

LEVERAGING TECHNOLOGY: HOW CAN LAW FIRMS BEST ADAPT TO OPERATING POST-LOCKDOWN?

**Failure to pay maintenance:
Revisiting the remedies in the
Maintenance Act**

**Does a Master have to approve of an
agreement when all heirs have given
their consent to a sale?**

**Enterprise risk management
as part of management process/
activity for quality
decision making**

**Who has to prove that the employee
did not participate in an unprotected strike?**

**Breaking the glass ceiling
in the legal profession**



**Protected Disclosures Act:
Interdicting the employer for
'occupational detriments'**

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a fatal blow to contingency fee agreements**



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- The hope of society lies on the shoulders of progressive legal practitioners
- US Embassy launches programme to improve representation of women in the legal sector

14 Leveraging technology: How can law firms best adapt to operating post-lockdown?

Managing Director, **Emmie de Kock**, notes the unpredictability and severe impact the COVID-19 pandemic has had on the legal profession. The lockdown regulations forced many law firms to move to a remote platform almost overnight and many were unprepared for this drastic shift. Despite advancement in information technology, Ms De Kock says that many law firms are still paper-heavy and conservative when it comes to adopting digital solutions. Ms De Kock writes that after two years of survival mode for many law firms, she hopes that law firms will use this opportunity to take stock of what worked and incorporate the temporary digital changes that contributed to the growth of their firm.

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FEATURES

17 Does a Master have to approve of an agreement when all heirs have given their consent to a sale?

Legal practitioner, **Kobus Els**, discusses the provisions of s 47 of the Administration of Estates Act 66 of 1965 (the Act), and a recent Gauteng Division judgment in which the court dealt with the interpretation of this section, namely, whether the provisions of s 47 are peremptory or directory and if declared peremptory, whether non-compliance with the peremptory provisions of s 47 render the contract a nullity. Mr Els writes that the court ultimately found with reference to case law that the provisions were indeed peremptory and non-compliance rendered the contract null and void.



19 Failure to pay maintenance: Revisiting the remedies in the Maintenance Act

The failure to pay maintenance has a negative impact on the best interest of the child and undermines the child's right to be maintained. The Maintenance Act 99 of 1998 makes provision for various remedies pertaining to non-compliance with a maintenance order and renders failure to pay maintenance a criminal offence. Maintenance Prosecutor, **Themba Alfred Ndaba**, writes that the Maintenance Act provides some remedies to combat the failure to pay maintenance, such as a warrant of execution, attachment of emoluments and attachment of debt. These remedies, Mr Ndaba writes, have proven to be successful mechanisms in the enforcement and recovery of maintenance arrears.



21 Breaking the glass ceiling in the legal profession

Legal practitioner, **Mabaeng Lenyai**, features in this month's Women in Law column. Ms Lenyai is an acting judge in the Gauteng Division High Court, newly elected President of the Law Society of South Africa (LSSA) and former member of the *De Rebus* Editorial Committee. Sub-editor, **Isabel Joubert**, spoke to Ms Lenyai about becoming the first elected female President of the LSSA, her thoughts on the future of the legal profession and the legacy she would like to one day leave behind.

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:

Michelle Beatson, 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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Rules by the Legal Services Ombud

The Legal Services Ombud, Justice Sirajudien Desai, has released rules in terms of ss 95(2) and (5) of the Legal Practice Act 28 of 2014 (LPA). Justice Desai has been appointed as the Legal Services Ombud since January 2021, however, his office is not yet established, and it is not yet operational. The rules were made prior to publication for comment because the LPA came into operation in a staggered manner.

In the notice for the released rules, Justice Desai states that the Legal Practice Council (LPC) and other related provisions came in two years before the appointment of the Ombud, therefore, the staggered approach has impacted on the disciplinary process of the LPC. The notice states that the appeal proceedings of the LPC cannot be proceeded with as the office of the Ombud is not operational.

Justice Desai rightly states that the fact that the office of the Ombud is not yet operational has a negative impact on

the perception by the public of the legal profession. 'It also has a negative impact on the resolution of disputes and in affording redress to the public's complaints. The establishment and maintenance of the lay person list as contemplated in section 37 [of the LPA], requires the Office of the Legal Services Ombud to be in operation,' Justice Desai added.

The rules were approached through s 95(5) of the LPA in order to realise the provisions of s 34 of the Constitution. This will assist in affording both members of the public and the profession a speedy resolution of the disputes and avoid further delays.

The schedule contains:

- Ways in which complaints should be submitted to the Ombud.
- Service of summons.
- Substituted services.
- The annual report of the Office of the Ombud.

The full rules are available here: www.derebus.org.za. Comments on the rules can be made



Mapula Oliphant - Editor

to the Office of the Ombud within 30 working days after 14 April 2022 by -

- posting such representations to the following address: PO BOX 1202, Pretoria, 0001;
- delivering such representations by hand at the following address: Spoorpark Building, 2007 Lenchen Avenue South, Centurion, Pretoria; or
- e-mailing: Vseroka@justice.gov.za.



Would you like to write for *De Rebus*?

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

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

- Please note that the word limit is 2 000 words.
- Upcoming deadlines for article submissions: 23 May; 20 June and 18 July 2022.



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Can a car sold under finance, or a suspensive condition be attached and sold in execution by a Sheriff?

I refer to the practice note published by Zibalule Wiseman Mdeni 'Can a car sold under finance, or a suspensive condition be attached and sold in execution by a Sheriff?' 2022 (March) DR 10. An error crept into this helpful note.

A vehicle, which is owned by the titleholder, cannot be attached in execution of a debt owing by the possessor.

As r 42(2) of the Magistrates' Courts Rules make clear, all the Sheriff can do is attach the interest of the execution debtor in the property sold under the suspensive condition. The vehicle itself is not the asset of the possessor under a suspensive sale and cannot be attached and sold to execute the judgment debt of the possessor.

Patrick Bracher Attorneys
Admission Diploma (Unisa) is a legal practitioner at Norton Rose Fulbright SA Inc in Johannesburg.



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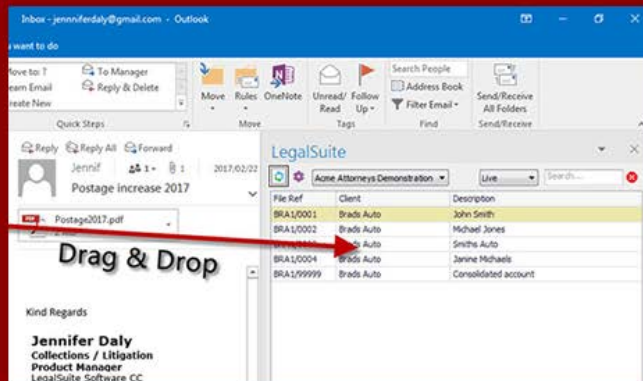
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By
Kgomotso
Ramotsho

LSSA makes history at its annual conference

The Law Society of South Africa (LSSA) held its Annual Conference and Annual General Meeting (AGM) under the theme 'The rule of law and the role of legal practitioners in combating corruption,' on 23 March 2022 in Johannesburg. Keynote speaker, political analyst and author, Professor William Gumede, told the delegates at the conference that almost the entire legal value chain is systemically corrupt. Among the examples he gave, Prof Gumede mentioned the police, investigators, crime intelligence and the Department of Public Prosecutions. He added that criminal justice procurement systems are captured.

Prof Gumede also spoke about the rise in corruption by 'trusted professionals' and he pointed out that professional associations, auditors, and medical professions, have spectacularly failed to uphold ethical, professional and behaviour standards of their members. He stated that while these organisations argue that government and everyone else behave corruptly, these organisations think they should do the same; or face losing out on lucrative government contracts. He added that given the very corrupt state of government, the regulations made by government of certain professions is unlikely to better the situation.



Keynote speaker, political analyst and author, Professor William Gumede, told the delegates at the conference that almost the entire legal value chain is systemically corrupt.

Prof Gumede gave a few points on how associations can tackle corruption, namely –

- by setting basic principles of behaviour for their members;
- professional associations, generally have codes of ethics, which provide a set of standards for conduct for members of the professions that issues the codes;
- professional associations must play a bigger role in holding their individual members and firm, accountable for corrupt behaviour;
- professional associations must play a stronger role in ensuring the corporate cultures of professional firms are more ethical, the clients they take on are more balanced and caring; and
- there has to be a change in professional firms' focus on profits at all costs, towards more balanced, ethical and sustainable profit targets.

Democracy should not be suffocated by corruption

Department of Justice and Correctional Services, Minister Ronald Lamola, said that AGMs are gatherings where accountability is practised, where interested parties gather to review the work entrusted to their leadership. He pointed out that the question of what the role legal practitioners play in combating corruption is very important, especially where South Africa's (SA) constitutional democracy is concerned. 'We are at a point where our democracy is being suffocated by corruption,' Mr Lamola said.

Mr Lamola said that the AGM was held at the time when SA had commemorated the 62nd anniversary of the Sharpeville Massacre, as well as the International Day for the Elimination of Racial Discrimination. 'South Africa as we experience it today, is fundamentally different from the South Africa where 69 people were brutally killed for protesting pass laws,' Mr Lamola said adding that the celebration of human rights and the eradication of racism are intertwined. He pointed out that one thing has become increasingly clear in post-Apartheid SA, is that corruption has disrupted government's ability to implement the structural reforms, which are required to move



Department of Justice and Correctional Services, Minister Ronald Lamola, said that AGMs are gatherings where accountability is practised.

SA away from the two nations, based on race which were orchestrated by the Apartheid regime.

Mr Lamola said that a document published by the Department of Planning, Monitoring and Evaluation, which reviews the 25 years of SA's democracy, makes some of the following observations:

- The state has not adequately utilised the levers at its disposal to fundamentally entrench the economic rights of the historically disadvantaged and reverse the Apartheid legacy.
- SA remains one of the most unequal societies in the world in terms of income levels and asset ownership, with a Gini coefficient of 0,68%. Over the past 25 years, Apartheid spatial planning has not been reversed through integrated development on and densification of well-located land.
- Poor service delivery, lack of consequence management for misconduct

and poor governance of state-owned companies remains weak, as is evidenced by regression in audit outcome, allegations of wide-scale corruption, and their extremely precarious financial situations. Corruption, real and perceived, has hampered the country's capacity to deliver services, despite the comprehensive architecture in place to prevent and combat it.

- The Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, chaired by Chief Justice Raymond Zondo, was established.

Having said that, Mr Lamola added that 'as a nation we found a way of viewing corruption as a predominantly government phenomenon, we seem to be tolerant of those who brag about paying a bribe to an officer who caught them speeding'. Regarding the role of legal practitioners, Mr Lamola said legal practitioners play an imminent role to eliminate the collusion on medical negligence cases. He said that it should go without saying that legal practitioners should not perform illegal acts.

Mr Lamola spoke on the findings of the Financial Intelligence Centre (FIC) report on the Assessment of the Inherent Money Laundering and Terrorist Financing Risks of Legal Practitioners in SA. He pointed out that some of the findings of that report include:

- The legal profession is internationally recognised as potentially vulnerable to being abused by criminals to launder their proceeds crimes.
- The use of legal practitioners to recover fictitious debts has also been identified as a method to possibly move funds from one entity to another, thereby giving criminal proceeds an appearance of legitimacy.
- The number of regulatory reports received from legal practitioners is very low.
- During the five years from April 2016 to March 2021, legal practitioners filed a total of 11 966 cash threshold reports at an average of 2 393 per year. He said one must bear in mind that these transactions exceed R 25 000.
- During the same period, the profession filed a total of 1 160 suspicious and unusual transaction reports at an average of 232 per year.

