

STANDING UP TO GOVERNMENT IN PUBLIC INTEREST LITIGATION – DOES IT REALLY EFFECT CHANGE?

**Withholding retirement benefits –
retirement funds boards' duty to
scrutinise employers' requests**

**Parents who assault their children –
the inconsistency of applying s 297(4)
of the Criminal Procedure Act**

Murder! Intention,
premeditation,
pre-planned –
what does it
all mean?

**Selling property without
spousal consent –
what are the
consequences?**

**Unjustifiable
restriction of the
constitutionally
entrenched
right of access
to courts**

**Dealing with
deceased estates
and maintaining
their accounting
records**

**Effective handling of
applications for
postponement during
internal disciplinary inquiries
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8 Standing up to government in public interest litigation – does it really effect change?

The Nkungumathe community in Nkandla has been waiting for a new school since 1996. In May 2010, the Kwa-Zulu-Natal Member of the Executive Council (MEC) for Education took the decision to establish and register the Khuba secondary school for the Nkungumathe community. Then in February 2017, the MEC withdrew this decision. The applicants in *Mpungose Traditional Council and Others v MEC for Education, KZN Province and Others* [2019] 3 All SA 817 (KZP) subsequently sought to review and set aside the MEC's decision and received a favourable judgment. However, this has not necessarily changed the reality of the Nkungumathe community. Legal practitioner, **Daniël Eloff**, explains that although it achieved a legal victory for the community the fight to secure the education rights of the children of the Nkungumathe community is not nearly over.

10 Murder! Intention, premeditation, pre-planned – what does it all mean?

The consequence of the application of s 51 of the Criminal Law Amendment Act 105 of 1997 is of crucial importance to legal practitioners who practice criminal law. Specifically, legal practitioners should be aware of the difference between planned and premeditated murder and the various consequences. A question that may arise is whether the actions of the accused could be considered as spur of the moment, premeditated or planned. Legal practitioner, **Palesa Judith Mokose**, examines the case of *Kekana v S* (SCA) (unreported case no 629/13, 1-10-2014) (Mathopo AJA (Lewis JA and Gerven AJA concurring)) and unpacks the meaning of the terms 'planned' and 'premeditated'.

FEATURES

12 Unjustifiable restriction of the constitutionally entrenched right of access to courts

When considering the constitutional right of access to courts, one may ask if the procedural limitation, imposed by s 29(1) of the Magistrates' Courts Act 32 of 1944, is justifiable? Furthermore, the magistrate's court does not enjoy inherent jurisdiction such as that possessed by the High Courts. Legal practitioner, **Marunelle Hitge**, submits that by limiting motion proceedings, s 29(1) imposes an unjustifiable limitation on the right of potential claimants to have their claims adjudicated in the most efficient, expeditious and cost-effective manner.

16 Withholding retirement benefits – retirement funds boards' duty to scrutinise employers' requests

Employers may request retirement funds boards to withhold members' retirement funds to provide them with an opportunity to obtain court orders that confirm members' liability to compensate them for financial harm caused by such members. Associate Professor, **Clement Marumoagae**, looks at the role of retirement funds boards' when employers make such requests and writes that retirement funds boards should not adopt a passive approach when requested to withhold their members' retirement benefits, but should instead actively attempt to understand the circumstances on which employers have based their request to satisfy themselves that such requests are not designed to financially prejudice members.

20 Parents who assault their children – the inconsistency of applying s 297(4) of the Criminal Procedure Act

The maxim *culpa poena par esto* has long been considered a cornerstone of criminal justice. Therefore, a sentence must be proportionate to the gravity of the offence and the degree of responsibility taken by the offender. The proportionality principle makes the blunt tool of punishment a valid and morally acceptable element of social order. Magistrate, **Desmond Francke**, reasons that in *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others (Global Initiative to End all Corporal Punishment of Children and Others as amici curiae)* 2019 (11) BCLR 1321 (CC) the Constitutional Court ignored the maxim *culpa poena par esto* in deciding that the common law defence of reasonable and moderate parental chastisement is inconsistent with the provisions of ss 10 and 12(1)(c) of the Constitution.

23 Selling property without spousal consent – what are the consequences?

It is common knowledge that spouses married in community of property need one another to co-sign agreements and legal documents. Specifically, ss 15(2) and 15(3) of the Matrimonial Property Act 88 of 1984 provide that a spouse married in community of property, shall not without the written consent of the other spouse, 'alienate, mortgage, burden with servitude or confer any other real right in any immovable property forming part of the joint estate'.



Therefore, it is unthinkable that someone could awake one day to find out that their spouse has sold and transferred immovable property that falls within the estate, without their knowledge. Legal practitioners, **Alethea Verona Robertson** and **Herbert James David Robertson**, write that this very scenario has indeed transpired, and on more than one occasion.

EDITOR:

Mapula Oliphant
NDip Journ (DUT) BTech (Journ) (TUT)

PRODUCTION EDITOR:

Kathleen Kriel
BTech (Journ) (TUT)

SUB-EDITOR:

Kevin O'Reilly
MA (NMU)

SUB-EDITOR:

Isabel Joubert
BIS Publishing (Hons) (UP)

NEWS REPORTER:

Kgomotso Ramotsho
Cert Journ (Boston)
Cert Photography (Vega)

EDITORIAL SECRETARY:

Shireen Mahomed

EDITORIAL COMMITTEE:

Giusi Harper (Chairperson), Peter Horn,
Maboku Mangena, Mohamed Randera

EDITORIAL OFFICE: 304 Brooks Street, Menlo Park,
Pretoria. PO Box 36626, Menlo Park 0102. Docex 82, Pretoria.

Tel (012) 366 8800 Fax (012) 362 0969.

E-mail: derebus@derebus.org.za

DE REBUS ONLINE: www.derebus.org.za

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ACCOUNT INQUIRIES: David Madonsela

Tel (012) 366 8800 E-mail: david@lssa.org.za

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After 65 years in existence, the *De Rebus* journal, has cemented its need and usefulness in the legal profession. *De Rebus* has become a necessary research tool that is used for educational purposes by the legal fraternity. The first issue of the journal was published in 1956 under the title *De Rebus Procuratoriis* (about the affairs of attorneys), in that issue, the President of the then Incorporated Law Society of the Transvaal, Allen Snijman, wrote: 'May this journal rapidly become the recognised organ of official communication ... and at the same time the vehicle of a bond of fellowship and loyalty to the tenets of our profession. Read it, advertise your requirements in it, send in contributions to it, and let us build it into something worthy of the intellect it represents' 1956 (Sept) *DRP* 1.

Throughout the years, the support the legal fraternity has shown to the journal can be seen by the fact that the journal has never lacked articles to be published. In fact, at the moment there is a reserve list of articles until August 2021. *De Rebus* is grateful for the article submissions by legal practitioners and the continued interaction with the profession. Articles, which are of importance to legal practitioners, continue to be published in *De Rebus* ensuring the journal sticks to its mandate of being the mouthpiece of the legal profession, for all legal practitioners while educating the profession. However, *De Rebus* needs financial support from the profession in the form of advertisements to ensure it carries on fulfilling its mandate and to guarantee its financial sustainability and longevity.

Since its inception, *De Rebus* has evolved with the times in the

way it is published and its contents. Through this evolution, the objectives of the journal have been to remain relevant to the profession, while upholding the highest standards to impart legal education.

De Rebus is now fully digital with a few subscription-based printed copies. The move to the digital version was to mitigate the forever rising costs of printing the journal, which attorneys and candidate attorneys previously received for free. Even though the journal is currently funded by the Legal Practice Council (LPC), the current economic climate dictates that all entities should relook at their budgets and make necessary cuts, and the LPC is no exception.

The publisher of *De Rebus*, the Law Society of South Africa, is grateful for the financial subvention provided by the LPC, however, for the journal to be financially sustainable it needs advertising income. We appeal to the legal profession, and of course other organisations, to consider supporting the journal by advertising in it. Our advertising rates are available on the *De Rebus* website and are discounted across the board and



Mapula Oliphant - Editor

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- Please note that the word limit is 2 000 words.
- Upcoming deadlines for article submissions: 21 June, 19 July and 23 August 2021.



By
Magate
Phala

Effective handling of applications for postponement during internal disciplinary inquiries and arbitration hearings

Rule 23 of the Rules for the Conduct of Proceedings before the Commission for Conciliation, Mediation and Arbitration (CCMA) deals with the procedure on how to postpone an arbitration and provides as follows:

'(1) An arbitration may be postponed –

(a) by written agreement between the parties; or

(b) by application to the Commission and on notice to the other parties ...

(2) The Commission must postpone an arbitration without the parties appearing if –

(a) all the parties to the dispute agree in writing to the postponement; and

(b) the written agreement for the postponement is received by the Commission at least seven (7) days prior to the scheduled date of the arbitration.

(3) If the conditions of sub-rule (2) are not met, any party may apply in terms of rule 31 to postpone an arbitration by delivering an application to the other parties to the dispute and filing a copy with the Commission before the scheduled date of arbitration.

(4) After considering the written application, the Commission may –

(a) without convening a hearing, postpone the matter; or

(b) convene a hearing to determine whether to postpone the matter.'

In *Free State Gambling and Liquor Authority v Motane NO and Others* (LC) (unreported case no JR1130/16, J23/15, 10-3-2017) Tlhotlhamajie J held at para 16 that:

'(a) postponements at arbitration hearings are not to be readily granted;

(b) postponements in arbitrations should be granted on "less generous basis". This approach is informed by the recognition that the [Labour Relations Act 66 of 1995] LRA requires that labour disputes need to be resolved expeditiously and thus arbitrators have a wide discretion in granting or refusing to grant a postponement;

(c) where fundamental fairness and justice justifies a postponement, the arbitrator may in appropriate cases, allow such an application even if it was not timeously made;

(d) the Labour Court sitting in review will adopt a stringent and restricted approach to interfering with the refusal to grant postponements by arbitrators;

(e) it is only when a compelling case has been made for interfering with the exercise of the discretion of the arbitrator, will the court interfere with the refusal to grant a postponement. This can be in instances where the arbitrator was influenced by wrong principles or misdirection on the facts, or where the decision reached could not reasonably have been made by an arbitrator properly directing him/herself to all the relevant facts and principles.'

In the context of internal disciplinary hearings, the procedure for postponement is usually contained in the disciplinary policy of the employer. In some instances, there are compelling reasons, which show that it is fair for a disciplinary hearing to be postponed, however,

in instances where no such procedure is outlined in the disciplinary policy of the employer, a decision to grant or refuse an application for a postponement of a disciplinary hearing should be made by a chairperson.

Some of the factors that the chairperson should consider, include among others, whether –

- any exceptional circumstances exist to allow the postponement;
- good cause has been shown by the applicant party (employee or employer) in the application for postponement;
- the employee has been afforded an adequate time to prepare for the hearing; or
- there have been any previous delays or requests for postponement.

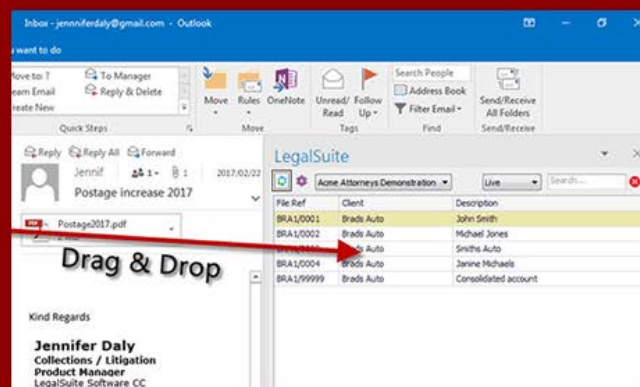
In *Old Mutual Life Assurance Co SA Ltd v Gumbi* [2007] 4 All SA 866 (SCA), the court held that a mere production of a medical certificate may not necessarily be regarded as a sufficient reason to postpone a disciplinary hearing (para 19 and 21): 'A mere production of the medical certificate was not, in the circumstances of this case, sufficient to justify the employee's absence from the hearing. As the certificate did not allege that he was incapable of attending at all, the chairman was entitled to require him to be present at the resumed hearing so as to himself enquire into his capacity to participate in the proceedings. These facts play a major role in determining unfairness when the interests of both parties are taken into account. ... *When all these facts are viewed objectively, it cannot be said that*

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Old Mutual has acted procedurally unfairly in continuing with the hearing in the employee's absence and dismissing him for the misconduct of which he was found guilty. The employee and his representative are the only persons to blame for his absence' (my italics).

In *Lekolwane and Another v Minister of Justice and Constitutional Development* 2007 (3) BCLR 280 (CC), the court held:

'The postponement of a matter set down for hearing on a particular date cannot be claimed as a right. An applicant for a postponement seeks an indulgence from the court. A postponement will not be granted, unless this court is satisfied that it is in the interests of justice to do so. In this respect the applicant must ordinarily show that there is good cause for the postponement. Whether a postponement will be granted is therefore in the discretion of the court. In exercising that discretion, this court takes into account a number of factors, including (but not limited to) whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties, whether the application is opposed and the broader public interest.'

In *SA Broadcasting Corporation v Commission for Conciliation, Mediation and Arbitration and Others* (2019) 40 ILJ 603 (LC), the employer's (SABC) legal representative informed the Commissioner, the employees, and their legal represent-

atives that his wife had been diagnosed with cancer and that she was scheduled to undergo chemotherapy treatment the next day, Tuesday, 22 November 2016. He asked to be excused until 11 am the next day for him to accompany her. A legal representative – who represented one of the applicants at the arbitration – mentioned that, to his knowledge, it was unlikely that the chemotherapy would be concluded by 11 am and suggested that the arbitration be adjourned until the following week. All present, including the Commissioner, agreed.

During the afternoon of 22 November 2016, the employer's legal representative advised that due to unexpected developments in his wife's treatment, he would be unavailable for the rest of the week. It transpired that the chemotherapy would take much longer than he had anticipated and that his wife would require his assistance afterwards. He mentioned that he would send his associate to apply for a postponement the next day. On the same afternoon of 22 November 2016, he sent a letter to all the attorneys representing the individual employees and informed them of the situation.

The arbitrator refused the postponement. He reasoned that the arbitration had been set down for five days and that the employer's legal representative must have been aware prior to Monday already about the procedures his wife had to undergo. He was of the opinion that 'there is no reason why counsel could not have been instructed or another colleague'.

The SABC took the arbitrator's award on review to the Labour Court where it was held that the arbitrator's refusal to postpone the arbitration in the unique circumstances of this case was irrational and unreasonable. The court reviewed and set aside the arbitrator's ruling which refused the SABC's request for postponement and remitted the dispute back to the CCMA for a fresh arbitration on the merits before a different Commissioner.

Chairpersons of disciplinary hearings may be lenient with applications for a first postponement. However, in the event where such applications are made deliberately with the intention to (directly or indirectly) delay and/or frustrate the proceedings, then a chairperson should adopt a rigid and strict approach in those circumstances. Therefore, it is recommended that employers should develop and incorporate in their disciplinary policies, a clear procedure regarding postponement of disciplinary hearings. This procedure will prevent unreasonable delays of the disciplinary hearing process and curtail costs associated with the process itself.

Magate Phala Dip Labour Law (University of Limpopo) PG Dip Labour Law (UJ) is a director at Magate Phala and Associates in Centurion.



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By
Simthandile
Kholelwa
Myemane

Dealing with deceased estates and maintaining their accounting records

Legal practitioners, as part of the services they may provide relate to deceased estates, either in the role as executors, administrators or as agents. In terms of the legislation that regulates legal practitioners, both the Legal Practice Act 28 of 2014 (LPA) and the Rules made under the authority of ss 95(1), 95(3) and 109(2) of the LPA, legal practitioners are required to prepare and maintain trust accounting records relating to deceased estates in which the legal practitioner is involved. This article does not seek to explore the administration of estates in detail but deals with certain areas that are of concern.

Section 87(3)(c) of the LPA states: 'For the purposes of subsections (1) and (2), "accounting records" includes any record or document kept by or in the custody or under the control of any trust accounting practice which relates to -

...
(c) any estate of a deceased person or any insolvent estate or any estate placed under curatorship, in respect of which an attorney in the trust account practice is the executor, trustee or curator or which he or she administers on behalf of the executor, trustee or curator'.

Rule 54.6 dealing with accounting requirements states: 'A firm shall keep in an official language of the Republic such accounting records, which record both business account transactions and trust account transactions, as are necessary to enable the firm to satisfy its obligations in terms of the Act, these rules and any other law with respect to the preparation of financial statements that present fairly and in accordance with an acceptable financial reporting framework in South

Africa the state of affairs and business of the firm and to explain the transactions and financial position of the firm including, without derogating from the generality of this rule -

...
54.6.2 records containing entries from day to day of all monies received and paid by it on its own account, as required by sections 87(1) and 87(3) of the Act;

54.6.3 records containing particulars and information of -

54.6.3.1 all monies received, held and paid by it for and on account of any person;

...
54.6.3.4 any interest credited to or in respect of any separate trust savings'.

According to r 54.9.1, all such records shall be retained for a period of seven years from date of the last entry recorded in each book or other document of record or file.

Rule 54.15.1 of the Rules states: 'Every firm shall extract monthly, and in a clearly legible manner, a list showing all persons on whose account money is held or has been received and the amount of all such moneys standing to the credit of each such person, who shall be identified therein by name, and shall total such list and compare the said total with the total of the balance standing to the credit of the firm's trust banking account, trust investment account and amounts held by it as trust cash, in the estates of deceased persons and other trust assets in order to ensure compliance with the accounting rules'.

In terms of s 55(1)(b) of the LPA, the Legal Practitioners' Fidelity Fund (the Fund) 'is liable to reimburse persons who suffer pecuniary loss, not exceeding

the amount determined by the Minister from time to time by notice in the [Government] Gazette, as a result of theft of any money or other property given in trust to a trust account practice in the course of the practice of the attorney or an advocate referred to in section 34(2) (b) as such, if the theft is committed -

...
(b) by an attorney or person acting as executor or administrator in the estate of a deceased person'. Considering the claims notified to and paid by the Fund relating to deceased estates over the past five years, the Fund has noticed that this category of claims has been in the top three categories of higher claims as can be seen in the table below.

Of note, the claims on deceased estates notified to the Fund relate to matters for which no bonds of security were issued by the Legal Practitioners' Indemnity Insurance Fund NPC (LPIIF).

In terms of s 77(3)(a) of the LPA dealing with the provision of insurance cover and suretyships, the Board of the Fund may enter into deeds of suretyship to the satisfaction of the Master of the High Court, who, in turn, has jurisdiction in order to provide security on behalf of a legal practitioner in respect of work done by that legal practitioner as executor in the estate of a deceased person. The Fund, through the LPIIF that the Fund established in 1993, issues bonds of security to legal practitioners who are appointed as executors in deceased estate matters. Legal practitioners can obtain these bonds through other insurers and are not compelled to obtain them through the LPIIF. Where the LPIIF has issued bonds of security, claims arising from those deceased estates handled by

Claims notified and paid		Financial year				
		2015	2016	2017	2018	2019
Notified	Number	111	106	129	Unavailable	Unavailable
	Value	R 37 914 562	R 52 729 070	R 53 055 931	R 48 992 767	R 19 383 982
Paid	Number	40	40	44	Unavailable	Unavailable
	Value	R 14 747 537	R 14 747 537	R 9 797 338	R 23 377 752	R 45 917 919

Source: www.fidfund.co.za/financial-reports/

the legal practitioner are reported to the LPIIF.

During the Fund's inspections at some legal practices, it was noted that where the LPIIF issued bonds of security for deceased estates, legal practitioners failed to notify the LPIIF of a distributed and finalised estate resulting in the LPIIF continuing to reflect an open position on those bonds. Open positions on bonds of security negatively impact on the insurance premiums for the LPIIF. These open positions also impact on the Fund's profiling of the legal practice and legal practitioner. Maintenance of accounting records could be a reminder for this notification as soon as 'nil' balances are recorded.

