithstanding other uncapped expenses, the court accepted a total amount of R 5 500 per month as reimbursement for cellular phone calls, pregnancy nutritional supplements and wages for a domestic worker.
- According to Thaldar (*op cit*) '[a] suitable surrogate mother must enjoy good mental health.' A surrogate mother ought to have good psychological wellness. The surrogate mother must not have any personality disorder or serious psychiatric illness or show patterns of self-injurious behaviour.
- Thaldar (*op cit*) states: 'A suitable surrogate mother must be emotionally well-resourced.' According to the joint expert opinion, being 'emotionally well-resourced' entails that the intended surrogate mother 'must either be emotionally self-reliant or have a ready and established emotional support structure' (see Thaldar (*op cit*)). A surrogate mother does not always need to have a supportive family

but it is rather important to examine how 'surrounding partnerships' are conducive to the surrogacy arrangement being complied with by the surrogacy mother. As such, an assessing clinical psychologist is obliged to report on the 'understanding and influence of the spouse, partner, relatives or extended family on the decision [to be a surrogate mother].'

- Thaldar (*op cit*) writes: 'A suitable surrogate mother must be emotionally available for her own child or children.' According to s 295(c) of the Children's Act, a surrogate mother is required to have 'at least one living child of her own.' In addition, an intended surrogate mother ought to be emotionally available for her own children as a way of protecting the children's welfare. Based on their ages and level of understanding, this also includes the surrogate mother's readiness to discuss the intended surrogate pregnancy with her children.
- A suitable surrogate mother must not engage in substance abuse of any kind, and must undertake to refrain from smoking or drinking alcohol during the pregnancy. The court, however, focused solely on substance abuse and thus, the issue of social drinking of alcohol and smoking during the pregnancy remained unspoken of.
- The intended surrogate mother must be financially stable, that is, she or her family unit must:
 - have a stable source of earnings; and
 - live within her or their means.
 This criterion was omitted by the court in its reformulated criteria, the court did apply it when assessing the reimbursable expenses.

Conclusion

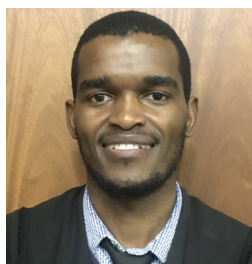
The *Ex Parte KAF II* judgment now serves as the yardstick with which to assess the suitability of intended surrogate mothers. Both clinical psychologists and legal practitioners – including judges – now have clear guidelines in this regard.

Tamanda Kamwendo LLB (University of Botswana) LLM (UKZN) is a PhD Fellow at the University of KwaZulu-Natal in Durban. □

Did you know?

In South Africa, the commissioning parents become the rightful parents at birth of the child and the surrogate mother cannot legally terminate the pregnancy for reasons other than medical.

Striking a balance in bail proceedings – how does a court determine bail in the interest of justice?



By
Mahlubandile
Ntontela

The 'interest of justice' principle would be meaningless and ineffective without the court carrying out its legislative duties of ensuring that a balance is struck in each and every bail proceeding. What is of significance is the following question: On what basis does a court determine that the interest of justice permits the release of a person on bail? This article focusses on the role that courts should play in interpreting the concept of the interests of justice in bail proceedings.

The role of the courts

Prior to the current South African constitutional dispensation and the codification of the bail proceedings, courts had already developed principles based on the presumption of innocence and the fundamental rights to freedom, together with the fact that bail is regarded as a very important means of giving effect to these rights during the pre-trial stages of a criminal case (MG Cowling 'The incidence and nature of an onus in bail applications' (2002) 15 SACJ 176 at 178). These developments were taken further in *S v Hlopane* 1990 (1) SA 239 (O), where the court held at 241G that it is the function of the presiding officer to inquire into the question of bail in each case. Thus, it was emphasised at 241H that courts could not rely on an accused's silence to justify a failure to initiate a bail inquiry. This was an extremely significant development at the time, because it seemed to suggest that there is a duty on judicial officers, *mero motu*, to initiate bail inquiries. This, then, was a clear move away from the traditional approach to the effect that bail is dealt with in the form of an application and that the accused bears sole responsibility for initiating such application, as well as the onus of convincing the court that they should be released on bail (Cowling (*op cit*) at 179).

The Constitutional Court (CC) has noted that one of the observations about



Picture source: Gallo Images/Getty

ch 9 of the Criminal Procedure Act 51 of 1977 (CPA) is that the discretion to grant or refuse bail is unmistakably a judicial function (*S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* 1999 (7) BCLR 771 (CC)). The correct jurisprudential approach to bail applications is that the court should adjudicate bail matters and that there should, as a matter of principle, be no legislative or executive attempts to curtail the jurisdiction of the courts (*S v Ramgobin* 1985 (4) SA 130 (N)). Courts should in effect regard legislative interventions merely as guidelines set to assist the courts in reaching a just decision. Each case should be considered on its merits and the court should consider the totality of the evidence (*S v Mawela* (GNP) (unreported case no A713/12, 30-11-2012) (Molefe J) at para 20).

In bail proceedings, unlike in trial proceedings, the courts play a more pro-active role. Magistrates are not to be dictat-

ed to by either of the parties on how the bail proceedings should be conducted. Nor are the courts to depend solely on the evidence led by the parties in reaching their decision as to whether the accused should be released on bail or not. It has been said in *S v Bruinders* 2012 (1) SACR 25 (WCC) that, as much as our criminal justice model is essentially an adversarial one – where the court is left to the comfort and safety of its armchair while the state and the accused contest the arena – the issue of bail is dealt with somewhat differently. The CPA does not treat a bail proceeding as something, which is simply to be left to one or the other of the parties to raise and deal with, particularly in regard to matters of procedure, proof and evidence (*Bruinders* (*op cit*) at para 60). Where a court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal, or that it lacks

certain important information to reach a decision on the bail application, it must order that such information or evidence be placed before it (s 60(3) of CPA). In a bail inquiry, courts are afforded greater inquisitorial powers to ensure that all material factors are before it, even when they are not presented by the parties, and courts should not disregard such factors (*S v Mabena and Another* [2007] 2 All SA 137 (SCA) at para 7). Where a court arrives at a decision based on insufficient information, such a court would be erring in its approach (*S v Mpofana* 1998 (1) SACR 40 (Tk)). Consequently, on appeal the matter may be remitted back to the court *a quo* to enable it to consider invoking the provisions of s 60(3) of the CPA (*Mpofana (op cit)*).

In terms of the provisions governing bail proceedings, judicial officers are well equipped to decide who should lead evidence and when to lead such evidence and, if the evidence already led is not enough, they are entitled to call evidence themselves in order to reach a decision that will be in the interests of justice. In *Prokureur-Generaal, Vrystaat v Ramokhosi* 1996 (11) BCLR 1514 (O), Edeling J noted that the provisions of ss 60(3) and (10) of the CPA characterise bail procedures as being inquisitorial beyond any doubt. This was further entrenched by the CC in *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat (op cit)* at para 11) when it reiterated that although bail, like the trial, is essentially adversarial, the inquisitorial powers of the presiding officer are greater.

Given the wide range of less restrictive options available to the court, aimed not only at securing the attendance of the accused at trial, but preventing the accused from engaging in the activities listed in s 60(4) of the CPA, courts are in a position to vigorously interrogate whether the reasons given by the state justify continued remand in detention (C Ballard 'A statute of liberty? The right to bail and a case for legislative reform' (2012) 24 SACJ 24 at 35). The court may impose any conditions on the release of an accused, which, in its opinion are in the interests of justice (s 60(12) of the CPA). Section 62 of the CPA demonstrates that the question of whether or not an accused should be granted bail is not an all or nothing process. There are a range of measures, some very restrictive, some less so, which enable a court to impose conditions commensurate with the needs of the state weighed against the freedom interests of an accused (Ballard (*op cit*)). The attitude of the Director of Public Prosecutions regarding the grant or refusal of bail is a relevant consideration, but their opinion must not usurp the function of the court (*Bolofo and Others v Director of Public Prosecutions* 1997 (8) BCLR 1135 (Lesotho CA)). Thus, the

court should not be led, or misled, by the passive attitude of the prosecution (*S v Sithole and Others* 2012 (1) SACR 586 (KZD) at paras 5 – 7).

The standard by which courts are to carry their role

The standard, which is required from the magistrates, is the same as the one applied in trial courts regarding impartiality and fairness during the proceedings. The court is to base their findings on the evidence led. This was reiterated in the case of *S v Majali* (GJ) (unreported case no 41210/2010, 19-7-2011) (Mokgoatlheng J) at para 33, where the court held:

'A bail inquiry is a judicial process that has to be conducted impartially and judicially and in accordance with relevant statutory and constitutional prescripts'. 'It must also be appreciated that the constitutional right to a fair trial includes proceedings such as bail proceedings. Fairness and the constitutional right to a fair bail hearing are manifestly under threat where a bail magistrate – like the one in *Kobese* – compromises her impartiality by making the remarks and observations, which she did in the course of an *ex tempore* judgment dealing with the question whether a male bail applicant charged with the rape of a young girl should be released on bail in the district of Grahamstown. What our law requires is that a bail magistrate, like any judicial officer presiding over a trial, should conduct proceedings open-mindedly, impartially and fairly, and that such conduct must indeed be manifest to all concerned, especially the bail applicant' (A Paizes (ed) *Criminal Justice Review 1 of 2017* (Cape Town: Juta 2017)).

The court has previously warned that magistrates are not rubber stamps for investigating officer's/prosecutor's views, regarding whether bail should be granted or not (*S v Joone* 1973 (1) SA 841 (C) 847A – C). The court in *Joone* remarked that a strict independent assessment of the facts of each case, which would include a careful consideration of the circumstances of each accused, the severity of the crime and the interests of the community by the presiding officer in each case, should be done. A court hearing a bail application should not be a passive umpire (T Geldenhuys, JJ Joubert, JP Swanepoel, SS Terblanche and SE van der Merwe *Criminal Procedure Handbook* 11ed (Cape Town: Juta 2014) at 184). Even in instances where the state is not opposed to the release of the accused person, the court is not expected to rubber stamp that decision. The court still has a duty to weigh up the personal circumstances of the accused against the interests of justice (s 60(10) of the CPA).

Even where the state asks that the accused's bail should be refused on the advice of the investigating officer, the duty still lies with the magistrate to evaluate the circumstances and to decide whether the proposal of the state is fair. The court should also ask itself if the further detention of the accused is in the interests of justice. If the matter of an undefended accused is remanded, a court should explain to such an accused the right to apply for bail and the procedure governing bail (s 60(1)(c) of the CPA).

However, the fact that the court is required to play an inquisitorial role in a bail application does not entitle it to resort to unfair and excessive robust questioning of the witness, including a bail applicant who has elected to testify orally in support of their application (Geldenhuys *et al (op cit)* at 185). A bail inquiry is an ordinary judicial process, adapted as far as needs be to take account of its peculiarities, is to be conducted impartially and judicially and in accordance with the relevant statutory prescripts.

Conclusion

What should not be overlooked is that, in any consideration of bail, a court must weigh two opposing interests, namely –

- the interests of an accused, who is to be presumed innocent until proven guilty; and
- the rights of witnesses and society at large to be protected against hardened criminals and to see that cases reach their conclusion without any undue delay.

'Although societal interests may demand that persons suspected of having committed crimes forfeit their personal freedom pending the determination of their guilt, such deprivation is subject to judicial supervision and control' (*S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat (op cit)* at para 10). Moreover, in exercising such an oversight with regard to bail, the court must not act as a passive umpire. It can be said that: 'Developments in South African bail law since 1994 have tried to ensure that bail is granted in circumstances which balance the risk of harm which the [accused] could cause to the victim/s, witnesses and the integrity of the justice process, on the one hand, with the rights of an accused person to the presumption of innocence, on the other' (J Burchell and A Erasmus (ed) *Criminal Justice in a New Society* (Cape Town: Juta 2003) at 163).

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Making sense of the demerit points system as a juristic person



By
George
Pelsier

It is common for a juristic person (a body recognised by the law as being entitled to rights and duties in the same way as a natural person) to own and use vehicles in the course of their business. These vehicles are often involved in traffic violations, such as exceeding the speed limit, and the fines are sent to the juristic person. It sometimes happens that the juristic person follows the 'incorrect procedure' of paying the fines without ensuring that the blame is allocated to the driver, who was driving the vehicle at the time of the incident. Con-

tinuing with the 'incorrect procedure' will lead to negative consequences that can hinder the operations of a juristic person.

The amendments to the Administrative Adjudication of Road Traffic Offences Act 46 of 1998 (the AARTO Act) will see the demerit points system coming into effect. Initially the speculated effective date was June 2020. This had road users scrambling to try and make sense of how this would impact them. The demerit points system, which will be implemented at a later stage, will not just have an impact on individuals, but also on juristic persons who own vehicles. It is, therefore, vital for juristic persons to stay abreast of these developments.

Once in effect, the demerit points system will allocate demerit points (ranging from one to six) to various traffic infringements as set out in the Administrative Adjudication of Road Traffic Offences Regulations, 2008 (the AARTO Regulations). Once in effect, all drivers will start with zero points and if the driver accumulates more than 12 demerit points (this is proposed to change to 15 points), their driver's licence will be suspended for a period of three months for every point exceeding the limit. For example, if a driver accumulated 14 demerit points, their driver's licence will be suspended for six months. A driver's

good behaviour on the road will reduce the demerit points at a rate of one point every three months.

The demerit points system does not substitute the payment of a fine. The AARTO Regulations set out the fines payable for various traffic infringements, together with the relevant demerit points linked to that infringement. For example, running a red light or skipping a stop sign will lead to a fine of R 500 and one demerit point.

The demerit points system is quite understandable for individuals, but there is still some confusion as to how this will affect a juristic person who owns and has their staff use the vehicles. One of the most frequently asked questions relates to whether a juristic person's identified proxy will get the demerit points in their personal capacity.

A proxy is a dedicated person who takes responsibility for various matters relating to the vehicles of a juristic person, such as attending to traffic infringements, roadworthiness of the vehicles and so on. Regulation 336 of the National Road Traffic Act 93 of 1996 places a duty on a juristic person to identify and appoint a proxy. The AARTO Act and Regulations do not have a similar provision. However, a juristic person still needs a representative to attend to vehicle related matters and it cannot be

assumed that a proxy must not be appointed due to legislation not making provision for it.

Even though notices for traffic infringements will be directed and addressed to the proxy, the question remains: What is the role of the proxy?

In the matter of *Fines4U CC and Another v Johannesburg Metropolitan Police Department and Others* 2014 (4) SA 89 (GJ), Gautschi AJ provided some clarity in para 24 when stating that:

‘The proxy cannot be prosecuted for the statutory transgression of the owner, the corporate body, but acts merely in a representative capacity’.

By stating that the proxy only acts in a representative capacity, one can argue that the proxy will also not get the demerit points in their personal capacity. However, it is necessary to look at the legislature’s intentions with this.

Currently, the AARTO Act and Regulations do not deal with the application of the demerit points system in a lot of detail. Amendments to the AARTO Act was signed into law on 13 August 2019 (commencement date pending) and in October 2019, new regulations were published in GN1319 GG42765/11-10-2019 for public comment (New Proposed Regulations). These amendments go into more detail and provide clarity on how the demerit point system might impact juristic persons.

Regulation 24(10) of the AARTO Regulations provides that juristic persons will not incur demerit points. However, this is about all that is said in respect of juristic persons and the demerit points system. It is, therefore, uncertain as to whether this means that demerit points will not apply at all or that it will only accrue to the driver of the vehicle owned by a juristic person.

The New Proposed Regulations (as it currently stands) provide some clarity and reg 18(4) states that in the case of a traffic infringement for a vehicle owned by a juristic person, the demerit points will be ‘allocated to that specific vehicle’. Unlike the suspension of an individual’s driver’s licence, it is the vehicle’s licence disc that is suspended (see reg 18(6)(b) of the New Proposed Regulations). This means that should the specific vehicle reach the demerit point limit, it does not disqualify a person to drive the vehicle, but rather that the vehicle is disqualified from being driven by anyone.

The New Proposed Regulations further explains in reg 20 that if the vehicle is suspended by being driven, the vehicle’s licence disc must be handed to the issuing authority. The issuing authority will keep the licence disc secured until the expiry of the suspension period and will provide proof of receipt. At the end of the suspension period, the juristic per-

son (through its proxy) can apply to the issuing authority for the return of the licence disc.

There seems to be a misconception that the demerit points will immediately accrue at the issuing of the infringement notice. It is important to remember that the consequences of a traffic violation will generally only occur once the infringer admits guilt (by paying the fine) or is found guilty by a court. This is echoed in s 24(2) of the AARTO Act and reg 18(1) of the New Proposed Regulations, where it is stated that the demerit points will only accrue when –

- the fine is paid, including partial or dishonoured payments;
- the infringer elected to pay the fine in instalments; or
- the infringer is found guilty by a court or an enforcement order has been authorised.

Seeing as demerit points will accrue once payment has been made, juristic persons must be careful to go ahead and pay a fine that has been issued for a vehicle that is owned by them. With the new demerit points system, it is not just the payment of a fine and it is over – the demerit points will accrue to the vehicle owned by the juristic person, and as discussed above, this can lead to the suspension of the juristic person’s vehicle licence disc.

It is one of the duties of a proxy to establish and keep a record of what the infringement/offence is and who the driver of the vehicle was at the time the infringement/offence occurred. The reason for this is that one must take responsibility for one’s actions.

Regulation 18 of the New Proposed Regulations states that it is not always the juristic person that will be liable for the traffic infringement. It firstly refers to vehicle-related infringements, such as failing to ensure that the vehicle is road-worthy. In this instance, both the juristic person and the driver of the vehicle at the time will be liable for the payment of the fines.

It secondly refers to camera captured traffic infringements, such as speeding. In this instance, both the juristic person and the driver of the vehicle at the time the incident took place will be liable for the payment of the fine. The infringement notice will be sent to the juristic person and the juristic person must nominate the driver of the vehicle at the time of the infringement (within the prescribed timeframe). If the juristic person does not nominate the driver, then the juristic person will remain liable for the infringement.

Juristic persons and their proxies should ensure that the actual infringer takes responsibility. Horwitz AJ explains this general duty in *Van Rensburg v The*

City of Johannesburg [2008] 1 All SA 645 (W) when saying the following:

‘Traffic law enforcement, no less than other forms of law enforcement, is extremely important for society to function in a well-ordered manner. Allied to this is the need to ensure that people who drive on our roads not only obey the rules thereof but if they disobey those rules, they have respect for, and heed, those procedural laws which are essential to bring the wrongdoers to book.’

It is the duty of the proxy to ensure that the necessary representations are made to the issuing authority and to inform the issuing authority regarding the details of the driver in order to have the infringement notice be re-issued to the driver in their capacity. Apart from this duty, there are other duties a proxy of a juristic person must take into account while anticipating the demerit points system coming into effect, such as:

- The proxy must ensure that all the provisions of the National Road Traffic Act and the AARTO Act are complied with.
- The proxy must keep an updated register containing the particulars of all drivers or persons in control of the vehicles. Section 17(5) of the AARTO Act makes it a criminal offence if the driver’s particulars are not obtained.
- The proxy must ensure that a driver does not drive the vehicle if their licence has been suspended. A juristic person must ensure that they get the written permission from the driver to access their records to monitor the status of the driver’s licence. A juristic person will also have to consider possible cost implications for accessing these records.

In light of the above, proxies can be at ease that intentions of the legislature seem to be that the demerit points will not accrue to them in their personal capacity. However, various other implications will come into play for a juristic person once the demerit points system comes into effect. Even though finer details of the demerit points system and the regulations must still be finalised, the information at hand gives a glimpse of what the intentions of the legislature are. This is enough for juristic persons to start planning and to ensure that the correct procedures are followed. Juristic persons might just as well begin to throw old habits out of the door and to implement some new practices, to make the transition easier.

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Dispute resolution forum: *Is your pension fund regulated by the Pension Fund Act?*



By
Clement
Marumoagae

This article highlights an issue of concern in the South African retirement fund industry regarding the discrimination experienced by members, trustees and other retirement fund stakeholders who are not regulated by the Pension Funds Act 24 of 1956 (the Act). All these parties do not have specialised pension law forums where they can seek to resolve disputes that arise from the management and administration of retirement funds with whom they are associated. The purpose of this article is to propose amendments to the law that would ensure that there is a specialised forum that would resolve pension law related disputes for all those operating within the retirement industry, irrespective of which legislation regulates their retirement fund.

In South Africa (SA), the majority of

retirement funds are regulated by the Act (C Marumoagae 'Liability to pay retirement benefits when contributions were not paid to the retirement fund' (2017) 20 *PER* at 4). Some of the state linked retirement funds that are not regulated under the Act are regulated by their own specific legislation (C Marumoagae 'The need for effective management of pension fund schemes in South Africa in order to protect members' benefits' (2016) 79 *THRHR* 614). For example, there are government linked retirement funds, such as –

- the Government Employees Pension Fund (GEPF), which is regulated by the Government Employees Pension Law Proclamation 21 of 1996;
- the Transnet Pension Fund, which is regulated by the Transnet Pension Fund Act 62 of 1990; and
- The Telkom Retirement Fund, as well

at the core of the concern and the need for greater control is the fact that an employer who participates in a defined benefit fund, such as the government of South Africa in this context, guarantees the pension benefits regardless of the investment performance of government funds. In the South African setting, this guarantee, especially in relation to the GEPF, is quite significant and justifies the parallel private pension regime to ensure greater control of government funds’.

I am afraid I am not convinced by this argument. It is nonetheless, worth noting that Mhango does recognise some of the constitutional defects of this fragmented regulation, which often calls for judicial intervention (Mhango (*op cit*) at 341). He correctly points out how the Constitutional Court (CC) had to eradicate the discrimination experienced by members of the GEPF and the Post Office Retirement Fund in relation to the clean-break principle regarding pension interests on divorce, wherein this benefit was only available to members whose retirement funds are regulated by the Act (Mhango (*op cit*) at 431, see also *Wiese v Government Employees Pension Fund and Others* 2012 (6) BCLR 599 (CC), *Ngewu and Another v Post Office Retirement Fund and Others* 2013 (4) BCLR 421 (CC) and *C Marumoagae* ‘Breaking up is hard to do, or is it? The clean-break principle explained’ 2013 (Oct) *DR* 38).

I submit that it is not enough to only have regard to policy issues, which are motivated by political considerations, when drafting the law regulating retirement funds. It is important that the law that regulates the retirement fund takes the actual implications of that law on the administration of the retirement fund and the impact on the members of that retirement fund into consideration. In my view, there should be one legislation that regulates all retirement funds in SA, which will ensure that all retirement funds members are accorded the same legal protection and have access to the same dispute resolution forums. A justifiable differentiation can be made regarding defined benefit funds and defined contribution funds only to the extent of their uniqueness, but that should not extend to general benefits that can easily be unified by legislation. Failure to do this, places the court in a difficult position to constantly do that which legislators should do, by making orders that have policy implications. In my view, this fragmented or parallel regulation of retirement funds is unjustifiable and leads to the unnecessary discrimination of members on the basis of their affiliated funds and thus infringes on s 9 of the Constitution. Discriminatory practices can be eradicated by the promulgation of a uniform retirement fund statute.