Mr Lamola said the question that arises is how it is possible that there were 16 059 legal practitioners, including branches, registered with FIC as of March 2021 yet there are such low numbers regarding reporting. He added that another question that arises is how legal practitioners implement s 7 of the Prevention of Organised Crime Act 121 of 1998, which criminalises the failure to report suspicion regarding proceeds of



Outgoing President of the Law Society of South Africa, Jan van Rensburg, during his presidential report said that during his term he had hoped that the LSSA's provincial associations would be fully established and functional.

unlawful activities. Mr Lamola pointed out that legal practitioners know very well the role they should be playing.

Helping beyond one's borders and giving back to the profession

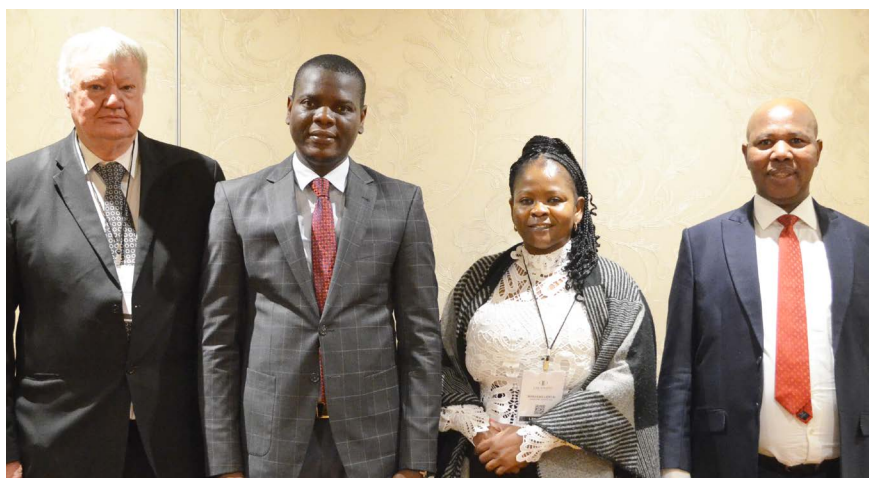
During his virtual address at the AGM, the President of the Commonwealth Lawyers Association (CLA), Brian Speers commended the LSSA on having a dialogue on corruption. He said the CLA is

a growing organisation of legal practitioners who sees the benefit of looking at jurisdictions beyond their own and who sees the benefit in giving back to the profession. He added that the CLA is still to have legal practitioners who give their time to share their experiences and to learn from the experience elsewhere. He pointed out that rule of law is at the heart of the CLA, he said that the CLA continues to give support to the legal profession and expressed concern against attacks or the challenges to the independence of the legal profession. Adding on the issue of corruption, Mr Speers said in his jurisdiction they have had legal practitioners killed because they were mixed up in corrupt matters.

Outgoing presidential report

In his presidential report, outgoing President of the LSSA, Jan Van Rensburg, said that during his term he had hoped that the LSSA's provincial associations would be fully established and functional, he however, said not all the provincial associations are running yet. He pointed out that the matter of the sustainability of the LSSA is a matter of concern, however, he added that the COVID-19 pandemic brought some sort of relief in terms of saving the LSSA money, as there were not many expenses, such as the travelling of committee members and holding physical meetings.

Mr van Rensburg, said that one of the reasons that there are financial issues at the LSSA is that the provincial associations are not fully functional yet. Regarding submissions that the LSSA has made, Mr van Rensburg said that the LSSA made submissions on -



From left: Outgoing President of the Law Society of South Africa (LSSA), Jan van Rensburg; Department of Justice and Correctional Services, Minister Ronald Lamola; incoming President of the LSSA, Mabaeng Lenyai; and outgoing Vice-President of the LSSA, Mvuzo Ntyesi.

- the matter of s 35 of the Legal Practice Act 28 of 2004, regarding legal fees, the proposed financial conduct of the fees/institution bill; as well as
- a submission to the Legal Practice Council (LPC) on the draft of conferment of senior counsel and senior attorneys' stages.

Mr van Rensburg, thanked the chairperson of the LPC, Janine Myburgh and her council for the work that they are doing, and for having an open door so that the LSSA can engage and work together with the LPC. He added that he hoped that the two organisations will work together to serve the interests of the legal profession.

Mr van Rensburg said the LSSA has engaged with the Legal Practitioners' Fidelity Fund (LPFF) to enhance avenues to develop the skills of legal practitioners in order to maintain high standards as they practise. Mr van Rensburg said the AGM is also a platform to address issues, such as a lack of ethics in the legal profession, as far as corruption is concerned, he also pointed out that through the LPFF they are trying to assist to enhance the legal profession. He added that the submission on the Legal Sector Code is still with the Minister of Justice and the profession is waiting on feedback.

During the questions and answers on Mr van Rensburg's report, legal practitioner William Booth, raised two issues, one regarding the senior counsel (SC) status for attorneys. Mr Booth said that the LSSA put up a proposal on the SC status for attorneys, however, he pointed out that the matter is still not resolved. He proposed that the LSSA be more proactive at meetings with the LPC and ad-



Incoming President of the Law Society of South Africa, Mabaeng Lenyai, thanked the Black Lawyers Association for having confidence in her and nominating her for the position of President.

dress the issue, so that the legal profession can move on from such aspects.

Mr Booth also spoke about the positions of acting judges at High Courts and magistrates in the regional magistrates' courts. He noted that he was aware that the LSSA also made a submission on this matter. He said that it is a matter of concern to some legal practitioners on how some of those who act are appointed. He added that there have been instances, specifically at magistrates' courts, where chief magistrates get frustrated about acting magistrates not attending to the finalisation of cases. He suggested that there should be a policy on how acting judges and magistrates are appointed and who appoints them.

Legal practitioner from Gauteng, Chris

Mamathuntsha, also commented on the matter of awarding of SC status to attorneys, he pointed that he was also aware of the submission the LSSA has made on the matter. He, however, suggested that that the document that the LSSA drafted and submitted to the Minister of Justice be circulated to the constituent members of the LSSA, so that those who have not seen the document can honestly say what is in the document and that it carries the members views, that the inputs that are in the final draft are the true reflection of the constituent members.

Mr van Rensburg in his closing remarks announced that he will be resigning from the House of Constituents (HoC) of the LSSA. He thanked the staff and HoC members of the LSSA for having worked well with him. Mr van Rensburg served as a Co-Chairperson of the LSSA in 2016 and as the Vice-President of the LSSA in 2019 and the President of the LSSA in 2021.

House of Constituents member of the LSSA, Ettienne Barnard, thanked Mr van Rensburg for his contribution to the legal profession and the role he has played in the LSSA. Mr Barnard added that Mr van Rensburg gave himself in a way a leader should. He pointed that Mr van Rensburg's input, selfless service and leadership is appreciated.

LSSA remains the voice for legal practitioners

Incoming President of the LSSA, Mabaeng Lenyai, began by thanking the Black Lawyers Association for having confidence in her and nominating her for the position of President. She also thanked the National Association of Democratic Lawyers and the Independent Attorneys Associations for also nominating women, namely, Eunice Masipa and Joanne Anthony-Gooden for the positions of Vice-President. She pointed out that she has worked with both ladies before and that she has no doubt that they will do a good job. She also thanked the HoC of the LSSA for the guidance and encouragement. She further thanked the staff members of the LSSA, she said without the staff the LSSA would close down, and she assured the staff that the LSSA would continue on.

Ms Lenyai pointed out that her term as the President of the LSSA comes at the time the LSSA and the country at large is facing many challenges. Ms Lenyai spoke about sustainability issues of the LSSA. She said that the LSSA as an organisation will need to develop innovative ways to make sure that it remains sustainable and once all the provisional law associations are in place, there must be a consistency plan on funding them and to make sure that the LSSA can be better.

Ms Lenyai promised that she will im-



From left: Vice-President of the Law Society of South Africa (LSSA) Joanne Anthony-Gooden; incoming President of the LSSA, Mabaeng Lenyai; and Vice-President of the LSSA, Eunice Masipa.

merse herself in the work that she was given by the legal profession of doing her utmost best and ensure that, the LSSA goes to greater heights, that it retains its objectives and to make sure that the LSSA remains the relevant voice for legal practitioners, domestically and internationally. 'We will continue to speak for the attorney's profession nationally, we will undertake advocacy issues and comment on legislation in the interest of the legal profession and the public. We will provide leadership not just leadership, but exceptional and excellent leadership and support the profession, through policy development,' Ms Lenyai said.

Ms Lenyai said that the LSSA will continue to interrogate legislation and look at what the government is doing to

make sure that the rule of law is always maintained. 'If it means we must take government to court to make sure that they do not offend the Constitution, we will do that with no fear or favour. This also talks to the issues of briefing patterns, the time for talking is coming to an end,' Ms Lenyai said. She pointed out that the profession will talk one last time and if nobody listens then litigation will have to take place. She said this will be discussed with constituencies, because the issue of briefing patterns or women legal practitioners being left behind has to come to an end. She added that regarding issues of the youth, it will be addressed.

A panel discussion was had regarding the functions of the LPC and the LSSA.

These differences are discussed in Maphula Oliphant's editorial entitled 'About the LPC' 2022 (JanFeb) DR 3.

The incoming President and Vice-Presidents of LSSA are:

- President – Mabaeng Denise Lenyai
- Vice-President – Eunice Masipa
- Vice-President – Joanne Anthony-Gooden

- Visit www.derebus.org.za to view the gallery of images from the LSSA Annual Conference and AGM.

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

By
Isabel
Joubert

Honouring a stalwart of the Black Lawyers Association

The Black Lawyers Association National Executive Committee (BLA NEC) met with the Mkele family, in Alberton, Johannesburg on 8 April 2022 to honour Ms Desiree Finca. Ms Finca was the first black female admitted attorney in South Africa (SA).

The Law Society of South Africa's (LS-SA's) President and the BLA Deputy President, Mabaeng Lenyai, thanked the Mkele family for allowing the BLA NEC into their home. Ms Lenyai said that it was an honour to be in Ms Finca's presence as one of the oldest living BLA members, who was also one of Mr Godfrey Pitje's – one of the founding fathers of the BLA – candidate attorneys. She said that the BLA is very proud because Ms Finca is a stalwart and achieved so much under such difficult circumstances. Ms Lenyai added: 'Because of your sacrifices, we today, are standing on your shoulders and are here today to say *siyabonga* – thank you very much, you are our inspiration, we look up to you and are very proud to call you our own.'

Ms Lenyai said that with the permission of the family the BLA would like to honour Ms Finca in August, at the recently formed Women's Forum event so that the world knows who Ms Finca is and what she has achieved. Ms Lenyai said:



The BLA NEC with Ms Finca.