In terms of the Administration of Estates Act 66 of 1965, s 28 dealing with banking accounts states that:

'(1) An executor –

(a) shall, unless the Master otherwise directs, as soon as he or she has in hand moneys in the estate in excess of R 1 000, open a cheque account in the name of the estate with a bank in the Republic and shall deposit therein the moneys which he or she has in hand and such other moneys as he or she may from time to time receive for the estate;

(b) may open a savings account in the name of the estate with a bank and may transfer thereto so much of the moneys deposited in the account referred to in paragraph (a) as is not immediately required for the payment of any claim against the estate;

(c) may place so much of the moneys deposited in the account referred to in paragraph (a) as is not immediately required for the payment of any claim against the estate on interest-bearing deposit with a bank'.

The Fund has noted – through inspections conducted at legal practices – that some legal practitioners do not open separate banking accounts as required in terms of this section for estate moneys in excess of R 1 000 but receive and keep the money in the general trust banking account of the legal practice. In this instance, the deceased estates form part of the general trust accounting records.

The Fund has noted through inspections that other legal practitioners do open estate late banking accounts into which estate's money is deposited as required and the money not immediately required is deposited into savings and interest-bearing deposit accounts. What the Fund has not seen in several instances, is the preparation and maintenance of accounting records where estate late accounts and separate interest-bearing accounts are opened. The scope of the auditors who audit trust accounts excludes the audit of deceased estates accounts, except for those that flow through the

general trust account of the legal practice, and this has resulted in this area of entrustment not being audited, and in turn led to some legal practitioners not maintaining the accounting records as required, and mishandling and/or misappropriating the money entrusted, hence the claims notified to the Fund. Legal practitioners should note that for purposes of inspections the Fund conducts at the appointment of the Board, deceased estates are not excluded from the scope of inspection. Legal practitioners should further take note that if at inspection it is found that the accounting records were not maintained, the inspector may write up the books and the cost for that inspection will be borne by the legal practice.

Because this area of entrustment poses a risk to both the Fund and the LPIIF, in that the issuing of bonds of security, both the Fund and the LPIIF have a vested interest on how these funds are dealt with at legal practices. As part of the profiling that the Fund conducts, the Fund also considers the deceased estates and their administration. Lack of controls or mismanagement of deceased estates raises the risk level of the legal practice and a legal practitioner, it may lead to an application through the courts for curatorship. Where there are concerns as to how deceased estates are dealt with by a trust legal practice, it may lead to an expanded inspection beyond just the deceased estates as they are symptomatic of a potential mismanagement of trust moneys in general.

In terms of s 51(4) of the Administration of Estates Act, '[a]n executor shall not be entitled to receive any remuneration before the estate has been distributed as provided in section 34(11) or 35(12), as the case may be, unless payment of such remuneration has been approved in writing by the Master'. There are tariffs determined for the executor's remuneration, these being –

- 3,5% of the gross assets of the estate; and
- 6% of the gross income post the passing of the deceased; or
- otherwise as provided in the will.

We have noted several instances where legal practitioners, following receipt of funds into the estate banking account, transfer funds from the estate banking account to their business banking account, sometimes before they even advertise the estate. This practice is not allowed as it amounts to contravening the requirements of the Act and possibly fraud. There is an exception in terms of fees earned on the sale of an immovable property of an estate. Fees relating to the conveyancing matter become due to the conveyancer on registration of the property in the purchaser's name, and this

happens before distribution of the estate as the proceeds from that sale form part of the distribution of the estate.

Lastly, the distribution of the estate should be done without any undue delay.

Conclusion

In conclusion, legal practitioners involved with deceased estates should always ensure compliance with all precepts surrounding this area of entrustment. Care should be taken when winding-up or assisting to wind-up an estate of the deceased. More often than not, the beneficiary from the estate needs the property that is bequeathed to them. In some cases, young children are the beneficiaries and are fully dependent on the funds and assets entrusted with the legal practitioner. In other cases, the widow or widower needs the bequeathed money and/or property to raise the children of the deceased. It is important that legal practices dealing with deceased estates are properly managed, and people within the legal practice dealing with deceased estates should protect the image of the profession and manage the estates correctly and in accordance with the prescribed legislation. If the trend in theft of funds from deceased estates continues to be high and not curbed, it poses a major risk to the Fund, and a risk to the sustainability of the Fund. Credibility of a legal practitioner goes a long way in protecting his or her reputation, legal practice, and the profession.

Preparation and maintenance of accounting records for deceased estates not flowing through the general trust account must always be ensured as it can assist in early detection of any wrongdoing.

Simthandile Kholelwa Myemane
BCom Dip Advanced Business Management (UJ) Cert Forensic and Investigative Auditing (Unisa) Certified Control Self Assessor (Institute of Internal Auditors) Cert in Management and Investigation of Cyber and Electronic Crimes Cert in Fraud Risk Management Cert in Law for Commercial Forensic Practitioners Cert in Investigation of Financial Crimes Cert in Investigation and Detection of Money Laundering Cert in Economic Crime Schemes (Enterprises University of Pretoria) is the Practitioner Support Manager at the Legal Practitioners' Fidelity Fund in Centurion.



Standing up to government in public interest litigation – *does it really effect change?*



By
Daniël
Eloff

A mere 15 minutes' walk from former president Jacob Zuma's homestead in Nkandla, the Nkungumathe community has been waiting since 1996 for a new school to be built. The community applied to the Department of Education in KwaZulu-Natal for the establishment of a secondary school in 1996, 2002 and then again in 2007.

In May 2010, the incumbent KwaZulu-Natal Member of the Executive Council (MEC) for Education took the decision to establish and register the Khuba secondary school as a fully-fledged school, the effect of which was that Khuba was to be constructed and appropriately provisioned. It did not come to pass. In June 2016 efforts were renewed to bring about the construction of Khuba. Then,

tional principles of the rule of law and the principle of legality insofar as the exercise of public powers are concerned.

Background to litigation

The applicants in the matter were Inkosi Zakhe Mpungose, as Nkosi of and on behalf of the Mpungose Traditional Council (the Council), together with the Nkungumathe NPO, a community representative organisation, two parents and one grandparent who are members of the community and who acted on behalf of their children and grandchild, respectively. The Nkungumathe NPO was represented by Mthokozi McDonald Mchunu the deponent for the Nkungumathe NPO (the third applicant), who is a primary school teacher in science and technology and the Deputy Principal of a primary school in the community. He is a community activist who wanted to hold government to its promise to build a school for the residents of the community. The applicants were quite carefully considered before the issuing of this application. As has become common practice in public interest litigation, using a mixture of different applicants that represent the interests of both the involved parties, as well as the public interest, is often an effective litigation strategy (S Budlender, G Marcus SC and N Ferreira *Public interest litigation and social change in South Africa: Strategies, tactics and lessons* (The Atlantic Philanthropies 2015)).

The promise of a new constitutional dispensation and a government that corrects the wrongs of the past, especially regarding education inequality kept the community on a string for over two decades. After years of attempting to engage with provincial government and after various promises to build the school, the community sought help from an unlikely place. Frustrated and fed up the community wrote to AfriForum in 2017, seeking their assistance. AfriForum offered to fund a legal challenge to review both the actions and inactions of the provincial government.

The determination of who should be the applicants plays into the discussion regarding case versus cause (J Brickhill and M Finn 'The ethics and politics of public interest litigation' in J Brickhill *Public Interest Litigation in South Africa* (Cape Town: Juta 2018) at 101 and 115). Not only were public interests' lawyers concerned with the outcome of the case

on 16 February 2017, without notice or consultation, the MEC withdrew the decision of his predecessor in office to register and establish Khuba.

At the heart of this case and legal challenge, which is still ongoing despite a court order in favour of the community, is the fundamental right of access to basic education under s 29 of the Constitution, and founda-



Picture source: Gallo Images/Getty

insofar as it relates to their particular clients and the countervailing interest of broad strategic litigation goals, but they had to consider how the case would be received both in the media and by the court in light of the unlikely alliance between this community and the civil rights organisation.

The decision as to who to include as co-applicants was, therefore, one of the early strategic litigation decisions that had to be taken by both the community and the legal representatives acting on behalf of the community. Despite the litigation being funded by AfriForum it was decided early on that AfriForum would not be cited as a co-applicant but rather that the emphasis and focus of the case would remain on the community, whose rights were being infringed.

Litigation

The application was brought on 4 October 2017 but only heard on 26 October 2018 after numerous attempts by the respondents to delay the process. The litigation was supported by a great amount of social mobilisation including a gathering of nearly 200 members of the Nkungumathe community in the court vicinity on the day of the hearing (Tania Broughton 'Rural Community in Court for School' www.africa-legal.com, accessed 6-5-2021). Although decisions of South African courts should not be swayed by spectacles outside of the courtroom, it is hard to imagine that any person could ignore hundreds of people gathered at a High Court located more than 200km from their community in order to assert the rights to education of their children.

Judgment was delivered on 17 July 2019. The order granted the review of the decision to renege on the promise made to the community and provided structural relief for the applicants as to how the decision should be implemented. The order also required the respondents to provide quarterly reports on the progress made in establishing the school.

Similar to the approach followed in the case of *Mshengu and Others v Msunduzi Local Municipality and Others* [2019] 4 All SA 469 (KZP) the relief was formulated and calibrated to ensure that the interests of the applicants were well served while leaving some room for the development of jurisprudence. In this case, the structural relief granted by the court went beyond what was sought by the applicants in their notice of motion. To an extent the broadened relief could be viewed as a type of punitive measure against the respondents, who arguably angered the presiding judge. Vahed J's dismay of the way government reneged on its promise to the community was evident in the judgment (*Mpungose Traditional Council and Others v MEC for Education, KZN Province and Others* [2019] 3 All SA 817 (KZP)).

Post litigation and enforcement

The favourable judgment seems to be similar to other judgments, which were beneficial to the applicants, in this case the Nkungumathe community, but has not necessarily changed the reality of weak institutions in KwaZulu-Natal, particularly the provincial Department of Education, that hinder justice and the fulfilment of the fundamental right to education (*Carmichele v Minister of Safety and Security and Another* 2001 (10) BCLR 995 (CC)). Although it achieved a legal victory for the community the challenge of implementation remained. As Budlender, Marcus SC and Ferreira (*op cit*) argued, post litigation implementation is perhaps the most critical aspect of the public interest litigation process.

Since the judgment was delivered the respondents have filed five progress reports as required by the court order. However, the respondents have through the filing of progress reports attempted to relitigate the case by raising budgetary constraints, the COVID-19 pandemic, and other logistical challenges as defences in order to delay the building of the school. As Roa and Klugman note after suffering defeat in court, opponents may utilise an array of mechanisms to attempt to effectively halt or nullify a court judgment against them (M Roa and B Klugman 'Social Change and The Courts: Options In The Activists' Advocacy Toolkit' (2016) at 94).

In the progress reports filed by the respondents, they claim that the earliest opportunity for the school to be built is 2024, which would be five years after the successful court challenge and more than 30 years after the community were first promised a school. The fact that the respondents are able to delay, but not necessarily circumvent, the building of the school and, therefore, in effect the fulfilment of the constitutional right to education, is a prime example of how a favourable court decision does not entail the end of the litigation road.

Although the court order provides that the applicants are able to approach the court again for assistance, should the respondents fail to make progress, is subject to first attempting meaningful engagement with the respondents. Since the judgment was handed down, there has been constant correspondence with the KwaZulu-Natal Department of Education seeking speedy compliance with the court order.

From a legal practitioner's standpoint, the post judgment phase has been the most frustrating part of the litigation. As legal practitioners, public interest legal practitioners are comfortable and familiar with civil procedure and the workings and dealings with the South African court systems. They, however, are not as well

trained in what to do at the conclusion of a case. An important decision to be made to ensure compliance by the respondents remains. The question begs, how to approach this phase. The initial instinct of a litigator would obviously firstly be to approach the court again should the respondents not comply with the order in a reasonable time. However, as is the case in public interest litigation before a judgment, perhaps the best route would be to find the right balance between sustained legal pressure, as well as continued mobilisation by the community.

Conclusion

The fight to secure the education rights of the children of the Nkungumathe community is not nearly done. In retrospect, although the legal victory might eventually secure the rights of the community, the victory may end up not securing and ensuring that the education rights of all learners in KwaZulu-Natal is protected. As Bell notes 'replication of legal campaigns where heralded victories are gained at too great cost' (D Bell 'Law, litigation, and the search for the promised land' (1987) 76 *Georgetown Law Journal* 229 at 236). This court victory should, therefore, be celebrated cautiously while firmly keeping the end goal in mind.

Although this case is likely not to be considered a classical public interest litigation test case that attempts to change an entire legal framework, it is nonetheless an important public interest litigation case in that it seeks to protect a vulnerable community against unlawful and exploitative governmental practices (H Corder (ed) *Essays on Law and Social Practice in South Africa* (Cape Town: Juta 1988)). Although merely a victory on procedural and administrative law grounds, the fact that the case received such widespread attention due to the combined efforts of social mobilisation through the community and the media leverage of AfriForum, this case had a positive impact. Moreover, there is much to be said about the unlikely alliance formed between AfriForum and this community. One might even slightly bullishly argue that unlikely alliances are crucially important in our constitutional order to ensure that all South Africans enjoy the rights promised to them in our Constitution.

What now remains is to ensure government is held accountable not only to the court but to the community that now has a court order in hand to assert the rights of their children.

Daniël Eloff LLB LLM (UP) PGDip Human Rights Advocacy (Wits) is a legal practitioner at Hurter Spies Inc in Pretoria. Hurter Spies Inc acted on behalf of the applicant. □



Murder! Intention, premeditation, pre-planned – what does it all mean?



By
Palesa
Judith
Mokose

The consequence of the application of s 51 of the Criminal Law Amendment Act 105 of 1997 (the Act) is of crucial importance to legal practitioners, more particularly those who practice criminal law. When an accused has been charged with murder, there are serious implications should the accused be found guilty, most importantly they could face life imprisonment. As the legal representative of an accused, one has to be aware of the elements of murder, whether it is planned or premeditated. This article discusses the difference between planned and premeditated murder and the consequences thereof. The focus of the article will be on various case law and the application of the Act.

The Act provides for mandatory minimum sentences. Section 51 deals with the discretionary minimum sentences for certain serious offences. For this arti-

cle, I will focus on sch 2 Part I (a) namely, murder when planned or premeditated. The section provides:

‘(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life’.

Practical statement of facts

In the case of *Kekana v S* (SCA) (unreported case no 629/13, 1-10-2014) (Mathopo AJA (Lewis JA and Gorven AJA concurring)), the accused pleaded guilty to locking his wife in the bedroom and setting the bed on fire. His wife died a few days later in hospital. The question was whether the accused acted on the spur of the moment or whether the murder was premeditated or planned.

As stated in s 51 above, should a court find that the murder committed was planned or premeditated, the accused will be sentenced to life imprisonment. However, should the court find that the murder was not premeditated or planned, the accused will be sentenced to –

- 15 years’ imprisonment if they are a first-time offender;
- 20 years’ imprisonment if they are a second time offender; and
- if they are a third and/or subsequent offender then they will receive 25 years’ imprisonment, (unless there are ‘substantial and compelling’ circumstances that exist, which warrant a lesser sentence than the prescribed minimum sentence). (Substantial and compelling circumstances will not be discussed in this article).

The court in the case of *Kekana* found

that the murder was premeditated. The court based its findings on the following surrounding circumstances set out in paras 6, 7 and 8 of the judgment:

- The accused and the deceased had a tempestuous relationship.
- He accused the deceased of conducting extramarital affairs.
- The parties argued incessantly and threatened to kill one another.
- The accused went out to buy petrol and came back and found his clothes on the floor after a heated argument between the parties.
- The accused locked the deceased in the bedroom and set the house alight.

The court further held that the accused’s action of locking the door and the further act of pouring petrol showed that he carefully implemented a plan from preventing the deceased from escaping and made sure she died in the fire. This – the court held – on its own was enough proof of premeditation.

To see how the court arrived at its decision in the *Kekana* case, it is important for one to unpack the meaning of planned and premeditated and to look at the way South African courts have interpreted same.

The meaning of planned and/or premeditated

The terms ‘planned’, or ‘premeditated’ murder is not defined in the Act. The legislature has left it to the judiciary to define or interpret the concept. The court in the case of *S v Raath* 2009 (2) SACR 46 (C) relied on the *Concise Oxford English Dictionary* for the meaning of the concept planned and premeditated and explained as follows at para 16C:

‘The concept of a planned or premedi-

tated murder is not statutorily defined. We were not referred to, and nor was I able to find, any authoritative pronouncement in our case law concerning this concept. By and large it would seem that the question of whether a murder was planned or premeditated has been dealt with by the court on a casuistic basis. The *Concise Oxford English Dictionary* 10 ed, revised, gives the meaning of premeditated as “to think out or plan beforehand” whilst “to plan” is given as meaning “to decide on, arrange in advance, make preparations for an anticipated event or time”.

In the case of *S v PM* 2014 (2) SACR 481 (GP) at paras 35-36, the court defined the term planned and premeditated murder as two different concepts, which do not have the same meaning, however, it has the same consequences. The court defined premeditated as ‘something done deliberately after rationally considering the timing or method of so doing, calculated to increase the likelihood of success, or to evade detection or apprehension’. Whereas, planned has been described as ‘a scheme, design or method of acting, doing, proceeding or making, which is developed in advance as a process, calculated to optimally achieve a goal’.

The meaning of ‘plan’ from *Dictionary.com* is defined as ‘a scheme or method of acting, doing, proceeding, making, etc., developed in advance’ (www.dictionary.com, accessed 6-5-2021).

The meaning of ‘premeditated’ from *Vocabulary.com* is ‘something ... planned in advance and has a purpose behind it ... it’s no accident’ (www.vocabulary.com, accessed 6-5-2021).

What is clear from all the definitions of ‘plan’ and ‘premeditated’ above is that there is a thought process involved with both concepts. Both require a person to have thought about the act to be done. The act done is then not by accident or mistake but deliberate.

What then is the difference between planned and premeditated? Is there even a difference? Finding that the murder was planned requires that there must have been a plan, design, or scheme in place. The accused must have thought about the murder days in advance, the planning must have been done in order to ensure that the act of murder is successful. The court in *PM* states the elements of ‘planned’ as follows at para 36:

- ‘(1) The identification of the goal to be achieved;
- (2) the allocation of time to be spent;
- (3) the establishment of relationships necessary to execute;
- (4) the formulation of strategies to achieve the goal;
- (5) arrangement or creation of the means or resources required to achieve the goal; and
- (6) directing, implementing and monitoring the process.

It subsequently appears that establish-

ing whether the murder was planned should not be problematic. However, finding that the murder was premeditated can be quite problematic. For premeditated murder it has to be established that an accused can premeditate the murder within minutes. In the case of *Kekana* in paras 12 to 13, the court dismisses the idea given in the case of *Raath* that in proving premeditation, the state must lead evidence to establish the period of time between the accused forming the intent to murder and the carrying out of his intention. The court held that it is not necessary for the appellant who is the accused, to have thought or planned their action over a long period of time in advance, before carrying out their plan. The court further, held that time is not the only consideration, because even a few minutes is enough to carry out a premeditated action.

It is, therefore, clear that a defence legal practitioner cannot raise the argument that the murder was committed as a spur of the moment act purely based on the time period between the forming of the intention to kill and the act of killing, because time on its own cannot provide a ready-made answer to the question of whether the murder was premeditated or not. Surrounding circumstances, such as the accused’s state of mind are, therefore, also of importance to establish whether there was premeditation or not. The test to determine premeditation is therefore an objective test.

Planned, premeditation and intention

From the above definitions, it is clear that there is a difference between the two concepts of planned and premeditation. What can be concluded from the above definitions and explanations from case law is that where the murder was planned it was also premeditated. Once you plan the murder, having a thought-out mission, it is automatically presumed that you have premeditated the commission of the act.