Establishing a uniform retirement fund statute will not prevent government from having ‘greater control’ over retirement funds. In actual fact, government can then solidify its control over retirement funds to which it contributes financially in such a uniform statute, while at the same time eradicating most of the discriminatory practices within the retirement industry.

The most significant differential treatment is in relation to the resolution of disputes that arise in the retirement industry. Only trustees, members, stakeholders and retirement funds regulated by the Act have access to a specialised pension law tribunal, which is specifically designed to resolve disputes arising out of the management and administration of retirement funds regulated by the Act, namely, the office of the Pension Funds Adjudicator (Adjudicator). The Adjudicator’s office is established in terms of s 30B of the Act, to investigate complaints and determine them through the principles of equity in a procedurally fair, economic and expeditious manner (see ss 30D and 30E). In terms of s 30O of the Act, an order made by the Adjudicator is regarded to be a judgment of a court of law – as if the matter before the Adjudicator was heard by a civil court – and if not complied with, can be executed by the Sheriff of the court on the strength of a writ of execution issued by a civil court (see *C Marumoagae* ‘Recognition of the concept of Contempt of “Determination” of the Pension Fund Adjudicator’s Determination: A missed opportunity – with particular reference to *Mantsho v Managing Director of the Municipal Employee Pension Fund and Others* (37226/14) [2015] ZAGPPHC 408 (26 June 2015)’ (2017) 50 *De Jure* 175 at 181).

Other retirement fund related statutes are silent on the issue of dispute resolution. These statutes neither establish dispute resolution forums, nor the manner in which members, trustees, retirement funds and stakeholders can seek to resolve their disputes that arise in the course of the administration of the retirement funds they regulate. In other words, stakeholders in these funds do not have a forum that can resolve their disputes in an expeditious, procedurally fair and economic manner. It is not clear why the legislature has not extended such an important forum to all those operating within the retirement industry. I submit that this omission violates the equality clause of the Constitution. In terms of s 9(3) of the Constitution, ‘[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, be-

as the Post Office Retirement Fund, which are regulated by the Post and Telecommunication-related Matters Act 44 of 1958.

According to M Mhango in ‘The right to equality and access to courts for government employees in South Africa: Time to amend the Government Employees Pension Law’ (2019) 19 *African Human Rights Law Journal* 337 at 340:

‘One of the benefits of the current parallel pension regime is that it allows the government of the day greater control in the affairs of government funds on matters that affect the national budget. This is relevant given that most government funds, particularly the GEPF, are organised as defined benefit funds where issues of the adequacy of funding levels may have significant political and economic consequences. In other words,

lief, culture, language and birth'. The CC designed the test of discrimination in *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at para 53. In terms of this test, it must first be determined whether the identified differentiation amounts to discrimination. If the differentiation is on a listed ground in s 9(3) of the Constitution then discrimination would have been established. If the differentiation is not on a listed ground, then it must be determined that the identified discrimination may lead to the infringement of the fundamental human dignity of people. If discrimination is established, then its fairness must be assessed. If any of the grounds listed in s 9(3) are established, then unfairness is presumed.

If the differentiation is on an unspecified or analogous ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation' (A Smith 'Equality constitutional adjudication in South Africa' (2014) 14 *African Human Rights Law Journal* 609 at 617). Denying retirement fund members access to a specialised dispute resolution forum is not a listed ground in s 9(3) of the Constitution. As an unlisted ground, it is important to assess its impact on retirement fund members not regulated by the Act, who do not have access to a specialised pension law dispute resolution forum in the same way those whose retirement funds are regulated by the Act do. It is true, as it was stated in *Gaum and Others v Van Rensburg NO and Others (Commission for Gender Equality and Another as amici curiae)* [2019] 2 All SA 722 (GP) at para 70, that '[t]o determine the unfairness of discrimination, the determining factor is the impact on the members of the affected group'. Mhango cites *Ntshangase v Government Employees Pension Fund* (KZD) (unreported case no 6166/16, 11-8-2017) (Van Zyl J), where the court highlighted that GEPPF members do not have access to cost-effective

dispute resolution mechanism for their retirement fund related disputes (Mhango (*op cit*) at 351-2). Mhango then correctly argues that 'the Government Employees Pension Law [and all other retirement fund statutes that do not afford their members a specialised retirement fund dispute resolution forum are] unconstitutional to the extent that [they do] not afford members of the GEPPF the advantage of and access to the dispute resolution services at the [Office of the Pension Funds Adjudicator] or similar tribunal' (Mhango (*op cit*) at 341). Those who are not afforded a specialised pension forum are forced to approach a civil court at great cost in order to have their disputes resolved by the court, which is a luxury that is not available to all. As such, retirement fund members are being unfairly discriminated against, based on being associated with retirement funds that are not regulated by the Act.

Currently, legal practitioners assisting clients with complaints against retirement funds, which are not regulated by the Act, have to complain to those funds directly. At times, depending on the efficiency or lack thereof from the officials who are assisting them, retirement fund members' complaints may not be responded to on time or at all. Or if responded to, their complaints may simply be dismissed. As such, retirement fund members will be forced to approach the court. Given the fact that retirement funds that are not regulated by the Act are associated with the state, there have been members who have taken their complaints against these retirement funds to the Office of the Public Protector. Apart from not having the necessary pension law expertise, the Office of the Public Protector does not have human and financial capacity to investigate the complaints and produce individual reports for each and every retirement fund member that complains to it, in the same way the Adjudicator's office does. Given the fact that the GEPPF is the largest retirement fund in SA with

the largest membership, the Office of the Public Protector is not adequately equipped to address disputes from GEPPF members (see C Marumoagae 'The need to provide members of retirement funds which are not regulated by the Pension Funds Act access to a specialised dispute resolution forum' (2019) 52 *De Jure* 115 at 123).

In conclusion, I recommended that the legislature should repeal all pension law statutes and promulgate a uniform retirement fund legislation that will regulate the South African retirement fund industry. This legislation should establish a specialised pension law tribunal that will be accessible to all within the retirement fund industry. I have argued elsewhere that 'the jurisdiction of the current Adjudicator's office should be extended to other retirement funds. If this proposal is adhered to, then the state should financially resource this office in order to make it easily accessible nationally by creating at least one office in each province. Each office should be duly capacitated to deal with the complaints, which will be lodged with it' (Marumoagae (*op cit*) *De Jure* at 131). Currently, those retirement funds regulated under the Act experience preferential treatment and can have their disputes resolved by a specialised dispute resolution tribunal. They enjoy another benefit that of orders that they are dissatisfied with being reconsidered by the Financial Services Tribunal in terms of s 230 of the Financial Sector Regulation Act 9 of 2017.

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Clarifying the term *pension fund* in the Divorce Act and the Pension Fund Act



By
Magdaleen
de Klerk

On 3 December 2019 the Supreme Court of Appeal (SCA) delivered a judgment in the case of *Nailana v Nailana* (SCA) (unreported case no 714/2018, 3-12-219) (Swain JA (Petse DP, Leach and Mbatha JJA and Dolamo AJA concurring)) in which the SCA found that the reference to a 'pension fund' in

the Divorce Act 70 of 1979 includes both pension and provident funds.

Development of the law with regard to the sharing of pension benefits

More than 30 years ago, the Divorce Act was amended by inserting ss 7(7) and 7(8), which provided for the sharing of pension benefits upon divorce. This followed a recommendation by the South African Law Reform Commission (the SALRC), where in its report the SALRC highlighted the inequalities of non-sharing, especially in relation to women.

However, following this amendment the non-member spouse could not release their share of the pension interest because payment thereof could only occur when the member spouse exited the fund. This prejudiced the non-member spouse severely.

To effect the so called 'clean-break' principle, ss 37D(4)(a) and 37D(4)(d) of the Pension Funds Act 24 of 1956 were inserted. Section 37D(4)(a) provides that 'the portion of the pension interest assigned to the non-member spouse in

terms of a decree of divorce ... is deemed to accrue to the member [spouse] on the date' of divorce while s 37D(4)(d) provides that 'any portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce ... granted prior to 13 September 2007' is 'deemed to have accrued to the member [spouse] on 13 September 2007'.

In the watershed case of *GN v JN* 2017 (1) SA 342 (SCA) the SCA clarified the proper interpretation of ss 7(7) and 7(8) of the Divorce Act. In the *GN v JN* case a settlement agreement, which was incorporated in an order of divorce granted by the regional court provided that 'the joint estate shall equally be divided between the parties'. Thereafter, the appellant approached the High Court seeking a declaratory order that she and the respondent were entitled to an amount equal to 50% of each other's pension interest. The High Court dismissed the application. The SCA found that by virtue of s 7(7) of the Divorce Act, the pension interests of both parties automatically falls into the joint estate for purposes of determining the patrimonial benefits to

which the parties are entitled to at the date of divorce. The SCA further found that s 7(8) of the Divorce Act provides 'a mechanism in terms of which the pension fund of the member spouse is statutorily bound' to effect payment of that portion of the pension interest assigned to the non-member spouse, directly to the non-member spouse.

Therefore, having regard to the judgment in the *GN v JN* case, it is imperative to obtain an order in terms of s 7(8) of the Divorce Act, from the court granting the decree of divorce that the pension fund concerned makes payment of the non-member spouse's share of the pension interest directly to the latter. Absent an order in terms of s 7(8) of the Divorce Act, the non-member spouse will have to look to the member spouse for the payment of their share of the pension interest, as the court order would not be enforceable against the pension fund. In the case of a so called 'blanket division order' the pension interest of the member spouse, therefore, forms part of the joint estate. However, the non-member spouse would not be able to enforce the same against the pension fund concerned.

At the hearing of the appeal in the *GN v JN* case, it was further submitted by counsel for the respondent that the appellant's belated application in the court *a quo* was doomed to fail, as no such order can be granted post the granting of the divorce order, even at the instance of a liquidator. The SCA held that it was not necessary to decide this point as the counsel for the appellant accepted that it would not be competent for that court to decide the issue for the first time on appeal. However, in the relevant footnote to the judgment, the following was said: '8 ... The wording of s 7(8)(a) would, however, seem to restrict the grant of such an order to the "court granting a decree of divorce". But for the present purposes it is unnecessary to express a definite conclusion on this question'.

The Nailana case

In the case of *Nailana* the SCA clarified the proper interpretation of the term 'pension fund' in the Divorce Act.

As far as the facts are concerned, the appellant, Mrs Nailana and the respondent, Mr Nailana's marriage was dissolved by the North Eastern Divorce Court on 6 December 2004. They entered into a settlement agreement, which was incorporated in the divorce order. The relevant part of the order reads as follows:

'That the joint estate shall be divided and 50% of the plaintiff's right and interest in the University of the North Pension Fund when it becomes due and payable to plaintiff be made out to defendant, calculated to date of this order'.

At the time the order was granted, the appellant could not release her share of

Absent an order in terms of s 7(8) of the Divorce Act, the non-member spouse will have to look to the member spouse for the payment of their share of the pension interest, as the court order would not be enforceable against the pension fund. In the case of a so called 'blanket division order' the pension interest of the member spouse, therefore, forms part of the joint estate.

the pension interest because payment of the pension interest to the non-member spouse could, as previously mentioned, only occur when the member spouse would exit from the fund.

Consequently, in 2011 the appellant lodged a claim with Alexander Forbes Financial Services, the fund administrator of the University of the North Pension Fund, whose name was subsequently changed to the University of Limpopo Retirement Fund, for the payment of the money owed to her in terms of the divorce order.

The response of the fund administrator to the claim of the appellant was that the appellant was only paid from the pension fund section because:

'The court order clearly states that we should pay from the pension fund section only, should the parties [have] intended for the payment to be deducted from the pension fund and provident fund section the court order should have clearly stated that the defendant (Mrs Nailana) is entitled to a portion from the pension and provident fund section.'

Consequently, the appellant instituted application proceedings in the Polokwane Regional Court, for an order varying the order granted by the divorce court, to read as follows:

'50% of the plaintiff's rights and interest in the University of Limpopo Retirement Fund, (Pension and Provident Section), be paid out to the defendant, calculated as on date of divorce, ... and that the University of Limpopo Retirement Fund, (Pension and Provident Section), be ordered to effect such payment to the defendant as on date of divorce, in terms of section 7(7) read with (8) of the Divorce Act 70 of 1979.'

The application was opposed by the respondent on three grounds:

- Firstly, that it was agreed between the parties that 50% of his pension interest would accrue to the appellant, but that it was never agreed that the appellant would have a share in his provident fund.
- Secondly, that ss 7(7) and 7(8) of the Divorce Act only dealt with a pension benefit and not a provident fund.
- Thirdly, that the definition of 'pension fund' in s 1(1) of the Pension Fund Act, did not include a provident fund.

The regional court dismissed the application with costs, *inter alia*, on the basis that it found that the Pensions Fund Act provides separate definitions for 'pension preservation fund' and 'provident preservation fund' and consequently the one did not include the other.

Aggrieved by the dismissal of her application, the appellant appealed to the Limpopo Division of the High Court, Polokwane. The appellant submitted that the divorce order did not state that the appellant was entitled to 50% of the respondent's pension interest in the 'pension fund section', but that she was entitled to 50% of the respondent's pension interest in the University of the North Pension Fund, which at all relevant times was the one and only fund, albeit that its name was subsequently changed to the University of Limpopo Retirement Fund. Therefore, the administrator of the fund was bound to make payment from the pension fund, which by definition, encompassed the provident fund as well. This argument was rejected by the High Court on the basis that the order was *perfecta* and could not be varied. The High Court further found that the divorce court had ordered the fund to pay as per the parties' settlement agreement and it was not suggested that the order was granted by mistake. The appeal was dismissed with costs on the attorney and client scale.

Thereafter, special leave to appeal was granted by the SCA.

At the hearing of the appeal in the SCA, counsel for the respondent submitted that the order granted by the divorce court had to be interpreted in the context of the settlement agreement concluded between the parties. In particular, that it was never agreed that the appellant would have a share in the respondent's provident fund. The SCA stated that the reliance by the respondent on the fact that the parties never agreed that the appellant, would have a share in his provident fund amounted to no more than an opportunistic reliance by the respondent on the erroneous interpretation placed on the order by the fund administrator. The SCA further stated that no variation of the order of the divorce court was necessary because the reference to 'the plaintiff's right and interest in the University of the North Pension Fund' included not only his right and interest in

the pension fund, but also the provident fund. This conclusion was motivated in para 20 of the judgment as follows: 'This is because s 7(8)(a)(i) of the Divorce Act, refers to "any part of the pension interest of that member" in respect of which the court may make an order that it be paid to the non-member spouse.

...
"Pension interest", in relation to a party to a divorce action who –

(a) is a member of a *pension fund* (excluding a retirement annuity fund), means the benefits to which that party as such a member would have been entitled in terms of the rules of that fund if his membership of the fund would have been terminated on the date of the divorce on account of his resignation from his office. (Emphasis added.)

"[P]ension [F]und" is defined in the Divorce Act as follows:

"... means a pension fund as defined in section 1(1) of the Pension Funds Act, 1956, irrespective of whether the provisions of that Act apply to the pension fund or not."

The [Pension Funds Act] must then be consulted to ascertain the meaning of

"pension fund", which in turn is defined as follows:

"[P]ension fund means a pension fund organisation."

"[P]ension fund organisation", is then defined in the PFA as follows:

"(a) any association of persons established with the object of providing annuities or lump sum payments for members or former members of such association upon their reaching retirement dates, or for the dependants of such members of former members upon the death of such members." (Emphasis added.)

In para 23 the SCA stated as follows: 'As correctly pointed out by A B Downie *Essentials of Retirement Fund Management*, (2019) para C2 at 12: "It is important to note that the differences between Pension and Provident Funds do not stem from the Pension Funds Act which does not distinguish between the two types of fund. The Pension Funds Act treats both pension and provident funds the same under the description of a "pension fund organisation" The differences between pension funds and provident funds ... stem from the Income Tax Act."

The SCA then concluded that 'properly interpreted, the reference in the court order to "... 50% of the plaintiff's right and interest in the University of the North Pension Fund" ... , includes both the pension fund section, as well as the provident fund section, of the University of Limpopo Retirement Fund.' Consequently, the appeal was upheld with costs.

Conclusion

Having regard to the uncertainty with regard to the proper interpretation of the 'court granting a decree of divorce' in s 7(8) of the Divorce Act as alluded to above, it is imperative that legal practitioners ensure that provision is made for an order in terms of s 7(8) of the Divorce Act in all divorce orders.

Magdaleen de Klerk BA (Hons) BProc (UFS) Cert Human Rights (UP) is a legal practitioner at DDKK Attorneys in Polokwane. DDKK Attorneys acted on behalf of the appellant in the *Nailana* matter.



Seen on social media



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

The Johannesburg Attorneys Association held a function on 12 March for candidate legal practitioners to get first hand advice and motivation from High Court judges in the country.



This is a very remarkable article. Thank you. Although it is written for the legal profession, it is my opinion that it can also apply to other professions, such as the accounting profession. Our focus should be on serving the public.

Tarita Mostert
@MostertTarita

Magistrate, Desmond Francke discusses three principal ways COVID-19 will affect South African jurisprudence in bail proceedings.



A good contribution to our legal literature on bail.

Theo Nel
@TheOneE

The Fiduciary Institute of Southern Africa has made an urgent submission to the Department of Justice to consider having the drafting and execution of a will declared as an essential service under the lockdown regulations.



Or perhaps change legislation to enable electronic signatures.

Louis Stroebel
Legal practitioner

Legal practitioner and acting magistrate, Tobile Bara, discusses the provisions of s 112(1)(a) and (b) of the Criminal Procedure Act.



Chaps, never make the mistake of going wrong on these provisions. Study and know the difference and be ready when you're faced with it!

GlobalCitizenship
@kennedykariseb

In this month's Employment Law column, legal practitioner, Moksha Naidoo, asks in the situation where an employee working post the expiry of a fixed term contract becomes automatically permanent or not?



Astute application of the law by Labour Appeal Court. A sound judgment and I am fully agreeable therewith.

Siphwe Ntuli
Legal practitioner

Challenges and opportunities for the legal profession



International legal trends are also pushing for more innovation and a radically new way of thinking when it comes to the provision of legal services. I thoroughly enjoyed this @DeRebusJournal article about this #legal #lawtwitter #legalinnovation

Leah Molatseli
@leahmolatseli

With the lack of female representation on the Bench, legal practitioner, E Herbert Ludick, asks if it is time to embrace judicial shadowing?



Agreed. We need more women on the Bench. A homogeneous Bench may be completely oblivious to a factor that is crucial to the resolution of a dispute which would have been quite obvious to a judge of a different background. Diversity gives the court a maturity of judgment.

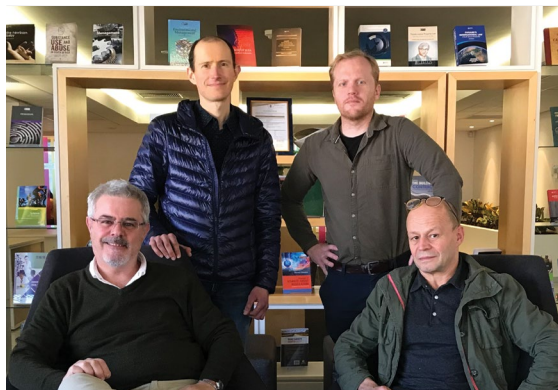
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THE LAW REPORTS



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

**May 2020 (3) South African Law Reports
(pp 1 – 323); May 2020 (1) South African
Criminal Law Reports (pp 449 – 559)**

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

Abbreviations:

ECG: Eastern Cape Division, Grahams-town
FB: Free State Division, Bloemfontein
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
LT: Limpopo Local Division, Thohoyandou
ML: Mpumalanga Local Division, Middelburg
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Attorneys

Is work done by an attorney who lacks a Fidelity Fund Certificate at the time of doing the work null and void? The litigation in *NW Civil Contractors CC v Anton Ramaano Inc and Another* 2020 (3) SA 241 (SCA) stemmed from a dispute between the parties over legal fees that the first respondent attorneys' firm maintained was owed to it by the appellant.

It appeared that the appellant's attorney, one Nange, had prosecuted an application for the appellant, and obtained favourable orders against the first respondent in the LT. However, at the time of so acting, Nange was not in possession of a valid Fidelity Fund Certificate.

Relevant to the case was s 41(1) of the Attorneys Act 53 of 1979 (the Act), which provides that: 'A practitioner shall not practise ... unless he is in possession of a Fidelity Fund Certificate'.

The first respondent approached the LT, which set aside the judgment the appellant had obtained there. In the court's view, absent a Fidelity Fund Certificate,

all work done in the matter, including drafting of the notice of motion, was rendered null by the contravention of s 41(1). This meant that the notice of motion, and the orders based thereon, requiring setting aside.

The first respondent then appealed to the SCA. The SCA per Ponnar JA (Swain JA, Zondi JA, Mocumie JA and Dolamo AJA concurring) set aside the LT's decision on the ground that its orders were impermissibly vague, and thus contravened the principle of the rule of law; and also on the basis that while a contravention of s 41(1) disentitled an attorney from getting his fee and rendered him guilty of an offence, the work done by the attorney was not rendered null since this was not what was contemplated by the Act. The SCA ruled that the legislature's intention in enacting s 41 was no more than to punish attorneys who did not comply with it. It held that a contrary reading would undermine the primary purpose of the Act, which was to protect the public, and would have grave consequences for the administration of justice, the rule of law and legal certainty. The SCA accordingly upheld the appeal with costs.

- See Kgomoitso Ramotsho 'The primary purpose of s 41 of the Attorneys Act is to protect the public' 2019 (Dec) *DR* 29.

Children

School admission policy excluding 'undocumented' learners: In *Centre for Child Law and Others v Minister of Basic Education and Others* 2020 (3) SA 141 (ECG), the matter concerned the validity of a 2016 policy change introduced

by the Department of Education, Eastern Cape, to withhold funding for learners without valid identity or passport numbers. This decision effectively resulted in the exclusion of such 'undocumented children' from school and from being funded if they remained at school.

Various issues were touched on, however, on the issue of its constitutionality the ECG, per Mbenenge JP (Schoeman J and Mfenyana AJ concurring), held that the policy was inconsistent with, *inter alia*, the right to basic education, which extended to all within South Africa's borders, irrespective of immigration status. A further issue was the ambit of Immigration Act 13 of 2002's prohibition on training or instruction of illegal foreigners by learning institutions (in ss 39(1) and 42), more specifically whether it applied to illegal foreign children. The court held that it did not.

Contract

Clause in settlement agreement ruled contrary to public policy: In *Standard Bank of South Africa Ltd v Bloemfontein Celtic Football Club (Pty) Ltd* 2020 (3) SA 298 (FB) the facts were that, in July 2015, Standard Bank (the Bank) entered into six home loan agreements with Bloemfontein Celtic Football Club (the Club). Mortgage bonds were registered over all six properties and registered in favour of the Bank even though the Club had no assets, no bank account, no income tax registration number and no financial statements. Shortly afterwards the Club defaulted, and on 2 August 2018 the Bank instituted liquidation proceedings. The Club filed a notice of intention to oppose. The parties then entered into a

settlement agreement under which they agreed that if the Club failed to make certain payments, the Bank would be entitled to re-enrol the liquidation application on an unopposed basis. When the Club subsequently defaulted on its obligations under the settlement agreement, the Bank proceeded with a liquidation application as foreshadowed in the settlement agreement. The Club argued that the term in question was contrary to public policy and, therefore, void.