Back row: University of Witwatersrand Black Lawyers Association (BLA) Student Chapter Chairperson, Tshepahalo Masakoana; Head of Legal Education and Research of the BLA, Vumani Mthembu; President of the Law Society of South Africa and Deputy President of the BLA, Mabaeng Lenyai; General Secretary of the BLA, Charlotte Mahlatji; Treasurer of the BLA, Noveni Kubayi and President of the BLA, Bayethe Maswazi. Front row: Head of Events and Campaigns of the BLA, Maboku Mangena; Deputy Secretary General of the BLA, Ncumisa Sotenjwa; Ms Desiree Finca; BLA Student Chapter: President, Shandukani Mudau; and BLA Administrator, Judith Mabelane.



President of the Law Society of South Africa and Deputy President of the Black Lawyers Association (BLA), Mabaeng Lenyai; Ms Desiree Finca and President of the BLA, Bayethe Maswazi.

'We have no excuse but to succeed, with someone like you as our inspiration.'

The President of the BLA, Bayethe Maswazi, started his speech by saying that the BLA is there to rekindle the flames that spurred Ms Finca and many others to join the legal profession and take the road less travelled. He continued by adding that Ms Finca had to face patriarchy, the BLA wants to rekindle Ms Finca's story so that young black females growing up all over the country are inspired by the story and can also decide to walk the path of joining the legal profession as it was paved with the hard work of Ms Finca. 'We are here to rekindle the legacy of the BLA and to walk the steps that you have walked with our grandfather, [Godfrey] Mokgonane Pitje, and many others who pioneered the work of the profession,' Mr Maswazi said.

Mr Maswazi told Ms Finca that the profession is changing as many women have followed in her footsteps even though there are still many issues that are being grappled with. Mr Maswazi said he hopes Ms Finca can receive the BLA again when all the issues have been sorted out. He said, 'We are in a profession where

women can stand up fearlessly and be able to claim it as theirs too.'

Mr Maswazi told Ms Finca that they know the scars she had to carry in order to live and survive in a profession existing in a colonial and Apartheid environment. Mr Maswazi thanked Ms Finca for allowing the BLA NEC to spend time with one so noble because to them she is the hero who stood up in the legal profession and made it possible for the woman who are sitting in the room with her today to practise law. Mr Maswazi quoted late President Nelson Mandela who said, 'The sun shall never set on so glorious an achievement' and said that the wish is that the sun never sets on Ms Finca's achievement. Mr Maswazi finished his address by thanking Ms Finca for being who she is.

Ms Finca's daughter, Pumla Mkele, introduced the family to the BLA and gave a brief history of the family. She explained that Ms Finca practiced law as Desiree Finca but the family name is Mkele. She mentioned that Ms Finca's grandchildren followed in their grandfather's footsteps as writers as Mr Finca wrote for *Drum* magazine. Ms Mkele thanked the BLA for

coming into their home to honour her mother as she said many people are forgotten when they get old. Ms Mkele said Ms Finca helped her children and grandchildren to become the people they are today and to follow their dreams.

Ms Lenyai was asked to speak on behalf of Ms Finca. Ms Lenyai said that Ms Finca wants everyone to treat their life as a new book, 'open it every day and write something new, something that will empower yourself and empower those who come after you'. Ms Lenyai said not to do things just to gain benefit from it, the legacy that one leaves behind should always be thought of. She went on to say that leaving a legacy does not have to be left after death, Ms Finca is alive and has left a great legacy to be followed and draw inspiration from. Ms Lenyai said that young women of today have forgotten that they are the flowers of the world, they need to dress up, look the part and own their space. She said Ms Finca is still here, looking the part and still inspiring. Ms Lenyai said people should see themselves as a brand as everything one does will have an impact on others. Ms Lenyai went on to say that one should aspire to be like Ms Finca so that maybe one-day people may too come knocking at your door as the BLA came to Ms Finca's door to honour her.

Mr Maboku Mangena was called on to present Ms Finca with gifts on behalf of the BLA NEC.


Isabel Joubert BIS Publishing (Hons) (UP) is the sub-editor at De Rebus.



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By
Joel
Zinhumwe

Enterprise risk management as part of management process/activity for quality decision making

The concept of Enterprise Risk Management (ERM) is viewed and applied differently by many corporate organisations around the world. There is no global definition for ERM, as everyone in the industry who has implemented it has done it in a different way. However, through my experience, I have noted that most organisations in the industry have a common understanding when it comes to ERM and the same applies to law firms. That ERM involves a process where a Risk Manager or someone charged with managing risk in the firm or organisation creates a framework document or methodology that is consistently applied to different types of risks across the company and then allows that person on a quarterly or bi-annual basis, to collect risk information and discuss with business units, project teams and so on, the various risks that are seen by all the stakeholders that may impact on the organisation's strategic objectives. The risk manager or the person charged with managing risk then applies that consistent companywide framework or methodology to those different risks and creates a consolidated company risk profile, that shows the overall picture. This approach has nothing to do with proper effective risk management of a firm.

Towards imbedding ERM

I submit that the way risk management is handled in a firm should be different within every organisation or firm. Instead of creating a single framework or methodology for different types of risks, decisions, or activities in a firm, it is better to have different types of methodologies that are all consistent in terms of risk management principles, which are aligned to the ideas of the ISO 31000 standards by the International Organisation for Standardisation and all go through the same process of identifying, assessing, and mitigating risks. In addition, for every different activity there may be a different set of tools and techniques for assessment and different options for the mitigation of risks. When risk management is embedded in the decision-making process for management, there would be no need for the firm's

risks to be assessed on pre-set times, such as on a quarterly or bi-annually basis.

It is important to note that risk should be analysed at a stage when a company or firm is about to make an important decision, for example, there should be a different methodology for risk-based budgeting, that should be followed when the budget is being prepared and before it is approved, there should be some proper risk analysis as part of it. The same goes for investment management, where a different risk framework or methodology should be implemented when deciding on which projects or investment portfolios to invest in, on the best deal structuring and exploring the alternatives in different markets, a proper risk analysis should be carried out. Furthermore, the risk assessment of different processes or activities maybe done using different set of tools and techniques. It is recommended that organisations or firms must have several risk methodologies that are aligned with the same principles of managing risks, with different risk checklists, different tools, and different risk considerations, this will improve the quality of decision making.

Legal practitioners are constantly facing many challenges and/or risks in the industry that are threatening their existence or survival in the economy. Such challenges include cyber threats, unreliable and deceitful clients and without proper risk management, legal practitioners may escalate the downfall or collapse of their firms. For example, it is important to perform a proper due diligence or risk analysis before accepting a new client and the constant checking and verifying of information for existing clients so as ensure that the firm's risks have been mitigated or managed to a reasonably acceptable level by management.

There are many ways in which risk management improves the quality of decision making and in the following article '3 Ways Risk Management Improves Decision Quality' (www.eagleedge.com.au, accessed 5-4-2022) three ways are listed wherein risk management improves decision quality as follows:

'Removing cognitive biases

Cognitive biases are systematic mental errors, which place limitations on how we view the world around us, leading to errors in decision making. Risk management plays an active part in removing these mental errors from decision making with a two-pronged approach.

First, when risk management is injected into decision-making processes, objective data is leveraged more heavily than subjective information. This helps to bring accurate information to the table to ward off "gut-felt decisions" or intuition from past experiences that can lead to poor decision quality.

Second, risk management processes encourage open discussions on current and emerging risks. This helps to bring cognitive biases to the forefront where they can be identified, addressed and discarded, leading to improved decision quality.

Exploring alternatives

The risk management process helps decision makers explore and select the best alternatives related to a strategic choice. The overall goal is for business leaders to consider all the potential consequences of a decision – or all decision alternatives for that matter – before making an informed and intelligent judgment. Exploring alternatives has an organic way of helping stakeholders think long-term on how a certain decision will play out versus the other options on the table.

These mental processes help to reduce decision errors while increasing insights that improves decision making even more. When a risk assessment is conducted on each option for a decision, quality improves, which increases the probability of more welcomed outcomes.

Increasing situational awareness

As business leaders go through the risk management process, the information collected can be used to assist with decision making, leading to improved decision quality. If all stakeholders involved in making a strategic decision are aware of the risks, this will help decision move in a direction that is more calculated.

This can also be used as a strategy to always ensure decisions are fitting within the risk appetite set by leadership and internal departments.

As every decision comes with risks of failure it is important to understand what less than ideal outcomes could result. Decisions should be made to ensure the company stays on the path to achieving the intended objective or goal. In the end, risk management gives leaders the tools to increase situational awareness of the world revolving around a specific decision.

Wrapping up

Businesses are constantly searching for ways to improve decision making to

optimise performance and reach strategic goals. Risk management is a value add-on that increases decision quality through open discussions on risk sources that can lead to goals not being achieved.'

Conclusion

The moment risk management information becomes disconnected from some sort of management process or activity and once it becomes risk information for the sake of risk information, once it becomes a separate agenda on a board meeting, discussing risks of the company, separate on discussing strategic goals, separate on discussing investment activities and budget activities.

Risk management will be viewed as a separate standalone activity. It will be viewed as just another item on a performance review, and nobody will really take it seriously in an organisation. Risk management is real when it is not an objective, but when it is a step in a process of something important in the business.

Joel Zinhumwe (FP) SA CFE Bcompt (Hons) Accounting Science/CTA (Unisa) BCom (Hons) Accounting (MSU) is a Practitioner Support Supervisor at the Legal Practitioners' Fidelity Fund in Centurion. □

People and practices

Compiled by Shireen Mahomed

All People and practices submissions are converted to the *De Rebus* house style. Please note, five or more people featured from one firm, in the same area, will have to submit a group photo. For more information on submissions to the People and Practices column, e-mail: Shireen@derebus.org.za

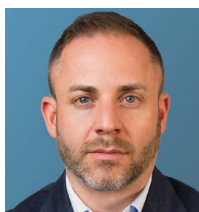
DSC Attorneys in Cape Town has appointed Sherilee Edwards as a legal practitioner.



Allen & Overy has two new appointments. Brian Price and Ze'ev Blieden have been appointed as corporate and commercial partners to head up the new practice in Johannesburg.



Brian Price



Ze'ev Blieden

Shepstone & Wylie has six new promotions.



Nalini Maharaj has been promoted as a partner in Johannesburg.



Heather Marsden has been promoted as a senior associate in Durban.



Cameron Wilson has been promoted as a senior associate in Durban.



Tebogo Mphaphuli has been promoted as a senior associate in Johannesburg.



Wesley Rajbansi has been promoted as a senior associate in Durban.



Chrichan de la Rey has been promoted as a senior associate in Durban. □

Leveraging technology: How can law firms best adapt to operating post-lockdown?

By
Emmie
de Kock

Have you ever seen a black swan? Black swans are regarded to be very rare and precious, as swans are generally white. In investments circles, a black swan is used as a metaphor to refer to an unexpected unpredictable event with major financial consequences, whether good or bad. Considering the unpredictability and severe impact of the COVID-19 pandemic, overall, the pandemic has been recognised as a black swan event for most sectors, including legal practices.

The lockdown regulations associated with the pandemic forced most existing law firms to move to a remote platform or at least adopt a hybrid model almost overnight. Many law firms were not prepared for these fast operational changes. Many traditional law firms are still very brick-and-mortar based, paper-heavy and conservative about adopting digital solutions. Considering the moral and statutory obligations on legal practitioners to keep and archive client and employee information confidential and secure, it is understandable. However, law firms who made no permanent positive changes towards joining the fourth industrial revolution during the time of the pandemic, hindered their own progress.