Pre-planned and premeditated murder should, however, not be confused with the intention to kill. The three types of intention being, direct intention, indirect intention and *dolus eventualis* should not be confused with premeditation or planned murder. The term premeditation or planned does not introduce a new kind of intention. It merely focuses on the surrounding circumstances around the act of killing. All cases of planned or premeditated murder will, therefore, involve one of the intentions. However, it is important to note that the mere fact that an accused formed an intention to kill someone beforehand does not automatically mean that the murder is premeditated or planned. South African law does not require that there be a trigger

point, which provokes the killing in the heat of the moment. Therefore, it can be that the murder was an act committed in the heat of the moment. It is also important to note that the test of determining intention is subjective, whereas the test of determining premeditation and/or pre-planning is objective.

It must be borne in mind that the finding of premeditation or planned murder does not rely on whether there was an intention to kill. First, the court has to find that there was an intention to kill. Then the court must look at the evidence to determine (based on the surrounding circumstances) whether there is premeditation or planning. As correctly stated in *S v Taunyane* 2018 (1) SACR 163 (GJ) the court held as follows:

‘In deciding whether or not [the] appellant killed the deceased in circumstances where such killing was planned or premeditated, the test is not whether there was an intention to kill. That had already been dealt with in finding that the killing was an act of murder. The question now is whether or not [the] appellant “weighed-up” his proposed conduct either on a thought-out basis or an arranged-in-advance basis’.

The burden of proof

For a court to find that the murder committed was planned or premeditated the usual standard of proof beyond reasonable doubt must be applied. The issue of planned or premeditated must be decided at conviction stage based on the evidence before the court. The prosecution must lead evidence that discloses that the murder was planned or premeditated, and the defence must rebut the evidence so given and show that other possible inferences can be drawn from the evidence that is not suggestive of premeditation or preplanning.

Conclusion

From the above analysis of the definitions of premeditation and planned, it becomes clear that when faced with a murder case one must think beyond the intention. Gather enough information from the client regarding the circumstances that led to the act. Bear in mind that intention is subjective and intent to kill alone cannot automatically be premeditated or planned. The sentence for a premeditated and/or planned murder far outweighs the sentence of murder without premeditation or pre-planning as far as severity is concerned.

Palesa Judith Mokose LLB (NWU) is a legal practitioner at Mokose Attorneys in Carletonville.





Unjustifiable restriction of the constitutionally entrenched right of access to courts



By
Marunelle
Hitge

This article questions the justifiability of the procedural limitation imposed in terms of s 29(1) of the Magistrates' Courts Act 32 of 1944 (the Act) with specific reference to the constitutional right of access to courts. For reasons set out herein, I submit that s 29(1) in limiting motion proceedings imposes an unjustifiable limitation on the right of a potential claimant (applicant) to have their claim adjudicated in the most efficient, expeditious and cost-effective manner, which the circumstances of their case permits.

The magistrate's court does not enjoy inherent jurisdiction, such as that possessed by the High Courts, and its jurisdiction is found within the four corners

of the Act (*Mason Motors (Edms) Bpk v Van Niekerk* 1983 (4) SA 406 (T) at 409). Put differently, whereas a magistrate's court is limited to what the law permits, a High Court is only restricted by what the law forbids (Joseph Herbststein, Louis de Villiers van Winsen, Andries Charl Cilliers and Cheryl Loots *The Civil Practice of the Supreme Court of South Africa* 4ed (Cape Town: Juta 1997)).

The problem

Section 29 of the Act provides as follows: 'Jurisdiction in respect of causes of action -

(1) Subject to the provisions of this Act and the National Credit Act, [34 of] 2005, a court, in respect of causes of action, shall have jurisdiction in -



(f) actions in terms of section 16 (1) of the Matrimonial Property Act, [88 of] 1984, where the claim or the value of the property in dispute does not exceed the amount determined by the Minister from time to time by notice in the *Gazette*;

(fA) actions, including an application for liquidation, in terms of the Close Corporations Act, 1984 (Act No. 69 of 1984);

(g) actions other than those already mentioned in this section, where the claim or the value of the matter in dispute does not exceed the amount determined by the Minister from time to time by notice in the *Gazette*.

...
(2) In subsection (1) “action” includes a claim in reconvention.’

Statutory limitations placed on the competence of a court usually relates to territory, subject matter, the amount in dispute and the parties to the dispute (see generally ss 26 and 28 of the Act). Section 29 of the Act does, however, impose an additional restriction on the power of the magistrate’s court, namely in respect of the form of proceedings, which is permissible in relation to the nature of the relief sought by a party.

The reference to ‘actions’ used in s 29(1) of the Act must be accorded the meaning of proceedings initiated by means of summons, thereby precluding the court from adjudicating claims for the relief listed in s 29(1) of the Act, if instituted by means of application (motion) (see, *inter alia*, *E Castignani (Pty) Ltd v Claude Neon Lights (SA) Ltd* 1969 (4) SA 462 (O); *In Re Pennington Health Committee* 1980 (4) SA 243 (N)).

As matters presently stand, motion procedure may be utilised only for the attachment of property to found or confirm jurisdiction, for interdictory relief and for spoliatory relief. In respect of the majority of causes of action, which would typically serve before a magistrate’s court, its jurisdiction is restricted to adjudication of the issues by means of the action procedure. A prospective litigant is accordingly deprived of a choice between motion proceedings and the cumbersome trial (action) proceedings, even where no real factual dispute exists between the parties. In fact, a litigant is required to choose between two equally unsatisfactory options to –

- either initiate action proceedings in the Magistrate’s Court; or
- to approach the applicable High Court with jurisdiction by means of motion proceedings.

The latter option is disproportionately expensive for litigants residing in rural areas, requiring the appointment of a correspondent legal practitioner at the seat of the High Court at the risk of the High Court only awarding costs on the magistrate’s court scale, resulting in a

considerable discrepancy between the litigant’s actual legal costs (attorney and own client scale) and the costs recoverable on the party-and-party scale.

The matter of *Minister of Safety and Security and Another v Bosman* 2010 (2) SA 148 (C) provides a startling example of the effect of s 29 of the Act on the right of access to courts. In this matter the court held that condonation for non-compliance with s 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 cannot be obtained in the magistrate’s court by means of application procedure.

Consequently, a plaintiff who intends to claim damages from the state and who failed to deliver a letter of demand within six months from the date on which their damages arose, is compelled to institute action in the High Court (which court can grant condonation through motion proceedings), despite the fact that their claim falls within the monetary jurisdiction of the magistrates’ courts’ jurisdiction.

Right of access to courts

Section 34 of the Constitution affords everyone the right of access to the courts.

The expressly stated purpose of the revised Rules Regulating the Conduct of the Proceedings of the Magistrates’ Courts of South Africa is to promote access to the courts and to ensure that the right to have disputes that can be resolved by the application of law by a fair public hearing before a court is given effect to. Such access must be affected by facilitation of an expeditious handling of disputes and the minimisation of costs involved (r 1(1) read with r 1(2)). In *D F Scott (EP) (Pty) Ltd v Golden Valley Supermarket* 2002 (6) SA 297 (SCA) it had been held at p 301 of the judgment, that the ‘Rules of Court are designed to ensure a fair hearing and should be interpreted in such a way as to advance, and not reduce, the scope of the entrenched fair trial right (s 34 of the Constitution)’.

While addressing the conference on Access to Justice held during 8 to 10 July 2011 in Sandton the then Chief Justice, Sandile Ngcobo, referred with approval to Lord Woolf’s eight basic principles of a civil justice system. These are:

1. It should be just in the results it delivers;
2. It should be fair and be seen to be so by:
 - Ensuring that litigants have an equal opportunity, regardless of their resources, to assert or defend their legal rights;
 - providing every litigant with an adequate opportunity to state his own case and answer his opponents; [and]
 - treating like cases alike.
3. Procedures and costs should be pro-

(a) actions in which is claimed the delivery or transfer of any property, movable or immovable, not exceeding in value the amount determined by the Minister from time to time by notice in the *Gazette*;

(b) actions of ejectment against the occupier of any premises or land within the district or regional division: Provided that, where the right of occupation of any such premises or land is in dispute between the parties, such right does not exceed the amount determined by the Minister from time to time by notice in the *Gazette* in clear value to the occupier;

(c) actions for the determination of a right of way, notwithstanding the provisions of section 46;

(d) actions on or arising out of a liquid document or a mortgage bond, where the claim does not exceed the amount determined by the Minister from time to time by notice in the *Gazette*;

(e) actions on or arising out of any credit agreement as defined in section 1 of the National Credit Act, 2005 ... ;

portionate to the nature of the issues involved.

4. It should deal with cases with reasonable speed.
5. It should be understandable to those who use it.
6. It should be responsive to the needs of those who use it.
7. It should provide as much certainty as the nature of particular cases allow.
8. It should be effective, adequately resourced and organised so as to give effect to the stated principles' (H Fabricius SC 'Access to justice: *The Woolf Report*' (1996) 9 *Consultus* 108).

There seems to be no rationally justifiable basis to confine the adjudication of causes of action listed in s 29 of the Act to the action procedure only. In fact, the ambit of s 29 of the Act has subsequently been eroded by certain legislative developments outside of the Act:

- Legal proceedings for eviction in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act) are not confined to action procedure only and application procedure may be followed. In the context of the PIE Act, the word 'proceedings' includes action, as well as application proceedings and to this extent it, therefore, has a wider meaning than the word 'action' in s 29(1)(b) (see *Nduna v Absa Bank Ltd and Others* 2004 (4) SA 453 (C) at 457).
- The jurisdiction to adjudicate applications for the review of administrative action extends to the magistrate's court in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). A 'court' includes 'a magistrate's court for any district or for

any regional division established by the Minister for the purposes of adjudicating civil disputes'. The Rules of Procedure for Judicial Review of Administrative Action published under GN R966 GG32622/9-10-2009 have, however, not yet taken effect.

- Applications for access to information in terms of ss 78 to 82 of the Promotion of Access to Information Act 2 of 2000 (PAIA) may be brought in the magistrate's court. The Rules of Procedure for Application to Court in terms of the Promotion of Access to Information Act 2 of 2000 published under GN R965 GG32622/9-10-2009 had taken effect on 16 November 2009.
- Section 69 of the Close Corporations Act 69 of 1984, affords a magistrate's court jurisdiction to hear applications for the liquidation of a close corporation (see also s 7 of the Close Corporations Act).
- Sections 23 to 29, as well as ss 42 to 44 of the Children's Act 38 of 2005 contain various examples of motion proceedings previously limited to the High Court – these include:
 - the assignment of contact and care and guardianship to interested persons by order of court;
 - inter-country adoptions;
 - paternity determinations; and
 - termination, extension, suspension or restriction of parental responsibilities and rights orders.

Especially the adjudication of proceedings in terms of the PIE Act, PAJA and PAIA often involves vexed constitutional questions.

Insofar as a paternalistic sentiment might previously have been the motivating factor in limiting the motion com-

petency of the magistrate's court, such disposition did clearly not keep up with constitutional values.

Conclusion

The jurisdictional restrictions in terms of which a magistrate's court is barred from adjudicating by means of motion proceedings the disputes listed in s 29(1) of the Act constitutes an unjustifiable restriction of the constitutionally entrenched right of access to the courts contained in s 34 of the Constitution.

Recommendations

- An amendment of ss 29, 30 and 56 of the Act is, therefore, imperative.
- The required amendment is easily achieved by –
 - consolidating ss 29 and 30 of the Act;
 - substituting the word 'actions' where it appears in s 29(1)(a) to (1)(g) for the word 'proceedings';
 - deleting s 29(2), alternatively replacing s 29(2) with the following:

'(2) any reference to 'proceedings' in subsection (1) includes a claim in reconvention, an application and a counter-application.'
 - r 56(1) and r 56(2) would be rendered obsolete by the above amendments and must be repealed; and
 - finally, r 56(3) must be amended by simply substituting the words: 'referred to in sub-rule (1), for the following: for an interdict or attachment or for a *mandament van spolie*'.

Marunelle Hitge *BCom LLB (NWU)* is a legal practitioner at Du Toit Smuts & Partners Attorneys in Mbombela. □

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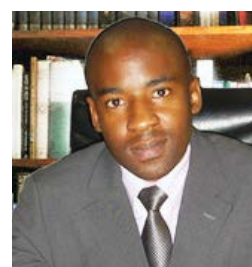
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Withholding retirement benefits – *retirement funds boards' duty to scrutinise employers' requests*

By
Clement
Marumoagae



This article discusses the role of retirement funds boards' when employers associated with their funds request them to withhold members' accrued retirement benefits pending the finalisation of court cases, which the employers instituted against members, who are their employees. The article aims to demonstrate that retirement funds boards should not adopt a passive approach when requested to withhold their members' retirement benefits but should actively attempt to understand the circumstances, which employers have based their requests on to satisfy themselves that such requests are not designed to financially prejudice members. Generally, employers request retirement funds boards to withhold members' retirement funds to provide them with an opportunity to obtain court orders that confirm members' liability to compensate them for financial harm caused by such members, as their employees in relation to the workplace. Such orders enable retirement funds boards to deduct quantified amounts from their members' retirement benefits to compensate employers.

Deducting accrued retirement funds

The regulation of the South African retirement fund industry is fragmented with many pieces of statutes regulating different retirement funds (see MC Marumoagae 'The need for effective management of pension funds schemes in South Africa in order to protect member's benefits' (2016) 79 *THRHR* 614). At times, these different statutes have similar pro-

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visions, which while drafted differently, nonetheless, deal with the same issue see –

- s 21(3)(c) of the Government Employees Pension Law Proclamation 21 of 1996;
- s 9(a) and (b) of the Transnet Pension Fund Act 62 of 1990;
- s 10B(2)(b)(iii) of the Post and Telecommunication-Related Matters Act 44 of 1958; and
- s 37D(1) Pension Funds Act 24 of 1956 (the PFA).

These provisions provide for the deduction of members' accrued retirement benefits, where it has been proven that such members have caused financial harm to their employers in relation to the workplace, for the purposes of compensating employers.

Section 10B(2)(b)(iii) of the Post and Telecommunication-Related Matters Act and s 9(a) and (b) of the Transnet Pension Fund Act appear to allow boards of retirement funds to deduct amounts owed to employers by members of these funds due to the alleged economic harm sustained by employers due to the members' dishonest conduct, misconduct, or negligence in the workplace. These provisions do not expressly require retirement funds boards to make such deductions after members have admitted liability in writing or employers have obtained court orders to that effect. However, s 21(3)(c) of the Government Employees Pension Law Proclamation and s 37D(1) of the PFA expressly provides that such deductions may only be made when members have admitted liability in writing or employers have obtained court orders that establish members' liability and employers' entitlement to be compensated by members. It is not clear why these provisions are drafted differently. Nonetheless, it can be argued that the legislature's intention is for retirement funds' boards, irrespective of which legislation regulates their retirement funds, to deduct their members' retirement benefits to compensate employers only when employees have admitted liability in writing, or if employers have obtained judgments against their employees, which clearly indicate that such employees, who are retirement fund members, are liable to compensate them. This can be a civil judgment or a compensatory order in a criminal judgment in terms of s 300 of the Criminal Procedure Act 51 of 1977 (see *Apahane v Auto Workers Provident Fund and Another* [2020] 2 BPLR 322 (PFA) at para 5.3).

Withholding retirement benefits

A careful reading of all these provisions reveals that none of the provisions expressly provides a duty for the retire-

ment fund boards they regulate to withhold their members' accrued retirement benefits at the employers' requests. The Supreme Court of Appeal (SCA), dealing with s 37D(1) of the PFA, in *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* [2009] 1 BPLR 1 (SCA) noted some of the practical challenges brought by lack of legislative recognition for the boards' power to withhold their members' retirement benefits at employers' requests. The SCA recognised that if employees do not admit liability in writing, employers are unlikely to have obtained judgments against such employees at the time of the termination of their employment contracts, which would enable boards to deduct members retirement benefits to compensate them (*Highveld Steel* at para 17). Further that court processes take time to complete. If members are provided their benefits, by the time employers obtain such orders, employers may not be able to enforce court orders because the retirement money employees received would have been depleted (*Highveld Steel* at para 17). The SCA was of the view that in order to protect the interests of employers, s 37D(1) of the PFA must be 'interpreted purposively to include the power to withhold payment of a member's pension benefits pending the determination or acknowledgement of such member's liability' (*Highveld Steel* at para 19). Thus, boards have discretion to withhold their members retirement benefits pending the finalisation of court processes that employers have undertaken against their employees, who are their members (*Highveld Steel* at para 19 and *Charlton and Others v Tongaat-Hulett Pension Fund* (KZD) (unreported case no 9438/05, 1-2-2006) (Balton JJ)).

The role of the board

The deduction of accrued retirement benefits for the purposes of compensating employers for the economic harm suffered through their employees is a clear statutory duty that does not appear to be controversial. What is controversial is the withholding of retirement benefits. It is evident that withholding retirement benefits is a remedy that is designed to protect the rights of employers. While it is meant to protect employers, there is evidence that some employers abuse this remedy, which brings into question the exact role of retirement funds boards once employers have approached them to withhold members' retirement benefits. For example, in *SA Metal Group (Pty) Ltd v Jeftha and Others* [2020] 1 BPLR 20 (WCC), the board received the employer's request to withhold the member's retirement benefits. The employer did not indicate to the board whether the member had admitted liability or that the employer had instituted court proceedings against the member (or at the very least,

if such proceedings have not yet been instituted when the employer would institute them). The employer merely alleged that the member had breached their employment contract without detailing the economic harm that the member had allegedly caused in the workplace. The fund withheld the member's benefits and advised the employer to institute court proceedings within six months, emphasising that delays in instituting such proceedings may lead to the board releasing the benefits to the member (*SA Metal Group* at para 29).

The employer failed to institute court proceedings against the member within the six-month period from the date the member's retirement funds were withheld by the fund. After the seventh month, the member lodged a complaint with the office of the pension funds adjudicator for the release of their benefits. Three months after the member lodged the complaint, the employer issued summons against the member at the High Court claiming damages amounting to R 3,7 million (*SA Metal Group* at para 52). The employer alleged that the member, as its employee, colluded with one of the service providers, resulting in the service provider charging the employer excessive prices, thereby causing the employer financial loss (*SA Metal Group* at para 17). The employer did not rely on this allegation when the request for the member's retirement benefits to be withheld was first made to the fund. The fund agreed to withhold the member's retirement benefits without evaluating whether the employer had a *prima facie* claim or at the very least, a claim that could stand in court against the member.

The fund failed to scrutinise the employer's claim before agreeing to withhold the member's retirement benefits. This raises the question whether the board has such a duty? The court was of the view that the board's fiduciary duty 'envisages careful scrutiny of claims made against benefits of members submitted by employers, and a weighing of the competing interests of the parties after affording a member the opportunity to place his case properly before the fund' (*SA Metal Group* at para 73). This duty is in line with s 7C(2)(a) of the PFA, which requires the board to take 'all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected at all times'. It is evident that the member will be prejudiced when the board agrees to withhold the member's accrued retirement benefits at the employer's request without either the member's admission of liability or the employer providing evidence of court proceedings against the member. By so doing, the board will be withholding the member's retirement benefits without

an idea as to how long it would need to withhold such benefits. Boards should never allow employers to make them withhold members' retirement benefits for unreasonably long periods or indefinitely (see *Watson v Corporate Selection Retirement Fund: Participating Employer – Impact Cleaning CC and Others* [2013] JOL 30315 (PFA) at para 5.7).

The duty to scrutinise the employer's request is also supported by s 7C(2)(b) of the PFA which requires the board to 'act with due care, diligence and good faith'. The boards should require more information from employers regarding the alleged economic harm caused by members to be satisfied that such claims can be competently taken to court. Further that such claims are not meant to prejudice members. The SCA in *Highveld Steel* at para 20 held that in '[c]onsidering the potential prejudice to an employee who may urgently need to access his pension benefits and who is in due course found innocent, it is necessary that pension funds exercise their discretion [to withhold members' retirement funds] with care'.