The FB, per Musi JP, ruled that the disputed term fell squarely into the category of offensive and unconscionable agreements, while at the same time having the tendency to deprive the Club of its constitutional right of access to the courts. The FB further pointed out that it made no difference that the Club was a company, not a person, since both sequestration and liquidation involved a change of status. Since the disputed term was void for being contrary to public policy, the Bank was not entitled to fall back on the original notice of motion to seek the Club's liquidation. The application was dismissed with costs.

Impossibility of performance: In *Fra-jenron (Pty) Ltd v Metcash Trading Ltd and Others* 2020 (3) SA 210 (GJ) a lessee defended a lessor's contractual claim for the return of leases premised, on the basis that it was impossible to do so because the party to whom it had been sublet refused to vacate it. In considering this defence, the GJ, per Valley J, discussed the development in South Africa of the principle that impossibility of performance was a legally permissible basis for discharging a party from performing its contractual obligation.

The court summarised the state of the law as follows: If a person was prevented from performing under their contract by certain events, *vis major* or *casus fortuitus*, they were discharged from liability as such events were not confined to acts of nature only, they included any event that may be caused by human agency, as long as it was 'unforeseeable with reasonable foresight and unavoidable with reasonable care'. No party was allowed to rely on an impossibility caused by their own act or omission (there should be no fault or neglect on their part in the creation of the impossibility). The impossibility had to be absolute and not relative; and it had to be applicable to everyone and not personal to the defendant, therefore, it had to be objective.

The GJ ruled that the impossibility of performance rule did not rescue the defendant from the consequences of its breach. It was their own initial misconduct in subletting the property that prevented it from restoring possession to the plaintiff. It did not matter that the defendant took steps to evict the sub-

lessee but had been stymied by the slowness of the legal process. The delay was foreseeable and avoidable, and did not entail impossibility of performance.

Credit agreements

Whether collections costs include legal fees: The background to *University of Stellenbosch Law Clinic and Others v National Credit Regulator and Others* 2020 (3) SA 307 (WCC) was the widespread problem affecting consumers – particularly those, who were often the poorest members of society, who had entered into small or microloans – of their debts under a credit agreement spiralling far beyond the initial debts incurred, owing to the credit provider's escalating legal fees being passed onto them.

In terms of s 103(5) of the National Credit Act 34 of 2005, the various costs of credit, which are allowed to be charged under a credit agreement in terms of s 101(1)(b) – (g) cannot in aggregate exceed the unpaid balance of the principal debt as at the time the default occurred. Such allowable costs of credit include 'collection charges' (as defined in s 1) and amounts 'that may be charged by a credit provider in respect of enforcement of a consumer's monetary obligations under a credit agreement, but does not include a default administration charge'. Collection costs are subject to a further limitation as provided in s 101(1)(g), in that they cannot exceed 'the prescribed maximum for the category of credit agreement concerned'.

The issue, on a more technical level, was whether 'collection costs', given the broad language used in the section, was to be read as including all legal fees incurred to enforce the monetary obligation under the credit agreement, whether charged before, during, or after litigation. If legal fees were subject to these caps, the problem of spiralling debts would potentially be alleviated. Such an interpretation, the applicants argued, was demanded given the purpose of the provisions in question, namely to protect the consumer, especially the poor, and would promote responsible lending practices (another of the purposes of the Act) by encouraging credit providers to vet clients properly.

The court, per Hack AJ, agreed and declared, *inter alia*, that legal fees, including fees of attorneys and advocates – in as much as they comprised part of collection costs as contemplated in s 101(1)(g) of the Act – may not be claimed from a consumer or recovered by a credit provider pursuant to a judgment to enforce the consumer's monetary obligations under a credit agreement, unless they were agreed to by the consumer or they had been taxed.

Criminal law

Police refusal to prevent criminal activity during protest action without prior court order censured: The case of *Impangele Logistics (Pty) Ltd and Another v All Truck Drivers' Foundation and Others* 2020 (1) SACR 536 (ML) concerned two separate applications, similar in nature, that emerged out of violent unlawful protest actions. The applicants approached the court seeking orders restraining the main respondents –

- from unlawfully damaging, obstructing, and interfering in the business conducted by Imbali Coal Mine;
- restraining and interdicting the respondents from impounding, detaining or obstructing in any manner whatsoever the vehicles belonging to Impangele Logistics; and
- restraining the respondents from intimidating, harassing, threatening or attacking any of the applicants' employees.

Six police stations were also cited as respondents and the applicants sought orders compelling the police to assist in the enforcement of the orders. The particular police stations were cited because when the applicants had sought assistance from them to prevent unlawful conduct by the various groups of protesters, they had refused to intervene until the court directed them to do so. The applicants had provided the court with clear evidence of the commission of criminal activities including assault, robbery, hijacking, malicious damage to property, unlawful detention of vehicles, blockage of public roads and inciting violence, in which the police had failed to intervene.

The relief was granted but the court was compelled to comment that this was not the first time that it had been confronted with such a response by the South African Police Service. It noted that when matters deserving the maintenance of public order by the police were reported, an immediate response was required. It was entirely lacking on the part of the police not to act when criminal activity was reported to them. For parties to have to seek an order of court before action was taken on criminal activity would only serve to bring the criminal justice system into disrepute. In response to a request from the applicants that the station commanders 'be encouraged by the Honourable Court to perform their duties', the court cautioned of the need to be mindful of the separation of powers. It emphasised that it was not the responsibility of the courts to prevent, combat or investigate crimes and neither was it its function to maintain public order, secure the inhabitants and their property. That was a power and authority constitutionally bestowed on the police in terms

of s 205 of the Constitution and it was for the police to ensure that they did what the Constitution obliged them to do. It was, however, the function of the provincial commissioner to encourage them to perform their duties. For this reason, therefore, the court instructed the registrar to bring the judgment to the attention of the Mpumalanga Provincial Commissioner who was to consider whether to institute an inquiry, to consult with the applicants' legal practitioners for the purpose of fully addressing the complaints raised and to take measures to avoid recurrence of similar complaints in the future.

Damages – Road Accident Fund (RAF)

Should any heed be paid to the RAF's liquidity in such an assessment? The matter of *Malatji v Road Accident Fund* 2020 (3) SA 236 (GP) involved a plaintiff who was a married woman who had a son. She was employed as a facility maintenance co-ordinator and was actively involved in her church. At the age of 40, her spine was injured in a motor vehicle accident, and she was rendered quadriplegic and incapable of living independently. She was permanently bound to her wheelchair, and suffered from incontinence, depressive episodes and a loss of sexual activity. According to the court, she had been rendered as a spectator of life.

The plaintiff sued the RAF for damages, and the issue before the GP was the amount of her general damages, which in this context referred solely to her non-patrimonial loss, the aim of which was said to be an attempt to neutralise that loss through the fact that a money payment might bring the plaintiff happiness, contentment or comfort or assist her in some other way to overcome the loss and trauma she had suffered as a result of the accident. The amount awarded was at the discretion of the court, but it had to be guided by awards made in comparable cases. The GP, per Van der Schyff AJ, pointed out, however, that no monetary award could undo the plaintiff's loss, and that it was obliged to take judicial recognition of the fact that the RAF was for practical purposes insolvent. A responsible approach would, therefore, consider the plaintiff's interests and the aim and purpose of the award with the public interest, which included the protection of the liquidity of the RAF. The GP proceeded to award an amount of R 2,65 million to the plaintiff.

Delict

Action for assault: Onus and duty to begin: In 1981 the Appellate Division in *Mabaso v Felix* 1981 (3) SA 865 (A) established the *Mabaso* principle that, in

delicts affecting a plaintiff's personality and bodily integrity, the onus was on the defendant to prove excuse or justification, such as for example, self-defence. Assault was one such delict.

In November 2019 the *Mabaso* principle came to the fore in *Merryweather v Scholtz and Another* 2020 (3) SA 230 (WCC). The facts were that Merryweather and Scholtz were in the early hours of 9 September 2006 involved in a group brawl between several young men and a subsequent altercation between Scholtz and Merryweather that left Merryweather paralysed. Merryweather sued Scholtz for damages, claiming that Scholtz had assaulted him by 'grabbing and pushing, kicking and punching him and throwing and/or spear-tackling him against a stationary motor vehicle'. In his plea Scholtz denied the allegations but added, 'without derogating from the [above] denial', that Merryweather had 'hit' and 'grabbed' him, and that he had then 'pushed [Merryweather] to get [Merryweather] off him'. Scholtz also specifically denied that he 'threw or tackled [Merryweather] against a motor vehicle' or 'pushed [him] off his feet' or 'intended [him] to lose his footing'. The court was called to make a preliminary ruling on the duty to begin and the onus of proof.

Counsel for Merryweather argued that Scholtz's plea was one of confession and avoidance and that he, therefore, attracted the onus, in accordance with the *Mabaso* principle, of proving self-defence. Counsel argued that the statement in Scholtz's plea that he had 'pushed [Merryweather] away' was an admission of assault, and that the fact that he did not admit to the exact type of assault alleged in the particulars was irrelevant. Counsel for Scholtz in turn argued that since Scholtz did not admit material aspects of the assault alleged by Merryweather, his plea was not one of confession and avoidance that triggered *Mabaso*. Counsel for Scholtz further pointed out that Scholtz specifically denied kicking or punching Merryweather, that he threw or spear-tackled Merryweather against a car, or intended Merryweather to lose his footing. Counsel stressed that Scholtz had stated in amplification of his plea that contact between himself and Merryweather was not initiated by him and that he had acted to ward off acts directed against himself.

In its judgment the WCC, per Meer J, ruled that Scholtz's admission in his plea that he had pushed Merryweather in self-defence was an admission to an assault, though not the precise assault described in the particulars. Meer J pointed out that this admission and invocation of self-defence put Scholtz within the ambit of the *Mabaso* principle as outlined above, notwithstanding the factual disputes as to the exact type of assault per-

petrated by Scholtz. Therefore, the admission of assault was sufficient for the *Mabaso* principle to apply, even though the admitted assault did not mirror the details described by Merryweather. It did not matter that the assault described in the particulars was a spear-tackle and the assault admitted to in the plea was a push in self-defence to avert an attack. Since his plea was one of confession and avoidance, he bore the onus set out in *Mabaso* and had the duty to begin.

Immigration

May an asylum seeker marry a South African citizen, and may an individual conclude both a civil and customary marriage with another individual?

The case of *Mzalisi NO and Others v Ochogwu and Another* 2020 (3) SA 83 (SCA) concerned an asylum seeker (first respondent) whose application for asylum had been refused. His appeal of that refusal was pending. The first respondent married a South African citizen under customary law, and he and his wife (second respondent), had approached the Department of Home Affairs (the Department) to register that marriage, as well as to solemnise a civil marriage. The Department refused the application on the basis of a circular, which provided that refugees 'whose asylum seeker application status is pending cannot contemplate marriage' and 'should there be an inquiry [into] a refugee or asylum seeker status the marriage cannot be concluded'.

The first and second respondents then obtained a declaration from the GP that the paragraph containing these provisions was inconsistent with the Constitution and invalid to the extent that it barred them registering their customary marriage and solemnising a civil marriage. The GP set the paragraph aside. The Department appealed to the SCA. It confirmed that the provisions were invalid on the ground that they limited the rights to freedom and security of the person, and dignity. The SCA, per Petse DP (Tshiqi JA, Wallis JA, Mbha JA and Dlodlo JA concurring), also considered the assertion of the Department, that the High Court's order was incompetent in declaring a right to conclude a civil marriage and directing registration of the customary union.

The SCA finally also rejected the Department's contention that it was impermissible to be married both civilly and customarily at the same time, pointing out that, correctly interpreted, the Recognition of Customary Marriages Act 120 of 1998, s 10(1) and 10(4) allowed it.

Lease

The termination of a lease for an undetermined period: The case of *Sharma*

v Hirschowitz and Another 2020 (3) SA 285 (GJ) answered the question whether, when a tenant remained on leased premises with the landlord's consent after the expiry of the lease, they could orally agree to increase the further rental payable.

The facts were that the appellant, as tenant, had rented the property from the respondents. On the expiry on 27 February 2014 of a written renewal lease agreement entered into between them, the parties orally agreed that the appellant would be allowed to remain on the property at an increased monthly rental amount. The appellant paid the increased rent for the months March to October 2014. The respondents gave notice to the appellant to vacate the property effective, October 2014. The appellant, however, stayed on until 26 February 2015, having only paid further rent at the increased rate for the months of November and December 2014. The respondents proceeded to sue the appellant in the Randburg Magistrates' Court for cancellation of the lease agreement and payment of damages for holding over, as well as payment of water and electricity consumption charges. The appellant counterclaimed for payment of his rental deposit plus interest. The magistrates' court granted cancellation

and found that the respondents were entitled to holding-over damages. It also dismissed the respondents' claim for utilities, as well as the appellant's counterclaim.

The appellant appealed to the GJ. While accepting that he had held over for the period claimed, he disputed the amount of damages to which the respondents were entitled. He also argued that the magistrate should have found that oral lease renewal agreement was invalid under s 5(5) of the Rental Housing Act 50 of 1999, which provides that 'on the expiration of the lease the tenant remains in the dwelling with the express or tacit consent of the landlord, the parties are deemed, in the absence of a further written lease, to have entered into a periodic lease, on the same terms and conditions as the expired lease'.

The GJ ruled that s 5(5) was only an evidentiary tool aimed at facilitating the proof of matters in which there was no written agreement. Absent writing, the renewed lease was 'deemed' to be the same as the previous one. Such deeming was, however, rebuttable. Since it was common cause that the oral agreement was concluded and implemented, the deeming provision was thereby rebutted and the rental due under the oral agreement rendered an enforceable ob-

ligation. The GJ accordingly upheld the appeal.

Other cases

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

- civil proceedings in magistrate's court;
- compensation claim against the road accident fund;
- dismissal for operational requirements;
- evidence – subpoena *dues tecum*;
- instalment sale agreement;
- production of documents and legal professional privilege;
- rights and duties of attorneys; and
- witness giving evidence via video link.

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Retrenchment consultations: The hierarchy and priority given to collective agreements in the retrenchment consultation process challenged



By
Mdumiseni
Gambushe

AMCU and Others v Royal Bafokeng Platinum Ltd and Others 2020 (3) SA 1 (CC)

Retrenchments are, in South Africa, unfortunately always lingering in the air for workers, especially in these uncertain economic times. Hence, when such an eventuality materialises, trade unions have a great interest in ensuring the protection of the rights of employees who are adversely affected. In the case of *AMCU and Others v Royal Bafokeng Platinum Ltd and Others 2020 (3) SA 1 (CC)*, the Constitutional Court (CC) dealt precisely with this point when it heard the appeal against the judgment and order of the Labour Appeal Court (LAC) on the applicants' constitutional challenge of ss 189(1) and 23(1)(d) of the Labour Relations Act 66 of 1995 (LRA).

Background facts

In the workplace of the first respondent (Royal Bafokeng Platinum Ltd), the second respondent, the National Union of Mineworkers (NUM), which was the majority trade union representing 75% of the workforce. The second respondent together with third respondent (United Association of South Africa) a minority trade union had signed a collective agreement with the employer to consult exclusively over any possible retrenchment in the workplace. Pursuant to this collective agreement, they signed a retrenchment agreement to the exclusion of the applicants, the Association of Mineworkers and Construction Union (AMCU), a minority trade union, which was then extended to all the employees in the workplace. The majority of the people who were affected by the retrenchment agreement were represented by AMCU.

AMCU launched a constitutional challenge to s 189(1) of the LRA, they argued that the impugned sections by creating an exclusive consultation regime, impermissibly infringes the employees right to fair labour practices. AMCU argued that this impugned section should be interpreted to mean the employer is obliged to consult with all the employees who

are likely to be affected by the retrenchment process notwithstanding a valid collective agreement. They also challenged s 23(1)(d) of the LRA, which was used to extend the retrenchment agreement to those who were not a party to the consultations.

The judgment

The minority judgment delivered by Ledwaba AJ recognised that the s 189(1) cascading hierarchy of consultation in the retrenchment process gives primacy to collective agreements, but if properly understood, the section aims to ensure consultation with all employees who are to be affected by the retrenchment processes, notwithstanding the dictates of the collective agreement.

The court held that since AMCU challenged the procedures followed in their members' dismissals, their challenge went to the heart of whether the section is truly fair in considering the objectives and purposes of the LRA and the Constitution. The court had to give due regard to the right to fair labour practice by striking a balance between the competing interests, namely, to run an effective business for the employer, and to avoid retrenchment or to mitigate its effects for the employee.

The court held the respondent's submissions (arguing that if there was an infringement to the applicants' rights) was nevertheless justified because it served to uphold the employer's right, and conflates consultation with collective bargaining. Consultation in the context of retrenchment is a joint consensus process and all that is required from the employer is a *bona fide* attempt to reach consensus, but the employer retains the discretion to continue with the proposed retrenchment or not. Therefore, the limitation to consult inclusively under the circumstances serves no purpose.

The court held inclusive consultation is not a bar to the extension of the collective agreement to non-parties thereto, thereby dismissing as all judgments did

the s 23 constitutional challenge. There is no reason why the employer cannot consult all the affected employees and then still conclude a valid bargaining agreement that will be extended to the entire workforce.

The limitation also does not promote the objectives of the LRA, such as labour peace in the workplace, since it leaves out minority voices and it also leaves minority trade unions powerless, thus encouraging the joining of majority trade unions. The court accordingly concluded that the impugned provision was unconstitutional and invalid.

The majority judgment delivered by Froneman J held that right to fair labour practice in the Constitution does not guarantee a right to be consulted individually in the retrenchment process. The court held that retrenchment for operational requirements is based on objective factors, therefore, it is not necessary to consult individually.

The court stated that consultation in the retrenchment process is a statutory entitlement flowing from the LRA and not the Constitution, therefore, it is incomprehensible that the very source limits it and that a fair consultative procedure is exhaustively set out in s 189(1) of the LRA. The court held that consulting inclusively – where the employees cannot affect the outcome – is near futile. The court questioned whether the consultative procedure in the s 189(1) passed the constitutional test for rationality and was convinced that it did.

Lastly, the court held that the consultation needs to also be substantively fair and in circumstances where the collective agreement is extended to non-parties in terms of s 23(1)(d) such extension is subject to legality review. Therefore, those who were not consulted are not remediless.

Jafta J and Theron J delivered supporting judgments to the first and second judgments respectively, where Jafta J challenged the second judgment's articulation that besides the s 189(1) infringement there were no rights neither

implicated nor argued by the applicants. He listed numerous rights and detailed how they are implicated. Theron J held that from a separation of powers point of view, s 189(1) should be tested against the standard of rationality and not reasonableness.

Conclusion

With the above case in mind, one may

ask if the collective agreement still enjoys primacy if it contemplates consulting with an employee that is in the minority union or will it not be affected by retrenchments? If so, is that rational? Furthermore, is it true that consultation is near futile and the threat of industrial action posed by majority trade unions and its effect on the employer might be the only reason they have the right to

consult? These are some of the questions that will need answers.

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By Dr
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Analysis of the Women's Legal Centre Trust case

Women's Legal Centre Trust v President of the Republic of South Africa and Others 2018 (6) SA 598 (WCC)

The Western Cape Division of the High Court in Cape Town handed down the judgment in the *Women's Legal Centre Trust* case on 31 August 2018.

It declared that the state is obliged to respect, protect, promote and fulfil the rights of the Constitution and that it is required to prepare, initiate, introduce, and enact legislation that recognises Muslim marriages and its consequences. The court held that the state is required to bring the legislation into operation. The High Court declared that the President and his Cabinet failed to fulfil their constitutional obligations and that their conduct was invalid.

The High Court directed that the President and his Cabinet together with Parliament have to rectify the failure within 24 months of the date of the order. The two year deadline comes to an end on 31 August 2020.

The High Court held that if the contemplated legislation is referred to the Constitutional Court (CC) by the President of South Africa, or if it is referred by members of the National Assembly, then the deadline would be suspended pending the final determination of the matter by the CC. However, the High Court further held that if the said legislation is not enacted within the time periods discussed above, a number of consequences will automatically come into effect (see para 252).

An analysis of the judgment

In its order, the High Court declared that 'a union, validly concluded as a marriage in terms of Sharia law [hereafter referred to as an Islamic marriage] and which subsists at the time this order becomes operative, may (even after its dissolution

in terms of Sharia law) be dissolved in accordance with the Divorce Act 70 of 1979 and all the provisions of that Act shall be applicable, provided that the provisions of s 7(3) shall apply to such a union regardless of when it was concluded' (para 252). These are possible consequences of enforcing this section of the High Court order.

In the event of a scenario where a Muslim couple is married only in terms of Islamic law, and an application is made by the wife to dissolve her marriage in terms of the *Women's Legal Centre Trust* judgment based on the fact that her husband does not want to issue her with a divorce (*talaq*) in terms of Islamic law, there would be problematic consequences that would unfold in this regard. Two issues will now be looked at based on the above order –

- the first issue concerns the dissolution of the Islamic marriage; and
- the second issue is the consequences thereof.

In this article, the issues are discussed together.

The fact that the High Court order states that an Islamic marriage may be dissolved in terms of the Divorce Act 70 of 1979 'even after' it has been dissolved in terms of Islamic law, brings about the perception that it is possible for the Islamic marriage to remain intact while the civil marriage (which in fact is non-existent) is capable of being dissolved by a court of law. This does not make any sense, as the question would then arise as to what exactly is being dissolved?

The situation should also be looked at in light of s 5A of the Divorce Act where it states that '[i]f it appears to a court in divorce proceedings that despite the granting of a decree of divorce by the court [that] the spouses or either one of

them will, by reason of the prescripts of their religion or the religion of either one of them, not be free to remarry unless the marriage is also dissolved in accordance with such prescripts or unless a barrier to the remarriage of the spouse concerned is removed, the court may refuse to grant a decree of divorce unless the court is satisfied that the spouse within whose power it is to have the marriage so dissolved or the said barrier so removed, has taken all the necessary steps to have the marriage so dissolved or the barrier to the remarriage of the other spouse removed or the court may make any other order that it finds just.'

Does the High Court order mean that a judge no longer has the right to refuse to grant a divorce regarding Muslim couples in terms of this section? This does seem to be the case.

An argument could be made that the Islamic divorce would also dissolve as a result of the decree of divorce by the judge (whether a Muslim or non-Muslim judge) in terms of the Divorce Act. It should be noted that Islamic law generally requires that an Islamic divorce should be granted by a Muslim judge and in terms of Islamic law. However, the European Council for Fatwa and Research issued an Islamic ruling (*fatwa*) in Dublin on 7 May 2000 where it stated that this would be allowed for a non-Muslim judge to grant a divorce that would bring the Islamic marriage to an end in the event where the parties entered into marriage in terms of the law of the non-Muslim (or Muslim minority) country. The *fatwa* does not, however, apply to the scenario at hand where the parties are not married in terms of the law of the country (see resolution 3/5 of the European Council for Fatwa and Research at www.e-cfr.org for the full *fatwa*).