After two years of survival mode for many law firms, and a hopeful close end to the state of disaster, law firm owners are encouraged to take stock and decide which temporary fast changes contributed to growth of their firm and which could be implemented over a long-term period.

Legal practices, which were established during or after lockdown, had an advantage in the sense that they did not face these challenges or resistance to change. Legal practitioners had no choice but to start-up their law firms in the 'new normal'. Have you considered how law firms that existed before the lockdown period, operate differently from law firms, which were established during or after lockdown? The COVID-

COVID-19 pandemic created many opportunities and a climate for new legal practices to thrive, if these opportunities were noted and grabbed.

It is not realistic or expected for legal practitioners to also become information technology (IT) experts when operating a legal practice, but a minimum interest and attention to technology should be encouraged to sufficiently engage and serve clients in the times we are living in. Legal services are essential for good order in society and to help avoid or resolve disputes, specifically in the digital realms. Notwithstanding rumours of threats posed by artificial intelligence to take over legal positions, clients will always need legal practitioners to empathise and lead them through a legal crisis.

The purpose of this article is to indicate minimum technology aspects, which every legal practice owner should

consider and manage properly post-lockdown.

E-mail hosting

When legal practitioners decide to rent offices, they take good care considering aspects, such as security, costs, size, accessibility to clients and compliance with the rules from the Legal Practice Act 28 of 2014 (LPA). However, the lockdown period has taught us that your digital ad-



Google (@gmail.com) or Yahoo (@yahoo.com) or Microsoft (@outlook.com). There are serious security and reputational risks for legal practices relying on e-mail addresses hosted by these global giant technology service providers. In accordance with the user terms and conditions governing these generic types of e-mail addresses, these service providers take

solutions relating to obtaining professional e-mail addresses for lawyers could be as follow –

- register your own unique domain name, which is associated with your own legal practice name (similar to a company name registration) through an Internet service provider; or
- join an online lawyer platform or voluntary lawyer association, which can provide secure e-mail services relating to a relevant common domain name.

Should your firm reconsider or change its e-mail addresses and hosting?

Electronic and social media platforms

The Code of Conduct for legal practitioners, candidate legal practitioners and juristic entities was published in GenN198 GG42364/29-3-2019 and was made by the Legal Practice Council (LPC) under the authority of s 36(1) of the LPA. Section 7 of the Code which deals with 'Approaches and publicity' (ie, marketing) provides for 'publicity' in any medium, including electronic and social media.

It has been reported that the use of social media during lockdown increased over 70% of which most time was spent on WhatsApp, Facebook Messenger and Instagram (Ian Haynes 'COVID-19 - Social media explodes' (<https://www.insil.com.au/>, accessed 1-4-2022)). According to www.statista.com, the most popular social media platform in South Africa (SA) is WhatsApp, with almost 23 million users calculated in 2021 in SA.

Many traditional prior-existing law firms often have difficulty adopting electronic or social media marketing strategies. However, it is interesting to note how new law firms, early adopters and Generation Z legal practitioners rely heavily on and embrace social media marketing strategies with success.

Social media, on particular platforms such as Facebook, Instagram and LinkedIn, have become helpful tools to find and make new connections fast, and in an informal way, in particular in times when physical network gatherings were limited. Professional trust is built faster and remotely by being digitally accessible, open, and professional. No social media activities should bring the legal profession into disrepute.

Although these platforms, and some new online platforms for legal practitioners, are helpful for legal practitioners to find, connect and network with each other, opportunities, and freedom to obtain positive exposure by engaging and publicising to prospective and existing clients on electronic and social media should not be missed.

Considering the informal nature of social media, legal practitioners should always bear in mind that their possi-

no responsibility for data leaks and do not comply with Protection of Personal Information Act 4 of 2013 (POPIA), which came into effect on 1 July 2020 with a one year grace period to comply.

Due to the low security guarantees relating to these free e-mail services, these e-mail addresses are often the target of cybercriminals. The public are often warned, in particular, by reputable financial institutions, against engaging with persons using these types of e-mail addresses, as they are often associated with scammers or amateur businesses.

It is not mandatory or necessary for all legal practices to create or host their own websites in order to get personalised e-mail addresses, as it is not in the budget or management range of all law firms, in particular solo practices. The

dress, in particular your e-mail address, is even more important to have in place, as without it written communication and financial transactions can be halted.

There are many options on the Internet to obtain an e-mail address in a fast, free and easy manner. But what does your e-mail address as a legal practitioner communicate to clients and the world?

Many legal practitioners starting up a legal practice using e-mails provided by free and global sources, for example



ble audience for social media posts are generally fellow legal practitioners, law students, mentors, existing and future clients. It is in the interest of our profession to keep one another accountable and to help build a positive image of South African legal practitioners online.

Consider if social media should be part of your legal career or law firm's marketing strategies and how keeping an online presence could help build your professional image as lawyer. Does your firm have a policy in place for members relating to activities on social media?

Cloud services

Cloud services echo the noble reasons why the Internet was originally founded in 1983, namely to protect essential knowledge and academia resources in the event of a physical nuclear disaster. These services aim to offer cost-effective solutions to access, store, back-up, update and share electronic data and files in real-time in a secure digital place accessible from anywhere the Internet can connect.

When hard lockdown hit SA in March 2020, existing law firms which were reliant on in-house servers (and/or back-ups on hard-drives) and/or paper-based records were greatly inconvenienced, disrupted and disadvantaged. Although these record keeping strategies were earlier adopted for physical data security purposes and possible better copyright protection of the firm's own templates, the pandemic demanded a more flexible approach urgently. The pandemic accelerated the adoption of cloud services in all sectors, including law firms, to adapt to 'working from home' (remote working) models, emigration policies and better risk management strategies. Cloud services used by most law firms today relate to practice management, record keeping, case management, billing and/or accounting.

The pandemic also gave the necessary push for the faster implementation of cloud-based platforms offered by government and the judiciary, for example, CaseLines, which was adopted by some courts. CaseLines was already approved for South African courts in 2019 and aims to enrol cases and operate courts without (or less) paper records. According to www.judiciary.com, CaseLines 'offers Microsoft tier four Azure cloud storage and is ISO270001 accredited'. As it is cloud-based, it 'can be accessed on any laptop or tablet with Internet access and an Internet browser that is HTML5 compliant'. 'The system offers a full audit trail of all actions on the system, tracking any changes made to court evidence'.

Considering the delays the pandemic caused in property transactions due to regular and necessary closures of government and Deeds Offices, it is regret-

'The increase in cloud computing also promoted e-commerce, which had a positive spin for legal practitioners looking to up-skill or study new legal or professional development areas.'

table that the deeds registries failed to switch to a fully digitised system (ie, e-EDR system) during lockdown as contemplated in the Electronic Deeds Registration Systems Act 19 of 2019.

The increase in cloud computing also promoted e-commerce, which had a positive spin for legal practitioners looking to up-skill or study new legal or professional development areas. Legal publishers and training institutions became more cloud-based during the pandemic to make the purchasing books, the use of legal resources and training so much more accessible and affordable. Cloud-resources have become essential for real-time updates as laws were rapidly changing during lockdown alert levels.

How is your law firm taking advantage of cloud services?

Electronic devices

In December 2020, the LPC amended the professional Rules by inserting new r 22.1.11, which prohibits the advertisement, interviews, and practical vocational training (PVT) contracts offered by law firms to prospective candidate legal practitioners to require a valid driver's licence or access to or ownership of a vehicle. The pressure for this change followed consistent complaints by LLB graduates (PVT seekers) who understandably do not all own, or cannot afford, vehicles. Apart from these reasonable financial objections, the amendments also align with modern lifestyle traits of Generations Y and Z (millennial) lawyers who may prefer saving costs (on vehicle loans, insurance, and maintenance) by catching private taxis.

Electronic devices (which are luckily a lot cheaper than vehicles) became more important than vehicles during lockdown. Whether a law firm had a 'bring your own device' policy in place or not, employees bring their own devices to work and use them when working from home. As the demand for remote working and social media connectivity contin-

ue, perhaps a discussion should follow what requirements a law firm may set in advertisements and employment contracts relating to the ownership and use of specific electronic devices which law firms could have (at least partial) access/control over.

Fortunately, sections of the Cyber-crimes Act 19 of 2020 came into effect from December 2021, which create new criminal offences relating to the unlawful disclosure or sharing of electronic messages or files, which may harm a law firm or its clients. Apart from the Copyright Act 98 of 1978 (as amended), possible provisions in employment contracts and the professional Rules, this new law provides additional protection for law firm owners against unlawful and illegal conduct by firm members (or any unauthorised third party) on electronic devices relating to unauthorised use of records, which are proprietary to a law firm or its clients.

Many smart devices are already issued with features compatible with the aspects discussed above. Allowing legal professionals in a firm to use their own devices could potentially save a firm a lot of money on IT management and maintenance services.

How could a more flexible policy regarding electronic devices save your firm operational costs?

Conclusion

No legal practitioner has been unaffected by the consequences of the COVID-19 pandemic or lockdown. Everyone had to adapt fast. Apart from personal and professional losses, deaths or illness suffered, hopefully there were also new opportunities noted, new connections made, and positive changes adopted for the long term.

Looking back at the black swan event, were the consequences worse or better for the development of South African legal practices?

Emmie de Kock BLC LLB (cum laude) is a Lawyer Coach and Managing Director of LawyerFirst Coaching & Consulting t/a Lawyers Working From Home.





ESTATE PLANNING LAW

Does a Master have to approve of an agreement when all heirs have given their consent to a sale?

By
Kobus
Els

In this article, I discuss the provisions of s 47 of the Administration of Estates Act 66 of 1965, which includes a short history of the section, and whether the provisions are peremptory or directory with reference to case law. A recent unreported judgment by the Gauteng Division of the High Court, which deals with the specific section, will also be discussed.

The Act

Section 47 of the Administration of Estates Act, provides as follows:

'47. Sales by executor

Unless it is contrary to the will of the deceased, an executor shall sell property (other than property of a class ordinarily sold through a stockbroker or a bill of exchange or property sold in the ordinary course of any business or undertaking carried on by the executor) in the manner and subject to the conditions which the heirs who have an interest therein approve in writing:

Provided that –

(a) in the case where an absentee, a minor or a person under curatorship is heir to the property; or

(b) if the said heirs are unable to agree on the manner and conditions of the sale,

the executor shall sell the property in such manner and subject to such conditions as the Master may approve.'

It may be worthwhile at this moment to visit the history of s 47. Levinsohn J remarked in *Davis and Another v Firman NO and Others* [2010] JOL 24849 (N): 'In the quest for the proper interpretation of the above section [47] it is, I think, necessary to trace its forerunners both statutory and at common law.'

History

Prior to 1910 powers and duties of executors were regulated statutorily. All deceased estates were administered by executors under the supervision of the Master. In *Ex Parte Eckard* 1902 TS 169, Innes CJ said that all sales by executors should be by public auction. If it is to the advantage of the estate, sales may be made out of hand, subject however, to the written consent of major heirs. Where there are minor heirs or if any major heirs did not give their consent, an application should be made to the court for the sanction of the sale.

The sale of assets by executors became regulated by statute when s 52 of the Administration of Estates Act 24 of 1913 was passed. Section 52 provided as follows:

'If the Master, after due enquiry, be of opinion that it will be to the advantage of persons interested in an estate to sell out of hand instead of by public auction, any property belonging to that estate, and if no provision be made in the will of

the deceased to the contrary, the Master may grant the necessary authority to the executor so to act.'