I submit that once retirement funds boards have received the relevant information that supports the request to withhold payment of members' retirement benefits by employers, such information should be forwarded to affected members to allow them to respond to the allegations made against them. This will enable retirement funds boards to properly weigh employers' and members' competing interests. It is also fundamentally important that boards do not take instructions from employers to withhold members' retirement benefits but consider the requests from employers to do so. This can be achieved when boards act independently, which they

are required to do in terms of s 7C(2)(d) of the PFA.

Scrutinising employers' allegations is important because it would also empower retirement funds boards to ask employers to quantify their loss, so that they can determine how much of the members' retirement benefits should be withheld. It will generally be prejudicial and unreasonable to withhold members' entire retirement benefit in circumstances where, even if employers receive orders in their favour, such orders will not lead to members' entire retirement benefits being used to compensate employers (see *Nkosi v Alexander Forbes Retirement Fund (Pension Section) and Others* [2020] 2 BPLR 512 (PFA) at para 5.7). It is reasonable to withhold only that portion of the benefit which, should the employer be successful in court, will be sufficient to satisfy the employer's claim.

Conclusion

Withholding members' retirement funds is a necessary remedy which, if used properly, can benefit employers. It is recommended that employers should only resort to this remedy when they have indeed suffered financial harm caused by their employees' dishonest conduct, misconduct or negligence. Further that when approaching boards to withhold their employees' retirement funds, employers must have already instituted, or at the very least, be in the process of immediately instituting court cases against their employees. In their requests for retirement funds to be withheld, in order to assist boards to properly exercise their discretion, employers should try to provide sufficient details regarding the alleged economic harm, such as –

- the nature of the damage caused;
- the value of the damages suffered;

- the amount claimed in court;
- court proceedings, which have been instituted or about to be instituted, including case numbers; and
- type of court where the case has been lodged, including the location (see Momentum 'Legal update - Withholding benefits' (<https://eb.momentum.co.za>, accessed 5-5-2021)).

Finally, retirement funds boards should always demand to be updated of the progress of the case and circumstances, which may occasion delays. I submitted that it amounts to good governance for retirement funds to also communicate with members who are subjected to court proceedings, to regularly advise them why their retirement benefits will continue being withheld.

Clement Marumoagae LLB LLM (Wits) LLM (NWU) Dip Insolvency Practice (UP) PhD (UCT) is a Director at Marumoagae Attorneys and an Associate Professor at the University of Witwatersrand in Johannesburg. Mr Marumoagae is also a council member of the Legal Practice Council. □

Fact corner

- The Government Employees Pension Fund (GEPF) is a defined benefit pension fund that was established in May 1996 when various public sector funds were consolidated (<https://www.gepf.gov.za/>, accessed 19-5-2021).



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Parents who assault their children – the inconsistency of applying s 297(4) of the Criminal Procedure Act



By
Desmond
Francke

People's conduct, and the legal consequences that follow it, should be judged based on the law in force at the time. This is a basic tenet of the South African legal system. The Latin maxim *culpa poena par esto* (let the punishment be proportioned to the crime; let the punishment fit the crime) has long been considered the cornerstone of criminal justice. This legal maxim predates Gilbert and Sullivan's famous, if ironic, musical rendition in *The Mikado*. A sentence must be proportionate to the gravity of the offence and the degree of responsibility taken by the offender. The proportionality principle makes the blunt tool of punishment a valid and morally acceptable element of social order. Without proportionality as the governing sentencing principle, sentencing would either be the arbitrary application of state power or an ineffective response to criminal conduct. One all-too-common sentencing scenario involves mandatory minimum sentence for the crime of '[a]ssault with intent to do grievous bodily harm on a child under the age of 16 years'.

Section 51(2) of the Criminal Law Amendment Act 105 of 1997 stipulates: 'Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court ... shall in respect of a person who has been convicted of an offence referred to in –

- ...
- (b) Part III of Schedule 2, sentence the person, in the case of –
 - (i) a first offender, to imprisonment for a period not less than 10 years;
 - (ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and
 - (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years'.

The crime of '[a]ssault with intent to do grievous bodily harm on a child under the

age of 16 years' falls within Part III of the Criminal Law Amendment Act.

On the 18 September 2019 the Constitutional Court (CC) did not take into account the maxim *culpa poena par esto*, in my opinion, in deciding the common law defence of reasonable and moderate parental chastisement is inconsistent with the provisions of ss 10 and 12(1)(c) of the Constitution. The concern is the decision of the CC – under the current sentencing law if correctly applied is grossly disproportionate. Perhaps I should take a step back and refer to the CC's decision. Chief Justice Mogoeng Mogoeng in a unanimous decision in *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others (Global Initiative to End All Corporal Punishment of Children and Others as amici curiae)* 2019 (11) BCLR 1321 (CC) declared that the common law defence of reasonable and moderate parental chastisement as inconsistent with the provisions of ss 10 and 12(1)(c) of the Constitution. Sections 10 and 12 provide for the protection of human dignity and the freedom and security of the person respectively in the Bill of Rights. In essence, any parent of a child convicted of the crime of assault with the intent to do grievous bodily harm faces a minimum sentence of ten years' imprisonment as a first offender. Section 51(3)(a) of the Criminal Law Amendment Act regulates: 'If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence'. It provides the court with a discretion to impose a lesser sentence than the minimum sentence provided substantial and compelling circumstances as exists as enunciated in the leading cases of *Malgas v S* [2001] 3 All SA 220 (A) and *S v Dodo* 2001 (3) SA 382 (CC).

Section 51(5) of the Criminal Law Amendment Act enacts that '[t]he operation of a sentence imposed in terms of this section [meaning ss 51(1) and 51(2)] shall not be suspended as contemplated in s 297(4) of the Criminal Procedure Act [51 of 1977]'. Section 297(4) of the Criminal Procedure Act enacts: 'Where a court convicts a person of an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion pass sentence but order the operation of a part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a)(i) of subsection (1)'. A mere reading of the sections sounds confusing, but it is explained in the Supreme Court of Appeal (SCA) case of *S*

v Seedat 2017 (1) SACR 141 (SCA). The SCA held at para 37 of its judgment: 'Section 297(4) envisages that only a part of the sentence should be suspended and not the whole sentence'. So, even if the court sought to impose a suspended sentence, it could not suspend the whole sentence. A wholly suspended sentence is not competent in terms of s 297(4) of the Criminal Procedure Act and there is no provision in law permitting a court to suspend the sentencing of an accused (see *Director of Public Prosecutions, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA)). I am aware the SCA in *Hildebrand v The State* (SCA) (unreported case no 00424/2015, 26-11-2015) (Bosielo JA (Tshiqi and Swain JJA concurring)) held a court 'having found good grounds to deviate from the minimum sentences, ... was at large to impose any sentence which [it] found appropriate, given the particular circumstances of this case'. I do not agree with the findings in the *Hildebrand* case. Firstly, it is contrary to the purpose of the Criminal Law Amendment Act. Secondly, if *Hildebrand* is correct, it begs the question what is the purpose and reason for the legislature to enact s 51(5) of the Criminal Law Amendment Act? Thirdly, with respect to Tshiqi JA and Bosielo JA in the subsequent decisions of *Seedat* and *Thabethe* realised they led us who have to follow them into quicksand due to the *Hildebrand* case and made a u-turn. I say this with respect because Tshiqi JA and Bosielo JA in the *Thabethe* and *Seedat* cases held opposing views from the decision they reached in *Seedat*.

In an interpretation of s 51(5) of the Criminal Law Amendment Act, the *Seedat* case and s 297(4) of the Criminal Procedure Act shows a parent assaulting their child under the age of 16, face a period of direct imprisonment notwithstanding the gravity of the offence and the degree of responsibility of the offender. Tshiqi JA said sentencing needs to 'serve the public interest' and '[c]riminal proceedings need to instil public confidence in the criminal justice system with the public'. I hold the view that the reasonable person properly informed about the philosophy of the legislative provisions, Constitutional values and the actual circumstances of the 'case' may well view this result as grossly disproportionate – particularly if it is understood that the penal disparity is neither idiosyncratic or even rare but, rather, the uniform, systematic and incorrigible consequence of legislation. A frisson of appreciation that the prejudicial distinction wrought by such legislation is also in some ways arbitrary could only contribute to a sense of public outrage or abhorrence, a palpable sensation of unfairness.

Perhaps an example would illustrate how grossly disproportionate a sentence

of imprisonment would be on a parent assaulting their child in the process of 'parents to chastise their children moderately and reasonably', but unlawfully. A parent after exhausting all remedies, assaults their 15-year-old child several times with a cane. The single parent has four other children younger than the 15-year-old. The parent assaulted the child, because the child did not want to attend school, wanted to hang around with criminal gangs, abuse drugs and on many occasions the child assaulted their younger siblings and stole household items. The single parent – who is also the sole breadwinner – after seeking help from law enforcement agencies, social welfare authorities and the justice system has no idea of how to discipline the 15-year-old child who 'rules the roost' in their house. The parent is criminally charged for assaulting their child and convicted. Under the current sentencing regime, the parent faces a minimum term of ten years' imprisonment.

The proportionality principle

Proportionality requires an examination of the specific circumstances of both the offender and the offence so that the 'punishment fits the crime'. The proportionality principle has long been understood as multi-faceted. Penalties should be distributed according to the blameworthiness of the criminal conduct. The principle of proportionality has a long history as a guiding principle in sentencing, and it has a constitutional dimension. A person cannot be made to suffer disproportionate punishment simply to send a message to discourage others from committing the same offence. The principle of proportionality is rooted in notions of fairness and justice. For the sentencing court to do justice to the offender, the sentence imposed must reflect –

- the seriousness of the offence;
- the degree of culpability of the offender; and
- the harm occasioned by the offence.

The court must have regard to the aggravating and mitigating factors in the case. Careful adherence to the proportionality principle ensures that the offender is not unjustly dealt with for the sake of the common good.

In order to reflect blameworthiness, the sentencing process should punish reprehensible criminal conduct equally, and grade punishments according to the severity of the conduct and rank the ordering of seriousness. These general terms are amplified by reference to ordinal and cardinal proportionality in sentencing. Ordinal proportionality is a comparative measure of the range of dispositions that are appropriate be-

tween and among classes of offences. It expresses the notion that treating like with like ideally expresses a measure by which sentences for offences that are not alike can be arranged in a normative hierarchy of commensurate values. Ordinal proportionality deals with the severity level of criminal conduct, a matter of convention and culture that fixes the rungs on the ladder.

Ordinal proportionality

Ordinal proportionality addresses the ordering of the rungs and the distance and spacing between them. Ordinal proportionality has three requirements, namely:

- Parity, which calls for offenders convicted of criminal acts of comparable blameworthiness to receive sanctions of like severity.
- Rank-ordering involves deciding the relative seriousness of various crimes, that is, which is worse than another, and ranking them accordingly.
- Spacing of penalties involves determining the extent of the gap between the crimes once rank-ordered.

Cardinal proportionality

Cardinal proportionality refers to the range of dispositions that are appropriate for a specific offence.

Legislative and judicial dimensions of proportionality

Ordinal and cardinal proportionality have both legislative and judicial dimensions. The first, obviously, relates to determinations by the legislature and the second refers to the jurisprudence of the courts. In either case a failure to satisfy the principle of ordinal proportionality necessarily implies a risk that the prin-

ciple of cardinal proportionality cannot be satisfied. The maximisation of ordinal and cardinal proportionality in a rational system of sentencing would thus tend to diminish, but never eliminate, disparity. Inflexible tariffs intended to minimise disparity risk the introduction, or perpetuation, of an artificial principle of proportionality that can fail to produce a just and fit sentence in individual cases.

The offender's responsibility

The gravity of the offence concerns the harm caused by the offender to the victim, as well as to society and its values. The other aspect of the principle of proportionality involves factors that relate to the offender's moral culpability. The degree of responsibility of the offender includes the *mens rea* level of intent, recklessness or wilful blindness associated with the *actus reus* of the crime committed. For this assessment, courts can draw extensively on criminal justice principles. The greater the harm intended or the greater the degree of recklessness or wilful blindness, the greater the moral culpability. In applying the principles of proportionality in sentencing a parent for 'disciplining' their child, demonstrates the current sentencing legislative scheme is grossly disproportionate.

Lastly s 51(5) of the Criminal Law Amendment Act and s 297(4) of the Criminal Procedure Act are in direct contrast to the principles of the 'best interests of the child' (the complainant or victim) and the principle of the primary caregiver in some cases, especially the example I referred to above. The court should consider the child's best interests as an important factor, given its substantial weight, and be alert, alive and sensitive to the child's best interests. That is

not to say that the child's best interests must always outweigh other considerations. Children depend on parents and teachers for guidance and discipline, to protect them from harm and to promote their healthy development within society. A stable and secure family and school setting is essential to this growth process. Parents are presumed to act in their child's best interests. Since the best interests of the child are presumed to lie with the parent, the child's psychological integrity and well-being may be seriously affected by the interference with the parent-child relationship by sentencing the parent to a period of imprisonment. In *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) the court found that s 28(2) of the Constitution should be read with s 28(1)(b) of the Constitution. These two provisions impose four responsibilities on a sentencing court when a custodial sentence for a primary caregiver is being dealt with. They are –

- 'to establish whether there will be an impact on a child;
- to consider independently the child's best interests;
- to attach appropriate weight to the child's best interests; [and]
- to ensure that the child will be taken care of if the primary caregiver is sent to prison' (*Noorman v S* (WCC) (unreported case no A 532/10, 27-1-2011) (Weyer AJ)).

Let us never forget the criminal law is a blunt instrument whose power can also be destructive of family and educational relationships.

Desmond Francke *Bluris* (UWC) is a magistrate in Ladysmith.



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Selling property without spousal consent – what are the consequences?



By Alethea Verona Robertson and
Herbert James David Robertson

It is common knowledge that spouses married in community of property need one another to co-sign agreements and legal documents due to their limited contractual capacity. Following this logic, it is almost unthinkable that a person, so married, can awake one day to the shocking reality that their spouse sold and transferred immovable property, falling within the joint estate, without them knowing. Yet, this very scenario

has transpired, and on more than one occasion, in our very own South Africa.

Sections 15(2) and 15(3) of the Matrimonial Property Act 88 of 1984 confirm the legal position as described above by providing that a spouse married in community of property, shall not without the written consent of the other spouse 'alienate, mortgage, burden with a servitude or confer any other real right in any immovable property forming part of the joint estate'.

Case law

As recently as 11 December 2020 the Supreme Court of Appeal (SCA) was again faced with this perplexing anomaly. In the matter of *Vukeya v Ntshane and Others* (SCA) (unreported case no 518/2019, 11-12-2020) the respondent and Mr Ntshane (now deceased) were married to each other in community of property. The respondent is an elderly woman who moved to another province leaving her, now deceased husband, in their home. The deceased passed away in 2013. On his passing, the respondent was appointed as the executor of her late husband's estate and only then became aware that the deceased had in fact sold their home without her consent, to the appellant.

Soon after learning hereof, this widow applied to the High Court to have the transfer cancelled. She launched the application based on her not consenting to the sale. The High Court found in her favour, but the matter was appealed, by the purchaser, and the SCA overturned the High Court's ruling by finding that a non-consenting spouse is deemed to have

consented to the sale if the purchaser was unaware, and could not have reasonably been aware, that the surviving spouse's consent was required.

Eleven years earlier, in 2009, the High Court of the Western Cape was faced with a similar factual matrix when it had to decide the matter of *Visser v Hull and Others* 2010 (1) SA 521 (WCC). This time the facts were a bit different though, as the purchasers were blood relatives of the spouse who sold them the property in question. It was, therefore, argued that the purchasers ought to have known that the consent of the applicant was required.

In eerily similar circumstances to the *Vukeya* matter, the deceased had confirmed to the transferring attorney that he was indeed unmarried and, therefore, had the required capacity to alienate the property in question.

In both the above cases, the courts agreed that the pertinent question was whether the purchaser could reasonably have known that the seller was married in community of property and, therefore, the consent of their spouse was indeed required for the alienation of the property such purchaser had bought? The courts further agreed that the purpose of s 15 of the Matrimonial Property Act was to strike a balance between the interests of a non-consenting spouse and the innocent third-party purchaser.

The issue the writers have with the above approach is that it places a duty on the shoulders of a purchaser to ascertain, by investigation, whether the consent of the non-contracting party has indeed been obtained. We are in agreement with the stance of Prof L Steyn voiced in 'When a third party "cannot reasonably know" that a spouse's consent to a contract is lacking' (2002) 119 *SALJ* 253 wherein it is argued that the above test should be whether a third party 'cannot reasonably know' and not whether such party 'would not reasonably have known'. The test requires the purchaser to do more than simply rely on what the contracting party is averring their legal status to be. The courts require such purchaser to do an 'adequate' inquiry into the necessary. It is important to note that the courts demand the purchaser to investigate if the seller has the required consent. The court does not refer to the conveyancer having to do such investigation. Indeed, a conveyancer does check for the same, but regrettably a seller may depose to an affidavit confirming them to have consent, without the same being true.

Therefore, the SCA found, in the *Vukeya* case, that the purchaser had done an 'adequate investigation' as the deed of transfer cited the deceased as unmarried and the power of attorney, which the deceased signed, further confirmed him to be unmarried. Due to the purchaser being blood relatives of the seller, the Western

Cape High Court in the *Visser* case, remained unconvinced that the purchaser had done an 'adequate' investigation and thus found that such purchaser could reasonably have known of the marital status of the deceased and, therefore, ordered the transfer to be deregistered and ownership of the property to be returned to the surviving spouse.

The arising question

The question that now arises is how did these transfers happen in the first place? Should the Registrar of Deeds not have rejected them based on the required consent not being in place?

In both instances, the title deeds did not reflect the non-consenting party's particulars. Therefore, it would seem to the Deeds Offices as if the properties were wholly owned by one person only. This is due to the database of the Department of Home Affairs incorrectly reflecting both these contracting parties to be unmarried. It would, therefore, appear as if the last line of defence – being the records provided by the Department of Home Affairs – may not always be reliable as once thought. This in turn allows a dishonest seller to alienate a property without the consent of their spouse. The remedy to the problem is a simple one – correct the incorrect records. Regrettably, although the solution may be a simple one, the practical execution thereof may be an unattainable dream.

It is for this reason that conveyancers should always be mindful that a client may either in terms of an innocent mistake or, and regrettably so, with malicious intent be portraying their marital status as something that it is not.

Conveyancing firms have adopted the stance that a marriage certificate is to be provided to their offices by both the purchaser and seller. The person attending to the transfer then also examines the parties' marital status further by confirming whether or not an antenuptial contract is registered in any of the Deeds Offices in South Africa. The purported marital regime is also compared with that of the existing title deed.

This situation is further complicated by the fact that if a person alleges to be unmarried, and thus does not provide a marriage certificate, and the Department of Home Affairs records also reflect the person to be unmarried, conveyancers have no alternative but to accept the same and draft their documents accordingly. Similarly, if an antenuptial contract cannot be located one must assume the person to be married in community of property, if such person provides you with a marriage certificate, and the above Department of Home Affairs' records reflect them to be married.

Regrettably despite a conveyancer duly adhering to all safety precautions,

in rare instances, matters seem to slip through the proverbial cracks. If we are then to accept that the possibility exists that a property may be sold and transferred without a non-contracting party even knowing about it – what is such a spouse and purchaser then to do?