The *fatwa* does have an influence on how s 5A of the Divorce Act applies to South African Muslims. It should be noted that the most recent version of the Muslim Marriage Bill (2010 draft Bill proposing the regulation of Muslim marriages in South Africa) states that a judge may grant a decree of divorce where 'discord between the spouses has undermined the objects of marriage, including the foundational values of mutual love, affection, companionship and understanding, with the result that the dissolution of the marriage is an option in the circumstances' (see Draft Muslim Marriages Bill at <https://pmg.org.za>).

This provision is much like ss 3 and 4 of the Divorce Act, which deals, *inter alia*, with an irretrievable breakdown of a marriage as a ground for granting a divorce by a judge. The consequence of the divorce is now looked at as to how it would apply to the couple in the scenario above.

The High Court order states that the Islamic marriage may 'be dissolved in accordance with the Divorce Act 70 of 1979 and all the provisions of that Act shall be applicable, provided that the provisions of s 7(3) shall apply to such a union regardless of when it was concluded'. This would also remain problematic

if the section causes patrimonial consequences that are different to those applicable in terms of Islamic law. It should be noted that the default patrimonial consequences of an Islamic marriage are that the assets of the parties to the marriage are kept separate. This would be similar to the South African position in terms of a marriage out of community of property without the application of the accrual system. The Draft of the Muslim Marriages Bill states under s 8(1) that '[a] Muslim marriage to which this Act applies is deemed to be a marriage out of community of property excluding the accrual system, unless the proprietary consequences governing the marriage are regulated by mutual agreement of the spouses, in an antenuptial contract'. Section 7(3) of the Divorce Act states that a court may order 'on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just be transferred to the first-mentioned party.' It can be seen that s 7(3) of the Divorce Act empowers the court (on application) to determine what the departure from the default position should be, whereas s 8(1) of the

Muslim Marriages Bill empowers the parties by way of mutual agreement to decide what the patrimonial consequences of the marriage would be on conclusion thereof. It is, therefore, possible that a judge would grant an order in terms of s 7(3) that is not necessarily compliant with Islamic law.

Conclusion

The above analysis has highlighted some of the problematic consequences that could unfold in the event where legislation is not enacted on or before 31 August 2020. I would, therefore, advise that couples married in terms of Islamic law only, should draft a contract explaining exactly what the consequences of the marriages would be. This could even be done by couples that are already married in terms of Islamic law. The above analysis has also shown why there is a dire need for legislation to be enacted that governs Muslim marriages and its consequences.

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By
Nomthandazo
Mahlangu

The protection of consumers under the NCA

Shoprite Investments Limited v National Credit Regulator (GP)
(unreported case no A509/2107, 18-12-2019) (Janse van Nieuwenhuizen J)

The National Credit Act 34 of 2005 (NCA) regulates the credit industry. The NCA is aimed at, *inter alia*, promoting responsibility in the credit market, and to achieve this objective, it encourages consumers to borrow responsibly in order to avoid over-indebtedness, while simultaneously prohibiting credit providers from granting credit recklessly (s 3(c)(i) and (ii)). The concept of reckless credit or 'reckless lending' was introduced by the NCA to protect consumers from over-indebtedness and to establish measures that credit providers must take when granting credit. A consumer is over-indebted if – after a careful assessment and all available information processed – a determination is made that the particular consumer is, or will be unable to satisfy all the obligations under all the credit agreements to which they are party to, in a timely manner (s 79).

Reckless credit, refers to a situation where – at the time of entering into a credit agreement – a credit provider fails to conduct the assessment, or having conducted an assessment, enters into an agreement that causes the consumer to be over-indebted (s 80).

Accordingly, it is required that before entering into a credit agreement, a credit provider must perform an affordability assessment to determine the consumer's financial means, prospects and obligations (s 81).

Credit providers have a discretion to determine suitable evaluative mechanisms and procedures to meet the assessment obligations, provided they are fair, objective and not in conflict with any affordability assessment regulations (s 82).

The determination of whether a credit agreement is reckless or not, is made at the time the agreement is concluded. It

follows that the credit provider's affordability assessment is the basis for granting reckless credit. This is significant because, if the credit provider fails to conduct such an assessment, that credit agreement, is automatically classified as reckless credit (see *VKB Landbou (Pty) Ltd v Van Deventer* (FB) (unreported case no 6115/2017, 5-7-2018) (Van Rhyn AJ)). However, in the same breath, the consumer's dilemma is that, only a court may declare that a credit agreement is reckless credit. The question to be considered is: Given that a consumer's protection is central to the purpose of this Act, are consumers adequately protected by the NCA?

In the *Shoprite Investments Limited* case the retailer was fined R 1 million for extending reckless credit. The National Credit Regulator undertook an investigation into the lending practices of the retailer that was concluded between

2013/2014, following media reports that the retailer extended credit to debt-ridden customers struggling to pay existing debts. The matter was referred to the National Consumer Tribunal (the Tribunal), which found against the retailer in 2017, subsequent to which the retailer lodged an appeal on this, and on other grounds that are not necessary for purposes of this discussion.

The High Court dismissed the appeal. The issue before the court was whether the retailer's affordability assessment method of potential consumers complied with the provisions of the NCA. It was the court's conclusion that the lending practices used by the retailer directly contravened the provisions of the NCA.

The findings by the Tribunal established that the *modus operandi* used by the retailer consisted of new credit agreements that were concluded with consumers, by manipulating the consumers' pre-existing and future commitments in favour of the consumer entering into a new credit agreement with the retailer. Moreover, in certain instances, customers pre-existing debt obligations were disregarded and credit bureau information was adjusted to enable the retailer to grant credit where the information was unfavourable to the granting of credit. The Tribunal further confirmed that the evaluation mechanisms and procedures used by the retailer did not bring about a fair and objective result to all the parties concerned. The evidence below is illustrative of the retailers conduct:

'Prior to [the retailer] granting credit, [consumer one] had a nett salary of R 19 900,01, monthly instalments of R 17 160, monthly deductions of R 6 060 and thus a disposable income of -R 3 319,99. After the granting of the loan, the disposable income was -R 3 542,37;

...
... a 61-year-old pensioner, [consumer two] had prior to the granting of the loan a nett disposable income of -R 201 and after the granting of the loan, had a disposable income of -R 493,25;

...
... a 67-year-old pensioner, [consumer three] had prior to the granting of credit by Shoprite a nett disposable income of -R 435 and after the granting of the loan, had a disposable income of -R 500,76;

...
... [consumer four] had a nett disposable income was -R 2 411,91 and after the granting of the loan, his disposable income was -R 2 674,01.'

With respect to consumer one, the retailer admitted to disregarding an instalment because only one month remained. The retailer further argued that as the consumer had a good repayment history, this suggested that the consumer could borrow from their bond.

Regarding consumer two, the 61-year-old pensioner, the retailer stated that certain instalments were disregarded. The reasons put forth were that the ITC records were purportedly obsolete, and in other instalments, only two or three months remained. According to the retailer, the consumer's marital status was also considered, and it presumed that the 'other spouse' would assist with payments.

In relation to consumer three, the 67-year-old pensioner, numerous instalments were disregarded, and the retailer contended that, as the consumer was a good payer and married, the spouse could accordingly assist with payments.

Lastly, regarding consumer four, the retailer not only disregarded numerous instalments, but failed to consider other existing instalments.

It is trite that when assessing whether to grant credit, the credit provider should only consider the income that is reliable, consistent and sustainable (*Absa Bank Ltd v De Beer and Others* 2016 (3) SA 432 (GP)). Evidently, the retailer was not privy to the credit applicant's spouse income and expenses, in order to reach the conclusion that 'they' would assist with payments. The court quite rightly remarked that, prospective customers were unaware that the retailer rearranged their financial affairs, nor were

they consulted as to whether they were prepared to sacrifice their existing contractual agreement to obtain the credit, especially given that evidence points to the fact that many consumers still had negative affordability figures after the retailers so called 'adjustment' exercise. In passing, it must be mentioned that, aside from contravening the provisions of the NCA, the retailer has transgressed other aspects of the law.

It is the object of the NCA to promote a fair and efficient credit system by delineating the rights of credit providers and consumers. Hence, there are specific measures that are provided in the NCA aimed at preventing reckless credit. It is alarming that such measures seem not to have the effect intended. This case has illustrated that notwithstanding the prevailing measures, retailers continue to target the financially illiterate and vulnerable members of society. These are highly compromised consumers currently experiencing unsustainable levels of debt. Though the court grants the legal remedy to consumers against reckless credit, that determination is only made if that matter is referred to a court, and until such time when that particular agreement is either sets aside or suspended, it remains in full force and effect. I submit that while cognisant of the NCA endeavours to protect consumers, it is evident that such protection does not cascade to the under-privileged members of society. It is my contention that a review of the provisions in connection with an administrative fine that may be imposed by the Tribunal is necessary, in an effort to dissuade reckless credit granting. Ultimately, the consequences for reckless credit granting should constitute financial harm, otherwise credit providers will continue to flout the law.

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Will the RAF have to fulfil its obligation to its panel of attorneys?

FourieFismer Inc and Others v Road Accident Fund and Others; Mabunda Inc and Others v Road Accident Fund; Diale Mogashoa Inc v Road Accident Fund (GP) (unreported case no 17518/2020, 15876/2020, 18239/2020, 1-6-2020) (Hughes J)

Attorneys contracted to the Road Accident Fund (the RAF), commonly known as panel attorneys initiated the three review applications, which served before the Gauteng Division of the High Court, Pretoria (the court) for determination. Panel attorneys are selected after the adjudication of a tender procurement process in terms of s 217 of the Constitution, which must be fair, equitable, transparent, competitive and cost-effective. Those suitably qualified panel attorneys selected, form a panel contracted to the RAF for a period of five years. The RAF from time to time would select an attorney from the panel to provide specialist litigation services in the various courts. The role of the panel attorneys is, therefore, to assist the RAF to duly perform its statutory mandate.

In this case, the court pointed out that for ease of reference, the review applications would be referred to as the *FourieFismer* review, *Mabunda* review and *Diale* review.

These review proceedings were intercepted by an interlocutory application by Maponya Inc, who was party to the *Mabunda* review, but withdrew to intervene in the *FourieFismer* review. The court said that the interlocutory application was subsequently withdrawn and the RAF accepted such withdrawal. 'At this juncture the Maponya intervention application is not opposed and is premised on the relief sought by *FourieFismer*, that the *status quo* of the panel of attorneys remains until a new panel is appointed or alternatively, if the review is not successful, Maponya seeks assurance from the RAF that their calculated fees and disbursements be paid by the RAF contrary to clause 14 of the service level agreement (SLA) between the parties'.

The court said since the matter was of urgency and dispensing with the rules in terms of r 6(12), it was imperative to highlight that all the litigants in the proceedings conceded that the proceedings were urgent, primarily so, because their contracts with the RAF would have come to an end on 31 May. The proceedings war-

ranted an endorsement as being urgent. The court pointed out that collectively the panel was seeking that the –

- decisions of 18 and 20 February, calling on the panel attorneys to handover their files, which were not finalised, be reviewed and set aside as constitutionally invalid;
- cancellation of tender RAF/2018/00054 on 26 and 28 February be reviewed and set aside and declared unconstitutional and invalid;
- decision of the RAF to dispense with the services of the panel attorneys from 1 June be reviewed and set aside as constitutionally invalid; and
- panel attorneys continue to service the RAF until 30 June or until the RAF has appointed a panel of attorneys in terms of tender RAF/2018/00054 or until appointments are made arising from a fresh tender process.

The court said that in the *Mabunda* review the litigant was additionally seeking the withdrawal of the handover notices and withdrawal of the cancellation of tender notices. While, in the *Diale* review the additional relief sought is that the RAF adjudicates tender RAF/2018/00054. The court added that *Diale* was further seeking that the second addendum to the SLA of 21 November 2019 be reviewed and set aside. The court pointed out that on the other hand, *Maponya* as the intervening party to the *FourieFismer* review, seeks not to review the handover notices, but rather requests an undertaking from the RAF, if the reviews fail, to be paid their calculated fees and disbursements contrary to clause 14 of the SLA.

The court added that the current 103 attorneys on the panel, contracted with the RAF pursuant to a procurement tender of 2014, to provide the RAF with specialist litigation services for a period of five years. The court noted that the SLA duly concluded between the panel attorneys and the RAF, would lapse with the effluxion of time on 29 November 2019. Hence, on 30 November 2018 tender RAF/2010/00054 was published with the closing date recorded two addendums were made to the SLA. This resulted in an

extension in the contract period between the panel attorneys and the RAF, which would culminate on 31 May.

The court pointed out that on 5 December 2019 the Minister of Transport appointed and inducted a permanent Board. According to the induction message of the Minister of Transport, he pressed on the Board to 'bring stability at leadership level and enable management, with your guidance to turn the tide'. Further, that serious attention of the Board would be required to build internal capacity of the RAF, which 'may involve in-sourcing legal work and directly employ[ing] attorneys to process the case load'. This he believed would save the RAF R 2,9 billion per annum.

The court said that according to the RAF the issue of in-sourcing versus out-sourcing of legal specialist services was an issue that the interim Board as far back as 22 October 2019 had resolved that the RAF was to investigate. The Acting Chief Executive Officer (ACEO) stated in an affidavit that 'this was the genesis of the decision to dispense with the use of panel attorneys'. In addition to the above, on 22 October 2019 management sought approval from the interim Board to extend the SLA of the panel attorneys for a further six months as the conclusion date of November 2019 was looming.

The court said that a meeting was convened with the management of the RAF and after the management of the RAF made submissions, the interim Board extended the panel attorney's SLA for a further six months ending on 31 May. On 28 January the Board held its first quarterly meeting for the year. The court added that the Board resolved at that meeting that a working group be formed, duly selected from its members. This working group would meet management on 30 January to finalise the draft Strategic Plan 2020-2025 and Annual Performance Plan 2020/2021, prior to its approval by round robin resolution.

The court pointed out that according to the ACEO the meeting did take place on 30 January, however, no minutes were available for that meeting. According to

the ACEO, management presented a detailed business strategy where the reduction of legal costs was interrogated by the Board members of the working group. The next meeting of the Board took place on 27 February. At that meeting, the ACEO stated he had 'indicated that the fund was incurring unnecessary legal costs within its claims litigation'.

According to the resolution taken by the Board at the meeting of 27 February, certified as such on 11 March, management was tasked to prepare a detailed handover plan, which could be substantiated and implemented. The court pointed out that the Board actually resolved that the handing over of files from panel attorneys would be per extract:

- '1. The Board would write a letter to the Law Society of South Africa and request a meeting.
2. Management was requested to prepare a detailed handover plan, which could be substantiated and implemented.
3. The Board delegated the oversight of the implementation of the detailed plan to the OPSIT Committee. The Chairperson of the OPSIT Committee would serve as liaison with management.
4. Reporting should take place on a weekly basis.
5. Should there be failure in terms of the implementation of this particular plan there will be consequences movement.'

The court noted that on 18 February the panel attorneys received correspondence from the Chief Operations Officer (COO), Lindelwa Xingwana-Jabavu, titled: 'Notification of handover pursuant to clause 14 of the service level agreement with RAF panel attorneys'. This notification set out the handover schedule to be adopted by panel attorneys and condition thereto. However, on 20 February the initial notification was retracted and replaced, which differed and there were additional conditions in respect to handing over files.

The court said that on 21 February the COO requested the Acting General Manager: Supply Chain Management, John Modisa, to facilitate the cancellation of the tender for panel attorneys RAF/2018/00054, as it was unaffordable and there were changed business circumstances in the RAF, which tender was advertised in November 2018. The services of panel attorneys in respect of the 2014 tender would expire on 29 November 2019, but an extension of a further six months was granted. The reason for the cancellation was that the RAF had decided to adopt a new litigation model where litigation would be facilitated in-house and as such there would be no need for legal representation by panel attorneys. Hence, the tender was no longer required.

The court added that the notification of 26 February was withdrawn and this time

the Chief Financial Officer advised the bidders the reasons for the cancellation. The court found it prudent to set out two new reasons advanced:

- '(a) The RAF's dire financial situation has necessitated a review of its operating model, which resulted in a conclusion that there is no need to have the panel of attorneys. Consequently, the RAF no longer requires the services, which were specified in the invitation.
- (b) In addition to (a) above, the RAF's financial situation which continues to worsen on a daily basis has rendered the funds no longer available to cover the total envisaged expenditure.'

The court said that it was mindful of the fact that the RAF derives its ability to procure services from the panel attorneys in terms of s 217 of the Constitution. The court added that the SLA is merely the instrument used to facilitate the services so procured. The court pointed out that this was confirmed by clause 3.6 of the SLA: 'This Service Level Agreement serves to record the Service Level Agreement between the parties and to regulate all aspects of the Services to be supplied by the Firm and the general business relationship between the Parties.'

The court pointed out that the RAF argued that the notices for the handover were issued in accordance with clause 14.1 of the extended SLA. The court added, furthermore, that in issuing these notices the RAF was exercising a private power and not a public power. Clause 14.1 of the extended SLA reads as follows:

'At least one month before the expiry of this Service Level Agreement (as amended), the Fund's Panel Manager shall deliver to the firm in writing, a Notice of Handover advising the firm to start to prepare all unfinalised files in its possession for the handover process and logistics thereof. The Notice of Handover will stipulate the handover procedure to be [followed]. The Fund reserves the right in its sole discretion, to waive the obligation to hand over files to the Fund'.

The court then turned to the conduct of the Board on issuing of the notification of handover to the panel attorneys. The court said during the course of the Board seeking legal assistance it made certain disclosure to its legal representatives. The court pointed out that the Board admitted that it was not informed nor had the COO prior to addressing these handover notices to the panel attorneys consulted it. The court asked, how then did the COO have the authority and mandate to issue the handover notifications? The court added that it is only the Board, subject to the powers of the minister, who has the power of authority and control over the RAF's management, financial position and operation.

The court said the powers of the minister referred to are those in s 9(1) of

the Road Accident Fund Act 56 of 1996, where the minister on recommendation of the Board may enter into agreements with private and public institutions. The court added that the minister has no power when making managerial decisions; it is only the Board who may do so. Thus, if the Board was not consulted in managerial decisions such as the issuing of notices prior to them being issued, the COO did not have necessary authority nor mandated to issue the notifications to the panel.

The court pointed out that in their answering affidavit and in argument the RAF did not deny the fact that the Board was not informed, but argued instead that when they issued the notifications they were exercising their private contractual powers, in terms of clause 14 of the SLA. The court said that the RAF as it had dictated the terms of the SLA, in this case clause 14, it was clearly acting from a position of power, standing instead of the state. As such the RAF was burdened with its public duty of fairness and transparency in exercising the powers it derived from the contract.

Hughes J said that in his view, the decision to issue the notices is susceptible to review. As the Board was not aware of the issuing of these notifications, their dissemination to the panel attorneys was unauthorised and as such are not valid. The court pointed out that the cancellation of the tender had the effect of dispensing with the services of the panel attorneys. The court added that the decision to cancel the tender was taken by the Bid Adjudication Committee. Both the RAF and the Board concede that this is so. The court said the minister also supported the decision that the RAF took to cancel the tender. Though the Board did not take the decision to cancel the tender it accepted management's decision to do so. All were on-board with the decision, but for, the affected parties, being the panel attorneys.

The court pointed out that both notices to cancel the tender were invalid. The court said that the first notice did not display the reason for termination and the second notification indicated that the financial position is no longer as it was to entertain the tender and, the circumstances of the RAF have changed. The court added the RAF raised reg 13(1)(a) and (b) of the Preferential Procurement Regulations, 2017. The onus was on the RAF to show that indeed this was the case.

The court said that in the circumstances of this case, it found it necessary to apply s 172(1)(b) of the Constitution. The court added that the RAF requires a period to reconsider its position for the sake of the general public of South Africa. The court pointed out that nothing precludes the RAF from implementing its proposed strategic plan in a manner that accords

with legality. The court said that the facts of the case permit it to resort to imposing an order not sort by the parties, in order to ensure just and equitability in the circumstances that prevail.

The court pointed out that the case was an exceptional case and a constitutional crisis looms. The court added that this could have grave effects for claimants and thus it must be averted to protect their rights. The court said it was, therefore, necessary to retain the *status quo* for at least six months with the panel attorneys' present contractual relationship. The court added that this will enable the RAF to reconsider its position and retain the social responsibility set in place protecting the public.

Hughes J ordered the following:

'1. The forms, service and time period prescribed by the Uniform Rules of

Court are dispensed with and the applications are heard as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court.

2. The Intervening Party is joined as the Fourth Applicant in the *FourieFismer* review application.
3. The panel attorneys on the RAF's panel as at the date of the launch of the *FourieFismer* review application shall continue to serve on the RAF panel of attorneys.
4. The RAF shall fulfil all of its obligations to such attorneys in terms of the existing Service Level Agreement.
5. This order shall operate for a period of six months from this order.
6. The Respondents are ordered to pay the costs of the review applications on a party and party scale, jointly and severally.

7. Such costs are to include the costs of two counsel for each legal team where so employed.'

• **Note:** At the time of going to print, the matter was being heard in court and an update will be published in *De Rebus* in due course.

• See also Kgomo tso Ramotsho 'The RAF to use new litigation model to reduce its litigation costs' 2020 (May) *DR* 22 for the full report on part A of the application.

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Bills

Upgrading of Land Tenure Rights Amendment Bill B6 of 2020.

National Road Traffic Amendment Bill B7 of 2020.

Commencement of Acts

Financial Sector Regulation Act 9 of 2017. Amended commencement date: Various dates. GN612 GG43371/29-5-2020 (also available in Setswana).

Selected list of delegated legislation

Competition Act 89 of 1998

Expansion of the scope of the COVID-19 block exemption for the banking sector, 2020 regulations. GN R502 GG43280/5-5-2020.

Buyer Power Guidelines. GN545 GG43341/22-5-2020.

Debt Collectors Act 114 of 1998

Amendment of Regulations relating to Debt Collectors, 2003 (expenses and fees). GN R580 GG43343/22-5-2020 (also available in Afrikaans).

Disaster Management Act 57 of 2002

• **Communications and digital technologies sectors**

Amendment of directions on the risk-ad-

justed strategy for the communications and digital technologies sector. GN590 GG43351/26-5-2020.

• E-Commerce

Directions regarding e-Commerce sales during Alert Level 4 of the COVID-19 national state of disaster. GN R535 GG43321/14-5-2020.

• Education

Directions to permit travel and recommencement of studies for final year medical students registered at public universities during the academic year 2020. GN533 GG43319/13-5-2020 and GN591 GG43352/26-5-2020.

• Electronic communications, postal and broadcasting

Amendment of the Electronic Communications, Postal and Broadcasting Directions. GN516 GG43299/8-4-2020.