The 1913 Act was repealed by the current Act. Section 47 prior to its amendment in 1983 provided as follows:

'Sales by executor – An executor shall not, unless authorised thereto by the will of the deceased, sell any property ... otherwise than by public auction after such notice and upon such conditions (if any) as the Master may direct:

Provided that –

(a) the foregoing provisions in this section shall not apply in respect of property sold in the ordinary course of any business or undertaking of the deceased carried on by the executor, and

(b) the Master may, if it would be to the advantage of the persons interested or if they all consent thereto and it would not be contrary to the terms of the will (if any) of the deceased, authorise the executor to sell any such property on such conditions as the Master may determine, by public tender or out of hand.'

Interpretation of s 47

That brings us back to the provisions of the present s 47. A sale by public auction is no longer peremptory and the Master's consent is no longer required but for the provisos of subss (a) and (b). Although it is within the power of the executor to sell assets, it is subject to the written consent of major heirs to the manner and conditions of sale. The question arises whether the obtaining of

*Is a contract concluded
in contravention of s 47
visited with nullity/
voidness?*

the major heirs' consent is peremptory or directory. Section 47 provides that an executor 'shall sell property ... subject to ...'. Here the word 'shall' when used in a statute should rather be construed as peremptory than as directory unless there are other circumstances which negative this construction (see *Sutter v Scheepers* 1932 AD 165 at 173-174). Non-compliance with s 47 attracts criminal sanction. In terms of s 102(1)(g) any person who contravenes or fails to comply with the provisions of s 47 shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months.

Section 47 relates to the manner and conditions of sale, and not to the decision whether to sell. The decision to sell falls in the province of the executor alone (see *Essack v Buchner NO and Others* 1987 (4) SA 53 (N)).

In *Schofield v Bontekoning* [2011] JOL 27906 (GSJ) van Oosten J (writing for the Full Bench) expressly held that s 47 is peremptory and it casts the duty on the executor to fulfil the requirements of obtaining the written consent of the heirs, non-compliance cannot even be cured by a court order.

Is a contract concluded in contravention of s 47 visited with nullity/voidness? 'It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect'. 'So that what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done' (see *Schierhout v Minister of Justice* 1926 AD 99 at 109).

The role of the Master under the present provisions of s 47 is also diminished. In terms of s 42(2) of the Act, the Master must also issue a certificate that there does not exist any objection against the sale. Thus, if all the heirs have given their consent in writing to the manner and conditions of sale, the Master cannot refuse the request for the certificate. 'While both the Master and Registrar of Deeds may perform administrative acts in the course of their statutory duties, where they have no decision-making function but perform acts that are purely clerical', they do not exercise judicial or quasi-judicial acts, which can be taken on review (see *Nedbank Ltd v Mendelow and Another NNO* 2013 (6) SA 130 (SCA) at paras 25 and 27).

Obviously, the Master does not have to approve of an agreement where all major heirs have given their consent to the manner and conditions of sale. All that he must do is to furnish the executor with their s 42(2) certificate.

*Mar-Deon Boerdery CC
v Marais NO and Others
(GP) (unreported case no
30031/21, 29-11-2021)
(Moosa AJ)*

In the above case, the first respondent who was the executor in the estate of one Hallatt passed away on 6 July 2020. In the deceased's will, there are three heirs who will inherit in equal shares. One of the assets, namely a farm, cannot be transferred to the heirs by virtue of the provisions of the Subdivision of Agricultural Land Act 70 of 1970. The executor can either redistribute the assets in the estate or sell the farm. In this instance a company was formed with the three heirs as shareholders and directors. A deed of sale was drafted with the company as purchaser and sent to the heirs. The heirs then signed the agreement on behalf of the company. A valuation of the property was obtained for an approximate R 8 million. On 30 September 2020 one of the heirs sent an e-mail stating that the first respondent and the other heirs had a discussion and that the executor can market the property to interested persons. The arrangement was that the executor could market the property to third parties for R 7,5 million. There was no prohibition in the will of the deceased to the sale of the property. A written offer from the applicant was then received by the first respondent for R 7,5 million. It was accepted by the first respondent on 9 March 2021 and signed by him. The whole agreement was made subject to the approval of the Master of the High Court Pretoria. The executor was mindful of the provisions of s 47 of the Act. On 9 March 2021 a copy of the deed of sale with draft consents were sent to the heirs, which had to be signed by each of them. The consents were never returned. Subsequently on 28 March 2021 one of the heirs sent an e-mail to the executor (with copies to the other two heirs) indicating that they do not wish to sell to the applicant but rather to a family member also for an amount of R 7,5 million. The company, as represented by the heirs, sold the property to their family member for the said amount. On 15 April 2021 the deed of sale between the estate and company was signed on behalf of the estate.

The applicant then brought the application asking for an interdict to prevent the executor from transferring the property to the company pending the outcome of an action instituted against the estate

claiming specific performance in terms of the deed of sale dated 9 March 2021.

The applicant interpreted the e-mail of 30 September 2020 by the one heir 'as written approval on the manner of the sale and the conditions of the sale' (see para 34).

In the judgment, the court then discussed the provisions of s 47, whether it was peremptory rather than directory and if peremptory, whether the non-compliance of s 47 renders the contract a nullity (see para 23). The court found with reference to case law that the provisions were indeed peremptory and non-compliance rendered the contract null and void.

The applicant went on to say 'that the probabilities are "overwhelming" that the heirs were fully and timeously appraised of the contract and that the contract would not have been concluded without their blessing' (see para 35). The facts, however, indicate that the heirs did not approve the manner of the sale and the conditions of the sale in writing (see para 36). 'Limiting the import and effect of section 47 only to the manner of sale and the price is not consonant with the express terms of section 47'. Heirs must also consent in writing to the conditions of sale as well (see para 39). When the Master approves of the manner and conditions of sale, it must be done prior to the conclusion of the contract and not *ex post facto*. The application was accordingly dismissed with costs.

Conclusion

It is, therefore, imperative to obtain the written consents of heirs who have an interest in the asset to be sold to the manner and conditions of sale, which include all conditions, not only the manner of sale and price. I submit that a special condition in the sale agreement be inserted, namely, that the whole agreement is subject to compliance with the provisions of s 47 of the Act, failing which the agreement is null and void.

In *Legator McKenna Inc and Another v Shea and Others* 2010 (1) SA 35 (SCA), the following was said by Brand JA at para 15: 'First, I am not aware of any rule that a contract cannot be rendered subject to compliance with a condition imposed by statute'. Absent such condition, the executor can 'run the risk of personal liability on the basis of an implied warranty of authority if the Master's [certificate] could ultimately not be obtained' (see *Legator McKenna* at para 16).

Kobus Els BProc (UP) LLM (Unisa) is a legal practitioner at Els Attorney in Pretoria. The author represented the first respondent in the above matter.





Failure to pay maintenance: Revisiting the remedies in the Maintenance Act



By
Themba
Alfred
Ndaba

The Maintenance Act 99 of 1998 (the Maintenance Act) makes provision for various remedies pertaining to non-compliance with a maintenance order and it also renders a failure to pay maintenance a criminal offence, which is punishable in law. The offence of failure to pay maintenance has a negative impact on the best interests of the child and it also undermines the child's right to be maintained.

The Constitution protects and provides in s 28(2) that 'a child's best interests are of paramount importance in every matter concerning the child'.

The writing of this article, therefore, emanates from the effect that the failure to pay maintenance has on the best interests of the child and the manner in which the said failure is curbed by the Maintenance Act through the remedies provided in the same Act.

General effects of failure to pay maintenance

Section 15(3)(a) of the Maintenance Act creates an obligation on both parents to support their children proportionately in accordance with their financial means. However, and notwithstanding this provision, many parents still fail to support their children and this failure negatively impacts on the children's rights to maintenance, which includes the provisions of food, accommodation, education, health, clothes, etcetera.

The said failure contributes to the adversities and poverty experienced by many children including those that are still at school. In this regard, it was held in the case of *Fish Hoek Primary School v GW* 2010 (2) SA 141 (SCA), that it is unquestionably in the best interests of a child that a non-custodian parent, who is unwilling, yet has the means to pay his child's school fees, should be made to do so, if necessary, by the making of an order of a competent court in that if

the said is not done, the custodian parent would solely be saddled with that responsibility.

The effect of failure to pay maintenance on the best interests of the child

The best interests of the child include, *inter alia*, the interest of the child to be provided with the necessary support or maintenance. In an earlier decision of *Fletcher v Fletcher* 1948 (1) SA 130 (A), the court 'emphasised that the best interest standard must undoubtedly be the main consideration in matters involving the children' (Themba Alfred Ndaba '*Child maintenance after a parent's death*' 2012 (March) DR 26).

Various factors for determining the best interests standard were cited in the case of *McCall v McCall* 1994 (3) SA 201 (C) and among them, the court indicated that the parent's ability to 'provide for the basic physical needs of the child, the so-called "creature comforts", such as food, clothing, housing and the other material needs – generally speaking, the provision of economic security' in respect of the child, fall within the criteria that can be used in the determination of what is in the best interests of the child.

Similarly, the Children's Act 38 of 2005, in s 7(1)(c) refers *inter alia* to the

capacity of the parents to provide for the needs of the child in determining the above interests and in s 9, the Children's Act read together with Article 3 of the United Nations Convention on the Rights of the Child, 1989, produce the results that in all actions concerning the child, the best interests of the child standard shall be of primary consideration and should always be applied as paramount.

The aforesaid provisions coupled with the criteria in *McCall's* case are broadly harmonious with the Constitutional provisions of the best interests of the child. Consequently, any disregard or failure on the part of the parent to pay maintenance in line with the said interests undermines same and accordingly, amounts to the violation of precious rights protected by the Constitution.

Maintenance Act civil remedies for failure to pay maintenance

Section 26(1)(a) and (b) of the Maintenance Act makes provisions for the civil recovery of the arrear maintenance by enlisting the following three civil remedies –

- warrant of execution;
- attachment of emoluments; and attachment of debt.
- The above remedies are discussed below, have, to a certain extent, proved themselves as a successful mechanism in the enforcement and recovery of the maintenance arrears.

Warrant of execution

A warrant of execution is one of the civil maintenance remedies that can be granted by the Maintenance Court against the movable property of the maintenance defaulter in order to satisfy the payment of the maintenance amount in arrears. Additionally, the Maintenance Act provides in s 27(1) that if the movable property attached is insufficient to recover the maintenance arrears, the immovable property can be attached and sold in execution to the amount necessary to cover the maintenance arrears.

In this regard, a warrant of execution is one of the best remedies incorporated in the Maintenance Act in that it considers the fact that the maintenance defaulter's property can be converted into a monetary value (see *Kroon v Kroon* 1986 (4) SA 616 (E): "Means of support" is an expression covering not only income but property that can be used to produce income').

Attachment of emoluments

Attachment of emoluments is an order, which can be granted by the Maintenance Court obliging and authorising the defaulter's employer to deduct the amount specified in the order from the emolu-

ments of the defaulter in order to satisfy or recover the maintenance amount in arrears until the arrears are fully paid.

Attachment of emoluments is mostly applied in practice. However, the manner in which it is applied was correctly criticised, though not directly by the court, in the case of *S v November and Three Similar Cases* 2006 (1) SACR 213 (C) read together with *S v Visser* 2004 (1) SACR 393 (SCA).