Section 15(9) of the Matrimonial Property Act provides for both the parties' remedies:

'(9) When a spouse enters into a transaction with a person contrary to the provisions of subsection (2) or (3) of this section, or an order under section 16(2), and –

(a) that person does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions or that order, *it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection (2) or (3), or while the power concerned of the spouse has not been suspended, as the case may be;*

(b) that spouse knows or ought reasonably to know that he will probably not obtain the consent required in terms of the said subsection (2) or (3), or that the power concerned has been suspended, as the case may be, *and the joint estate suffers a loss as a result of that transaction, an adjustment shall be effected in favour of the other spouse upon the division of the joint estate'* (our italics).

In *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 (3) SA 960 (SCA) the court had to deal with an enrichment action and declared such action would also apply to situations where a third party accepts the transfer of immovable property knowing that the necessary consent was not obtained.

From this it would seem as if the non-consenting party will have a claim against their spouse and the purchaser, should the purchaser have known such spouse's consent was required but not obtained.

The remedy for the purchaser, therefore, is quite apt in that should they prove that they did not know and could not have known that the seller required the consent of the non-contracting party, the agreement is deemed to be valid and enforceable. Thus, any transfer which has been effected, the non-consenting party is deemed to have consented cannot be deregistered.

Should the purchaser fail in discharging their burden of proof, the agreement would be void and the registration of the property into their name would be undone. In such circumstances it is quite unlikely that the purchaser would be successful with a damage claim against such seller.

Although the purchaser's remedy looks to be sound, it once again shifts the onus to a (possibly) innocent party, who

needs to institute an action, discharge a burden of proof, and only thereafter, will transfer be confirmed, and then only in the event of the purchaser being successful. The same can, unfortunately, not be said for the non-consenting spouse.

Conditions for non-consenting spouse to become eligible for compensation

The legislature has imposed two conditions on the non-consenting spouse before they become eligible for compensation. The first being that an adjustment in favour of such spouse is only possible on the dissolution of the joint estate and the second being that such a non-contracting spouse would need to prove their husband to have alienated their immovable property without the required consent.

The first condition is understandable – an adjustment is of course only possible when the joint estate is dissolved. It is incomprehensible how the court would go about effecting such adjustment if the non-contracting party and the contracting party are sharing an estate as any adjustment would have no net effect – taking from the joint estate and depositing such amount back into the exact same joint estate.

We further submit that should a property be alienated without the required

consent of the other spouse, a dissolution of the joint estate, most probably through divorce (maybe death), would result. Section 20 of the Matrimonial Property Act also provides the immediate division of the joint estate but again such spouse must approach the High Court to have the same ordered. The court in *Bopape and Another v Moloto* [1999] 4 All SA 277 (T) also referred hereto and further confirmed that the remedies of the non-consenting spouse must not be limited to the ‘four corners of section 15(9)(b) of the Act’. An example of such ‘damage’ suffered leading to the division of the estate is discussed below in the *Visser* matter.

The second condition is of greater concern, but the writers propose that the same can be addressed by the non-consenting spouse joining action with the purchaser and praying for the relevant court declaring the adjustment of the joint estate be affected. The rationale is that the spouse would virtually have to present the same evidence the purchaser did in their claim against the contracting party and such duplication of matters can be curtailed by simply joining the actions. Should the non-consenting party not elect to join the purchaser in their claim, their claim against their spouse is in no way affected.

It also goes without saying that the joint estate must indeed have suffered a loss before the non-consenting spouse's

claim for fraudulent concealment, as described in *Caxton Printing Works (Pty) Ltd v Transvaal Advertising Contractors Ltd* 1936 TPD 209 would arise. Interestingly in the *Visser* matter, the deceased sold the property for a mere R 10 500 to the purchasers despite the same being worth R 98 000. The effect thereof is that the joint estate was impoverished by R 87 500. The R 10 500 paid by the purchasers was ordered to be recovered from the joint estate by a separate action.

Conclusion

Ultimately, the transfer of a property without the consent of a spouse to which the seller is married in community of property, is a scarcity. The checks and balances systems in place are to thank for this but as rare as these instances are, they do happen. More can be done to prevent them, but it is unlikely that the relevant entity would be inclined to effect the required changes. This leaves us, as legal practitioners, as the proverbial gatekeepers and we must be more vigilant than ever.

Alethea Verona Robertson LLB (UP) is a legal practitioner, notary and conveyancer and **Herbert James David Robertson LLB (cum laude) (UP)** is a legal practitioner at **Dykes van Heerden Inc** in Johannesburg.



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By
Merilyn
Rowena
Kader

THE LAW REPORTS

April [2021] 2 All South African Law Reports
(pp 1 – 322); April 2021 (4) Butterworths Constitutional
Law Reports (pp 349 – 448)

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

Abbreviations

CC: Constitutional Court
ECP: Eastern Cape Local Division, Port Elizabeth
GP: Gauteng Division, Pretoria
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Civil procedure

Abuse of court processes: Two mining companies, involved in the exploration and development of major mineral sands projects in South Africa, sued three environmental attorneys and three community activists for defamation and damages in the sum of R 14,25 million, alternatively the publication of apologies. The plaintiffs alleged that each of the defendants had made defamatory statements relating to the plaintiffs' mining operations. The defendants raised two substantially identical special pleas in each of the three separate actions, and in response, the mining companies raised exceptions to the special pleas. The court held at the outset that the second special plea was not sustainable and, therefore, it was necessary to determine only the exception to the first set of special pleas.

In the first special plea, the defendants in *Mineral Sands Resources (Pty) Ltd v Reddell* [2021] 2 All SA 183 (WCC) averred that in bringing their actions, the plaintiffs' conduct amounted to –

- an abuse of process;
- the use of court process to achieve an improper end and to use litigation to cause the defendants' financial or other prejudice in order to silence them; and/or
- violated the constitutional right to freedom of expression.

The special pleas thus introduced a novel Strategic Litigation Against Public Participation (SLAPP) defence.

Common law affords the courts the inherent power to stop frivolous and vexatious proceedings when they amount to

an abuse of its processes. South African courts have repeatedly referred to the purpose of litigation as being relevant to the question of abuse of process. Litigation, which is brought for an ulterior purpose is impermissible.

The court, per Goliath DJP, held s 16 of the Constitution protects the concept of freedom of expression. An order preventing a person from making allegedly defamatory statements is a drastic interference with that right, and is granted only in extremely circumscribed circumstances, and only after considering the prejudice to the public.

SLAPPs are strategic lawsuits or litigation against public participation, meritless or exaggerated lawsuits intended to intimidate civil society advocates, human rights defenders, journalists, academics and individuals, as well as organisations acting in the public interest. SLAPPs are designed to turn the justice system into a weapon to intimidate people who are exercising their constitutional rights, restrain public interest in activism; and convert matters of public interest into technical private law disputes. Distinguishing a SLAPP suit from a conventional civil lawsuit involves competing policy considerations in determining which activities should be protected from legal action.

It became evident that the plaintiffs' strategy was that the more vocal the opponent was, the higher the damages amount claimed. Public participation is key in environmental activism, and the effect of SLAPP can be detrimental to the enforcement of environmental rights. The court was satisfied that the defamation suit was not *bona fide*, but merely a pretext with its only purpose to silence its opponents. It was confirmed as a SLAPP suit, and the first set of special pleas was a valid defence to the action. The first set of exceptions was dismissed with costs.

Appealability of interim orders: In June 2018, the appellants in *United Democratic Movement and Another v Lebashe*

Investment Group (Pty) Ltd and Others [2021] 2 All SA 90 (SCA) sent the President of South Africa a letter in which it was alleged that the respondents had conducted themselves unlawfully in various ways in relation to the Public Investment Corporation. The letter was also published on the website of the first appellant, the United Democratic Movement (the UDM).

Pending an action for damages for alleged defamation, the respondents sought interim relief in the High Court. The court granted an interim interdict against the appellants forbidding the repetition of certain remarks they had made publicly about the respondents. Leave to appeal was granted but when the appeal was heard, the matter was struck off the roll on the ground that the interim order was not appealable.

In the majority judgment, the crux of the dispute was whether the order was final in effect and was, therefore, appealable, or, if its true nature was in fact interim, whether the interests of justice warranted an appeal against it to be entertained.

An application for leave to appeal is regulated by s 17(1) of the Superior Courts Act 10 of 2013. In terms thereof, leave to appeal may only be given where the judge is of the opinion that –

- the appeal would have a reasonable prospect of success;
 - there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
 - the decision sought on appeal does not fall within the ambit of s 16(2)(a); and
 - where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.
- Case law shows that the general principles on the appealability of interim orders have been adapted to accord with

the equitable and more context-sensitive standard of the interests of justice favoured by the South African Constitution.

In the High Court, the question to be decided was simply whether, *prima facie*, the appellants' published remarks were defamatory and whether an interim interdict inhibiting the repetition of those remarks pending a trial was appropriate. The order then granted could not plausibly be interpreted as having final effect. The court confirmed that the order was interim in effect as well as in form, and that the interests of justice did not require that an appeal be entertained.

In two dissenting judgments as per Molemela JA and Makgoka JA, it was pointed out firstly that there is no absolute bar against subjecting interim orders to an appeal. An interim order may be appealed if the interests of justice, based on the specific facts of a particular case, so dictate. The dissenting opinions found that the High Court was aware of the fact that interim interdicts are not ordinarily appealable but exercised its discretion to grant the appellants leave to appeal on the basis that the interests of justice warranted that its interim order be the subject of an appeal. The dissenting opinions agreed that such decision was correct.

Corporate and commercial

Restraint of trade: In 2019, the first respondent (Kuhn), who had been previously employed by the applicant (Value Logistics), again assumed employment with the company. Kuhn's contract of employment in *Value Logistics Limited v Kuhn and Another* [2021] 2 All SA 298 (ECP) contained a restraint of trade and a confidentiality policy. However, in 2020, he resigned from his employment with Value Logistics and took up employment with Jungheinrich. On the day he handed in his letter of resignation, his manager brought to his attention the restraint and confidentiality policy. When Kuhn went ahead and assumed employment with Jungheinrich, Value Logistics brought the present application to enforce the restraint of trade agreement and confidentiality undertaking. It also sought to enforce a non-solicitation undertaking given by Jungheinrich to Value Logistics in a contract (the FML Agreement) between them.

Value Logistics stated that Jungheinrich was its competitor, and a customer until the FML Agreement was terminated. It discovered that Kuhn had e-mailed a service manual to himself before leaving employment, leading to the suspicion that he intended to use it to Jungheinrich's benefit. According to Value Logistics, the pool of customers in Port Elizabeth was limited and due to the close customer connection, which Kuhn had

established, and extensive confidential information which he was privy to during the eight years he was employed by Value Logistics, he was in a position to solicit business away from the company in favour of Jungheinrich.

It was not in dispute that Jungheinrich was a competitor of Value Logistics, and that Kuhn's employment in each company had overlapping elements. Having regard to Kuhn's own version of his employment with Value Logistics, the court found that he had breached the restraint. It referred to case authority, which established that the party wishing to enforce a restraint needs no more than to invoke the provisions of the contract and prove the breach. The party seeking to avoid enforcement must then prove on a preponderance of probability that in all the circumstances of the particular case it will be unreasonable to enforce the restraint.

The court, as per Mullins AJ, found that Value Logistics had made a case for the relief sought.

The next question was whether the duration and geographical extent of the restraint were reasonable. It had to be considered whether the restraint was wider than necessary to protect the protectable interest. In this case, the restraint was unreasonable in respect of both time and extent. The duration was reduced from two years to 12 months, and the geographic restriction was adjusted.

As against Jungheinrich, the court pointed out that at common law, it is not unlawful to solicit the services of another business's employee. In any event, there was no suggestion on the papers that Jungheinrich's motives in offering Kuhn a job was anything but legitimate. Moreover, the FML Agreement was a temporary arrangement intended to be of relatively short duration. To prohibit all Value Logistic's employees for a period of two years after the termination of the FML Agreement from taking up employment with Jungheinrich was indefensible and the clause was unenforceable.

Education – administrative law

Breach of university disciplinary code by student: Having been involved in the conceptualisation and production of racially divisive posters, which were subsequently erected on the campus of the fourth respondent university, the applicant in *Dart v Chairperson of the DAC of Stellenbosch University and Others* [2021] 2 All SA 141 (WCC) was charged with breaches of the university's Disciplinary Code. The university's Central Disciplinary Committee (CDC) found him guilty of contravening two rules of the Disciplinary Code and imposed a sanction of 100 hours of community

service and completion of a restorative assignment.

The applicant appealed the CDC's decision to the Disciplinary Appeal Committee (DAC), which dismissed the appeal, and increased the sanction imposed by the CDC to one of immediate expulsion from the university.

In terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000, the applicant sought to review the DAC's decisions.

It was held that in applications for review, the question is not whether a court agrees with the decision made by the decision maker, but whether it was one that the decision maker could reach.

The applicant's grounds for review included –

- allegations of bias;
- failure by the DAC to comply with the provisions of the Disciplinary Code; and
- taking into account irrelevant considerations while ignoring relevant considerations.

The arguments made in support of the allegations of bias were held to be unfounded.

The challenge based on contentions that the DAC failed to take relevant considerations into account and took irrelevant considerations into account was also unfounded, and failed.

The final ground of review was that the decision of the DAC to dismiss the appeal in the first instance was not rationally connected to the information before it, and the decision was so unreasonable that no reasonable decision maker could have so exercised the function of deciding the appeal. The court was not influenced by the contentions made in that regard.

The applicant raised two specific grounds of review in respect of the increase of sanction, viz that the decision of the DAC to increase the sanction was not rationally connected to the information before it, and that the decision was so unreasonable that no reasonable decision maker could have so exercised the function of deciding the appeal. The fact that the DAC did not give the applicant notice of the possibility of the increase in sanction could not be relied on by the applicant as he had not raised it in the founding papers. The same applied with regard to the alleged disparity between the sanctions imposed on the applicant and two fellow students.

The application was dismissed.

Legal practice

Application for readmission as advocate: Mr Nthai, the applicant in *Johannesburg Society of Advocates and Another v Nthai and Others* [2021] 2 All SA 37 (SCA) was an advocate appointed to act as lead counsel on behalf of the

South African government before the International Arbitration Tribunal in a dispute with Italian nationals on a mining-related issue. Before the arbitration hearing could commence, the claimants expressed a willingness to withdraw the claim, but the issue of costs stood in the way. During meetings with the Chief Executive Officer of one of the claimant companies, Mr Nthai attempted to solicit a bribe of R 5 million, in return for which he undertook to ensure that the South African government would agree to settle the dispute on the basis that each party would pay its own costs, thus potentially saving the claimants millions, at the expense of his client, the government. When that came to light, a complaint was lodged with the Pretoria Society of Advocates in which Mr Nthai was a member. At the end of disciplinary proceedings, Mr Nthai's name was struck from the roll of advocates.

In October 2018, Mr Nthai applied *ex parte* to the Limpopo Division of the High Court, Polokwane, to be readmitted as an advocate. His application was successful and the appellants obtained leave to appeal.

The court explained the nature of such proceedings; the onus to be discharged by an applicant seeking readmission; and the role of professional bodies in an application of this kind.

In the readmission application, the court had to be satisfied that the applicant was a fit and proper person and that his readmission would involve no danger to the public or the good name of the profession.

Mr Nthai's misconduct was not a casual or momentary lapse of judgment, but was carefully calculated and zealously pursued. He pursued personal enrichment at the expense of his client. He deliberately downplayed the full extent of the allegations and showed no true cognitive appreciation of their seriousness.

The High Court failed to appreciate the full import of the transgression. The appeal against its order was upheld with costs.

Mining, minerals and energy

Responsibilities of holder of mining rights: The applicant Ezulwini Mining Company (EMC) in *Ezulwini Mining Company (Pty) Ltd v Minister of Mineral Resources and Energy and Others* [2021] 2 All SA 160 (GP) had acquired the underground and surface operations of a gold and uranium mine in 2014. In September 2016, EMC ceased underground mining operations at the mine (Ezulwini) as the underground mine was no longer economically viable. Surface mining-related operations, including, gold metallurgical processing operations, were however ongoing at the mine. In order to under-

take the underground mining operations at Ezulwini, EMC and its predecessors pumped groundwater from the underground workings, which resulted in the dewatering of the Gembokfontein West Dolomitic Compartment. In its founding affidavit, EMC stated that notwithstanding the cessation of underground operations at Ezulwini, EMC continued to pump and treat water from the underground workings at a cost of approximately R 21,1 million per month. It wished to cease the pumping of water from the defunct underground workings, and in 2017, it applied for two authorisations to cease the pumping. The authorisations have been refused, EMC brought the present application for a declaration that neither an environmental authorisation in terms of the National Environmental Management Act 107 of 1998 and the Environmental Impact Assessment Regulations, nor an amendment to the water use licence issued to EMC in terms of the National Water Act 36 of 1998, was required to cease the pumping of water from the defunct underground workings.

A counter-application was brought by the sixth respondent (Goldfields) for a declaration that EMC remained responsible for the pumping and treatment of extraneous water from the underground workings of the Ezulwini mine until at least the Minister issued a closure certificate in terms of s 43 of the Mineral and Petroleum Resources Development Act 28 of 2002 to EMC or such longer period as contemplated in s 24R of the National Environmental Management Act. Further relief sought was for EMC to maintain the shafts and pumping infrastructure required for the pumping and treatment of water from Ezulwini's underground workings and to allow the fifth and sixth respondents access to the Ezulwini mine for purposes of inspection.

Fabricius J held that in respect of the latter two prayers mentioned above, Goldfields had not established that it had a clear or even *prima facie* right to the relief sought, nor had it demonstrated a reasonable apprehension of any harm should the relief not be granted. There was no basis for granting those orders.

Section 43(1) of the Mineral and Petroleum Resources Development Act provides that the holder of a mining right 'remains responsible' for the pumping and treatment of extraneous water until the Minister has issued a closure certificate in terms of the Act to the holder. In other words, where pumping was actually being conducted in order to mine, the holder of the mining right remains responsible for pumping and treatment of water until a closure certificate is issued, in order to maintain the *status quo* until such time as the cessation of pumping can be properly regulated. Goldfield's

application for declaratory relief as set out above was thus granted.

Privacy

Right not to have the privacy of one's communications infringed: In the case of *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others* (Media Monitoring Africa Trust and Others as amici curiae) and a related matter 2021 (4) BCLR 349 (CC), the applicants, AmaBhungane Centre for Investigative Journalism NPC and Mr Stephen Sole, a journalist who had been the subject of state surveillance, brought an application in the High Court challenging the constitutionality of the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 (RICA) in several respects.

The CC, by a majority as per Madlanga J (Khampepe, Majiedt, Mhlantla, Theron, Tshiqi JJ, Mathopo and Victor AJJ concurring) confirmed the declaration of unconstitutionality made by the High Court but only to the extent that RICA failed to -

- provide for safeguards to ensure that a judge designated in terms of s 1 is sufficiently independent,
- provide for notifying the subject of surveillance of the fact of her or his surveillance as soon as notification can be given without jeopardising the purpose of surveillance after surveillance has been terminated,
- adequately provide safeguards to address the fact that interception directions are sought and obtained *ex parte*;
- adequately prescribe procedures to ensure that data obtained pursuant to the interception of communications is managed lawfully and not used or interfered with unlawfully, including prescribing procedures to be followed for examining, copying, sharing, sorting through, using, storing or destroying the data, and failed to provide adequate safeguards where the subject of surveillance is a practising lawyer or journalist.

The CC ordered that the declaration of unconstitutionality would take effect from the date of the court's judgment and be suspended for 36 months to afford Parliament an opportunity to cure the defects causing the invalidity. It ordered that during the period of suspension RICA would be deemed to include additional sections (the wording of which was set out) numbered 23A and 25A dealing respectively with 'disclosure that the person in respect of whom a direction, extension of a direction or entry warrant is sought is a journalist or practising lawyer' and 'post-surveillance notification'.

Second respondent, the Minister of State Security, sought to appeal against the High Court's finding that the state's practice of bulk interception of communications was not authorised by law. This appeal was dismissed with costs.