• Environment

Directions for measures to address, prevent and combat the spread of COVID-19 in relation to recycling of waste. GN539 GG43325/14-5-2020.

Measures to address, prevent and combat the spread of COVID-19 in relation to the freshwater and marine fishing sectors. GN538 GG43324/14-5-2020.

Directions for measures to address, prevent and combat the spread of COVID-19 in relation to the biodiversity sector. GN537 GG43323/14-5-2020 and GN596 GG43355/26-5-2020.

• Essential goods and services

Directions issued by the Minister of Finance on the Regulations issued by the

Minister of Cooperative Government and Traditional Affairs in terms of essential financial services include services required to comply with obligations imposed by or to exercise a right afforded in terms of tax legislation. GN487 GG43266/4-5-2020.

Directions regarding the sale of clothing, footwear and bedding during Alert Level 4 of the COVID-19 national state of disaster. GN R523 GG43307/12-5-2020.

Directions regarding the sale of cars and emergency automobile repairs during Alert Level 4 of the COVID-19 national state of disaster. GN R524 GG43308/12-5-2020.

• Healthcare

Amendment of directions regarding measures to address, prevent and combat the spread of COVID-19 in the health sector. GN589 GG43350/25-5-2020.

• General regulations

Directions relating to the movement of persons and goods during the Alert Level 4. GN513 GG43293/7-5-2020.

Directions on the return of South African citizens and the repatriation of foreign nationals to their countries of nationality or residence in order to prevent and combat spread of COVID-19. GN R518 GG43301/9-5-2020.

Directions relating to once-off movement of persons and transportation of goods during Alert Level 4 during the COVID-19 lockdown. GN534 GG43320/14-5-2020. Directions to address, prevent and combat the spread of COVID-19 for religious

New legislation

Legislation published from 1 – 31 May 2020

gatherings. GN609 GG43365/28-5-2020. Alert Level 3 regulations: Determination of alert levels and hotspots. GN608 GG43364/28-5-2020.

- **Justice and courts**

Directions to address, prevent and combat spread of COVID-19 during Alert Level 4: Courts, court precincts and justice service points. GN R489 GG43268/4-5-2020.

Directive issued by Chief Justice Mogoeng Mogoeng in terms of s 8(3)(b) of the Superior Courts Act 10 of 2013 for the management of courts during the national state of disaster. GenN254 GG43283/6-5-2020.

- **Labour and workplaces**

Amendment of the COVID-19 Temporary Employee/Employer Relief Scheme (C19 TERS). GN R486 GG43265/4-5-2020 and GN R541 GG43330/15-5-2020.

Court order handed down by the Labour Court: Standard operating procedures for mines following COVID-19 lockdown. GenN253 GG43282/5-5-2020.

Amended COVID-19 Temporary Employee/Employer Relief Scheme (C19 TERS) Directive, 2020. GN R595 GG43353/26-5-2020.

- **Local government**

Amendment of directions to address, prevent and combat the spread of COVID-19: Municipal operations and governance. GN510 GG43291/7-5-2020.

- **Mineral resources and energy**

Directions for the mineral resources and energy industry on the implementation of provisions related to permitted goods and services during COVID-19 lockdown. GN542 GG43331/15-5-2020.

- **Small businesses**

Directions to assist micro and small businesses trading in permitted services during COVID-19 lockdown. GN R522 GG43306/12-5-2020.

- **Social development**

Amendment of the social development directions to address, prevent and combat the spread of COVID-19. GN R517 GG43300/9-5-2020.

- **Sports, arts and culture**

Directions to address prevent and combat the spread of the COVID-19 during Alert Level 4: Live streaming of the creative sector services. GN490 GG43269/4-5-2020.

- **Transport**

Directions to address, prevent and combat the spread of COVID-19 in the railway operations. GN494 GG43273/4-5-2020, GN536 GG43322/14-5-2020 and GN613 GG43373/30-5-2020.

Directions to address, prevent and combat spread of COVID-19: Extension of the validity of learner's licences, driving licence cards, licence discs, professional driving permits and registration of motor vehicles. GN491 GG43270/4-5-2020 and GN544 GG43339/20-5-2020.

Directions to address, prevent and combat the spread of COVID-19 in air freight

operations. GN492 GG43271/4-5-2020.

Directions to address, prevent and combat the spread of COVID-19 in public transport services. GN493 GG433272/4-5-2020 and GN495 GG43274/4-5-2020, GN504 GG43284/6-5-2020, GN R587 GG43348/22-5-2020 and GN614 GG43374/30-5-2020.

Directions to address, prevent and combat the spread of COVID-19 in the sea ports. GN496 GG43275/4-5-2020.

Amendment of the directions to prevent and combat the spread of COVID-19 in public transport services: Air services. GN615 GG43375/30-5-2020.

- **Electronic Communications Act 36 of 2005**

Amendment of the information and communications technology (ICT) COVID-19 national state of disaster regulations. GenN252 GG43279/5-4-2020.

- **Housing Act 107 of 1997**

Declaration of priority human settlements and housing development areas. GN526 GG43316/15-5-2020.

- **Immigration Act 13 of 2002**

Determination of correctional facilities as places of detention of illegal foreigners pending deportation during the national state of disaster. GN512 GG43292/7-5-2020.

- **Labour Relations Act 66 of 1995**

Bargaining Councils that have been accredited by the Commission for Conciliation, Mediation and Arbitration. GenN286 GG43341/22-5-2020 and GenN291-292 GG43358/29-5-2020.

- **Local Government: Municipal Finance Management Act 56 of 2003**

Exemption of municipalities and municipal entities for regs 4(3) and 29(2) of the Municipal Supply Chain Management Regulations, 2005. GN503 GG43281/5-5-2020.

- **Medical Schemes Act 131 of 1998**

Amendment of the Medical Schemes Regulations (COVID-19). GN515 GG43295/7-5-2020.

- **Medicines and Related Substances Act 101 of 1965**

Exclusion of Schedule 2, Schedule 3 and Schedule 4 substances from the requirement that substances must be dispensed for no longer than six months. GN514 GG43294/7-5-2020.

Amendment of Schedule 4. GN R586 GG43347/22-5-2020.

Exclusion of certain medicines, medical devices and in vitro diagnostics from the operation of certain provisions of the Act. GN R585 GG43346/22-5-2020.

- **Mine Health and Safety Act 29 of 1996**

Guidelines for a Mandatory Code of Practice on Mitigation and Management of the COVID-19 Outbreak. GenN280 GG43335/18-5-2020.

- **National Conventional Arms Control Act 41 of 2002**

Amendment of National Conventional Arms Control Regulations. GN520 GG43303/11-5-2020.

- **National Environmental Management Act 107 of 1998**

Amendment of the Environmental Impact Assessment Regulations, 2014. GN599 GG43358/29-5-2020.

- **National Railway Safety Regulator Act 16 of 2002**

Determination of safety permit fees. GN527 GG43316/15-5-2020.

- **Nursing Act 33 of 2005**

Regulations regarding the register for learner/student nurses and midwives. GN519 GG43302/11-5-2020.

Fees payable. BN64 GG43358/29-5-2020.

- **Pharmacy Act 53 of 1974**

Guideline for removal of pharmacy registration/recording as a result of non-compliance with good pharmacy practice and other pharmacy legislation. BN63 GG43358/29-5-2020.

- **Property Valuers Profession Act 74 of 2000**

Fees and charges from 1 April 2020. GenN259 GG43288/8-5-2020.

- **Public Audit Act 25 of 2004**

Directive issued by the Auditor-General of the Republic of South Africa. GN540 GG43326/15-5-2020.

- **Public Finance Management Act 1 of 1999**

Statement of the national revenue, expenditure and borrowing as at 30 April 2020. GenN298 GG43363/29-5-2020.

- **Road Accident Fund Act 56 of 1996**

Adjustment of R 160 000 statutory limit referred to in s 17(4)(c) to R 294 300. BN62 GG43358/29-5-2020 (also available in Afrikaans).

Draft delegated legislation

- Draft Regulations amending the Electricity Regulations on New Generation Capacity, 2011 in terms of the Electricity Regulation Act 4 of 2006 for comment. GN500 GG43277/5-5-2020.
- Guideline for the Compilation of a Mandatory Code of Practice for the Mitigation and Management of the COVID-19 Outbreak in terms of the Mine Health and Safety Act 29 of 1996 for comment. GenN262 GG43304/11-5-2020.
- Regulations regarding the scope of practice of nurses and midwives in terms of the Nursing Act 33 of 2005 for comment. GN521 GG43305/12-5-2020.
- Guidelines and conditions relating to the extension of safeguard measures introduced by the International Trade Administration Commission for comment. GenN271 GG43316/15-5-2020.
- Regulations relating to the requirements and conditions for registration of a specialty in occupational social work in terms of the Social Service Professions Act 110 of 1978 for comment. GN R582 GG43343/22-5-2020.



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Ostensible authority: Implementation of 'revised' salary increases

In *Eskom Holdings SOC Ltd v National Union of Mineworkers and Others* [2020] 5 BLLR 514 (LAC), Eskom unilaterally decided to award *ad hoc* salary increases to a group of employees, which included a number of members of the National Union of Mineworkers (the employees). The *ad hoc* salary increases were designed to ensure that the employees' salaries were market-related and were recorded in a letter addressed to each employee. Pursuant to the letters, however, the employees received their electronic payslips, which reflected that the increases were less than those indicated in the letters. On inquiry, the employees were informed that the salary increases had been 'revised' downwards because they had been wrongly calculated.

After lodging a grievance, the employees approached the Labour Court (LC) with a contractual claim for specific performance based on s 77(3) of the Basic Conditions of Employment Act (the BCEA). The LC found that Eskom was bound by the increases set out in the letters as the general manager who had signed the letters had the necessary authority to approve the salary increases. In addition, the LC rejected Eskom's claim that the amounts reflected in the letters constituted a justifiable error and ordered Eskom to pay the increases initially promised to the employees.

On appeal, the question before the Labour Appeal Court (LAC) was whether Eskom lawfully awarded the *ad hoc* salary increases to the employees. The court noted that a comparative exercise guided the decision-making process in the determination of the salary increases, which were granted, the objective being to ensure the salaries were as close as possible to market-related salaries. The exercise comparison was reflected on a sheet titled 'final proposed salary' and was approved by Eskom's executive manager. Thereafter, the sheet was sent to the Human Resources Department to

generate the requisite letters to inform the employees of the salary increases. Instead of reflecting the approved salary increases, the Human Resources Department made a mistake and reflected the incorrect increases.

Eskom submitted that the increases reflected in the letters had not been duly authorised as the letters had not been signed by Eskom's Divisional Managing Director, who was the office bearer possessed with the necessary authority to approve the salary increases. This submission was supported by the provisions of a collective bargaining agreement titled 'Basic Salary for Bargaining Unit Employees', which provided that all *ad hoc* salary increases must be approved by the relevant Divisional Managing Director. In the circumstances, the court found that no lawfully binding contract had come into existence between the parties in the absence of authorisation by the Divisional Managing Director.

Notwithstanding this, the employees sought to argue that Eskom was bound by the letters on the basis of the doctrine of 'ostensible authority'. In this regard, the court found that there was no evidence to suggest that the employees were misled into believing that the initial salary increases had been approved by the Divisional Managing Director, nor that the provisions of the collective bargaining agreement could have been bypassed.

The appeal was upheld with costs.

Payment for accumulated annual leave – limited

In *Bronner v Alpha Pharm (Pty) Ltd and Another* [2020] 5 BLLR 518 (LC), the applicant retired as Chief Executive Officer of Natal Wholesale Chemicals (Holdings) Ltd trading as Alpha Pharm (the employer). Pursuant to his retirement, he instituted an action in terms of s 77(3) of the Basic Conditions of Employment Act 75 of 1997 (BCEA) in relation to several claims for money allegedly owing to him by the employer. The claims included –

- payment of the difference between the surrender value and the paid-up value of an insurance policy;
- payment for four additional days worked by the applicant;
- payment of a full, rather than a pro-

rated portion, of the applicant's annual bonus; and

- payment for accumulated annual leave.

The employer contended that all the applicant's claims were fatally flawed.

As regards the first three claims instituted by the applicant, the Labour Court (LC) found that –

- the applicant had agreed that he would be paid the surrender value of the insurance policy;
- he had also agreed to and accepted the payment of a specified amount on termination by his employer, which amount he had received; and
- the applicant had provided no proof that it was the employer's 'practice' to pay employees who retired a full annual bonus. These three claims were, therefore, unsustainable.

Turning to the claim of payment for accumulated annual leave, the applicant alleged that he had accumulated 80 days' annual leave and that he had been underpaid for leave not taken in his final leave cycle. The LC noted that the employer's handbook provided that annual leave must be taken within six months of the anniversaries of appointment and that annual leave not taken would be forfeited. Having regard to a number of judgments on the subject of accrued annual leave, the court noted as follows:

- Sections 20 (regulating annual leave) and 40 (regulating payments on termination of employment) of the BCEA have, on numerous occasions, been the subject of much interpretation and application by the LC.
- For example, in *Jardine v Tongaat-Hulett Sugar Ltd* [2003] 7 BLLR 717 (LC), the LC held that the requirement imposed by the BCEA on employers to grant annual leave to an employee within six months after the end of a leave cycle was intended to protect an employee who would otherwise be denied such leave. Notwithstanding this, the court held that employees are under no obligation to, in fact, take the annual leave within six months after the end of the leave cycle and leave not taken within six months was not automatically forfeited. Thus, employees retain claims for unpaid annual leave not taken during earlier leave cy-

cles, even if an employer has a policy regulating the forfeiture of such leave.

- Conversely, in *Ludick v Rural Maintenance (Pty) Ltd* [2014] 2 BLLR 178 (LC), the LC held that the BCEA imposes an obligation on an employer to grant annual leave before the expiry of the six-month period following a leave cycle and the timing of such leave ought to be agreed to between the employer and the employee. In addition, the BCEA contemplated that claims for the value of accrued annual leave be limited to statutory annual leave accrued in the current and immediately

preceding leave cycles. Therefore, employees may only claim for unpaid leave accrued to them during the former and current leave cycles and not during earlier leave cycles.

Having regard to the above, the court held that the decision in the *Jardine* case had not been consistently followed and the law as it now stands is that s 20 of the BCEA contemplates payments only in respect of annual leave not taken in the current leave cycle and the leave cycle immediately preceding the termination of employment. Applying this principle to the matter at hand, the court found

that the applicant was indeed paid for the annual leave he accumulated during the current and final leave cycle immediately preceding his retirement. Accordingly, his claim for accumulated annual leave also failed.

The court held further that since the applicant had chosen to bring a civil claim, and in the absence of any special considerations, there was no reason why the costs should not follow the result.

The application was dismissed with costs.



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A precondition for a business rescue practitioner issuing s 189(3) notices

NUMSA and Another v SAA and Others (LC) (unreported case no J424/20, 8-5-2020) (Van Niekerk J).

‘Can a business rescue practitioner appointed under the Companies Act [71 of 2008] dismiss employees for reasons related to operational requirements before a business rescue plan that contemplates retrenchments has been prepared and presented?’ This was the central question before the court in this application.

The answer, as will be detailed below, turns on the interpretation of s 136 of the Companies Act.

Prior to addressing the merits of the case and to the extent that the two trade union applicants sought to declare the s 189(3) notices invalid and unlawful for being issued in contravention to s 136 of the Companies Act. The respondents challenged the Labour Court’s (LC) jurisdiction to pronounce on whether a party has lawfully complied with certain provisions of the Companies Act.

The respondents challenge was dispensed with on the basis that the unions approached the court in terms of s 189A(13) of the Labour Relations Act

66 of 1995 (LRA) seeking an order that the issuing of the s 189(3) notices were procedurally unfair.

Section 189A(13) affords a party involved in large scaled retrenchment consultations, to approach the LC for an appropriate remedy, under circumstances where the other party has failed to follow a fair procedure.

Background

On 9 March, the business rescue practitioners, the second and third respondents respectively, issued s 189(3) notices to all relevant trade unions and employees. In terms of the prescribed procedures, the consultation process would endure for a 60-day period within which time South African Airways (SAA) was prevented from dismissing any employee for operational reasons. The end of the 60-day period corresponded with the day on which this application was heard. It was common cause that at the time the s 189(3) notices were issued, the business rescue practitioners had not finalised and presented a business rescue plan.

On 23 April the business rescue practitioners informed all relevant stakeholders, including the employees, that in light of government’s decision not to provide additional funding to the practitioners, there were only two options open to pursue; firstly to develop a business rescue plan or to file an application to liquidate SAA.

The first option entailed a winding down process wherein employees would be terminated by mutual consent because of SAA’s operational requirements and would receive agreed on severance packages. To this end, the business rescue practitioners provided all unions and non-union employees with a draft collective agreement and gave them until 8 May to accept a termination of employment by mutual agreement, which included a relevant retrenchment package.

As at 4 May, non-unionised managers accepted the offer whereas other employees, including members of the two applicant unions had rejected the offer.

Legislative framework

Section 136(1) of the Companies Act, under the heading ‘Effect of business rescue on employees and contracts’ reads:

‘Despite any provision of an agreement to the contrary –

(a) during a company’s business rescue proceedings, employees of the company immediately before the beginning of those proceedings continue to be so employed on the same terms and conditions, except to the extent that –

(i) changes occur in the ordinary course of attrition; or

(ii) the employees and the company, in accordance with applicable labour laws, agree different terms and conditions; and

(b) any retrenchment of any such employees contemplated in the company’s business rescue plan is subject to section 189 and 189A of the Labour Relations Act, 1995 (Act No 66 of 1995), and other applicable employment related legislation’.

The court reaffirmed the approach to interpreting statute – words should be afforded their ordinary grammatical meaning save when this leads to an absurdity. The three interrelated riders to the general principle were that statutes must be –

- interpreted purposively;
- properly contextualised; and
- construed in a manner, which is consistent with the objectives of the Constitution.

Approaching s 136(1) in this manner, the court noted that the default position in terms of s 136(1) was that during business rescue proceedings, employees continue to be employed under the same terms and conditions, which they worked under immediately prior to the business rescue proceedings.

Section 136(1)(a)(i) is the first exception to the default position, which for the duration of the business rescue proceedings, relates to the changes that occur in the ordinary course of attrition. The word ‘attrition’, as per the Oxford English Dictionary 2ed (Oxford Univer-

sity Press 1989), includes 'the gradual reduction of the workforce by employees leaving and not being replaced'. This definition, as accepted by the court, displaced SAA's argument that the term 'ordinary course of attrition' included employees being retrenched for operational reasons – a view, which was expressed by the LC as *obiter dictum* in *Solidarity obo BD Fourie and Others v Vanchem Vanadium Products (Pty) Ltd and Others; In re: NUMSA obo Members v Vanchem Vanadium Products (Pty) Ltd and Another* (LC) (unreported case no J385/16; J393/16, 22-3-2016) (Lagrange J).

The second exception, s 136(1)(a) (ii) was an agreement reached between employer and employees with regard to changes of terms and conditions of employment and which included termination by consent of the parties.

It was s 136(1)(b), which held the answer to the question before the court and, which states that retrenchments as

'contemplated in the company's business rescue plan' are subject to the provisions of s 189 and s 189A of the LRA.

On this footing the court held:

'Section 136(1)(b) requires that any need to retrench must necessarily be rooted in the business rescue plan. It is the contemplation at that point that there is a prospect that employees will be retrenched as an element of the plan that brings s 189 and s 189A of the LRA into play. There is no provision in s 136(1), or anywhere else in Chapter 6 of the Companies Act, that empowers a business rescue practitioner to retrench employees in the absence of a business rescue plan. ... While s 136 might not provide for an absolute moratorium of retrenchment during business rescue proceedings, it locates the right to retrench in the business plan. It follows that the giving of any notice to commence a consultation process in terms of s 189 or s 189A of the LRA, given by

a business rescue practitioner in the absence of a business rescue plan, would be premature and thus constitute an act of procedural unfairness'.

The court further held that nothing prevented the business rescue practitioners from offering employees voluntary separation packages as a measure to avoid possible retrenchments.

Following the above, an order in the following terms was handed down:

- The second and third respondents' conduct in issuing a s 189(3) notice of invitation to consult is procedurally unfair.
- The second and third respondents are directed to withdraw the notices.
- Nothing in this order precludes the second and third respondents from offering, nor any employee of the first respondent from accepting, any offer of voluntary retrenchment.



By
Kathleen
Kriel

Recent articles and research

Abbreviation	Title	Publisher	Volume/issue
BTCLQ	Business Tax and Company Law Quarterly	SiberInk	(2020) 11.1
LDD	Law, Democracy and Development	University of the Western Cape, Faculty of Law	(2019) 23 (2020) 24
SAJHR	South African Journal on Human Rights	Taylor & Francis	(2019) 35.4
TPCP	Tax Planning Corporate and Personal	LexisNexis	(2020) 34.2 (2020) 34.3

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Kathleen Kriel *BTech (Journ)* is the Production Editor at *De Rebus*. □



By
Nicholene
Nxumalo

Employee support amidst the COVID-19 pandemic in South Africa

A recent article by Tages-Anzeiger 'Companies must pay share of rent for employees working from home' (www.swissinfo.ch, accessed 17-6-2020) has reignited the value of a 2019 decision of the Federal Court in Switzerland (see Ruling of the Swiss Supreme Court of 19-4-2019 at www.bger.ch). In this case, an employee approached the Labour Court of the Zurich District seeking financial relief after working beyond office hours and utilising his private residence as a home office for the performance of his work duties. The court passed a significant

precedent when it ruled that employers should contribute a percentage towards payment of rent. Considering the COVID-19 pandemic, the decision to award compensation of an amount equivalent to US\$ 154 to employees, gives new meaning to employee support. It is crucial to determine whether such employee support is a reasonable expectation from employers within the South African context. Therefore, where labour law might be silent, a constitutional obligation may arise.

It can be argued that the outbreak of COVID-19 has wreaked havoc in all aspects of human life, including the world

of work and how employees are expected to carry on with their obligations. Since this is a global crisis, the impact has been disproportionate considering that many countries were only just catching up with the fourth industrial revolution. Once more, technology finds itself at the epicentre of a disruption to the world order, becoming a major source of unrest. This is because plans to salvage work deadlines, industry activities and personal commitments have called for a virtual solution, as people attempt to avoid the impact of an economic standstill.

The work environment is designed to accommodate the daily functions and

activities to be performed by employees. It includes essential office furniture, and technical devices such as laptops, printers and mobile phones, depending on the nature of individual work. The most fundamental resource at the heart of efficient work performance is Internet connection, and places of employment are already equipped to cater for such need. Undoubtedly, the transition to working from home raised an issue of 'readiness' to employees across the spectrum. Employers were faced with the dilemma of issuing laptops to employees who ordinarily relied on desktop devices at work. This was coupled with the additional problem of providing Internet access. Many companies and institutions responded by distributing modems and financial incentives towards subsidising the data usage of employees working from home. Further debates have since surfaced regarding whether employee support is enough to complete monthly work tasks and engage in hour-long online meetings on Microsoft Teams and Zoom. Either way, working from home has shifted some financial burdens, which would ordinarily be shouldered by the employer.