The criticism in the former case and its relevancy to the attachment of emoluments related to the lenient terms on which the accused persons were ordered to repay their maintenance arrears in terms of s 40(1) of the Maintenance Act.

The said s 40 of the Maintenance Act has among others, the similar effect to s 28 (of the Maintenance Act) attachment of emolument in as far as the granting of the civil judgment and the terms of payment for the recovery of arrear maintenance is concerned.

Alternatively, in the *Visser* case, Van Heerden AJA stated that:

'Effective enforcement of maintenance payments is necessary, not only to secure the rights of children but also to uphold the dignity of women and promote the constitutional ideals of achieving substantive gender equality. It is therefore important that courts regard deliberate failures to comply with maintenance orders as serious offences and punish such failures accordingly'.

Attachment of debts

Attachment of a debt is an order, which can be granted by the maintenance court directing any person who has incurred a debt obligation to the maintenance defaulter, to make such payments as may be specified in the order within the time and in the manner so specified, to recover the maintenance amount in arrears. The maintenance defaulter's failure to pay maintenance should always be viewed seriously in context of the children's rights and the achievement of gender equality. In the case of *Bannatyne v Bannatyne and Another* 2003 (2) BCLR 111 (CC), the Constitutional Court (CC) held that:

'Compounding these logistical difficulties is the gendered nature of the maintenance system. The material shows that on the breakdown of a marriage or similar relationship it is almost always mothers who become the custodial parent and have to care for the children. This places an additional financial burden on them and inhibits their ability to obtain remunerative employment. Divorced or separated mothers accordingly face the double disadvantage of being overburdened in terms of responsibilities and under-resourced in terms of means. Fathers, on the other hand, remain actively employed and generally become economically enriched. Maintenance payments

are therefore essential to relieve this financial burden. These disparities undermine the achievement of gender equality which is a founding value of the Constitution. ... Effective mechanisms for the enforcement of maintenance obligations are thus essential for the simultaneous achievement of the rights of the child and the promotion of gender equality.'

Criminal remedy for failure to pay maintenance

The Maintenance Act in s 31 (as amended), renders any failure to comply with a maintenance order a criminal offence punishable in law. The Maintenance Amendment Act 9 of 2015, increased the sentence of a failure to pay maintenance from a period of one year imprisonment to a period of three years.

In ensuring compliance with maintenance orders and the effectiveness of maintenance payments after conviction, it remains permissible for our courts to also consider the imposition of other various sentences instead of the above and where the circumstances necessitate.

Considering the above, it is highly important to all maintenance legal practitioners in the field of maintenance to diligently ensure the enforcement of maintenance orders and compliance in order to protect the best interests of the children to be maintained.

Conclusion and recommendations

The offence of failure to pay maintenance has a negative impact on the best interests of the child and it undermines and overlooks the practical needs for which the Maintenance Act was promulgated.

The effective enforcement and implementation of the laws governing maintenance can highly assist in the protection of the best interests of the child and can also promote the constitutional ideals of achieving substantive gender equality and upholding of the dignity of women.

The remedies under the Maintenance Act should be applied fully and diligently. Courts should be alive to recalcitrant offenders and impose effective and appropriate sentences accordingly.

The insurance of maintenance payments through reputable private insurance companies may play a greater role in South Africa as is the case in some European countries.

Themba Alfred Ndaba LLB (University of Limpopo) is a Maintenance Prosecutor at Taung Magistrate Court. This article was written in his personal capacity.

By
Isabel
Joubert

Breaking the glass ceiling in the legal profession

The newly elected President of the Law Society of South Africa (LSSA), Mabaeng Lenyai, has certainly broken the glass ceiling in the legal profession when she became the first elected female President of the LSSA. History was made at the recently held LSSA conference and annual general meeting when an all-female Presidents committee was voted into leadership. Joanne Anthony-Gooden, and Ntlai Eunice Masipa as Vice-Presidents together with Ms Lenyai will be steering the organised legal profession into greater heights. Ms Lenyai spoke to *De Rebus* Sub-editor, Isabel Joubert, on the future of the profession and the legacy she would like to leave behind.

Isabel Joubert (IJ): Please tell us about yourself, where you hail from, your high school and tertiary education?

Mabaeng Lenyai (ML): I was born in Mthatha, but I was raised in Pretoria.

We stayed with my paternal grandparents in Mamelodi and then moved into our own home in Mabopane when I was two years old.

I went to a primary school called Kopa Dilalelo in Mabopane. I was there from sub-A to standard four (grade six). In standard five (grade seven) I went to Bafeti Middle School. I then attended Tsogo High School, a Roman Catholic school, where I completed my standard six (grade eight) and standard seven (grade nine) years. I wanted to experience a boarding school so in standard ten (grade 12) I went to Motswedi Secondary School in Zeerust.

In my primary school, I was in the Girl Guides. I was the lead girl guide. And I think that is where my leadership skills started, because every Wednesday the Girl Guides would take over the school, I did not know what I was doing, but my principal was very good and instilled leadership skills in all of us. I was a prefect at Tsogo but was not a prefect in Motswedi because I only attended from grade 12, however, everyone came to me for advice.

Thereafter, I went to Rhodes University. It was a very unpleasant experience because I wasted my time. I passed all my subjects throughout the year but come end of the year I would get a 49%, this is what was called a 'first class fail' and because I was studying towards a junior degree I would not pass. I left Rhodes University and went to Turfloop,



President of the Law Society of South Africa and Deputy President of the Black Lawyers Association, Mabaeng Lenyai.

the University of Limpopo and started my degree from scratch. I did my BProc there and I passed everything. From 1994 to 1995 I did my LLB at the University of Natal.

I came to Pretoria to do my articles at van der Merwe, du Toit and Fuchs in 1996 (VDT Attorneys), an Afrikaans law firm where I was taught many things. My principals were predominantly Afrikaans but they did everything humanly possible to make sure that they trained me properly. I am a notary and conveyancer today because of them, they pushed hard and trained me and they are the reason I am what I am today. Mr de Bruin and Mr Burger made sure that I did not become complaisant, they made sure I did my work and passed. I was an

attorney, notary and conveyancer by the time I had finished my articles.

I then went to Johannesburg to work as a professional assistant at Nicholls, Cambanis and Associates Attorneys. We did a lot of work for the Truth and Reconciliation Commission. When I started there, they were not doing commercial work, conveyancing or administration of estates and they gave me the latitude to open those departments within the firm, which was a wonderful opportunity. When I left to open my own law firm they were gracious enough to give me all the files and fees.

I opened my own firm, Ramothwala Lenyai Incorporated in Pretoria in 1999 until the November of 2008 when we had challenges with the Law Society of the

Northern Provinces (LSNP), which took a decade to complete. In that decade I was interdicted from running my own law firm, I had to work under people. It was the most painful decade of my life. This was in the time that I started my activism as an attorney, I joined the Black Lawyers Association (BLA) and within three months of joining the BLA in the North West I became their chairperson for two terms.

When I was interdicted in 2008 I went back to my principals at VDT Attorneys and worked with them until the end of 2011. When I left VDT Attorneys I joined Khanyisa Mogale Attorneys Inc in Rustenburg from November 2011 until August 2015. I then returned to Pretoria and worked with Kgokong, Nameng, Tumagole Attorneys Inc from 2015 to 2017.

In October 2017 the LSNP matter was dismissed. We were restored back into the positions we were in prior to the court case and in 2018 I started my law firm, Mabaeng Lenyai Inc. I worked from my dining room table for a year and then in May 2019 we moved into our current offices.

My passion is to empower the youth, especially female candidate legal practitioners because it is very clear that there are many challenges, either they do not get employed because their male counterparts are afraid of being accused of sexual harassment or they get appointed and are then faced with sexual harassment and they do not know where to go to complain. They will complain informally and in the criminal courts the victim has to lay the complaint herself.

IJ: What is the most important quality you think a legal practitioner should have?

ML: I think the most important quality a legal practitioner should have is honesty, your moral fibre has to be very high. One has to be knowledgeable and everything else but if you cannot be trusted and you have no integrity then you may just as well leave the profession because you will bring disrepute to the profession and you will become a danger to the very people you are supposed to be helping.

IJ: Give us the one value that you personally live by, as a legal practitioner?

ML: The one value that I personally live by is to be trustworthy, do what you say you will do. If I say I will do 'one, two, three, four...' I do it. If you have not had the opportunity to do it then own up to it, but make sure that you finalise it. I say again, if you cannot be trusted then it is useless.

IJ: Why is it important that the LSSA continues to exist?

ML: It is important that the LSSA continues to exist because it is the only body

that combines all the different interests of legal practitioners in their different groupings and looks after the members' interests. The previous provincial law societies, before 2018, used to have a dual purpose, namely, to look after the interests of attorneys, and deal with regulatory issues. With the Legal Practice Act 28 of 2014 (LPA), that has been split, the Legal Practice Council (LPC) looks after the regulatory issues and the LSSA has had to reinvent itself to take over the role of looking, not only after the rule of law and interest of the public but also looking after the well-being of legal practitioners.

IJ: Do you feel that under the new structure challenges that legal practitioners face will be addressed?

ML: Yes, I feel so because we are the mouthpiece of the legal practitioners, especially the attorneys. Although we are trying to work towards a fusion, we are not there yet. We are the mouthpiece that speaks to their interests with the LPC, Legal Practitioners Fidelity Fund (LPFF) and the Legal Practitioners' Indemnity Insurance Fund NPC (LPIIF). Even now, with the challenges of sustainability, the LSSA has been the champion that said: 'Let us meet and sit down and talk and see where we can meet each other halfway'. Even now, with the new report from the South African Law Reform Commission with regard to the fees, again the LSSA must be the mouthpiece of everyone to make sure that the rules make sense and if they do not make sense then the LSSA needs to collate the different views and put them in one paper and submit them to both the LPC and the Minister of Justice.

IJ: How does it feel being the first female President of the LSSA?

ML: It is a great honour and a great privilege. It has been overwhelming sometimes because the challenges are so many, but I know that I have a good team of good people surrounding me. The team at the LSSA that I have been working with since 2015 will help make it a good term.

IJ: What can we expect from you and your Vice-President's, with regard to leading and taking the LSSA to new heights?

ML: What you can expect from us is that we will take up the issues of transformation very seriously, and transformation in a very broad way, because women in the legal profession, even though we have made strides and milestones, it is not enough. Women should be a lot further ahead. We will look at issues of the youth, we are going to make sure that the challenges of the youth are also put on the map. We have programmes that will make sure that everyone gets

involved and everyone's livelihoods are improved. We are also going to take on issues of well-being because many legal practitioners, with the advent of COVID-19 have lost their law firms, have lost their livelihoods and there have been a lot of suicides and substance abuse, perhaps because people want to numb the pain. We will make sure that we improve the image of the legal practitioner with the general populous because we seem to have lost the moral high ground and the trust of the nation. We need to hold government accountable with regard to the rule of law.

IJ: The newly elected president of SADC-LA is female, will you be comparing notes?