The fifth respondent, the Minister of Police, sought to appeal against the High Court's finding on the issue of notification. The fifth respondent argued for the retention of the blanket non-availability of notification. He contended that the Constitution conferred no right to notification, neither pre- nor post-surveillance. This appeal was also dismissed with costs.

Applicants also appealed against the costs order made by the High Court. The High Court had held that there would be no order as to costs. Applicants' appeal against this was upheld with costs. The High Court's order in respect of costs was set aside. The Minister of Justice and Correctional Services, the Minister of State Security, the Minister of Defence and Military Veterans, the Minister of Police, the Office for Interception Centres, the National Communications Centre and the State Security Agency were ordered to pay the applicants' costs of the application before the High Court.

A dissenting judgment as per Jafta J (Mogoeng CJ concurring) set out reasons for agreeing with much of what was con-

tained in the first judgment, except its conclusion that RICA empowered the Minister of Justice to designate a judge for the purposes of the Act. The minority would simply have declared the impugned provisions invalid without granting any additional remedies.

Property

Cancellation of lease agreement due to breach of contract and obtaining of order of eviction: In terms of a lease agreement entered into with the first respondent, the appellant (Shevel) took occupation of a flat on 1 February 2013. In 2019, he fell into arrears with three months' rent due. The first respondent gave him notice and cancelled the agreement on 30 April 2019. The applicant failed to vacate the property, causing the first respondent to obtain an eviction order.

In his appeal against the eviction order, the appellant claimed that he had not had a fair trial in the court *a quo*, that the magistrate had erred in relation to his earning capacity, and that if the present court confirmed the order, he would be rendered homeless.

In contending that he had not had a fair trial, the appellant complained that his legal representative failed to prepare adequately for the hearing and, further, did not adhere to his instructions. Hav-

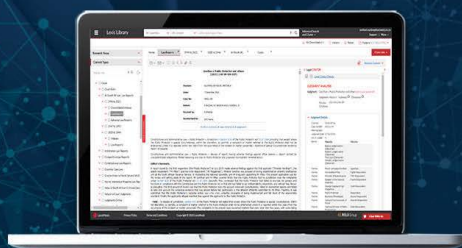
ing considered the record of proceedings in the court *a quo*, and in particular the detail traversed in the submissions to the court, the present court held that the appellant's complaint was unfounded.

On the evidence around the appellant's income in *Shevel v Alson Development Sea Point (Pty) Ltd and Another* [2021] 2 All SA 260 (WCC), the court accepted that he might not have earned the amount pointed to in the lower court, as the said amount was made up of earnings and money obtained from friends of the appellant. The alleged misdirection was not material, and the court confirmed the correctness of the finding that there was sufficient money available to the appellant every month to enable him to find alternative accommodation. The court's view that the appellant was unlikely to be rendered homeless, based on the evidence, was also confirmed on appeal.

The magistrate had properly exercised his discretion under s 4(6) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 in evicting the appellant and giving him just more than a month to vacate. There was no reason to interfere with the order of eviction or its terms.

As the date stipulated in the eviction order had come and gone, the court had to affix a new date by which the appellant had to be out of the property. It was

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pointed out that the country was under a Level 3 Lockdown under the Disaster Management Act 57 of 2002, which made the eviction of persons from their places of residence subject to ministerial regulation. Having regard to the circumstances of this matter, the court held that it would not be just and equitable to suspend the operation of the eviction order until the suspension of the current State of Disaster. The court was satisfied that it would be just and equitable to order the appellant to vacate the flat within four weeks of its order.

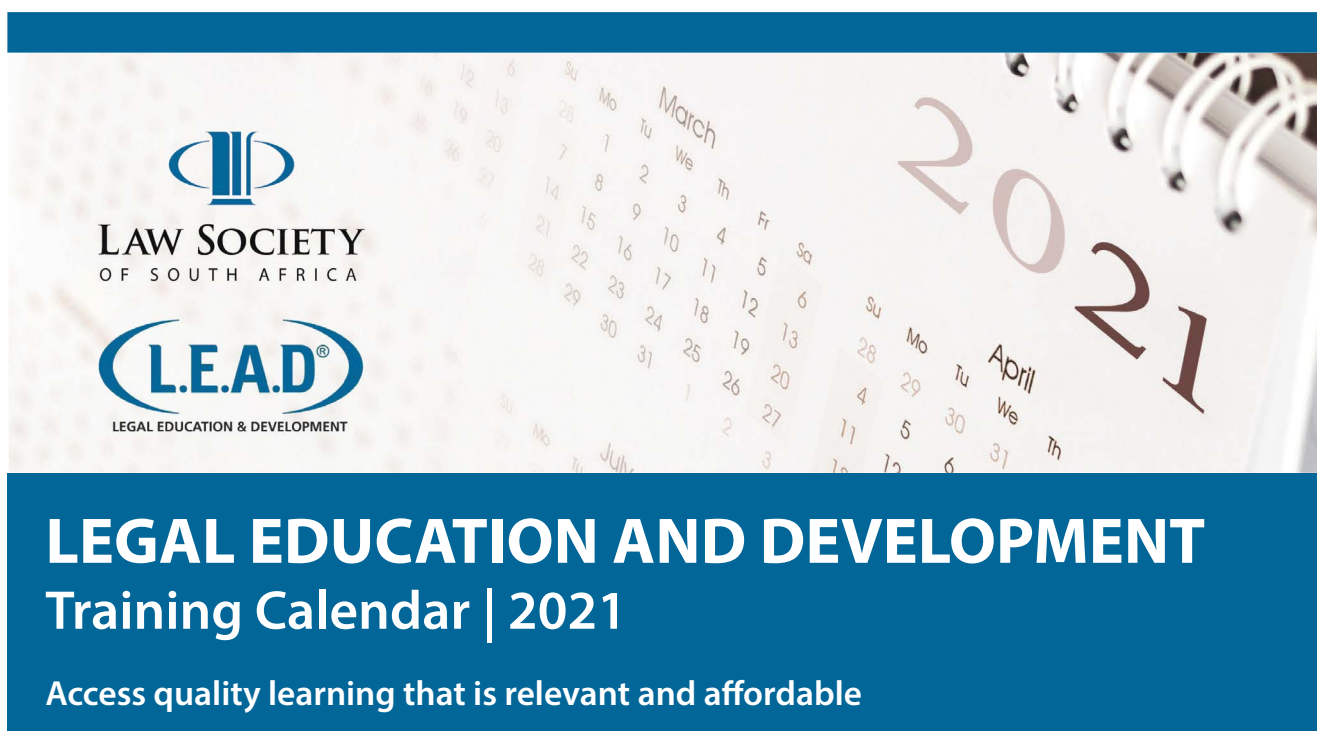
Other cases

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

- application for removal of advocate from the roll – whether striking off or suspension would be appropriate sanction;
- arbitration – application for award to be made order of court;
- children – right not to be detained except as matter of last resort;
- freedom of expression and speech;

- interpretation of statutes and parliamentary material;
- oral evidence – whether court may raise point of law *mero motu* at oral-evidence hearing; and
- search and seizure – powers under National Prosecuting Authority Act 32 of 1998.

Merilyn Rowena Kader LLB (Unisa) is a Legal Editor at LexisNexis in Durban. □



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The Prevention of Organised Crime Act empowers the High Court to make an order of forfeiture provided that the property concerned is ‘the proceeds of unlawful activities’



By
Kgomotso
Ramotsho

Bobroff and Another v National Director of Public Prosecutions (SCA)
(unreported case no 194/20, 3-5-2021)
(Eksteen AJA (Ponnan, Mbha and Molemela JJA and Weiner AJA concurring))

In the *Bobroff* case, two issues were brought to the Supreme Court of Appeal (SCA), namely –

- whether the Gauteng Division of the High Court in Pretoria (the High Court) had jurisdiction to make a forfeiture order in terms of s 50(1)(b) of the Prevention of Organised Crime Act 121 of 1998 (the Act) in respect of property situated outside the territory of South Africa (SA) and belonging to persons who are presently in Australia; and if so
- whether the respondent National Director of Public Prosecutions (NDPP), had established that the property was proceeds of unlawful activities as defined in the Act.

On 28 July 2017, the High Court granted an *ex parte* application for a preservation order, in terms of s 38 of the Act, in respect of the credit balances and interest accrued and held in two accounts in Israel in the name of the first appellant, Ronald Bobroff (Mr R Bobroff) at the Israel Discount Bank (IDB), and the second appellant, Darren Bobroff (Mr D Bobroff) at the Bank Mizrahi-Tefahot (BMT), respectively. The Bobroffs had been prominent legal practitioners practising as directors at the firm Ronald Bobroff and Partners Inc (the firm) in Johannesburg. Mr R Bobroff became a director of the firm in 2006. He had also been a member of the council of the Law Society of the Northern Provinces (the law society) for many years and was chairperson of the South African Association of Personal Injury Lawyers in 2004.

The firm predominantly dealt with cases in the field of personal injury litigation, often acting on a contingency basis. In 2010, allegations began to surface that the firm, had over the preceding three years, charged clients inflated fees exceeding the maximum permitted in terms of the Contingency Fees Act 66 of

1997. During 2011, a former client of the firm filed a complaint with the law society against Mr D Bobroff alleging that he had been charged inflated fees. The law society commenced a disciplinary inquiry against the Bobroffs in February 2012. The inquiry was protracted by the failure of the Bobroffs to incorporate.

In the interim, in October 2012, Bernadine van Wyk, a bookkeeper employed by the firm, deposed to an affidavit pursuant to the Protected Disclosures Act 26 of 2000, in which she made serious allegations of significant financial impropriety by the Bobroffs. This prompted an investigation by the South African Police Services (SAPS). Eventually, on 3 March 2016, the law society filed an application to strike the Bobroffs from the roll of legal practitioners. The application, which eventually led to the disbarment of the Bobroffs, was heard on 14 March 2016. This was the same day the SAPS, as a result of their investigation, issued warrants of arrest for both, Mr R Bobroff and Mr D Bobroff.

However, on 16 March 2016, before the warrants of arrest could be executed, Mr D Bobroff departed for Australia, and Mr R Bobroff followed on 19 March 2016. Neither has returned since. As a result of their sudden departure, the SAPS caused a Red Notice to be circulated through Interpol. On 8 May 2017, the State Attorney in Israel sent a request for assistance in a criminal matter to the Department of Justice and Constitutional Development in SA. The request recorded that the police in Israel were investigating suspected crimes of money laundering, which had allegedly been committed by the Bobroffs in Israel.

The investigation, it said, had arisen out of a suspicious transaction, which had been transmitted by a compliance officer in the BMT on 12 February 2017. The compliance officer had reported

that Mr D Bobroff, a non-resident of Israel, maintained a BMT account and had given an instruction to transfer US\$ 3 million from his account from the BMT to an account in Australia. The transaction had appeared suspicious and the BMT accordingly declined to execute the transfer. Mr D Bobroff responded with a request to withdraw the entire credit of approximately US\$ 7 million, which he held in the BMT account at the time. The action prompted the compliance officer to contact the Israel National Police for instructions.

On 1 March 2017, the Israel National Police had received a report from the compliance officer of IDB regarding an attempt by Mr R Bobroff to withdraw an amount of US\$ 830 000 from an account in his name at IDB. The Israel National Police thereafter learnt of the Interpol Red Notice. The accounts were frozen at the instance of the Israel National Police and litigation followed as the Bobroffs sought the release of the funds.

The NDPP contended that credits held in these accounts were proceeds of unlawful activities in SA, in particular theft, fraud, money laundering and transgressions of the South African tax legislation. The SCA firstly considered the question of jurisdiction. The SCA added that the determination of jurisdiction involves a two-stage inquiry, namely –

- the SCA had to establish whether the court is, as matter of principle, competent to take cognisance of the particular case (that is, whether a recognised jurisdictional ground is present); and
- if a jurisdictional ground is established, whether an effective judgment can be given.

The SCA said that the NDPP, argued that the Act itself provides for extra-territorial jurisdiction in forfeiture proceedings. Mr Labuschagne on behalf of the NDPP relied largely on the definition

in the Act of 'proceeds of unlawful activities', which is defined to mean: 'any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived'.

Meanwhile, Mr Subel, on behalf of the appellants, contended that neither of the requirements for jurisdiction had been established. He referred to s 21 of the Superior Courts Act 10 of 2013, which provides for the jurisdiction of the High Courts in both civil and criminal matters. The material portion of s 21 provides:

'(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance'. Mr Subel contended that it is to the common law that the SCA must look to determine whether a recognised jurisdictional ground is present. He referred the SCA to E Bertelsmann and DE van Loggerenberg *Erasmus: Superior Court Practice* (Cape Town: Juta 2015) at A2-103 to A2-104, which records:

'The jurisdictional connecting factors or *rationes jurisdictionis* recognised by the common law include residence, domicile, the situation of the subject matter of the action within the jurisdiction, cause of action which includes the conclusion or performance of a contract and the commission of a delict within the jurisdiction'. The SCA said that forfeiture proceedings under ch 6 of the Act are not dependent on institutions of criminal proceedings. The focus in such proceedings is not on the wrongdoer, but on the property, which had been used to commit an offence of which constitutes the proceeds of a crime. The SCA pointed out that the proceedings are "*in rem*" and are civil proceedings'.

The SCA added that the property subject to forfeiture in this matter, being credit balances in a bank account, are incorporeal assets. The SCA said it accepted, for the purpose of the judgment, that at common law, jurisdiction for such an action is determined by the *forum rei sitae*, which is the place of residence of the debtor. The SCA, however, said jurisdiction of South African courts is not determined solely by s 21 of the Superior Courts Act. The SCA added that generally, the jurisdiction of SA courts has three sources, namely –

- statutory;
- common law; and
- inherent jurisdiction.

Apart from the Superior Courts Act, the SCA pointed out that matters of ju-

risdiction are dealt with in numerous statutory provisions. The SCA said that whether the Act provides a statutory jurisdictional ground is a question which requires an interpretation of the Act, and in particular, ch 6 thereof.

The SCA added that the interpretation of documents, including statutes, requires a consideration of the language used, in which the light of the ordinary rules of grammar and syntax, in the context in which the provision appears. The SCA said that the apparent purpose to which it is directed should be considered in the light of all the material known to those responsible for its production. The SCA pointed out that, when more than one meaning is possible, each possibility must be weighed in the light of all factors, and a sensible meaning is to be preferred to one that leads to an insensible or unbusinesslike result.

The SCA said that while forfeiture is a civil matter, it is alleged to arise, in this case, at least in part, from transnational money laundering. The SCA noted that electronic banking has made the transfer of money across borders uncomplicated and instantaneous, and currencies can be changed at the drop of a hat. The SCA pointed out that A Kruger *Organised Crime and Proceeds of Crime Law in South Africa* 2ed (Durban: LexisNexis 2008) suggests that international crime and terrorism have led to the separation between jurisdiction and sovereignty of states. But rather, treaties are now used to establish suitable jurisdiction. The SCA added that with the increase in organised crime, there has been a growing perception, internationally, that conventional penalties are inadequate as measures of deterrence to crime.

The SCA made reference to *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2002 (2) SACR 196 (CC), where Ackermann J said:

'It is common cause that conventional criminal penalties are inadequate as measures of deterrence when organised crime leaders are able to retain the considerable gains derived from organised crime, even on those occasions when they are brought to justice. ... Various international instruments deal with the problem of international crime in this regard and it is now widely accepted in the international community that criminals should be stripped of the proceeds of their crimes, the purpose being to remove the incentive for crime, not to punish them. This approach has similarly been adopted by our legislature.'

The SCA pointed out that it was against this background that the Act was promulgated. The SCA added that the preamble to the Act recognises the rapid growth of organised crime and money laundering, nationally and internation-

ally. It records that "no person should benefit from the fruits of unlawful activities", and that legislation is necessary to provide for a civil remedy for the preservation, seizure and forfeiture of property which is derived from unlawful activities'. The SCA said that ch 5, which applies where there has been a prosecution, and ch 6, which applies even where no prosecution is instituted, provide the mechanism for such forfeiture.

The SCA added that notice to any party is required after the preservation order is made, and such party is afforded an opportunity to enter an appearance to resist the granting of a forfeiture order. The SCA pointed out that the Bobroffs did so. The SCA said while a preservation order is in force, the NDPP may bring an application for the property to be forfeited to the state. The SCA added that s 50 empowers the High Court to make an order of forfeiture, subject to the provisions of s 52, provided it finds on a balance of probabilities that property concerned is the proceeds of unlawful activities.

The SCA said the definition of 'the proceeds of unlawful activities' strike at any property 'derived, received or retained, directly or indirectly, in the Republic or elsewhere'. 'Property' is defined in the Act to mean, 'money or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof'. The SCA added that the purpose of s 50(1) of the Act, as read with the definition of 'proceeds of unlawful activities', in the context of the known developments worldwide in relation to transnational crime, is to strip offenders of the proceeds of their crime wherever they may retain it.

The SCA said it was fortified in its conclusion by the provisions of the International Co-operation in Criminal Matters Act 75 of 1996. The SCA pointed out that the NDPP relied on theft, fraud, money laundering and contraventions of the tax legislation. But also, the second pillar of the NDPP's case rested on the affidavit of Ms van Wyk, who was an experienced legal bookkeeper employed by the firm on 16 September 2010. The allegations by Ms van Wyk spoke to specific instances of widespread theft and fraud involving the Bobroffs from approximately 2008 (in respect of the Discovery files) to 2012.

The SCA, while determining whether there was a crime committed, said the Bobroffs firm dealt with thousands of files per annum and Mr R Bobroff ventured an estimate of at least 6 000 matters in 2013 to 2015. The period of misconduct testified to by Ms van Wyk extended over a period of five years prior to 2012. The SCA pointed out

that a simple calculation reveals, on 60 000 files alone, that an amount of R 90 million would have been illegitimately charged to unsuspecting clients on this basis. The SCA held that very substantial sums thereof were moved into accounts of the Bobroffs in 2009 to 2010 on which interest has accrued in the interim.

The SCA said the origin of money is a matter exclusively within the knowledge of the Bobroffs. The SCA added that the Bobroffs had made no attempt to explain it. The SCA concluded that the forfeiture order which it made is not dispropor-

tionate to the proceeds received from unlawful activity proved. In the result the SCA made the following order:

'1. The order of the High Court is amended as follows:

(a) By the addition to para 1.2, after the word 'Bobroff' of the following: "save for the amounts of USD 256 217.84 and AUD 284 785"; and

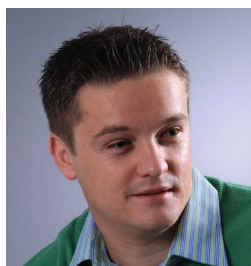
(b) Paragraph 3 is set aside and replaced with the following:

"The balance of the proceeds in the accounts, as set out in para 1 above, are to be paid into the Criminal Assets Re-

covery Account established under s 63 of the POCA, number 80303056, at the South African Reserve Bank, Vermeulen Street, Pretoria".

2. Save to the extent set out in para 1 above, the appeal is dismissed with costs of two counsel, where so employed'.

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



By
Philip
Stoop

New legislation

Legislation published from
1 – 30 April 2021

Commencement of Acts

Marine Spatial Planning Act 16 of 2018. *Commencement:* 1 April 2021. Proc4 GG44383/1-4-2021 (also available in isi-Zulu).

Customs and Excise Act 91 of 1964, s 58A. *Commencement:* 1 April 2021. Proc6 GG44383/1-4-2021.

Promotion of Access to Information Amendment Act 31 of 2019. *Commencement:* 1 April 2021. Proc R10 GG44403/1-4-2021 (also available in Afrikaans).

Protection of Personal Information Act 4 of 2013, s 58(2). *Commencement:* 1 July 2021. GN297 GG44383/1-4-2021 (also available in Afrikaans).

Promulgation of Acts

Auditing Profession Amendment Act 5 of 2021. *Commencement:* 26 April 2021. GenN228 GG44493/26-4-2021 (also available in Sesotho).