In the South African context, several issues are worth considering. As a point of departure, South Africa (SA) is certainly not in a financially viable position to offer the type of employee support that the highest court in Switzerland, or other countries in the global north, has mandated. In 2019, Switzerland recorded a GDP of US\$ 703,165 million, which is far in excess to that of SA at about US\$ 350 million. Therefore, it is important to note that the Swiss legal response to employee support is contextual. Indeed, these are uncharted waters, and there is even greater pressure on South African employers to display flexibility and compassion.

The Occupational Health and Safety Act 85 of 1993 is vocal about the em-

ployer's obligation to provide a safe work environment, which is extremely relevant during the COVID-19 pandemic. In terms of SA's advanced labour regulations, there is no express law that compels employers to reimburse employees for additional expenses incurred as a result of working from home. The reason for suggesting reasonable support during this period is primarily that the spirit of the Constitution states that 'everyone has the right to fair labour practices', this constitutional protection extends to both the employer and the employee. Reasonableness in terms of the approach to employer support considers the employers already strained financial position. Furthermore, the constitutional protection guards against exploitation of either party during such uncharted times.

A response to the question of reasonable employee support is important since this might shape and alter the world of work. To navigate these uncharted waters, employers in SA have adopted different methods to employee support. It is extremely important to consider the South African context, suffering high unemployment rates long before the arrival of COVID-19. As a result, the gravity of the situation has been increased. This calls for a balanced approach when considering the further financial strain that would burden South African employers, and the possibility of a detrimental retaliation.

While SA does not have the financial muscle of Switzerland, there is a legal framework to bind employers to give 'reasonable subsidy' to their employees, a development, which trade unions might also have to confront soon. The concept of reasonable subsidy refers to financial and non-financial measures that can be adopted by employers, in addition to those already existing within the workplace. This includes allowing employees to take leave, and to continue

encouraging the prioritisation of mental wellness and well-being. In addition, reasonable subsidy will have to be a subjective industry-specific consideration ensuring that employers do not pass off work expenses to employees.

What constitutes a reasonable subsidy?

In relation to data costs and charges for Internet installation and usage, the approach adopted should consider a shared responsibility between the employer and employee in the calculation of those expenses. As a safeguard, each employee would be required to provide proof of data capacity on devices, which is relied on by the employee, for the fulfilment of their duties, as well as the proof of payment, in order to prevent unjustified enrichment. The employer will then compensate retrospectively.

Conclusion

Accordingly, South Africa's current economic climate faces great instability as the COVID-19 pandemic continues. As such, it is not financially viable to expect South African employers to disseminate elaborate forms of employee support like contributing towards the payment of rent for utilising the private residence as a home office, and compensation for working overtime. However, there is a constitutional obligation that compels employers to fair labour practices. This entitles employees to be reimbursed for data and Internet connection costs, in addition to other reasonable non-financial support mechanisms.

Nicholene Nxumalo LLM (UKZN) is a lecturer in the Public Law Department at Nelson Mandela University in Port Elizabeth. □

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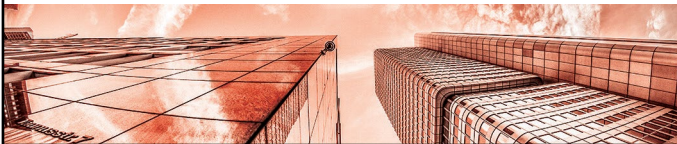
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**Administrator of
deceased estates**


Our Wills & Estates specialist Arnold Shapiro has extensive experience in the administration of deceased estates, having lectured regularly on the topic to students and the profession and providing expert commentary to the media.

He offers colleagues in the legal profession the service of attending to their estate work at an arranged allowance.

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 **LAWTONS
AFRICA**

RISKALERT

JULY 2020 NO 4/2020

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RISK MANAGEMENT COLUMN

LPIIF DOCUMENTS FOR THE 2020/2021 INSURANCE YEAR

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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.



Legal Practitioners' Indemnity Insurance Fund NPC

Est. 1993 by the Legal Practitioners' Fidelity Fund



LEGAL PRACTITIONERS' FIDELITY FUND

SOUTH AFRICA

Welcome to the 2020/2021 insurance scheme year.

This month we have published a bumper edition, including all the documents relating to the LPIIF's 2020/2021 insurance scheme year. You will now have all the documents relating to the primary layer of professional indemnity insurance in one place.

Readers will recall that the June 2020 edition of the Bulletin highlighted the pending changes to the LPIIF policies. Please study the wording of both policies carefully.

The beginning of the new insurance scheme year is an opportune time to assess the risk environment in which the practice operates and the risk management measures that the firm has in place. The completion of the risk management self-assessment



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questionnaire is one part of that broader risk assessment process.

We wish all legal practitioners a claim free year ahead.



THE 2020/2021 LPIIF MASTER POLICY

PREAMBLE

The **Legal Practitioners' Fidelity Fund**, as permitted by the **Act**, has contracted with the **Insurer** to provide professional indemnity insurance to the **Insured**, in a sustainable manner and with due regard for the interests of the public by:

- a) protecting the integrity, esteem, status and assets of the **Insured** and the legal profession;
- b) protecting the public against indemnifiable and provable losses arising out of **Legal Services** provided by the **Insured**, on the basis set out in this policy.

DEFINITIONS:

- I Act:** The Legal Practice Act 28 of 2014;
- II Annual Amount of Cover:** The total available amount of cover for the **Insurance Year** for the aggregate of payments made for all **Claims**, **Approved Costs** and **Claimants' Costs** in respect of any **Legal Practice** as set out in Schedule A;
- III Approved Costs:** Legal and other costs incurred by the **Insured** with the **Insurer's** prior written permission (which will be in the **Insurer's** sole discretion) in attempting to prevent a **Claim** or limit the amount of a **Claim**;
- IV Legal Practitioners' Fidelity Fund:** As referred to in Section 53 of the **Act**;
- V Bridging Finance:** The provision of short-term finance to a party to a **Conveyancing Transaction** before it has been registered in the Deeds Registry;
- VI Claim:** A written demand for compensation from the **Insured**, which arises out of the **Insured's** provision of **Legal Services**. For the purposes of this policy, a written demand is any written communication or legal document that either makes a demand for or intimates or implies an intention to demand compensation or damages from an **Insured**;
- VII Claimant's Costs:** The legal costs the **Insured** is obliged to pay to a claimant by order of a court, arbitrator, or by an agreement approved by the **Insurer**;
- VIII Conveyancing Transaction:** A transaction which:
 - a) involves the transfer of legal title to or the registration of a real right in immovable property from one or more legal entities or natural persons to another; and/or
 - b) involves the registration or cancellation of any mortgage bond or real right over immovable property; and/or
 - c) is required to be registered in any Deeds Registry in the Republic of South Africa, in terms of any relevant legislation;
- IX Cybercrime:** Any criminal or other offence that is facilitated by or involves the use of electronic communications or information systems, including any device or the internet or any one or more of them. (The device may be the agent, the facilitator or the target

of the crime or offence). Hacking of any of the electronic environments is not a necessity in order for the offence or the loss to fall within this definition;

- X Defence Costs:** The reasonable costs the **Insurer** or **Insured**, with the **Insurer's** written consent, incurs in investigating and defending a **Claim** against an **Insured**;

- XI Dishonest:** Bears its ordinary meaning but includes conduct which may occur without an **Insured's** subjective purpose, motive or intent, but which a reasonable legal practitioner would consider to be deceptive or untruthful or lacking integrity or conduct which is generally not in keeping with the ethics of the legal profession;

- XII Employee:** A person who is or was employed or engaged by the **Legal Practice** to assist in providing **Legal Services**. (This includes in-house legal consultants, associates, professional assistants, candidate legal practitioners, paralegals and clerical staff but does not include an independent contractor who is not a **Practitioner**);

- XIII Excess:** The first amount (or deductible) payable by the **Insured** in respect of each and every **Claim** (including **Claimant's Costs**) as set out in schedule B;

- XIV Fidelity Fund Certificate:** A certificate provided for in terms of section 85 of the **Act**, read with Rules 3, 47, 48 and 49 of the South African Legal Practice Council Rules made under the authority of section 95(1) of the **Act**;

- XV Innocent Principal:** Each current or former **Principal** who:

- a) may be liable for the debts and liabilities of the **Legal Practice**; and
- b) did not personally commit or participate in committing the **Dishonest**, fraudulent or other criminal act and had no knowledge or awareness of such act;

- XVI Insured:** The persons or entities referred to in clauses 5 and 6 of this policy;

- XVII Insurer:** The Legal Practitioners Indemnity Insurance Fund NPC, Reg. No. 93/03588/08;

- XVIII Insurance Year:** The period covered by the policy, which runs from 1 July of the first year to 30 June of the following year;

- XIX Legal Practice:** The person or entity listed in clause 5 of this policy;

- XX Legal Services:** Work reasonably done or advice given in the ordinary course of carrying on the business of a **Legal Practice** in the Republic of South Africa in accordance with the provisions of section 33 of the **Act**. Work done or advice given on the law applicable in jurisdictions other than the Republic of South Africa are specifically excluded, unless provided by a person admitted to practise in the applicable jurisdiction;

- XXI Practitioner:** Any attorney, advocate referred to in

section 34(2)(b) of the Act, notary or conveyancer as defined in the Act;

- XXII **Prescription Alert:** The computerised back-up diary system that the **Insurer** makes available to the legal profession;
- XXIII **Principal:** An advocate referred to in section 34(2)(b) of the Act, sole **Practitioner**, partner or director of a **Legal Practice** or any person who is publicly held out to be a partner or director of a **Legal Practice**;
- XXIV **Risk Management Questionnaire:** A self-assessment questionnaire which can be downloaded from or completed on the **Insurer's** website (www.lpiif.co.za) and which must be completed annually by the advocate referred to in section 34(2)(b) of the Act, sole practitioner, senior partner, director or designated risk manager of the **Insured** as referred to in clause 5. The annual completion of the **Risk Management Questionnaire** is prescribed by this policy (see clause 23) and the South African Legal Practice Council Rules (the Rules) made under the Act;
- XXV **Road Accident Fund claim (RAF):** A claim for compensation for losses in respect of bodily injury or death caused by, arising from or in any way connected with the driving of a motor vehicle (as defined in the Road Accident Fund Act 56 of 1996 or any predecessor or successor of that Act) in the Republic of South Africa;
- XXVI **Senior Practitioner:** A **Practitioner** with no less than 15 years' standing in the legal profession, with experience in professional indemnity insurance law;
- XXVII **Trading Debt:** A debt incurred as a result of the undertaking of the **Insured's** business or trade. (Trading debts are not compensatory in nature and this policy deals only with claims for compensation). This exclusion includes (but is not limited to) the following:
 - a) a refund of any fee or disbursement charged by the **Insured** to a client;
 - b) damages or compensation or payment calculated by reference to any fee or disbursement charged by the **Insured** to a client;
 - c) payment of costs relating to a dispute about fees or disbursements charged by the **Insured** to a client; and/or
 - d) any labour dispute or act of an administrative nature in the **Insured's** practice.

WHAT COVER IS PROVIDED BY THIS POLICY?

1. On the basis set out in this policy, the **Insurer** agrees to indemnify the **Insured** against professional legal liability to pay compensation to any third party:
 - a) that arises out of the provision of **Legal Services** by the **Insured**; and
 - b) where the **Claim** is first made against the **Insured** during the current **Insurance Year**.
2. The **Insurer** agrees to indemnify the **Insured** for **Claimants' Costs** and **Defence Costs** on the basis set out in this policy.
3. The **Insurer** agrees to indemnify the **Insured** for **Approved Costs** in connection with any **Claim** referred to in clause 1.
4. As set out in clause 38, the **Insurer** will not indemnify the **Insured** in the current **Insurance Year**, if the circumstance giving rise to the **Claim** has previously been notified to the **Insurer** by the **Insured** in an earlier **Insurance Year**.

WHO IS INSURED?

5. Provided that each **Principal** had a **Fidelity Fund Certificate** at the time of the circumstance, act, error or omission giving rise to the **Claim**, the **Insurer** insures all **Legal Practices** providing **Legal Services** in the form of either:
 - a) a sole **Practitioner**;
 - b) a partnership of **Practitioners**;
 - c) an incorporated **Legal Practice** as referred to in section 34(7) of the Act; or
 - d) an advocate referred to in section 34 (2)(b) of the Act. For purposes of this policy, an advocate referred to in section 34(2)(b) of the Act, will be regarded as a sole practitioner.
6. The following are included in the cover provided to the **Legal Practice**, subject to the **Annual Amount of Cover** applicable to the **Legal Practice**:
 - a) a **Principal** of a **Legal Practice** providing **Legal Services**, provided that the **Principal** had a **Fidelity Fund Certificate** at the time of the circumstance, act, error or omission giving rise to the **Claim**;
 - b) a previous **Principal** of a **Legal Practice** providing **Legal Services**, provided that that **Principal** had a **Fidelity Fund Certificate** at the time of the circumstance, act, error or omission giving rise to the **Claim**;
 - c) an **Employee** of a **Legal Practice** providing **Legal Services** at the time of the circumstance, act, error or omission giving rise to the **Claim**;
 - d) the estates of the people referred to in clauses 6(a), 6(b) and 6(c);
 - e) subject to clause 16(c), a liquidator or trustee in an insolvent estate, where the appointment is or was motivated solely because the **Insured** is a **Practitioner** and the fees derived from such appointment are paid directly to the **Legal Practice**.

AMOUNT OF COVER

7. The **Annual Amount of Cover**, as set out in Schedule A, is calculated by reference to the number of **Principals** that made up the **Legal Practice** on the date of the circumstance, act, error or omission giving rise to the **Claim**.
A change during the course of an insurance year in the composition of a **Legal Practice** which is a partnership will not constitute a new **Legal Practice** for purposes of this policy and would not entitle that **Legal Practice** to more than one limit of indemnity in respect of that **Insurance Year**.
8. Schedule A sets out the maximum **Annual Amount of Cover** that the **Insurer** provides per **Legal Practice**. This amount includes payment of compensation (capital and interest) as well as **Claimant's Costs** and **Approved Costs**.
9. Cover for **Approved Costs** is limited to 25% of the **Annual Amount of Cover** or such other amount that the **Insurer** may allow in its sole discretion.

INSURED'S EXCESS PAYMENT

10. The **Insured** must pay the **Excess** in respect of each **Claim**, directly to the claimant or the claimant's legal representatives, immediately it becomes due and payable.
Where two or more **Claims** are made simultaneously, each **Claim** will attract its own **Excess** and to the

RISKALERT

extent that one or more **Claims** arise from the same circumstance, act, error or omission the **Insured** must pay the **Excess** in respect of each such **Claim**;

11. The **Excess** is calculated by reference to the number of **Principals** that made up the **Legal Practice** on the date of the circumstance, act, error or omission giving rise to the **Claim**, and the type of matter giving rise to the **Claim**, as set out in Schedule B.
12. The **Excess** set out in column A of Schedule B applies:
 - a) in the case of a **Claim** arising out of the prescription of a **Road Accident Fund claim**. This **Excess** increases by an additional 20% if **Prescription Alert** has not been used and complied with by the **Insured**, by timeous lodgement and service of summons in accordance with the reminders sent by **Prescription Alert**;
 - b) in the case of a **Claim** arising from a **Conveyancing Transaction**.
13. In the case of a **Claim** where clause 20 applies, the **excess** increases by an additional 20%.
14. No **Excess** applies to **Approved costs** or **Defence costs**.
15. The **Excess** set out in column B of Schedule B applies to all other types of **Claim**.

WHAT IS EXCLUDED FROM COVER?

16. This policy does not cover any liability for compensation:
 - a) arising out of or in connection with the **Insured's Trading Debts** or those of any **Legal Practice** or business managed by or carried on by the **Insured**;
 - b) arising from or in connection with misappropriation or unauthorised borrowing by the **Insured** or **Employee** or agent of the **Insured** or of the **Insured's** predecessors in practice, of any money or other property belonging to a client or third party and/or as referred to in section 55 of the **Act**;
 - c) which is insured or could more appropriately have been insured under any other valid and collectible insurance available to the **Insured**, covering a loss arising out of the normal course and conduct of the business or where the risk has been guaranteed by a person or entity, either in general or in respect of a particular transaction, to the extent to which it is covered by the guarantee. This includes but is not limited to Misappropriation of Trust Funds, Personal Injury, Commercial and Cybercrime insurance policies;
 - d) arising from or in terms of any judgment or order(s) obtained in the first instance other than in a court of competent jurisdiction within the Republic of South Africa;
 - e) arising from or in connection with the provision of **Investment Advice**, the administration of any funds or taking of any deposits as contemplated in:
 - (i) the Banks Act 94 of 1990;
 - (ii) the Financial Advisory and Intermediary Services Act 37 of 2002;
 - (iii) the Agricultural Credit Act 28 of 1996;
 - (iv) any law administered by the Financial Sector Conduct Authority and/or the South African Reserve Bank and any regulations issued thereunder; or

(v) the Medical Schemes Act 131 of 1998 as amended or replaced;

For purposes of this Clause, **Investment Advice** means any recommendation, guidance or proposal of a financial nature furnished to any client or group of clients –

- a) in respect of the purchase of any financial product; or
- b) in respect of the investment in any financial product; or
- c) the engagement of any financial service provider.
- f) arising where the **Insured** is instructed to invest money on behalf of any person, except for an instruction to invest the funds in an interest-bearing account in terms of section 86(4) of the **Act**, and if such investment is done pending the conclusion or implementation of a particular matter or transaction which is already in existence or about to come into existence at the time the investment is made;

This exclusion does not apply (subject to the other provisions of this policy) to funds which the **Insured** is authorised to invest in his or her capacity as executor, trustee, curator or in any similar representative capacity;
- g) arising from or in connection with any fine, penalty, punitive or exemplary damages awarded against the **Insured**, or from an order against the **Insured** to pay costs *de bonis propriis*;
- h) arising out of or in connection with any work done on behalf of an entity defined in the Housing Act 107 of 1997 or its representative, with respect to the National Housing Programme provided for in the Housing Act;
- i) directly or indirectly arising from, or in connection with or as a consequence of the provision of **Bridging Finance** in respect of a **Conveyancing Transaction**. This exclusion does not apply where **Bridging Finance** has been provided for the payment of:
 - (i) transfer duty and costs;
 - (ii) municipal or other rates and taxes relating to the immovable property which is to be transferred;
 - (iii) levies payable to the body corporate or homeowners' association relating to the immovable property which is to be transferred;
- j) arising from the **Insured's** having given an unqualified undertaking legally binding his or her practice, in matters where the fulfilment of that undertaking is dependent on the act or omission of a third party;
- k) arising out of or in connection with a breach of contract unless such breach is a breach of professional duty by the **Insured**;
- l) arising where the **Insured** acts or acted as a business rescue practitioner as defined in section 128(1)(d) of the Companies Act 71 of 2008;
- m) arising out of or in connection with the receipt or payment of funds, whether into or from the **Legal Practice's** trust account or otherwise, where that receipt or payment of funds:
 - (i) is unrelated to the successful completion of the direct instruction to provide specific **Legal Services** being carried out or having been

- completed; or
- (ii) where the insured acts merely as a conduit for the transfer of funds from the Legal Practice's trust or other account to the payee;
- n) arising out of a defamation **Claim** that is brought against the **Insured**;
- o) arising out of **Cybercrime**. Losses arising out of **Cybercrime** include, payments made into an incorrect and/or fraudulent bank account where either the **Insured** or any other party has been induced to make the payment into the incorrect bank account and has failed to verify the authenticity of such bank account;
For purposes of this clause, "verify" means that the **Insured** must have a face-to-face meeting with the client and/or other intended recipient of the funds. The client (or other intended recipient of the funds, as the case may be) must provide the **Insured** with an original signed and duly commissioned affidavit confirming the instruction to change their banking details and attaching an original stamped document from the bank confirming ownership of the account.
- p) arising out of a **Claim** against the **Insured** by an entity in which the **Insured** and/or related or interrelated persons* has/have a material interest and/or hold/s a position of influence or control**.

* as defined in section 2(1) of the Companies Act 71 of 2008

** as defined in section 2(2) of the Companies Act 71 of 2008

For the purposes of this paragraph, "material interest" means an interest of at least ten (10) percent in the entity;

- q) arising out of or in connection with a **Claim** resulting from:
 - (i) War, invasion, act of foreign enemy, hostilities or warlike operations (whether war is declared or not) civil war, mutiny, insurrection, rebellion, revolution, military or usurped power;
 - (ii) Any action taken in controlling, preventing, suppressing or in any way relating to the excluded situations in (i) above including, but not limited to, confiscation, nationalisation, damage to or destruction of property by or under the control of any Government or Public or Local Authority;
 - (iii) Any act of terrorism regardless of any other cause contributing concurrently or in any other sequence to the loss;

For the purpose of this exclusion, terrorism includes an act of violence or any act dangerous to human life, tangible or intangible property or infrastructure with the intention or effect to influence any Government or to put the public or any section of the public in fear;

- r) arising out of or in connection with any **Claim** resulting from:
 - (i) ionising radiations or contamination by radio-activity from any nuclear fuel or from any nuclear waste from the combustion or use of nuclear fuel;
 - (ii) nuclear material, nuclear fission or fusion, nuclear radiation;
 - (iii) nuclear explosives or any nuclear weapon;

- (iv) nuclear waste in whatever form; regardless of any other cause or event contributing concurrently or in any other sequence to the loss. For the purpose of this exclusion only, combustion includes any self-sustaining process of nuclear fission or fusion;
- s) arising out of or resulting from the hazardous nature of asbestos in whatever form or quantity; and
- t) arising out of or resulting from **Legal Services** carried out in violation of the **Act** and the **Rules**.

FRAUDULENT APPLICATIONS FOR INDEMNITY

- 17. The **Insurer** will reject a fraudulent application for indemnity.

CLAIMS ARISING OUT OF DISHONESTY OR FRAUD

- 18. Any **Insured** will not be indemnified for a **Claim** that arises:
 - a) directly or indirectly from any **Dishonest**, fraudulent or other criminal act or omission by that **Insured**;
 - b) directly or indirectly from any **Dishonest**, fraudulent or other criminal act or omission by another party and that **Insured** was knowingly connected with, or colluded with or condoned or acquiesced or was party to that dishonesty, fraud or other criminal act or omission.

Subject to clauses 16, 19 and 20, this exclusion does not apply to an **Innocent Principal**.

- 19. In the event of a **Claim** to which clause 18 applies, the **Insurer** will have the discretion not to make any payment, before the **Innocent Principal** takes all reasonable action to:
 - a) institute criminal proceedings against the alleged **Dishonest** party and present proof thereof to the **Insurer**; and/or
 - b) sue for and obtain reimbursement from any such alleged **Dishonest** party or its or her or his estate or legal representatives;

Any benefits due to the alleged **Dishonest** party held by the **Legal Practice**, must, to the extent allowable by law, be deducted from the **Legal Practice's** loss.

- 20. Where the **Dishonest** conduct includes:
 - a) the witnessing (or purported witnessing) of the signing or execution of a document without seeing the actual signing or execution; or
 - b) the making of a representation (including, but not limited to, a representation by way of a certificate, acknowledgement or other document) which was known at the time it was made to be false;

The **Excess** payable by the **Innocent Insured** will be increased by an additional 20%.