ML: I will definitely. After she was appointed, at the gala dinner, we sat down and said that we definitely need to collaborate because with issues of the Southern African Development Community (SADC) in the region, especially with the movement of people and goods across boarder transactions there has to be a lot of talking and as well as giving and taking. This cannot only be done by the LSSA because there are also regulatory issues that are involved, so the LPC will have to be roped in as well as the LPFF because they are the ones who are tasked with paying in the event of legal practitioner's acting in an unbecoming manner. The LPIIF will also have to be involved. Again, all the structures need to sit down and talk. It is going to be very interesting and challenging with the SADC secretariat because all the countries are sovereign countries and for us to come back under one union it might mean letting go of some of the sovereignty in some instances. And again we need to get a buy-in from government for all this to happen, the LSSA cannot do this alone.

IJ: Who would you say is your mentor? And who do you go to for advice?

ML: My mentors in the profession are VDT attorneys, they have been there for me all these years. Sadly, the former BLA president, Lutendo Benedict Sigogo, who has passed on was also my mentor. Ms Kathleen Matolo-Dlepu and Ms Peppy Kekana who are also in leadership positions in the LPC and the LPFF, also my parents, I look up to them, they are my mentors as well as the leadership in all the structures.

IJ: In hindsight what advice would you give to yourself as a candidate attorney?

ML: The advice that I would give my younger self would be to be open to advice, because at some point in my career as a candidate attorney I was advised to take on intellectual property law and I did not listen. I did everything else ex-

cept that one item of law and now that work, that used to be exclusively reserved for attorneys, can now be done by others. I think I would give my younger self the advice to be more willing to listen to advice even if it is not the most comfortable advice, it might end up being your lifeline at the end of the day.

IJ: What legacy would you like to leave, especially for female attorneys? You have broken the glass ceiling when it comes to female attorneys.

ML: The legacy that I would like to leave is, work hard, be inclusive in your leadership, listen to what other people are saying to you, whether it is negative or positive, listen very closely to them and also never be complaisant. You must always work hard despite what other people are telling you, you must also do your own due diligence, verify what it is that needs to be done because people think

that just by being a woman you need to be micromanaged. Women need to stand their ground, while still maintaining their integrity. Do not allow browbeating and do not allow yourself to be used by people. Stay firm and true to what it is that you are doing and always remain honest. Most importantly, I believe, seek guidance from God.

Ms Lenyai is currently the LSSA President, she was previously the Vice-President from 2019. She has been an acting judge in the High Court in Pretoria since 2020 and has been a member of the BLA since 2003, occupying the positions of Chairperson (North West branch), member of the National Executive Council as head of events and campaigns, General Secretary and currently Deputy-President. She has been a council member of the LSSA since 2015, was a member of the *De Rebus* Editorial Committee from 2016 to 2019 and

has been a member of the Women's Task Team of the LSSA since 2016. In 2020, she became a Board member of Care-Net Development and Support Organisation. Since 2017, she has been a council member of the Community Education Training Centre (Mmakau) and was also a legal adviser on the radio station *Motsweding FM* from 2017 to 2020.

Isabel Joubert *BIS Publishing (Hons) (UP)* is the sub-editor at *De Rebus*.



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THE LAW REPORTS



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

March 2022 (1) South African Law Reports (pp 1 – 318); March 2022 South African Criminal Law Reports (pp 229 – 338)

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

Abbreviations

CC: Constitutional Court
ECG: Eastern Cape Division, Grahamstown
GP: Gauteng Division of the High Court in Pretoria
KZD: KwaZulu-Natal Local Division, Durban
KZP: KwaZulu-Natal Division, Pietermaritzburg
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Children

The constitutionality of the prohibition on unmarried fathers giving notice of birth of children born out of wedlock under their own surnames in absence of or without consent of the mother: The matter of *Centre for Child Law v Director-General, Department of Home Affairs and Others* 2022 (2) SA 131 (CC) concerned an application to confirm an order by the Full Court of the ECG declaring the provisions of s 10 read with s 9 of the Births and Deaths Registration Act 51 of 1992 unconstitutional. Section 9(2) provided that notice shall be given 'under the surname of either the father or the mother of the child concerned, or the surnames of both the father and mother joined together as a double-barrelled surname'. This section was made '[s]ubject to the provisions of section 10'. Section 10 in effect regulated the giving of notice of birth of a child born 'out of wedlock': it permitted the mother, without qualification, to give notice of such birth under her surname, yet, in contrast, allowed the father to give notice under his surname only if it was done in

the presence of the mother or with her consent. According to the Full Bench of the ECG, this differentiation made the section unconstitutional.

The matter arose out of an application brought before a single judge of the ECG by Mr Naki, a South African and Ms Ndovya, a citizen of the Democratic Republic of Congo (DRC), to compel the Department of Home Affairs (the Department) to register the birth of their child born in South Africa (SA). The Department refused on the grounds that the parents did not meet the requirements of the regulations in respect of children born of foreign nationals: The mother did not have a valid visa or permit, and the Department refused to recognise the validity of Ms Ndovya and Mr Naki's marriage because it took place in accordance with the customs of the DRC. The Department accordingly regarded the child was born out of wedlock.

The Centre for Child Law successfully intervened in the application, seeking an order impugning the constitutionality of, *inter alia*, s 10 of the Act. While Ms Ndovya and Mr Naki were successful in their application, the Centre for Child Law was not, and so appealed to the Full Court, achieving success there. The Centre for Child Law was the applicant in the present application before the CC. The Director General of the Department of Home Affairs and the Minister of Home Affairs were, respectively, the first and second respondents.

The majority of the CC (per Victor AJ, with Jafta J, Khampepe J, Madlanga J, Majiedt J, Mhlantla J, Theron J and Tshiqi J concurring) found that s 10 un-

fairly discriminated against an unmarried father on the basis of sex, gender and marital status, by prohibiting him from registering the birth of his child without the mother's consent or presence. The CC ruled that this was a barrier to unmarried fathers' full participation as parents and perpetuated harmful gendered narratives about caregiving, such as that child-care was inherently a mother's duty. The CC also found that s 10 infringed the unmarried father's dignity by deeming his bond with his child to be less worthy simply based on his marital status.

The majority declared s 10 to be unconstitutional. The appropriate remedy, they found, was to sever ss 10 and 9(2) (which made s 9 subject to s 10) from the Act.

In a dissenting judgment Mogoeng J (Mathopo AJ concurring) acknowledged that s 10 discriminated against unmarried fathers. He found, however, that the discrimination was justifiable under the limitations clause of the Constitution. He held that it was rational to require, when a person sought to register the birth of his child born out of wedlock under his surname as father, the presence of consent or the mother. This was crucial to confirm the fatherhood of the person claiming it, and whether he indeed was committed to the welfare of the child; this, given the undocumented, informal and unevicenced nature of relationships other than a marriage. Mogoeng J added that a regulatory framework requiring such assurances from the mother could not be said to impair the dignity of the unmarried father.



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Criminal law

Police must follow the correct procedures in cases of alleged shoplifting: In *S v Elgin* 2022 (1) SACR 325 (WCC) the accused was arrested on a charge of theft of a mini hair-straightener and a box of Calmettes from a Clicks store and taken to the local police station. There she was told that she would be released if she paid an admission-of-guilt fine of R 300. She duly paid the fine and was released. This also led to a previous conviction being entered on her record.

In a subsequent affidavit, provided to the magistrates' court, the accused alleged that the South African Police Service (SAPS) did not follow correct procedures and that the ones followed amounted to an injustice. She had entered the store 'in a daze' while emotionally fragile and did not understand the steps in the process before she paid the fine. She suffered from depression and anxiety and used anti-depressant and anti-psychotic medication which affected her mental state and made her feel 'spaced out'. She was told that if she did not pay, she would be detained overnight, for up to 48 hours or until the court hearing. She was terrified and did not want to go back to the cells. The payment of a fine was presented to her as the only option for her release, and it was never explained that she could be released on warning or on bail and pay a fine later or appear later in court.

The admission of guilt was confirmed by a magistrate, but in the light of the new facts the senior magistrate in Wynberg Magistrate's Court sent the matter on review in terms of the provisions of s 304(4) of the Criminal Procedure Act 51 of 1977.

Thulare AJ, the reviewing judge, found that the import of the consequences of the accused paying the admission-of-guilt fine had not been explained to her, and that this deficiency had resulted in a failure of justice. The certifying magistrate had not been apprised of the facts set out in the affidavit at the time of certification and justice required that these new facts be considered. An alleged erroneous admission of guilt and/or a probable or an arguable defence, had been sufficiently demonstrated in the affidavit.

In coming to his conclusions, Thulare AJ noted that the accused was not issued with a summons or written notice, but arrested and detained for a minor offence, contrary to the spirit and purport of the provisions of s 57. Alluding to low-hanging fruit, he cautioned against the practice, pointing out that justice ought not be buried in the cemetery of statistics on convictions for the state to look good on paper in the fight against crime.

The conviction and sentence were accordingly set aside, and the amount paid

refunded to the accused who could still be prosecuted in the ordinary course.

Other criminal law cases

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

- amendment of bail conditions;
- bail;
- domestic violence protection orders;
- drunk driving: Driving with excessive concentration of alcohol in blood;
- mental health: Assisted-care, treatment and rehabilitation services;
- permanent stay of prosecution;
- prevention of crime: Restraint order – company in business rescue;
- search and seizure;
- sentence: Non-parole period; and
- the putting into operation of a suspended sentence.

Education

Was the discontinuation of Afrikaans as a medium of instruction at Unisa, the country's principal distance-learning university, constitutional? The background to *Chairperson, Council of the University of South Africa and Others v Afriforum NPC* 2022 (2) SA 1 (CC) (Majiedt J writing for a unanimous court), was that before 2006 all undergraduate courses at the University of South Africa (Unisa) were in English with an Afrikaans component that ranged in its extent. Such courses could be fully bilingual in their teaching and materials or could provide for Afrikaans in lesser degree, such as in materials only. In 2016 this changed when Unisa adopted a policy phasing out Afrikaans as a language of instruction. Displeased with this state of affairs, Afriforum approached the GP for the review and setting aside of Unisa's decision on the bases that it infringed Afrikaans-speaking students' right to receive education in the language of their choice, that it was irrational, and that it was also unlawful.

The High Court ruled against Afriforum, finding that there was no violation of the right to language-of-choice education and that Unisa's decision was a sound balancing of the interests of practicability, equity, and redress, particularly when viewed against the background of declining demand for Afrikaans teaching and a need to devote resources to other official languages. The High Court also found that the decision was a rational employment of Unisa's powers under the Higher Education Act 101 of 1997 and the National Language Policy, and that despite procedural shortcomings, it met the standard of legality.

With the High Court's leave, Afriforum appealed to the SCA, which ruled that Unisa had not established that practica-

bility, redress and equity militated for Afrikaans's removal. Factors bearing on this were the diminishment of a presently enjoyed right, the insufficiency of resources, and the absence of risk that continued instruction in Afrikaans could foment the racially based ills that it had at two other universities. The SCA consequently ordered the reinstatement of Afrikaans modules on the back of a declaration that the language policy was unconstitutional.

Unisa then sought leave to appeal to the CC, which was granted, though the court ultimately dismissed the appeal. In essence, the CC found that Unisa had taken insufficient cognisance of the factors listed in s 29(2) (practicability, redress, equity, alternatives) before taking its decision, and that, in any event, assessment of these factors weighed against the discontinuation of Afrikaans tuition. The CC specifically found that:

Continuation of Afrikaans did not pose the threat it had in the previous university cases (segregation, marginalisation, access), in large part because the students did not attend the Unisa campus for teaching.