Selected list of delegated legislation

Agricultural Product Standards Act 119 of 1990

Amendment regulations regarding departmental fees. GN R359 GG44473/23-4-2021.

Architectural Professions Act 44 of 2000

Identification of work for the different categories of registered persons and identification of the scope of work for every category or registered persons in the architectural profession. BN27 GG44505/30-4-2021.

Auditing Profession Act 26 of 2005

Amendment of the Code of Professional Conduct for Registered Auditors to promote the role and mindset expected of registered auditors and the use of electronic signatures when signing audit or other assurance reports. BN25 GG44455/16-4-2021.

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Optometrist and Speech/Audiologist Gazette 2021. GenN179 GG44406/1-4-2021. *Physiotherapist Gazette* 2021. GenN180 GG44407/1-4-2021.

Occupational Therapy Gazette 2021. GenN181 GG44408/1-4-2021.

Increase of the minimum assessment to R 1 284, withdrawal of the implementation of s 85(1) and the withdrawal of the implementation of s 78. GenN189 GG44422/7-4-2021.

CF-1B Application for the Change of the Nature of Business and CF-2C Application for the Estimation Forms. GenN190 GG44425/8-4-2021.

Council for Medical Schemes Levies Act 58 of 2000

Imposition of levies on medical schemes. GenN196 GG44436/9-4-2021.

Dental Technicians Act 19 of 1979

Amendment of the fine for improper or disgraceful conduct to R 50 000. GN339 GG44461/19-4-2021.

Amendment of the regulations relating to unmounted artificial teeth, 1982. GN340 GG44462/19-4-2021.

Amendment of the regulations relating to the registration of dental laboratories and related matters. GN341 GG44463/19-4-2021.

Disaster Management Act 57 of 2002 (COVID-19)

• Education

Amendment of directions regarding measures to address, prevent and combat spread of COVID-19 in the National Department of Basic Education: Re-opening of schools. GenN224 GG44486/23-4-2021.

• General regulations

Extension of National State of Disaster under the COVID-19 lockdown to 15 May 2021. GN R333 GG44447/14-4-2021. Amendment to the regulations issued in terms of s 27(2): COVID-19 vaccine injury no-fault compensation scheme. GN376 GG44485/22-4-2021.

• Labour

COVID-19 Temporary Employee/Employer Relief Scheme (C19 TERS) Direction, 2021. GN R342 GG44465/20-4-2021.

Electricity Act 41 of 1987

License fees payable by licensed generators of electricity. GN357 GG44469/23-4-2021.

Electronic Communications Act 36 of 2005

Increase of administration fees in relation to service licences. GenN175 GG44392/1-4-2021.

Increase of radio frequency spectrum licence fees. GenN175 GG44391/1-4-2021.

Increase of administration fees in relation to approvals. GenN177 GG44393/1-4-2021.

Digital Sound Broadcasting Service Regulations. GenN215 GG44469/23-4-2021.

Employment of Educators Act 76 of 1998

Terms and conditions of employment of educators. GN331 GG44433/9-4-2021.

Independent Communications Authority of South Africa Act 13 of 2000

Code for Persons with Disabilities Regulations, 2021. GN325 GG44427/9-4-2021.

Legal Practice Act 28 of 2014

Amendment of rules (r 16.10). GenN171 GG44383/1-4-2021.

Inclusion of new rule (r 54.9.2.1). GenN191 GG44427/9-4-2021.

Medical Schemes Act 131 of 1998

Council for Medical Schemes: Declaration of certain practices by medical schemes in selecting designated health care providers and imposing excessive as irregular or undesirable practices. GenN214 GG44469/23-4-2021.

Merchant Shipping Act 57 of 1951

Merchant Shipping (Safe Manning, Training and Certification) Regulations, 2020. GenN219 GG44469/23-4-2021 (also available in isiZulu).

Mine Health and Safety Act 29 of 1996

Guideline for the compilation of a mandatory code of practice for prevention of flammable gas explosions in mines other than coal mines. GN326 GG44427/9-4-2021.

Guidance note on the management and control of HIV in the South African mining industry. GN327 GG44427/9-4-2021.

National Environmental Management Act 107 of 1998

Amendment to the regulations regarding plastic carrier bags and plastic flat bags, 2021. GN317 GG44421/7-4-2021.

Identification of a Generic Environmental Management Programme relevant to an application for environmental authorisation for the development or expansion of gas transmission pipeline infrastructure. GN373 GG44481/23-4-2021.

Identification of expanded geographical areas of strategic importance for development of electricity transmission and distribution infrastructure and procedures to be followed when applying for environmental authorisation for large scale electricity transmission or distribution development activities when occurring in geographical areas of strategic importance. GN383 GG44504/29-4-2021.

National Qualifications Framework Act 67 of 2008

Policy and Criteria for Credit Accumulation and Transfer within the National Qualifications Framework (as amended, 2021). GN321 GG44424/8-4-2021.

Non-Proliferation of Weapons of Mass Destruction Act 87 of 1993

Declaration of certain missile technology and related item as controlled goods, and control measures, applicable to such goods. GN318 GG44423/8-4-2021.

Declaration of nuclear-related dual-use equipment, material, software and related technology as controlled goods, and control measures applicable to such goods. GN319 GG44423/8-4-2021.

Declaration of certain chemical goods as controlled goods and control measures applicable to such goods. GN320 GG44423/8-4-2021.

National Railway Safety Regulator Act 16 of 2002

Determination of permit fees. GN338 GG44455/16-4-2021.

Political Party Funding Act 6 of 2018

Amount available for allocation in terms of the Regulations on Political Party Funding. GenN178 GG44405/1-4-2021 and GenN205 GG44450/15-4-2021.

Postal Service Act 124 of 1998

Fee increase in terms of the Unreserved Postal Service Regulations, 2020. GenN183 GG44413/1-4-2021.

Promotion of Access to Information Act 2 of 2000

Amendment of regulations. GN307 GG44404/1-4-2021 (also available in Afrikaans).

Property Valuers Profession Act 47 of 2000

Fees and charges effective from 1 April 2021 to 31 March 2022. GenN216 GG44469/23-4-2021.

Public Finance Management Act 1 of 1999

Exemption of national and provincial departments and government components which apply the modified cash standard, from complying with s 40(1)(b) for a period of five years. GN322 GG44426/8-4-2021.

Statement of the national revenue, expenditure and borrowings as at 31 March 2021. GenN247 GG44514/30-4-2021.

Superior Courts Act 10 of 2013

Establishment of Circuit Courts within the Western Cape Division of the High Court of South Africa. GenN236 GG44505/30-4-2021.

Tax Administration Act 28 of 2011

Application and cost recovery fees for binding private rulings and binding class rulings. GN299 GG44383/1-4-2021 (also available in Afrikaans).

Value-Added Tax Act 89 of 1991

List of transactions or matters in respect of which the Commissioner may decline to make a decision. GN300 GG44383/1-4-2021 (also available in Afrikaans).

Amendment of para 8 of sch 1 to regulated purchases made by diplomats at licensed special shops. GN R369 GG44473/23-4-2021 (also available in Afrikaans).

Draft delegated legislation

- Proposed National Data and Cloud Policy in terms of the Electronic Communications Act 36 of 2005 for comment. GN306 GG44389/1-4-2021 and GN309 GG44411/1-4-2021.
- Regulations under the Rental Housing

Act 50 of 1999 for comment. GN296 GG44383/1-4-2021.

- Proposed regulations on accounting standards in terms of the Public Finance Management Act 1 of 1999 for comment. GN298 GG44383/1-4-2021.
- Draft national policy pertaining to conduct, administration and management of examinations of colleges in terms of the Continuing Education and Training Act 16 of 2006 for comment. GN324 GG44427/9-4-2021.
- Amendment to the Financial Provisioning Regulations, 2015 in terms of the National Environmental Management Act 107 of 1998 for comments. GN371 GG44477/22-4-2021.
- Licencing exemption and registration requirements in terms of the Electricity Regulation Act 4 of 2006 for comment. GN347 GG44482/23-4-2021.
- Draft Amendment to the National Road Traffic Regulations, 2000 in terms of the National Road Traffic Act 93 of 1996 for comment. GN375 GG44484/23-4-2021.
- Draft Policy for the quality assurance of assessment of qualifications registered on the General and Further Education and Training Qualifications Sub-framework in terms of the National Qualifications Framework Act 67 of 2008 for comment. GN385 GG44505/30-4-2021.

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



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By
Monique
Jefferson

Employment law update

Prescription of arbitration awards

In *South African Tourism v Monare* [2021] 4 BLLR 386 (LAC) a former employee instituted a claim for payment in respect of loss of salary. The employee had been engaged on a fixed-term contract for three years but was dismissed prior to the expiry of the contract. The employee referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The dismissal was found to be substantively unfair, and reinstatement was ordered with backpay. When the employee wished to tender his services, he was advised by the employer not to report for duty as the arbitration award was to be taken on review.

On review, the Labour Court (LC) set the arbitration award aside on the basis that the CCMA lacked jurisdiction to determine the dispute. The matter was then taken on appeal to the Labour Appeal Court (LAC) where the LAC overturned the LC's decision, and the reinstatement order was accordingly revived. By this time, the fixed-term contract had already expired, and the employee accordingly could not be reinstated to his position. The employee subsequently launched an application in the LC for the recovery of his lost salary.

The employer argued that the claim had prescribed but the LC found that the claim had in fact not prescribed. In the circumstances the employer was ordered to pay the employee damages as a result of the loss of salary from October 2010 to January 2015. This amount was calculated with reference to the exchange rate as at the expiry of the contract in January 2015. The employer took the decision on appeal and the employee cross-appealed alleging that the exchange rate to be applied should be that at the time of payment. He also alleged that the employer should have been ordered to pay costs and that the LC erred in not dealing with interest on the outstanding amount.

The LAC was required to consider whether the LC erred in finding that the

claim for arrear salaries had not prescribed and in not making an order in respect of interest payable. Furthermore, the LAC had to consider whether the exchange rate that was applied was correct and whether an order of costs should have been made. In determining whether the claim had prescribed, the LAC had to determine whether the cause of action arose when the employee was dismissed on 30 September 2010 and whether the reinstatement order was suspended for the period between the LC judgment and the LAC judgment and if so, whether this also suspended the contractual claim.

According to the employer, the claim had prescribed as the cause of action to claim arrear salaries arose more than three years prior to the date when the employee was dismissed as the employee could have instituted a contractual claim immediately thereafter and could have sued the employer for damages or specific performance. This argument was on the basis that the employer alleged that it had repudiated the contract and at that point the employee did not have to wait for anything further before bringing such a claim. The LAC found that this argument would only be applicable if the employee had accepted the repudiation of his contract. This was not the case as the employee had immediately disputed the termination when he referred a dismissal to the CCMA and accordingly took steps to revive and enforce the contract as opposed to cancel it. The current claim arose because the employer did not comply with the reinstatement order. If the employer had complied with the reinstatement order, then the employee would have received payment of a salary as and when such payment fell due in terms of the contract. It was due to the employer's conduct that the employee was not reinstated as per the order and this claim could only have arisen after the reinstatement order was revived by the LAC.

The LAC found that this was a contractual claim and agreed that there was no full cause of action before the LAC judgment on 11 November 2015. It was held

that prescription starts to run when a debt becomes due and payable. Prescription, therefore, only began to run from the date that the new cause of action arose when the employer did not comply with the reinstatement order, which was a separate claim to that at the time of dismissal.

Regarding the cross appeal, the LAC found that the LC had erroneously not dealt with interest on the salaries claimed. It was held that the interest would run from the date of expiry of the fixed-term contract. Regarding costs, the LAC found that it was appropriate to award costs when regard was had to the fact that this was a civil claim, the parties had agreed that costs would follow the result and the employee had to bring a further application to enforce payment. It was held that the rule of practice that costs should generally not follow the result in LC disputes was relevant to employment and labour disputes but did not apply to civil claims to claim arrear wages. The appeal was dismissed, and the cross-appeal was upheld. Therefore, the claim had not prescribed, and the employer was required to pay the costs of the proceedings.

In *NUM obo Majebe v Civil and General Contractors* [2021] 4 BLLR 374 (LAC) the employee wanted to enforce a reinstatement order eight years after the award was issued. In this case, the employee was dismissed for misconduct in 2006. The dismissal was found to be unfair by the Commission for Conciliation, Mediation and Arbitration (CCMA) and in 2007 reinstatement was ordered with retrospective effect. The employer subsequently instituted review proceedings.

In 2014 the employee applied to have the award made an order of court. The employer then argued that the arbitration award had prescribed. The Labour Court (LC) agreed that the arbitration award had prescribed on the basis that the filing of a review application did not interrupt prescription. Two years later the employee appealed against the LC's judgment. The employee applied for

condonation on the basis that there had since been a judgment handed down in *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus and Others* [2017] 3 BLLR 213 (CC), which improved his prospects of success. This is because the LC decision in upholding the plea of prescription was based on the decision of the LC in *Myathaza v Johannesburg Metropolitan Bus Service Soc Ltd t/a Metrobus In re: Mazibuko v Concor Plant; Cellucity (Pty) Ltd v Communication Workers Union obo Peters* [2016] 1 BLLR 24 (LAC), in which it was held that an arbitration award is a 'debt' as per the Prescription Act 68 of 1969 and, as such, prescribes after three years. This decision was then overturned by the Constitutional Court (CC) in terms

of which, four judges found that the Prescription Act is incompatible with the Labour Relations Act 66 of 1995 (LRA), and four judges found that it did not contradict the LRA, but that referring a dispute to the CCMA interrupted prescription. Condonation was accordingly granted based on excellent prospects of success, as well as the fact that there was no real prejudice to the other party, hearing the matter was in the interests of justice and the appeal would bring about certainty regarding the prescription of awards in terms of the LRA.

Subsequently in *Food and Allied Workers' Union obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd* [2018] 6 BLLR 531 (CC) the CC held that the Prescription Act is not inconsistent with the LRA and that

claims under the LRA do prescribe. In light of this, the Prescription Act does apply to orders for reinstatement or compensation and such claims prescribe after three years. It was held, however, that the referral of an unfair dismissal dispute to the CCMA interrupts prescription until any review proceedings are finalised. The appeal was accordingly upheld, and the matter was remitted to the LC for determination if the parties wished to pursue that application.

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



By
Moksha
Naidoo

Denying reinstatement despite the employer's failure to present argument why this remedy was inappropriate

Booyesen v Safety and Security Sectoral Bargaining Council and Others (LAC) (unreported case no PA12/18, 30-3-2021) (Kathree-Setiloane AJA with Coppin JA and Phatshoane ADJP concurring)

The facts in this matter involved the employee being dismissed for allegedly raping a minor. The employee's dismissal was set aside on review, despite which, the court denied the employee reinstatement based solely on his conduct and awarded him compensation.

Before the Labour Appeal Court (LAC), the employee's ground of contention was that the Labour Court (LC) erred when it denied the employee reinstatement under circumstances where the employer did not present any argument as to why such relief was inappropriate.

The employee was employed as a chef at a South African Police Service (SAPS) college. He was charged and dismissed for raping a 16-year-old female at the latter's place of residence. His dismissal was confirmed at arbitration.

On review, the LC found that on the facts presented at arbitration, the probability was that the employee chef had had consensual sex with the 16-year-old female. For this reason, the court found that the employee was not guilty of the charge preferred against him and hence his dismissal was substantively unfair. Despite the employee seeking to be reinstated retrospectively, the court held:

'On his own version, the appellant had sexual intercourse with a 16-year-old, a person barely above the age of consent. Although the appellant is not an officer in the SAPS, he is employed by the SAPS at the local police college. It is reasonable to assume in these circumstances that the local community identifies the [appellant] as a member of or associates him with the SAPS. What the [appellant] did, on his own version, is not compatible with the SAPS's stated values and is likely to bring the SAPS into disrepute. In my view, a continued employment relationship would be intolerable or not reasonably practical. An award of compensation is more one that better fits the requirements of s 193'.

On appeal, the employee raised the following grounds on which to overturn the court *a quo*'s findings:

- He was not employed as a police officer by the SAPS but rather as a chef and, therefore, it was incorrect to hold the employee up to the same standards of a member of the SAPS.
- The SAPS had not led any evidence at the arbitration to arrive at the conclusion that reinstatement was an inappropriate remedy. On the contrary the employee had worked for the SAPS for nine years and had a clean disciplinary record and was, furthermore, found not guilty of statutory rape in the criminal trial.

The starting point for the LAC was to examine s 193(2) of the Labour Relations Act 66 of 1995 (LRA). On a plain reading, this section states that the primary remedy for a substantively unfair

dismissal is reinstatement. The exception in awarding this remedy is if the employee does not wish to be reinstated, where a continued employment relationship would be intolerable or when it is not reasonably practical to reinstate the employee.

Should an employer oppose reinstatement, then the onus would rest on the employer to prove that one of the exceptions apply.

In the absence of the SAPS leading any evidence as to why it would not be feasible for the employee to be reinstated or to demonstrate that a continued employment relationship with the SAPS would be intolerable; the LC made certain factual assumptions, that being –

- despite the employee not being a member of the SAPS, the community identifies him or associates him with the SAPS; and
- the employee's conduct was not compatible with the standards and values of the SAPS.

In addressing the question of whether it was open for the LC to make these factual findings, under circumstances where the employer had not presented an argument opposing reinstatement, the LAC held that:

'This court has held in *Mediterranean Textile Mills (Pty) Ltd v SACTWU [and Others]* [2012] 2 BLLR 142 (LAC), that even where no specific evidence is led by the employer as to the intolerability of a continued employment relationship or the impracticality of reinstatement, the Labour Court or arbitrator is obliged "to take into account any factor which ... is relevant in the determination of whether or not such conditions exist". The conduct of the employee is a relevant factor which the Labour Court or arbitrator should take into account in this determination'.

Having made this point the LAC went on to interrogate the findings of the LC.

The LAC found that the court *a quo* was correct to have regard to the fact

that on the employee's own version he had sex with a 16-year-old female, who was defined as a child in terms of the Children's Act 38 of 2005. The employee's conduct occurred while he was an employee of the SAPS and hence, he remained bound by the Code of Conduct for Public Servants, which requires every public sector employee to protect and respect every person's dignity and rights as enshrined in the Constitution. Additionally, the LAC concurred with the findings that the employee's actions, were not compatible with the values of the SAPS as set out in the South African Police

Services Act 68 of 1995. Furthermore, the LAC found that the LC's assumption that even though the employee was not a member of the SAPS, his conduct would have been associated with the SAPS in the communities' eyes, was not implausible or improbable.

In conclusion the LAC held:

'All things considered, I am of the view that it was fair, on the objective facts of this matter, for the Labour Court to conclude that the appellant's conduct is incompatible with the SAPS stated values and is likely to bring the SAPS into disrepute. By the same token, the Labour

Court was justified in concluding that the continued employment relationship with the appellant would be intolerable or not reasonably practical, and that an award of compensation as opposed to reinstatement is the appropriate remedy'.

The appeal was dismissed with no order as to costs.

Moksha Naidoo BA (Wits) LLB (UKZN) is a legal practitioner holding chambers at the Johannesburg Bar (Sandton), as well as the KwaZulu-Natal Bar (Durban). □

Book announcements



A guide to eDiscovery in South Africa

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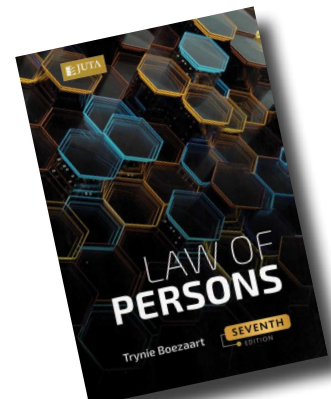
The first text on this subject in Africa, answers the call for expert guidance on this rapidly developing subject. The title explains in understandable language what eDiscovery is, why we need it, how it affects dispute resolution and the risks and dangers of ignoring it. The publication looks at the effect of eDiscovery on data protection and privacy, including cross-border litigation and, particularly, the Protection of Personal Information Act 4 of 2013. The book also looks at the rules of civil procedure in other jurisdictions and the current position in South Africa.