- 21. If the **Insurer** makes a payment of any nature under the policy in connection with a **Claim** and it later emerges that it wholly or partly arose from a **Dishonest**, fraudulent or other criminal act or omission of the **Insured**, the **Insurer** will have the right to recover full repayment from that **Insured** and any party knowingly connected with that **Dishonest**, fraudulent or criminal act or omission.

THE INSURED'S RIGHTS AND DUTIES

- 22. The **Insured** must;
 - a) give immediate written notice to the **Insurer** of

- any circumstance, act, error or omission that may give rise to a **Claim**; and
- b) notify the **Insurer** in writing as soon as practicable, of any **Claim** made against them, but by no later than one (1) week after receipt by the **Insured**, of a written demand or summons/counterclaim or application. In the case of a late notification of receipt of the written demand, summons or application by the **Insured**, the **Insurer** reserves the right not to indemnify the **Insured** for costs and ancillary charges incurred prior to or as a result of such late notification.
23. Once the **Insured** has notified the **Insurer**, the **Insurer** will require the **Insured** to provide a completed **Risk Management Questionnaire** and to complete a claim form providing all information reasonably required by the **Insurer** in respect of the **Claim**. The **Insured** will not be entitled to indemnity until the claim form and **Risk Management Questionnaire** have been completed by the **Insured**, to the **Insurer's** reasonable satisfaction and returned to the **Insurer**.
 24. The **Insured**:
 - 24.1. shall not cede or assign any rights in terms of this policy;
 - 24.2. agrees not to, without the **Insurer's** prior written consent:
 - a) admit or deny liability for a **Claim**;
 - b) settle a **Claim**;
 - c) incur any costs or expenses in connection with a **Claim** unless the sum of the **Claim** and **Claimant's Costs** falls within the **Insured's Excess**; failing which, the **Insurer** will be entitled to reject the **Claim**, but will have sole discretion to agree to provide indemnity, wholly or partly.
 25. The **Insured** agrees to give the **Insurer** and any of its appointed agents:
 - 25.1. all information and documents that may be reasonably required, at the **Insured's** own expense.
 - 25.2. assistance and cooperation, which includes, but not limited to, preparing, service and filing of notices and pleadings by the **Insured** as specifically instructed by the **Insurer** at the **Insurer's** expense, which expenses must be agreed to in writing.
 26. The **Insured** also gives the **Insurer** or its appointed agents the right of reasonable access to the **Insured's** premises, staff and records for purposes of inspecting or reviewing them in the conduct of an investigation of any **Claim** where the **Insurer** believes such review or inspection is necessary.
 27. Notwithstanding anything else contained in this policy, should the **Insured** fail or refuse to provide information, documents, assistance or cooperation in terms of this policy, to the **Insurer** or its appointed agents and remain in breach for a period of ten (10) working days after receipt of written notice to remedy such breach (from the **Insurer** or its appointed agents) the **Insurer** has the right to:
 - a) withdraw indemnity; and/or
 - b) report the **Insured's** conduct to the regulator; and/or
 - c) recover all payments and expenses incurred by it. For the purposes of this paragraph, written notice will be sent to the address last provided to the **Insurer** by the **Insured** and will be deemed to have been received five (5) working days after electronic transmission or posting by registered mail.
 28. By complying with the obligation to disclose all documents and information required by the **Insurer** and its legal representatives, the **Insured** does not waive any claim of legal professional privilege or confidentiality.
 29. Where a breach of, or non-compliance with any term of this policy by the **Insured** has resulted in material prejudice to the handling or settlement of any **Claim** against the **Insured**, the **Insured** will reimburse the **Insurer** the difference between the sum payable by the **Insurer** in respect of that **Claim** and the sum which would in the sole opinion of the **Insurer** have been payable in the absence of such prejudice. It is a condition precedent of the **Insurer's** right to obtain reimbursement, that the **Insurer** has fully indemnified the **Insured** in terms of this policy.
 30. Written notification of any new **Claim** must be given to:

Legal Practitioners Indemnity Insurance Fund NPC
1256 Heuwel Avenue|Centurion|0127
PO Box 12189|Die Hoewes|0163
Docex 24 | Centurion
Email: claims@lpiif.co.za
Tel:+27(0)12 622 3900

The Insurer's rights and duties
 31. The **Insured** agrees that:
 - a) the **Insurer** has full discretion in the conduct of the **Claim** against the **Insured** including, but not limited to, its investigation, defence, settlement or appeal in the name of the **Insured**;
 - b) the **Insurer** has the right to appoint its own legal representative(s) or service providers to act in the conduct and the investigation of the **Claim**;

The exercise of the **Insurer's** discretion in terms of

 - a) will not be unreasonable.
 32. The **Insurer** agrees that it will not settle any **Claim** against any **Insured** without prior consultation with that **Insured**. However, if the **Insured** does not accept the **Insurer's** recommendation for settlement:
 - a) the **Insurer** will not cover further **Defence Costs** and **Claimant's Costs** beyond the date of the **Insurer's** recommendation to the **Insured**; and
 - b) the **Insurer's** obligation to indemnify the **Insured** will be limited to the amount of its recommendation for settlement or the **Insured's** available **Annual Amount of Cover** (whichever is the lesser amount).
 33. If the amount of any **Claim** exceeds the **Insured's** available **Annual Amount of Cover** the **Insurer** may, in its sole discretion, hold or pay over such amount or any lesser amount for which the **Claim** can be settled. The **Insurer** will thereafter be under no further liability in respect of such a **Claim**, except for the payment of **Approved Costs** or **Defence Costs** incurred prior to the date on which the **Insurer** notifies the **Insured** of its decision.
 34. Where the **Insurer** indemnifies the **Insured** in relation to only part of any **Claim**, the **Insurer** will be responsible for only the portion of the **Defence Costs** that reflects an amount attributable to the matters so indemnified. The **Insurer** reserves the right to determine that proportion in its absolute discretion.
 35. In the event of the **Insured's** material non-disclosure or misrepresentation in respect of the application for indemnity, the **Insurer** reserves the right to re-

port the **Insured's** conduct to the regulator and to recover any amounts that it may have incurred as a result of the **Insured's** conduct.

36. If the **Insurer** makes payment under this policy, it will not require the **Insured's** consent to take over the **Insured's** right to recover (whether in the **Insurer's** name or the name of the **Insured**) any amounts paid by the **Insurer**;
37. All recoveries made in respect of any **Claim** under this policy will be applied (after deduction of the costs, fees and expenses incurred in obtaining such recovery) in the following order of priority:
 - a) the **Insured** will first be reimbursed for the amount by which its liability in respect of such **Claim** exceeded the **Amount of Cover** provided by this policy;
 - b) the **Insurer** will then be reimbursed for the amount of its liability under this policy in respect of such **Claim**;
 - c) any remaining amount will be applied toward the **Excess** paid by the **Insured** in respect of such **Claim**.
38. If the **Insured** gives notice during an **Insurance Year**, of any circumstance, act, error or omission (or a related series of acts, errors or omissions) which may give rise to a **Claim** or **Claims**, then any **Claim** or **Claims** in respect of that/those circumstance/s, act/s, error/s or omission/s subsequently made against the **Insured**, will for the purposes of this policy be considered to fall within one **Insurance Year**, being the **Insurance Year** of the first notice.
39. This policy does not give third parties any rights against the **Insurer**.

How the parties will resolve disputes

40. Subject to the provisions of this policy, any dispute or disagreement between the **Insured** and the **Insurer** as to any right to indemnity in terms of this policy, or as to any matter arising out of or in connection with this policy, must be dealt with in the following order:
 - a) written submissions by the **Insured** must be referred to the **Insurer's** internal complaints/dispute team at disputes@lpiif.co.za or to the address set out in clause 30 of this policy, within thirty (30) days of receipt of the written communication from the **Insurer** which has given rise to the dispute;
 - b) should the dispute not have been resolved within thirty (30) days from the date of receipt by the **Insurer** of the submission referred to in a), then the parties must agree on an independent **Senior Practitioner** who has experience in the area of professional indemnity insurance, to whom the dispute can be referred for a determination. Failing such an agreement, the choice of such **Senior Practitioner** must be referred to the Chairperson of the Legal Practice Council to appointment the **Senior Practitioner** with the relevant experience;
 - c) the parties must make written submissions which will be referred for determination to the **Senior Practitioner** referred to in b). The costs incurred in so referring the matter and the costs of the **Senior Practitioner** will be borne by the unsuccessful party;
 - d) the determination does not have the force of an arbitration award. The unsuccessful party must

notify the successful party in writing, within thirty (30) days of the determination by the **Senior Practitioner**, if the determination is not accepted to it;

The procedures in a) b) c) and d) above must be completed before any formal legal action is undertaken by the parties.

SCHEDULE A

Period of Insurance: 1st July 2020 to 30th June 2021 (both days inclusive)

No of Principals	Annual Amount of Cover for Insurance Year
1	R1 562 500
2	R1 562 500
3	R1 562 500
4	R1 562 500
5	R1 562 500
6	R1 562 500
7	R1 640 625
8	R1 875 000
9	R2 109 375
10	R2 343 750
11	R2 578 125
12	R2 812 500
13	R3 046 875
14 and above	R3 125 000

SCHEDULE B

Period of Insurance: 1st July 2020 to 30th June 2021 (both days inclusive)

No of Principals	Column A Excess for prescribed RAF* and Conveyancing Claims**	Column B Excess for all other Claims**
1	R35 000	R20 000
2	R63 000	R36 000
3	R84 000	R48 000
4	R105 000	R60 000
5	R126 000	R72 000
6	R147 000	R84 000
7	R168 000	R96 000
8	R189 000	R108 000
9	R210 000	R120 000
10	R231 000	R132 000
11	R252 000	R144 000
12	R273 000	R156 000
13	R294 000	R168 000
14 and above	R315 000	R180 000

*The applicable **Excess** will be increased by an additional 20% if **Prescription Alert** is not used and complied with.

The applicable **Excess will be increased by an additional 20% if clause 20 of this policy applies.



RISK MANAGEMENT SELF-ASSESSMENT QUESTIONNAIRE

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 **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.

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.

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 LPFF 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.

SECTION 1

1. General practice information:

- 1.1 Name under which practice is conducted
- 1.2 Practice number
- 1.3 Under which Provincial Council (s) does your practice operate? (see section 23 of the Act)
- 1.4 Is your practice a Sole Practice/Partnership/Incorporated Company/ Advocate referred to in section 34(2)(b) of the Act?

2. Principal office details:

- 2.1 Address and postal code
- 2.2 Telephone number
- 2.3 Email.....

- 2.4 Docex.....
- 2.5 Website.....
- 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.....
-
-
-

4 Composition of the practice.

Number of:

- 4.1 Partners/directors.....
- 4.2 Professional Assistants/ Associates/ Consultants
- 4.2 Candidate Attorneys.....
- 4.3 Paralegals.....
- 4.4 Other staff including secretaries.....
- 4.5 Total.....
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

5. For the past financial year, please provide approximate percentages of total fees earned in the following categories of legal work:
- 5.1 Conveyancing.....
- 5.2 Commercial.....
- 5.3 Criminal.....
- 5.4 Debt collection.....
- 5.5 Estates – trustees, executors, administrators.....
- 5.6 Insurance.....
- 5.7 Investments.....
- 5.8 Liquidations.....
- 5.9 Marine.....
- 5.10 Matrimonial.....
- 5.11 Patents & Trademarks.....
- 5.12 Personal injury (RAF claims).....
- 5.13 Medical malpractice.....
- 5.14 General litigation.....
- 5.15 Other (please specify any type of work that makes up a significant percentage of your fees)
-

SECTION 2

Risk Management Information

6. Do you have a dedicated risk management resource/ a person responsible for risk management and/or quality control?.....

RISKALERT

7. Are all instructions recorded in a letter of engagement?.....
8. Does your practice screen prospective clients?.....
9. Do you assess whether or not you have the appetite, the resources and the expertise to carry out the mandate within the required time?.....
10. Has your firm registered all time barred matters with the LPIIF's Prescription Alert unit?.....
11. Are regular file audits conducted?.....
12. Is the proximity the prescription date taken into account when accepting new instructions and explained to clients?.....
13. Is a peer review system implemented in the firm?.....
14. Is advice to clients always signed off by a partner/ director?.....
15. Do you have a dual diary system in place for professionals and support staff?.....
16. Do you have a system that ensures that all diarised matters are attended to?.....
17. Is more than one contact number obtained for clients?.....
18. Are instructions, consultations and telephone discussions confirmed in writing?.....
19. Do you have a formal handover process when a file is transferred from one person to another within the firm?
20. Does your firm have documented minimum operating standards/standard operating procedures?.....
21. Does your practice have effective policies on uniform file order?.....
22. Is there a formal structure and process for supervision of staff and delegation of duties?.....
23. Do you have a formal training program in place?.....
24. Does the training program include risk management training?.....
25. Are new background checks (including criminal records and professional history) conducted on new employees?
26. In respect of the financial functions, has an adequate system been implemented which addresses:
 - 26.1 segregation of duties;.....
 - 26.2 Checks and balances;.....
 - 26.3 The internal controls prescribed by Rule 54.14.7 with regards to the safeguarding of trust funds?.....
 - 26.4 Compliance with FICA and the investment rules?.....
 - 26.5 The verification of the payee banking details and any purported changes as required by Rule 54.13?.....
27. 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)
28. Are you aware of the risks associated with cybercrime in general and risks associated with phishing/cyberscams and the scams involving fraudulent instructions relating to the purported change of beneficiary banking details? ..

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
29. Does your practice have regular meetings of professional staff to discuss problem matters?.....
30. Does your practice have formal policies on file storage and retrieval? (Procedures to ensure that files are not lost or misplaced or overlooked)
31. Have you read the Master Policy and are you (and all others in your practice) aware of the exclusions (including the cybercrime exclusion)?
32. 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/>).....

NAME :.....

CAPACITY:.....

SIGNATURE:.....

DATE OF COMPLETION:.....



**Legal Practitioners
Indemnity Insurance
Fund NPC**
Est. 1993 by the Legal Practitioners Fidelity Fund

PROFESSIONAL INDEMNITY CLAIM FORM

CLAIM FORM

This claim form should be read in conjunction with the applicable LPIIF Policy for the specific insurance year, a copy of which can be found on the LPIIF website: www.lpiif.co.za

1. FIRM

1.1 Name of firm :	
1.2 In which Legal Practice Council jurisdiction is your firm practising?	
1.3 Firm number with the applicable Legal Practice Council:	
1.4 Does your firm practice in the jurisdiction of more than one Legal Practice Council?	YES <input type="checkbox"/> NO <input type="checkbox"/>
<ul style="list-style-type: none"> If Yes, state the Legal Practice Council and the firm number in that jurisdiction: 	<p>-----</p> <p>-----</p> <p>-----</p>
1.5 Does your firm have any branch offices?	YES <input type="checkbox"/> NO <input type="checkbox"/>
<ul style="list-style-type: none"> If Yes, please give us the full details of each branch office. 	<p>-----</p> <p>-----</p> <p>-----</p>
1.6 Is your practice conducted as a sole practitioner, a partnership or incorporated practice?	Sole practitioner <input type="checkbox"/> Partnership <input type="checkbox"/>
<ul style="list-style-type: none"> If incorporated please provide registration number: 	Incorporated practice <input type="checkbox"/>
	Registration number:-----
1.7 Is your trading name the same as the registered name?	YES <input type="checkbox"/> NO <input type="checkbox"/>
<ul style="list-style-type: none"> If No, please specify trading name and registered name: 	Trading : -----
	Registered: -----

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<p>1.8 Has the name of your firm changed in the last 5 years:</p> <ul style="list-style-type: none"> If Yes, please provide details of previous names and the dates when changed: 	<p>YES <input type="checkbox"/> NO <input type="checkbox"/></p> <p>-----</p> <p>-----</p> <p>-----</p>
<p>1.10 If a partnership, how many years has the partnership been in existence?</p>	<p>Years <input type="text"/></p>
<p>1.11 Is the name of your current partnership the same as any previously dissolved partnership you may have been involved in?</p> <ul style="list-style-type: none"> If Yes, please provide details and the date when the previous partnership was dissolved: 	<p>YES <input type="checkbox"/> NO <input type="checkbox"/></p> <p>-----</p> <p>-----</p> <p>-----</p>
<p>1.12 Number of partners / directors in the firm at the date the alleged circumstance, act error or omission giving rise to the claim occurred: (See explanatory Note 1)</p> <p>1 / 2 / 3 / 4 / 5 / 6 / 7 / 8 / 6 / 7 / 8 / 9 / 10 / 11 / 12 / 13 / 14 or more: -----</p>	
<p>1.13 Physical address :</p>	
<p style="text-align: right;">Code :</p>	
<p>1.14 Postal address :</p>	
<p style="text-align: right;">Code :</p>	
<p>1.15 Telephone number :</p>	
<p>1.16 Fax number :</p>	
<p>1.18 Contact person:</p>	
<p>1.20 Email address:</p>	
<p>1.21 Vat registration number:</p>	
<p>1.22 Firm's FFC number:</p>	
<p>1.23 Firm's MMS number:</p>	

<p>1.24 Does your firm have “top-up” insurance?</p> <ul style="list-style-type: none"> If YES, please give details of broker, insurer and policy number for the LPIIF record purposes: <p>PLEASE NOTE THAT IT REMAINS YOUR RESPONSIBILITY TO NOTIFY YOUR TOP-UP BROKER/INSURER ABOUT THIS CLAIM AND TO UPDATE THEM ON ALL DEVELOPMENTS. THE LPIIF DOES NOT TAKE ANY RESPONSIBILITY WHATSOEVER FOR ANY POSSIBLE REPUDIATION DUE TO YOUR NON-COMPLIANCE WITH YOUR TOP-UP POLICY REQUIREMENTS.</p>	<p>YES <input type="checkbox"/> NO <input type="checkbox"/></p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>
--	--

2. DETAILS OF PERSON WHO DEALT WITH THE MATTER

2.1 Surname:	
2.2 Full names:	
<p>2.3 Capacity:</p> <ul style="list-style-type: none"> If Partner/Director/Professional Assistant/Associate /Consultant, please provide practitioner number: 	<p>Candidate Attorney <input type="checkbox"/> Consultant <input type="checkbox"/></p> <p>Legal Secretary <input type="checkbox"/> Paralegal <input type="checkbox"/></p> <p>Partner/Director <input type="checkbox"/> Associate <input type="checkbox"/></p> <p>Professional Assistant <input type="checkbox"/> Pupil <input type="checkbox"/></p> <p>Advocate <input type="checkbox"/></p> <p>-----</p>
<p>2.4 If the person who dealt with the matter is a Candidate Legal Practitioner, Paralegal or Legal Secretary or in some other capacity as a member of your support staff, please provide the details of the supervising legal practitioner:</p>	<p>Name and surname: -----</p> <p>Legal Practitioner number : -----</p>
2.5 Fidelity Fund Certificate number of the supervising legal practitioner:	
2.6 Direct telephone number of the supervising legal practitioner:	
2.7 Direct e-mail address of the supervising legal practitioner:	

RISKALERT

In terms of the relevant Policy the Insured is obliged to give immediate written notice to the Insurer of a Claim or intimation of a Claim. (See clause 22 of the Policy.)

3. CLAIM			
3.1 Are you notifying the LPIIF of a potential claim?		YES <input type="checkbox"/> NO <input type="checkbox"/>	
<ul style="list-style-type: none"> If Yes, please advise the date the person dealing with the matter first became aware of the possibility of a claim: Attach a detailed report on the circumstances surrounding this possible claim. 		<p>-----</p> <p>Report Attached:</p> <p>YES <input type="checkbox"/> NO <input type="checkbox"/></p>	
3.2 Did you receive a letter of demand or any other correspondence giving an intimation of a claim?		YES <input type="checkbox"/> NO <input type="checkbox"/>	
<ul style="list-style-type: none"> If Yes, please provide a copy of the correspondence. 		<p>Letter attached:</p> <p>YES <input type="checkbox"/> NO <input type="checkbox"/></p>	
3.3 Did you receive a summons or counterclaim wherein the liability of your firm is pleaded or intimated?		YES <input type="checkbox"/> NO <input type="checkbox"/>	
<ul style="list-style-type: none"> If Yes, please provide copies of all notices and pleadings served to date. 		<p>Summons and/or Pleadings attached:</p> <p>YES <input type="checkbox"/> NO <input type="checkbox"/></p>	
3.4 Did you serve a notice of intention to defend/ notice of intention to oppose?		YES NO	
<ul style="list-style-type: none"> If Yes, please provide a copy. If No, please serve one immediately to avoid default judgment. (See explanatory Note 2) 		<p>Notice of intention to defend attached:</p> <p>YES NO</p>	
3.5 Are you in possession of your original file, relating to your conduct of the matter out of which this claim arises?		YES NO	
<ul style="list-style-type: none"> If No, who is currently in possession of the original file? If No, did you retain copies of the file contents? If Yes, please provide copies of entire file contents. 		<p>-----</p> <p>YES NO</p> <p>Copies of file attached:</p> <p>YES NO</p>	
3.6 Please specify the claim type by marking the correct option: (See explanatory Note 3.)			
RAF prescription (See Explanatory Note 2)	<input type="checkbox"/>	Patents & Trade Marks	<input type="checkbox"/>
RAF under settlement	<input type="checkbox"/>	Marine	<input type="checkbox"/>
MVA common law claim prescription	<input type="checkbox"/>	Trustees/Executors/Administrators	<input type="checkbox"/>
General prescription	<input type="checkbox"/>	Liquidations	<input type="checkbox"/>

Litigation		Matrimonial	
Conveyancing		Labour law	
Commercial		Investments	
Defamation/Iniuria		Wrongful arrest of 3 rd parties	
Prescribed medical malpractice		Wills	
Medical malpractice under settlement		Other	
3.7 If RAF prescription, was the matter registered with Prescription Alert? (See explanatory Note 4)	YES <input type="checkbox"/> NO <input type="checkbox"/>		
3.8 Has your firm notified the insurer of any other claims against it since 1 July 2016? • If Yes, please provide the reference number under which that claim was registered and the name of the claimant.	YES <input type="checkbox"/> NO <input type="checkbox"/> ----- ----- -----		
3.9 Please provide an estimate of the quantum of the claim:	R.-----		
3.10 Full names of the claimant:			
3.11 Identity number / Registration number of Claimant:			

The risk management questions below are over and above the information required in the Risk Management Questionnaire (See explanatory Note 5)

4. RISK MANAGEMENT

4.1 Please provide full details of the circumstances, errors or omissions which led to the claim:

4.2 Please provide full details of the risk management measures that have been put in place in the aftermath of this claim to prevent further claims in the future:

RISKALERT

4.3 If no or insufficient risk management measures have been put in place, please provide us with a detailed plan on how your firm will avoid similar claims from arising in future:

SIGNED.....

NAME.....

CAPACITY.....

DATE.....