The Rental Housing Act: Amendments, Annotations and Commentary

By Philip Stoop
Cape Town: Juta
(2020) 1st edition
Price R 155 (including VAT)
91 pages (soft cover)

The Rental Housing Amendment Act 35 of 2014, which has yet to commence, creates mechanisms to ensure the proper functioning of the South African rental housing market. This book provides an easy to follow system to clearly identify changes to the Act by the forthcoming amendments and includes commentary to help the reader understand the amendments and their context and interplay with other provisions of the Act. All amendments are colour-coded, making them easy and quick to identify.



Law of Persons

By Trynie Boezaart
Cape Town: Juta
(2020) 7th edition
Price R 599 (including VAT)
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Also available as a
Multimedia ePublication

This book has become a standard text on the South African law of persons and was first published in 1995, just after the dawn of South Africa's first democratic dispensation. The book constitutes a general and fully referenced source on the law of persons and reflects the transformation of the law of persons in line with the values entrenched in the Constitution, with specific reference to the Bill of Rights. The book's systematic approach and comprehensive overview makes it suitable as a textbook. □



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Abbreviation	Title	Publisher	Volume/issue
<i>Advocate</i>	Advocate	General Council of the Bar	(2021) 34.1
<i>EL</i>	Employment Law Journal	LexisNexis	(2021) 37.2
<i>ITJ</i>	Insurance and Tax Journal	LexisNexis	(2021) 36.1
<i>JCLA</i>	Journal of Comparative Law in Africa	Juta	(2020) 7.2
<i>LDD</i>	Law, Democracy and Development	University of the Western Cape, Faculty of Law	(2021) 25
<i>LitNet</i>	LitNet Akademies (Regte)	Trust vir Afrikaanse Onderwys	(2021) 18(1)
<i>PER</i>	Potchefstroom Electronic Law Journal	North West University, Faculty of Law	(2020) 23 (2021) 24
<i>PLD</i>	Property Law Digest	LexisNexis	(2021) 25.1
<i>SAJCJ</i>	South African Journal of Criminal Justice	Juta	(2020) 33.3
<i>SALJ</i>	South African Law Journal	Juta	(2021) 138.1
<i>SJ</i>	Speculum Juris	University of Fort Hare	(2020) 34.3

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20122 Milan, Italy

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

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Telephone: +27 (0) 11 463 1214

Cell: +27 (0)82 553 7824

E-mail: odasilva@law.co.za

Avril Pagel:

Cell: +27 (0)82 606 0441

E-mail: pagel@law.co.za



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RISKALERT

JUNE 2021 NO /2021

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RISK MANAGEMENT COLUMN

NOTICE: LPIIF POLICIES FOR THE 2021/2022 INSURANCE YEAR

The Legal Practitioners Indemnity Insurance Fund NPC (LPIIF) insurance year runs from 1 July of each year to 30 June of the following year. The current policy period thus ends on 30 June 2021. Ahead of the new insurance year, the policy wording and related documents are published in this edition of the Bulletin. The policies will also be uploaded onto the LPIIF website www.lpiif.co.za



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

Legal Practitioners' Indemnity Insurance Fund: Thomas Harban, General Manager, 1256 Heuwel Avenue, Centurion 0127 • PO Box 12189, Die Hoewes 0163 • Docex 24, Centurion • Tel: 012 622 3900
Website: www.lpiif.co.za • Twitter handle: @AIIFZA

Prescription Alert, 2nd Floor, Waalburg Building, 28 Wale Street, Cape Town 8001 • PO Box 3062, Cape Town, 8000, South Africa, Docex 149 • Tel: (021) 422 2830 • Fax: (021) 422 2990
E-mail: alert@aiif.co.za • Website: www.lpiif.co.za

Legal Practitioners' Fidelity Fund, 5th Floor, Waalburg Building, 28 Wale Street, Cape Town 8001 • PO Box 3062, Cape Town, 8000, South Africa, Docex 154 • Tel: (021) 424 5351 • Fax: (021) 423 4819
E-mail: attorneys@fidfund.co.za • Website: www.fidfund.co.za

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.

The Executor bond policy

No changes have been made to the executor bond policy or the terms on which LPIIF grants bonds of security to attorneys appointed as executors of deceased estates.

The Professional Indemnity Policy

Annually, the LPIIF issues one Master Policy applicable to all insured legal practitioners.

The amendments are aimed at improving the articulation of the affected clauses and, in the case of clause XIV, to correct the reference to the applicable provision in the

Legal Practice Act 28 of 2014. The words in bold text are defined in the policy.

It will be noted that the amendments do not introduce any new exclusions. The annual limits of indemnity (amount of cover) and the applicable deductibles (excess) also remain unchanged.

The amendments will become effective on 1 July 2021 when the new Master Policy comes into operation. For ease of reference, the changes have been underlined in the column on the right setting the amendment wording:



Legal Practitioners' Indemnity Insurance Fund NPC

Est. 1993 by the Legal Practitioners' Fidelity Fund



LEGAL PRACTITIONERS' FIDELITY FUND

SOUTH AFRICA

RISK MANAGEMENT COLUMN continued...

Clause number in policy	Current wording	Amended wording
III	<p>Approved costs:</p> <p>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;</p>	<p>Approved costs:</p> <p>Legal and other costs incurred by the Insured with the Insurer's prior written <u>consent</u> (which will be in the Insurer's sole discretion) in attempting to prevent a Claim or limit the amount of a <u>potential Claim</u>;</p>
XIV	<p>Fidelity Fund Certificate:</p> <p>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;</p>	<p>Fidelity Fund Certificate:</p> <p>A certificate provided for in terms of section <u>84</u> 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;</p>
16 (c)	<p>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;</p>	<p>which is insured or could more appropriately have been insured under any other valid and collectible insurance <u>policy</u> 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;</p>

RISK MANAGEMENT COLUMN continued...

<p>16 (e)</p>	<p>arising from or in connection with the provision of investment advice, the administration of any funds or taking any deposits as contemplated in:</p> <ul style="list-style-type: none"> (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; <p>For purposes of this clause, Investment Advice means any recommendation, guidance or proposal of a financial nature to any client or group of clients-</p> <ul style="list-style-type: none"> (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. 	<p>arising from or in connection with the provision of investment advice, the administration of any funds or taking any deposits as contemplated in:</p> <ul style="list-style-type: none"> (vi) the Banks Act 94 of 1990; (vii) the Financial Advisory and Intermediary Services Act 37 of 2002; (viii) the Agricultural Credit Act 28 of 1996; (ix) any law administered by the Financial Sector Conduct Authority and/or the South African Reserve Bank and any regulations issued thereunder; or (x) the Medical Schemes Act 131 of 1998 as amended or replaced; <p>For purposes of this clause, Investment Advice means any recommendation, guidance or proposal of a financial nature to any client or group of clients-</p> <ul style="list-style-type: none"> (d) in respect of the purchase of any financial product; or (e) in respect of the investment in any financial product; or (f) <u>to engage</u> any financial service provider.
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Questions relating to the policies or risk management in general can be addressed to Henri van Rooyen, the LPIIF's Practice Support Executive, at risk@lpiif.co.za. Risk management training is provided by the LPIIF at no cost to the legal practitioners.



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

THE 2021/2022 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 consent (which will be in the **Insurer's** sole discretion) in attempting to prevent a **Claim** or limit the amount of a potential **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 84 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 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

RISKALERT

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 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 policy 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) to engage 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 radioactivity 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** noti-

fies 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 report 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

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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 appoint 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 2021 to 30th June 2022 (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 2021 to 30th June 2022 (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.



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

RISK MANAGEMENT SELF-ASSESSMENT QUESTIONNAIRE

LPIIF 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

A. How often must the questionnaire be completed?

Clauses XXIV and 23 of the Legal Practitioners Indemnity Insurance Fund NPC (the LPIIF) Master Policy read with the South African Legal Practice Council Rules (the Rules) prescribe that every insured legal practitioner must complete this questionnaire annually. The LPIIF will not provide indemnity in respect of a claim where the insured has not completed this questionnaire in the applicable insurance scheme year. Attorneys must have regard to point 15 of the application for a Fidelity Fund certificate form (schedule 7A of the Rules) which provides that this form must be completed. Advocates with trust accounts rendering legal services in terms of section 34(2)(b) of the Legal Practice Act 28 of 2014 (the Act) must also complete this questionnaire annually (see point 13 of the application for a Fidelity Fund certificate form for advocates (schedule 7B of the Rules)). A Fidelity Fund certificate will not be issued to a legal practitioner who has not complied with this requirement. Any reference to a firm in this form includes advocates practicing in terms of section 34(2)(b) of the Act.

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

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

B. Why is the risk information required?

The information which we ask for in this assessment will be treated as strictly confidential. It will not be disclosed to any other person, without your practice's written permission. It will also not be used by the LPIIF and the 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.

1. SECTION 1

1.1. General practice information:

1.1.1. Name under which practice is conducted

.....

1.1.2. Practice number

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

.....

1.1.4. Is your practice a Sole Practice/Partnership/Incorporated Company/ Advocate referred to in section 34(2) (b) of the Act?

.....

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1.2. Principal office details:

- 1.2.1 Address and postal code:
- 1.2.2 Telephone number:
- 1.2.3 Email :
- 1.2.4 Docex :
- 1.2.5 Website:
- 1.2.6 Details of any other physical address at which the practice will be carried on and name of practitioner in direct control at each office
.....

1.3. Composition of the practice:

- 1.3.1 Partners/directors:
- 1.3.2 Professional Assistants/Associates/ Consultants:.....
- 1.3.3 Candidate Attorneys:.....
- 1.3.4 Paralegals:.....
- 1.3.5 Other staff including secretaries:.....
- 1.3.6 Total:.....

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

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

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

Are of practice	Percentage	Are of practice	Percentage
Conveyancing		Commercial	
Criminal		Debt collection	
Estates - trustees executors administrators		Insurance	
Investments		Liquidations	
Marine		Matrimonial	

Are of practice	Percentage	Are of practice	Percentage
Patents & Trademarks		Personal injury (RAF claims)	
Medical malpractice		General litigation	
Other (please specify any type of work that makes up a significant percentage of your fees)		

2. SECTION 2

2.1. Risk Management Information

Risk Question		Yes	No
2.1.1.	Do you have a dedicated risk management resource/ a person responsible for risk management and/or quality control?		
2.1.2.	Are all instructions recorded in a letter of engagement?		
2.1.3.	Does your practice screen prospective clients?		
2.1.4.	Do you assess whether or not you have the appetite, the resources and the expertise to carry out the mandate within the required time?		
2.1.5.	Has your firm registered all time-barred matters with the LPIIF's Prescription Alert unit?		
2.1.6.	Are regular file audits conducted?		
2.1.7.	Is the proximity the prescription date taken into account when accepting new instructions and explained to clients?		
2.1.8.	Is a peer review system implemented in the firm?		
2.1.9.	Is advice to clients always signed off by a partner/ director?		
2.1.10.	Do you have a dual diary system in place for professionals and support staff?		
2.1.11.	Do you have a formal handover process when a file is transferred from one person to another within the firm?		
2.1.12.	Is more than one contact number obtained for clients?		
2.1.13.	Are instructions, consultations and telephone discussions confirmed in writing?		
2.1.14.	Does your firm have documented minimum operating standards/ standard operating procedures?		
2.1.15.	Does your practice have effective policies on uniform file order?		
2.1.16.	Is there a formal structure and process for supervision of staff and delegation of duties?		

Risk Question		Yes	No
2.1.17.	Do you have a formal training program in place?		
2.1.18.	Does the training program include risk management training?		
2.1.19.	Do you have any executor bonds of security issued by the LPIIF?		
2.1.20.	If yes, have the estate funds been audited as part of your annual regulatory audit? please provide a copy of the annual audit report		
2.1.21.	Are background checks (including criminal records and professional history) conducted on new employees?		
2.1.22.	In respect of the financial functions, has an adequate system been implemented which addresses:		
2.1.22.1.	Segregation of duties?		
2.1.22.2.	Checks and balances?		
2.1.22.3.	The internal controls prescribed by Rule 54.14.7 with regards to the safeguarding of trust funds?		
2.1.22.4.	Compliance with FICA and the investment rules?		
2.1.22.5.	The verification of the payee banking details and any purported changes as required by Rule 54.13?		

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

.....

.....

.....

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

Yes		No	
-----	--	----	--

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

Yes		No	
-----	--	----	--

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

Yes		No	
-----	--	----	--

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

Yes		No	
-----	--	----	--

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

Yes		No	
-----	--	----	--

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

Yes		No	
-----	--	----	--

- 2.9. Would your firm like to receive risk management training?

Yes		No	
-----	--	----	--

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

Henri Van Rooyen (Practitioner Support Executive)

Email: henri.vanrooyen@LPIIF.co.za

Thomas Harban (General Manager)

Email: thomas.harban@LPIIF.co.za

NAME:

CAPACITY:

SIGNATURE:

DATE OF COMPLETION:



**Legal Practitioners
Indemnity Insurance
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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
Please send the completed claim form to claims@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	<div> <div>Does your firm practice in the jurisdiction of more than one Legal Practice Council?</div> <div> YES <input type="checkbox"/> NO <input type="checkbox"/> </div> </div> <div> <ul style="list-style-type: none"> If Yes, state the Legal Practice Council and the firm number in that jurisdiction: </div>
1.5	<div>Does your firm have any branch offices?</div> <div> YES <input type="checkbox"/> NO <input type="checkbox"/> </div> <div> <ul style="list-style-type: none"> If Yes, please give us the full details of each branch office. </div>
1.6	<div>Is your practice conducted as a sole practitioner, a partnership or incorporated practice?</div> <div> Sole practitioner <input type="checkbox"/> Partnership <input type="checkbox"/> </div> <div> Incorporated practice <input type="checkbox"/> </div> <div> <ul style="list-style-type: none"> If incorporated please provide registration number: </div>
1.7	<div>Is your trading name the same as the registered name?</div> <div> YES <input type="checkbox"/> NO <input type="checkbox"/> </div> <div> <ul style="list-style-type: none"> If No, please specify trading name and registered name: </div>

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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>1.9 If a partnership, how many years has the partnership been in existence?</p>	<p>Years <input type="text"/></p>
<p>1.10 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>-----</p>
<p>1.11 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>1.12 Physical address :</p> <p style="text-align: right;">Code :</p>	
<p>1.13 Postal address :</p> <p style="text-align: right;">Code :</p>	
<p>1.14 Telephone number :</p>	
<p>1.15 Fax number :</p>	
<p>1.16 Contact person:</p>	
<p>1.17 Email address:</p>	
<p>1.18 Vat registration number:</p>	
<p>1.19 Firm's FFC number:</p>	
<p>1.20 Firms MMS number:</p>	
<p>1.21 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>

2. DETAILS OF PERSON WHO DEALT WITH THE MATTER

2.1	Surname:		
2.2	Full names:		
2.3	Capacity:	Candidate Attorney <input type="checkbox"/> Consultant <input type="checkbox"/> Legal Secretary <input type="checkbox"/> Paralegal <input type="checkbox"/> Partner / Director <input type="checkbox"/> Associate <input type="checkbox"/> Professional Assistant <input type="checkbox"/> Pupil <input type="checkbox"/> Advocate <input type="checkbox"/>	
	<ul style="list-style-type: none"> If Partner/Director/Professional Assistant/Associate /Consultant, please provide practitioner number: 		
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:	Name and surname: _____ Legal Practitioner number: _____	
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:		

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? <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. 	YES <input type="checkbox"/> NO <input type="checkbox"/> _____ Report Attached: YES <input type="checkbox"/> NO <input type="checkbox"/>
3.2	Did you receive a letter of demand or any other correspondence giving an intimation of a claim? <ul style="list-style-type: none"> If Yes, please provide a copy of the correspondence. 	YES <input type="checkbox"/> NO <input type="checkbox"/> Letter attached: YES <input type="checkbox"/> NO <input type="checkbox"/>
3.3	Did you receive a summons or counterclaim wherein the liability of your firm is pleaded or intimated? <ul style="list-style-type: none"> If Yes, please provide copies of all notices and pleadings served to date. 	YES <input type="checkbox"/> NO <input type="checkbox"/> Summons and/or Pleadings attached: YES <input type="checkbox"/> NO <input type="checkbox"/>
3.4	Did you serve a notice of intention to defend/notice of intention to oppose? <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) 	YES <input type="checkbox"/> NO <input type="checkbox"/> Notice of intention to defend attached: YES <input type="checkbox"/> NO <input type="checkbox"/>

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3.5	Are you in possession of your original file, relating to your conduct of the matter out of which this claim arises?	YES <input type="checkbox"/> NO <input type="checkbox"/>
	<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 <input type="checkbox"/> NO <input type="checkbox"/></p> <p>Copies of file attached:</p> <p>YES <input type="checkbox"/> NO <input type="checkbox"/></p>
3.6	Please specify the claim type by marking the correct option: (See explanatory Note 3.)	
	RAF prescription (<i>See Explanatory Note 2</i>)	Patents & Trade Marks
	RAF under settlement	Marine
	MVA common law claim prescription	Trustees/Executors/Administrators
	General prescription	Liquidations
	Litigation	Matrimonial
	Conveyancing	Labour law
	Commercial	Investments
	Defamation/Iniuria	Wrongful arrest of 3rd 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?	YES <input type="checkbox"/> NO <input type="checkbox"/>
	<ul style="list-style-type: none"> If Yes, please provide the reference number under which that claim was registered and the name of the claimant. 	<p>-----</p> <p>-----</p> <p>-----</p>
3.9	Please provide an estimate of the quantum of the claim:	R-----
3.10	Full names of the claimant:	
1.6	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: ----- ----- ----- ----- -----
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).



EXECUTOR BONDS 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/

- 2.6 was a partner or director or member of staff at the time of the alleged dishonesty thereafter;
- 2.7 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;
- 2.8 the applicant has a direct or indirect interest in the estate for which the bond is requested other than executor fees;
- 2.9 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;
- 2.10 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;
- 2.11 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

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- 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

- 5.1 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 THIS

DAY OF 20.....

.....
WITNESS (Full names & signature)

.....
WITNESS (Full names & signature)

.....
APPLICANT (Full names & signature)



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

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

☐

NO

☐

1.11 When were you admitted as an attorney?

1.12 Have you previously been appointed as an executor, curator, liquidator or trustee?

YES

☐

NO

☐

(a) If, YES, please provide a list for the past 3 years :

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<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>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>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 Executor</p>

<p>1.18 By whom are you nominated?</p>	<p>In terms of a will Family</p> <p>Master Court Order</p> <p>Other Details _____</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>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>

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(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>1.27 Is there any other material factor that you wish to bring to the LPIIF's attention?</p>	

2. FIRM

<p>2.1 Name of firm :</p>
<p>2.2 Firm number :</p>
<p>2.3 Number of partners/ directors :</p>

2.4 Physical address :

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?

YES ☐ NO ☐

- If YES, please, state insurer and the limit of Indemnity.

3. DECEASED

3.1 Surname :

3.2 Full names :

3.3 Identity number :

3.4 Date of birth :

<p>3.5 Date of death :</p> <ul style="list-style-type: none"> A copy of the death certificate must be attached to this application form. 	
<p>3.6 At which Master's office was the estate reported?</p>	<p>Province : _____</p> <p>Division : _____</p>
<p>3.7 Master's reference / Estate number :</p>	
<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>2.10 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;

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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 be emailed to confirm compliance and outstanding requirements, prior to the submission of the original documents. Original documents will still be required as the J262E must be submitted to the Master of the High Court in its original format.**
- 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 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