EXPLANATORY NOTES:

1. The Annual Amount of Cover and the Excess in respect of each Claim is calculated by reference to the number of Principals that made up the Legal Practice on the date of the circumstance, act, error or omission giving rise to the Claim. A Principal includes a partner or director who is publicly held out to be a partner or director of the Legal Practice. (See Clauses XXIII, 7 to 15 and Schedule A and B of the relevant Policy)
2. In terms of the relevant Policy the Insured agrees to give the Insurer and any of its appointed agents all information, documents, assistance and cooperation that may be reasonably required, at the Insured's own expense. (See Clause 25)
3. RAF prescription- and Conveyancing claims attract a higher Excess (See Schedule B of the relevant Policy). The Policy specifically excludes liability for claims as specified in clause 16 of the Policy.
4. This Excess applicable to RAF prescription claims increases by an additional 20% if Prescription Alert has not been used and complied with by the Insured, by timeous lodgement and service of summons in accordance with the reminders sent by Prescription Alert. (See clauses XXII and 12(a) of the relevant Policy) For more information about Prescription Alert please consult our website www.lpiif.co.za or contact our Prescription Alert office at 021 422 2830 or alert@lpiif.co.za
5. The risk management questions in section 4 of this claim form specifically relate to the claim being reported to the LPIIF. The Risk Management Questionnaire is a self-assessment questionnaire which can be downloaded from the Insurer's website (www.lpiif.co.za) and which must be completed annually by the senior partner or director or designated risk manager of the Insured (See clauses XXIV and 23 of the Policy).



**Legal Practitioners
Indemnity Insurance
Fund NPC**
Est. 1993 by the Legal Practitioners Fidelity Fund

EXECUTOR BOND POLICY

1. GENERAL PROVISIONS

- 1.1 The Legal Practitioners Indemnity Insurance Fund NPC (hereinafter referred to as the LPIIF) will provide a bond only to the executor of a deceased estate, the administration of which is subject to the provisions of South African Law, and who is a legal practitioner practising in South Africa with a valid Fidelity Fund Certificate.
- 1.2 The LPIIF will, in its sole discretion, assess the validity of and risk associated with the information supplied in the application, and any other relevant information at its disposal, which includes the manner in which the administration of previous estates in respect of which bonds have been issued, in deciding whether or not to issue a bond to an applicant.
 - 1.2.1 If the applicant disputes the LPIIF's rejection of the application, such dispute will be dealt with in the following order:
 - 1.2.2 written submissions by the applicant should be referred to the LPIIF Executive Committee at disputes@lpiif.co.za or to the address set out in clause 6 of this document, within thirty (30) days of receipt of the communication from the LPIIF rejecting the application;
 - 1.2.3 should the dispute not have been resolved within thirty (30) days, then such dispute will be referred to the Sub-Committee appointed by the LPIIF's board of directors for a final determination.

2. EXCLUSIONS

Before completing the application, please note that a bond will NOT be issued where:

- 2.1 the applicant seeks to/ is to be appointed in any capacity other than as the executor, which includes an appointment as Master's Representative in terms of Section 18(3) of the Administration of Estates Act 66 of 1965;
- 2.2 it is found that the day to day administration of the estate will not be executed by the applicant, partners or co-directors or members of staff under the applicant's, partner's or co-director's supervision, within the applicant's offices;
- 2.3 it is found that the administration of the estate will be executed by any entity other than the legal firm of which the applicant is part;
- 2.4 the co-executor is not a practising attorney;
- 2.5 any claim involving dishonesty has been made against the applicant or any member of his or her firm. We reserve the right not to issue any bonds to the applicant or any firm in which the applicant is/ was a partner or director or member of staff at the

time of the alleged dishonesty thereafter;

- 2.6 the applicant or his or her firm has not provided the LPIIF with all updates or the required information in respect of previous bonds, or complied with the Terms and Conditions;
- 2.7 the applicant has a direct or indirect interest in the estate for which the bond is requested other than executor fees;
- 2.8 the applicant is an unrehabilitated insolvent, suspended or interdicted from practice, or where proceedings have commenced to remove him or her from the roll of practicing attorneys;
- 2.9 the applicant has either been found guilty by a court or a professional regulatory body of an offence or an act involving an element of dishonesty, or by reason of a dishonest act or breach of a duty, been removed from a position of trust;
- 2.10 the applicant has breached the terms of the policy in respect of any matter where a bond has been issued by the LPIIF.

3. TERMS AND CONDITIONS

- 3.1 An applicant must complete the prescribed application form and provide the LPIIF with all the relevant supporting documents. A copy of the application form is attached as annexure "A".
- 3.2 In the case of an application for co-executorship, each applicant must sign and submit a separate application form and also sign the Undertaking (Form J262E). Each applicant will be jointly and severally responsible for adhering to all the terms and conditions contained in this application.
- 3.3 The applicant undertakes:
 - 3.3.1 to finalise the administration of the estate for which the bond is requested, within twelve (12) months from date of issue. In the event that the administration takes longer than twelve (12) months, the executor shall provide written reasons for the delay and evidence thereof, not later than thirty (30) days before the expiry of the twelve (12) month period;
 - 3.3.2 to provide the LPIIF with information and access to records and correspondence relating to each estate for which the LPIIF has issued a bond, as if the LPIIF were in a similar position to the Master of the High Court (hereinafter referred to as the Master) or any beneficiary. In this regard:
 - 3.3.2.1 a copy of the letters of executorship must be provided to the LPIIF within thirty (30) days of being granted by the Master.

- Should the applicant fail to provide the letters of executorship to the LPIIF and remain in breach for a period of six (6) months after the initial thirty (30) days period, the LPIIF will not issue any further bonds, and the bond issued under this application will be withdrawn.
- 3.3.2.2 a separate estate bank account must be opened as required in terms of Section 28 of the Administration of Estates Act 66 of 1965 and proof of such account must be submitted to the LPIIF within thirty (30) days of being appointed as executor. When completing the application for a Fidelity Fund Certificate, all funds and property held in respect of estates must be accounted for and a detailed list setting out the particulars thereof must be provided to the LPIIF;
 - 3.3.2.3 copies of the provisional and final liquidation and distribution accounts must be provided to the LPIIF, within six (6) months from the granting of the letter of executorship. Alternatively, proof of an application for and the granting of an extension or condonation by the Master must be provided. Failure to comply with this provision will result in an application to the Master to have the applicant removed as executor and/or the withdrawal of the bond.
 - 3.3.2.4 within 30 days after the final liquidation and distribution account having been approved, the executor must account to the Master, apply for the closure of the bond and provide proof of such account and application to the LPIIF within 30 days of doing so.
 - 3.3.2.5 the Master's filing slip or release must be provided to the LPIIF within 30 days of issue by the Master.
 - 3.3.3 to ensure that all insurable assets in the estate are sufficiently and appropriately insured, within 24 hours of receipt of the letters of executorship, and to provide the LPIIF with proof of such insurance within 30 days of such appointment. The insurance must remain in place for the duration of the administration of the estate, failing which the applicant and his firm will be personally liable for any loss or damage that may result from the absence of such insurance;
 - 3.3.4 to keep the LPIIF fully informed about the progress of the administration of the estate - in the same way as he or she would inform the Master or any beneficiary, of the progress of the administration;
 - 3.3.5 to inform the LPIIF within 30 days of becoming aware of a change in his or her status as a legal practitioner or of any application for removal or suspension as a legal practitioner or executor or any similar office;
 - 3.3.6 If an applicant or a firm reaches 75 % of the R20 million limit (that is, R15 million) as specified in clause 4 and clause 3.3.1 is applicable, the applicant or firm shall provide the LPIIF, within thirty (30) days from request, with a written plan evidencing how the reduction of the exposure in respect of active bonds older than twelve (12) months will be achieved. Failure to comply with this provision will result in no new bonds being issued.
 - 3.4 Once a bond has been issued, the applicant will not seek to reduce its value, unless the Master is satisfied that the reduced security will sufficiently indemnify the beneficiaries and has given written confirmation of such reduction. A copy of such written confirmation must be provided to the LPIIF within thirty (30) days of it being provided.
 - 3.5 The applicant consents to the LPIIF making enquiries about his or her credit record with any credit reference agency and any other party, for the purposes of risk management.
 - 3.6 The applicant consents to the Legal Practice Council giving the LPIIF all information in respect of the applicant's disciplinary record and status of good standing or otherwise.
 - 3.7 The applicant undertakes to give the LPIIF all information, documents, assistance and co-operation that may be reasonably required, at the applicant's own expense. If the applicant fails or refuses to provide assistance or co-operation to the LPIIF, and remains in breach for a period of thirty (30) days after receipt of written notice from the LPIIF to remedy such breach, the LPIIF reserves the right to:
 - 3.7.1 report the applicant to the Legal Practice Council; and/or
 - 3.7.2 request the Master to remove him or her as the executor.
 - 3.8 The applicant accepts personal liability for all and any acts and/or omissions, including negligence, misappropriation or maladministration committed or incurred whether personally or by any agent, consultant, employee or representative appointed or used by the applicant in the administration of an estate.
 - 3.9 In the event of a claim arising out of a fraudulent act or misappropriation or maladministration, the LPIIF reserves the right to take action to:
 - 3.9.1 institute civil and/or criminal proceedings against the applicant relating to any payments already made. A certificate of balance provided by the LPIIF in respect of the payment made in terms of the bond will be sufficient proof of the amount due and payable; and/or

- 3.9.2 report the applicant to the Legal Practice Council.
- 3.10 The other partners or directors of the firm must sign a resolution acknowledging and agreeing to the provisions set out in that resolution. A copy of such resolution is attached as annexure "B".
- 3.11 If there is any dispute between the LPIIF and the executor as to the validity of a claim by the Master, then such dispute will be dealt with in the following order:
- 3.11.1 written submissions by the executor should be referred to the LPIIF's internal dispute team at dispute@lpiif.co.za or to the address set out in clause 6 of this document, within thirty (30) days of receipt of the written communication from the LPIIF, which has given rise to the dispute;
- 3.11.2 should the dispute not have been resolved within thirty (30) days from the date of receipt by the LPIIF of the submission referred to in 3.11.1, then the parties must agree on an independent senior estates legal practitioner with no less than 15 years standing in the legal profession, to which the dispute can be referred for a determination. Failing an agreement, the choice of such senior estates legal practitioner will be referred to the chairperson of the Legal Practice Council 1 (or his/her successor in title) having jurisdiction over the executor;
- 3.11.3 the parties must make written submissions which will be referred for a determination to the senior estates legal practitioner referred to in 3.11.2. The costs incurred in so referring the matter will be borne by the unsuccessful party;
- 3.12 A copy of the executor's current Fidelity Fund Certificate must be submitted annually within (thirty) 30 days of issue, but no later than the end of February each year.

4. LIMITS

- 4.1 The value of any bond is limited to **R5 million** per estate. The cumulative total of all bonds issued to any one firm will not exceed **R20 million** at any given time.
- 4.2 If a legal practitioner is part of or holds himself or herself out to be part of more than one (1) firm simultaneously, such legal practitioner shall be permitted to obtain bonds as a practitioner only under one (1) firm at any given time.
- 4.3 In the case of co-executorship, each executor needs to meet the criteria as specified in this document. The limits will apply as mentioned in 4.1 and 4.2 above as if there were no co-executorship.
- 4.4 No new bonds will be issued where the applicant or the firm has failed to adhere to any of the provisions of this policy.

5. SOLE RECORD OF THE AGREEMENT

- 1.1 This document constitutes the sole record of the agreement between the LPIIF, the firm and the applicant in relation to the bond to which this document applies.
- 5.2 This document supersedes and replaces all prior

commitments, undertakings or representations, (whether oral or written) between the parties in respect of this application.

- 5.3 No addition to, variation, novation or agreed cancellation of any provision of this document shall be binding upon the LPIIF unless reduced to writing and signed by or on behalf of both parties, by authorised persons.
- 5.4 If there are any material changes to the information contained in this application, the applicant undertakes to inform the LPIIF in writing within fifteen (15) days of such change.

6. DOMICILIUM

The parties choose as their *domicilia citandi et executandi* for the service of notices given in terms of this agreement and all legal processes, the following addresses:

- 6.1 LPIIF: 1256 Heuwel Avenue
Centurion
0157
Email: courtbonds@lpiif.co.za
- 6.2 The Applicant: The address provided in the application form.
- 6.3 Notices or legal processes may be delivered by hand or sent by electronic mail to the above addresses. The date of receipt by the addressee will be the date of hand delivery or transmission.
- 6.4 Either party may change its *domicilium* by giving the other party written notice of such change.

7. DECLARATION

If the bond is granted, I agree:

- 7.1 to fully comply with the terms and conditions contained in clause 3;
- 7.2 that all estate funds will be invested strictly in terms of the Administration of Estates Act 66 of 1965, the Legal Practice Act 28 of 2014 and the rules and regulations as promulgated in respect thereof;
- 7.3 to furnish the LPIIF with the annual audit certificates completed by my or our external auditors, verifying the continued existence of the property or funds under my control as executor within thirty (30) days of such certificate being issued.

I hereby confirm that I have read, understand and agree to be bound by the terms and conditions contained in this document.

DATED AT ON THISDAY OF 20.....

WITNESS (Full names & signature)

APPLICANT (Full names & signature)

WITNESS (Full names & signature)



EXECUTOR BOND APPLICATION FORM

APPLICATION FORM FOR EXECUTOR BOND

1. APPLICANT	
1.1	Surname :
1.2	Full names :
1.3	Identity number :
1.4	Practitioner number :
1.5	Fidelity fund certificate number :
1.6	Residential address :
	Code :
1.7	Cell number :
1.8	Work telephone number :
1.9	Work email address :
1.10	Are you a practising attorney? YES <input type="checkbox"/> NO <input type="checkbox"/>
1.11	When were you admitted as an attorney?
1.12	Have you previously been appointed as an executor, curator, liquidator or trustee? YES <input type="checkbox"/> NO <input type="checkbox"/>
(a)	If, YES, please provide a list for the past 3 years : <div style="border-bottom: 1px dashed black; height: 15px; margin-bottom: 5px;"></div> <div style="border-bottom: 1px dashed black; height: 15px; margin-bottom: 5px;"></div> <div style="border-bottom: 1px dashed black; height: 15px; margin-bottom: 5px;"></div> <div style="border-bottom: 1px dashed black; height: 15px; margin-bottom: 5px;"></div> <div style="border-bottom: 1px dashed black; height: 15px; margin-bottom: 5px;"></div>

<p>1.13 Have you ever been removed from office in respect of an appointment referred to in 1.12?</p>	<p>YES <input type="checkbox"/> NO <input type="checkbox"/></p>
<p>(a) If YES, please provide details :</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>	
<p>1.14 Has the Master ever disallowed your fees relating to an appointment referred to in 1.12?</p>	<p>YES <input type="checkbox"/> NO <input type="checkbox"/></p>
<p>(a) If YES, please provide details :</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>	
<p>1.15 Number of years' experience as an executor :</p> <p>If less than 2 years', provide proof of experience, education or mentorship.</p>	<p>_____years _____months</p>
<p>1.16 PLEASE ATTACH APPLICANT'S ABRIDGED CURRICULUM VITAE</p>	
<p>1.17 Are you being appointed as an agent or executor?</p>	<p>Agent <input type="checkbox"/></p> <p>Executor <input type="checkbox"/></p>

<p>1.18 By whom are you nominated?</p>	<p>In terms of a will <input type="checkbox"/></p> <p>Family <input type="checkbox"/></p> <p>Master <input type="checkbox"/></p> <p>Court Order <input type="checkbox"/></p> <p>Other <input type="checkbox"/></p> <p>Details _____</p> <p>_____</p>
<p>1.19 Are you the SOLE executor of this estate?</p> <ul style="list-style-type: none"> If NO, the co- executor, who must be a practising attorney, should complete a separate application form. J262 E must be co-signed by both applicants. 	<p>YES <input type="checkbox"/> NO <input type="checkbox"/></p>
<p>1.20 Are you / is your firm personally responsible for the day to day administration of the estate?</p>	<p>YES <input type="checkbox"/> NO <input type="checkbox"/></p>
<p>1.21 Has a claim been made against you or the firm relating to a previous estate administrated by you or the firm?</p>	<p>YES <input type="checkbox"/> NO <input type="checkbox"/></p>
<p>(a) If YES, please provide details :</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p>	
<p>1.22 Do you have any direct or indirect interest in this estate other than executor fees?</p>	<p>YES <input type="checkbox"/> NO <input type="checkbox"/></p>

(a) If YES, please provide details :

1.23 Have you made application for an executor bond with an institution other than the LPIIF in the past three years?

YES ☐

NO ☐

(a) If YES, state name of institution (s) and estate name(s) :

1.24 Has any previous application for an executor bond with the LPIIF or other institution been declined?

YES ☐

NO ☐

(a) If YES, please provide details:

1.25 Have you ever been declared insolvent or has your personal estate been placed under administration?

YES ☐

NO ☐

- If YES, please provide proof of rehabilitation or release from administration.

<p>1.26 Have you (or the person who will be assisting with the estate within your firm) :</p> <p>1.26.1 ever been found guilty (by a court of law or professional regulatory body) of an offence involving an element of dishonesty?</p> <p>1.26.2 been struck off the roll of practising attorneys or suspended or interdicted from practice?</p> <p>1.26.3 any outstanding criminal cases or civil lawsuits or any regulatory disciplinary matters pending?</p>	<p>YES <input type="checkbox"/> NO <input type="checkbox"/></p> <p>YES <input type="checkbox"/> NO <input type="checkbox"/></p> <p>YES <input type="checkbox"/> NO <input type="checkbox"/></p>
<p>(a) If YES, please provide details :</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>	
<p>1.27 Is there any other material factor that you wish to bring to the LPIIF's attention?</p>	

<h2>2. FIRM</h2>
<p>2.1 Name of firm :</p>
<p>2.2 Firm number :</p>
<p>2.3 Number of partners/ directors :</p>
<p>2.4 Physical address :</p>

Code :	
2.5 Postal address :	
Code :	
2.6 Telephone number :	
2.7 Fax number :	
2.8 Does your firm have misappropriation of trust monies insurance? • If YES, please, state insurer and the limit of Indemnity.	YES <input type="checkbox"/> NO <input type="checkbox"/> -----
3. DECEASED	
3.1 Surname :	
3.2 Full names :	
3.3 Identity number :	
3.4 Date of birth :	
3.5 Date of death : • A copy of the death certificate must be attached to this application form.	
3.6 At which Master's office was the estate reported?	Province : ----- Division : -----
3.7 Master's reference / Estate number :	

<p>3.8 Did the deceased die testate or intestate?</p> <ul style="list-style-type: none"> If testate a copy of the will must be attached to this application form. 	<p>Testate <input type="checkbox"/></p> <p>Intestate <input type="checkbox"/></p>
<p>3.9 In terms of the inventory please advise the following :</p> <ul style="list-style-type: none"> A copy of the inventory must be attached to this application. 	<p>Assets : R _____</p> <p>Liabilities : R _____</p>
<p>3.10 Would appropriate insurance for the insurable assets in the estate be in place on your appointment?</p> <ul style="list-style-type: none"> Please refer to clause 3.3.3 of the terms and conditions. 	<p>YES <input type="checkbox"/> NO <input type="checkbox"/></p>

The following documents are required for a bond to be issued:

1. A covering letter on the applicant's official company letterhead;
2. Proof of practice or firm number;*
3. Proof of practitioner or member number;
4. The original form J262E (Bond of Security) which must be completed and signed by the applicant, whose signature must be attested to by two witnesses;
5. Copy of the will (if applicable);
6. Copy of certified death certificate (a copy of the death notice, if there is no death certificate);
7. Copy of court order (if applicable);
8. Inventory or statement of assets & liabilities of the estate;
9. Copy of any directions from the Master as to the security required;
10. Proof of Master's estate reference number;
11. Nomination forms by the beneficiaries/person appointing the applicant as executor;
12. The executor's acceptance of trust as executor;
13. A certified copy of the executor's identity document;
14. The executor's current fidelity fund certificate;
15. If applicant is not a director/partner a letter on the firm's letterhead signed by one of the partners confirming that the appointee is employed by the firm and has been authorised to apply for bonds of security in the name of the firm and to administer the estate on behalf of the firm. This letter must be accompanied by the certified current fidelity fund certificate of the partner/ director;
16. Applicant's abridged curriculum vitae (CV);

17. A resolution as contemplated in clause 3.10 of the terms and conditions, where applicable.

✓ The application documents may not be faxed or emailed.

✓ The application forms and requirements are available on our website www.lpiif.co.za.

**This may be obtained from your Provincial Council / Regulator.*

Alternatively you may contact:

- Ms Patricia Motsepe on 012 622 3927 - email patricia.motsepe@lpiif.co.za
- Mr Sifiso Khuboni on 012 622 3935 - email Sifiso.khuboni@lpiif.co.za

I hereby declare that to the best of my knowledge and belief, the information provided in this application is true in every respect, and will form the basis of the agreement between myself and the LPIIF. If any information herein is not true and correct, or if any relevant information has not been disclosed, the LPIIF will be entitled to make use of all rights and remedies available to it in terms of the law.

DATED AT ON THIS DAY OF 20.....

.....

WITNESS (Full names & signature) APPLICANT (Full names & signature)

.....

WITNESS (Full names & signature)



**Legal Practitioners
Indemnity Insurance
Fund NPC**
Est. 1993 by the Legal Practitioners Fidelity Fund

RESOLUTION REQUIRED IN TERMS OF CLAUSE 3.10

In the matter of: Estate Late _____

_____ [the firm of attorneys]
herein represented by:

1. _____;
2. _____;
3. _____;
4. _____;
5. _____;

Full names of directors or partners signing. (Attach a list if necessary.)

who warrant/s that they or she or he are/is duly authorised to act on behalf of the firm and to bind it in terms of this resolution;

and who, by signing this document, undertake/s and agree/s unequivocally that the firm of attorneys together with each and every director or partner listed above, will be jointly and severally liable to the Legal Practitioners Indemnity Insurance Fund NPC (LPIIF) for the fulfilment of the terms and conditions set out in 1 and 2 below.

1. The firm and its directors or partners will provide full co-operation to the LPIIF in the event of any claim being made against the LPIIF in respect of any fraudulent act, misappropriation or maladministration committed by the firm, or its present or former director or partner or present or former employee, arising out of the administration of an estate in respect of which the LPIIF has issued an executor bond.
2. The firm and its directors or partners will provide full assistance to the LPIIF:
 - 2.1 to institute and prosecute to completion any criminal or civil proceedings brought against any person referred to in 1 above or any individual or entity connected to any fraudulent act, misappropriation or maladministration resulting in a claim for which the LPIIF may have to pay compensation;
 - 2.2 to report any attorney or candidate attorney to the relevant law society or regulator on the request of the LPIIF within thirty (30) days;
3. The directors or partners renounce the legal benefits of “order”, “excussion”, “division”, “cession of action”, “*non numeratae pecuniae*”, “*non causa debiti*”, “*errore calculi*”, “revision of accounts” and all or any exceptions which could or might be pleaded to any claim.

Director/Partner 1 Signature

Director/Partner 2 Signature

Director/Partner 3 Signature

Director/Partner 4 Signature

Director/Partner 5 Signature