There was no evidence that Afrikaans teaching was or would be a retardant of the development of other African languages.

Cost considerations had not been raised at all in the meetings before the language policy was adopted and the argument that continuing with Afrikaans favoured the historically privileged was fallacious because it was based on an inaccurate picture of who Afrikaans speakers were, it was unsupported by evidence, and contrary to the commitment to heal societal divisions.

As far as remedy was concerned, the CC, mindful of overreach and the need to afford leeway to the University to determine the language policy going forward, ordered as follows –

- the SCA's order was suspended (it had, *inter alia*, declared the language policy unconstitutional, set aside the decisions adopting it, and ordered the presentation in Afrikaans of courses that had been in that language);
- that were the University to continue with the policy, it was to be adapted to comply with section 29(2); and
- that were the University to adopt a new policy the SCA's order would fall away.

Interest

The application of the *in duplum* rule to *mora* interest claimed on liquidated debt as contemplated in s 1(1) of Prescribed Rate of Interest Act 55 of 1975 (the Act): This matter, cited *Da Cruz v Bernardo* 2022 (2) SA 185 (GJ), concerned an application before the GJ, heard by Turner AJ, for an order declaring that the *in duplum* rule did not apply to the moratory interest on a liquidated debt

awarded in a previous order of the same court (per Foulkes-Jones AJ). The latter had been confronted with a claim for damages brought by the applicant, Da Cruz, against the respondent, Bernardo, in which the former sought repayment of money the latter promised, in terms of an agreement between the parties, to invest in one of the respondent's businesses. Those investments collapsed, which prompted the applicant to litigate. Foulkes-Jones AJ ordered the respondent to pay to the applicant the capital sum of R 812 500, plus interest on the amount *a tempore mora* calculated from date on which the applicant had initially demanded repayment. At a date subsequent to judgment, the applicant had sought payment from the respondent of capital, plus interest in the amount of R 1 590 952,91. The respondent paid the capital sum, but, as to interest, agreed only to pay the equivalent of the capital amount, refusing to pay the interest claimed. It justified this action based on the *in duplum* principle, which provides that arrear interest ceases to accrue once the sum of the unpaid interest equals the amount of the outstanding capital. That response prompted the present proceedings, in which the applicant sought the declarator above, as well as orders declaring the respondent to remain indebted to the applicant in the amount of R 785 008,56, being the balance due in respect of moratory interest awarded in the judgment; and seeking interest on the amount of R 785 008,56 *a tempore morae* to date of final payment.

The legal issue to be decided was whether the *in duplum* rule applied to liquidated debts which, in the absence of any law or agreement regulating interest, bore *mora* interest in terms of the common law, to which s 1(1) of the Prescribed Rate of Interest Act 55 of 1975 consequently applied. The court reached the conclusion that it did not. Critical to its finding was that a survey of South African authorities revealed that the judgments that had held the rule applicable concerned contractual claims where the interest rate was agreed. *Mora* interest was, however, fundamentally different to contractual interest, because it was not payable in terms of an agreement but regarded as fair compensation for loss or damage arising from default by the debtor. Also relevant was the fact that there could be significant delays in litigation concerning claims for liquidated debts to which *mora* interest applied. In addition, the Prescribed Rate of Interest Act itself did not set a limit on the interest claimable or specifically incorporate the *in duplum* principle.

The GJ in view of the above found for the applicant and ordered the respondent to pay the applicant the balance due in respect of moratory interest awarded by Foulkes-Jones AJ.

Landlord and tenant

Remission of rental for loss of beneficial occupation by subtenant due vis maior: In *Trustees, Bymyam Trust v Butcher Shop and Grill CC* 2022 (2) SA 99 (WCC) the facts were that the respondent (BSG) had leased premises from the applicant (BT), on which it, *inter alia*, ran a restaurant business. BSG, later sublet the premises, with BT's written consent, to a closely related entity, Apoldo Trade (Pty) Ltd (Apoldo), which continued the business, 'trading as' BSG.

Then lockdown regulations under the Disaster Management Act 57 of 2002 intervened. Aimed at combating the COVID-19 pandemic, they imposed an initial lockdown period that initially forced restaurants to close completely and, thereafter, severely limited their maximum seating capacity, crushing their profitability. In response BSG stopped paying BT rental and resisted BT's application in the WCC to collect outstanding rental – in arrears since the initial lockdown period – on the basis that the regulations constituted *vis maior* or *casus fortuitus*, which deprived it of beneficial occupation and exempted it from having to pay the full rental. BSG also brought a counter-application for a stay and dismissal of the main application and for a declaratory order that it was entitled to a remission of rental on the same basis for the period April – August 2020. In issue was whether a lessee may claim rental remission based on loss of beneficial occupation by the sublessee which occupied the leased premises, namely, where the lessee was not in beneficial occupation or physical control of the leased premises.

The WCC, per Pangarker AJ, held that a sublease entailed two contracts:

- a lease between landlord and tenant (lessor and lessee); and
- a sublease between tenant and subtenant (sublessee).

The lessor's obligations were toward the lessee and not the sublessee. BT's written consent to the respondent subletting the premises in no way created an agreement in terms of which BT was obliged to provide beneficial occupation to the sublessee (Apoldo), nor did it create obligations and rights between them.

Pangarker AJ noted that BSG was not occupying the leased premises, nor was it in physical possession or control thereof. It further held that a lessee could not avail itself of the common-law claim for an abatement or remission of rent in circumstances where its use, enjoyment and beneficial occupation were not denied or disturbed. BSG's lack of physical occupation of the leased premises had the result that it was not entitled to claim rental remission from the applicant, and its counter-application would, therefore, be dismissed. Pangarker AJ

concluded that BSG was, therefore, still bound by the lease agreement and would be required to comply with its terms and pay the full rental.

Legal practitioners

Where a client's attorney moves to a new firm, may the new firm be interdicted from acting against the client?

What happens when one of the legal practitioners dealing with your divorce moves to the firm representing your spouse? Can you get an interdict? These were the issues in *WDL and Others v Gundelfinger and Others* 2022 (2) SA 272 (GJ) (per Windell J). The attorney in question, Ms Steyn, had done work for the husband (the first applicant) while in the employ of the firm (Clarks Attorneys) and then joined the firm representing the wife (BL Attorneys). When the husband became aware of this, he, and the other applicants, citing conflict of interest, demanded that BL Attorneys withdraw from the divorce proceedings. They sought a final interdict based on the right to protection of the confidential information imparted to Clarks Attorneys when they represented the husband. The issue before the GJ was whether the information imparted to Ms Steyn was still confidential and relevant to the issues in the subject-matter and, therefore, worthy of protection. The applicants claimed that an interdict was the only viable remedy available for the protection of the husband's right to information confidentiality and that he had a well-founded fear that it would be compromised because of Ms Steyn's employment with BL Attorneys. The respondents (the wife, the attorney representing her and Ms Steyn) did not dispute that Ms Steyn received confidential information from the husband but contended, nonetheless, that the applicants failed to sufficiently identify the information sought to be protected, and as a result failed to establish that the information remained confidential and relevant to the issues in the divorce proceedings.

In her judgment, Windell J pointed out that a legal representative owes a fiduciary duty to their current client to act in their best interests, which duty precludes a legal representative from simultaneously acting for two clients with conflicting interests. The only duty that survives the termination of the legal representative's mandate, is the duty to preserve the confidentiality of information imparted to him through his professional relationship with a former client. To obtain the interdict, the applicants had to show, *inter alia*, that the information imparted to Ms Steyn remained confidential and relevant to the divorce.

As to the degree of particularity required in respect of the information, Windell J emphasised that this always depended on the facts. She pointed out

that it was not sufficient for an applicant to make a general allegation that the attorney was in possession of confidential information. Indeed, the more general the description of the information that the applicant sought to protect, the more difficult it would be to decide, which information to protect.

After considering the relevant facts, Windell J concluded that the applicants had failed to sufficiently identify the information they claimed to be confidential, which was a fatal deficiency. Over and above that, the applicants failed to show that the information imparted to Ms Steyn remained confidential or that it was memorable and not forgettable. This was also fatal to the application.

Windell J, therefore, refused the application for a final interdict: The right foundational to the relief sought had not been established.

Windell J then considered whether she should engage the court's inherent jurisdiction to bar the respondent attorneys from acting in the matter. The test was whether a reasonable person in possession of the relevant facts would think that judicial process and the administration of justice would be threatened if respondents continued to act for the wife. Windell J concluded that this requirement was not established, and that it was not in the public interest to disqualify respondents from continuing

their services to the wife. In the light of all this, she dismissed the application.

Sectional title

Compromising body corporate's claim for arrear levies, interest and costs:

The matter of *Zikalala v Body Corporate, Selma Court and Another* 2022 (2) SA 305 (KZP) concerned an appeal against the dismissal of a counter-application by the appellant, the owner of sectional title unit in the Selma Court sectional title scheme, in an application by the Selma Court's body corporate to declare his unit specially executable. This was after Selma Court's body corporate had taken default judgment against the appellant for, *inter alia*, arrear levies. The appellant subsequently made an offer – for less than the full outstanding amount, interest and costs – which was at first accepted, in error, by the body corporate's attorneys and then rejected. The appellant's counter-application was for an order declaring that this 'settlement agreement' was valid and enforceable. The issue before the KZP was whether it was competent in law for the first respondent to have accepted an offer less than what had been claimed against the appellant, namely, whether the trustees could do so given their powers in terms of the Sectional Title Schemes Management Act 8 of 2011 and the Regulations.

The KZP, per Chetty J, dismissed the appeal, ruling that trustees may not conclude an agreement outside the ambit of the powers they were given under the Act. Neither the Act nor the Management Rules permitted a body corporate to compromise its obligation to collect levies or contributions. Absent any express or implied provision in the Act, trustees are not empowered to accept a settlement offer of a lesser amount than what is owing to the body corporate. The statutory obligation imposed on the body corporate is to collect the full amount of levies and contributions due, together with interest and legal costs. No latitude was afforded to trustees to deviate from this obligation.

Shipping

Limitation of the shipowner's liability in case of damage caused to a foreign warship:

In *MV MSC Susanna: Owners and Underwriters, MV MSC Susanna and Another v Transnet SOC Ltd and Others* 2022 (2) SA 85 (SCA), the SCA was faced with the current implications of the old principle of maritime law that a shipowner can limit their liability for damages arising from the operation of their ship to its value. In South Africa, this limitation is embodied in ch V Part 4 of the Merchant Shipping Act 57 of 1951, specifically s 261(1)(b), headed 'Colli-




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sions, Accidents at Sea, and Limitation of Liability' and which specifies '[w]hen owner [of harm-causing vessel is] not liable for whole damage'. The case dealt the interpretation of s 261(1)(b) in the light of s 3(6) of the Act, which states that the Act 'shall not apply to ships belonging to the defence forces of the Republic or of any other country'.

The facts were that, during a severe storm in October 2017, *MSC Susanna* broke its moorings in the port of Durban and collided with the frigate *Floreal* of the French Navy (represented by the second respondent – the French *Ministère des Armées*) as well as with port infrastructure belonging to Transnet (the first respondent in the guise of the National Ports Authority of South Africa (the NPA)). The NPA sued the appellants – the owners and underwriters, and the demise charterer of *Susanna* – for damages of R 23 million. The appellants applied for a declaration of non-liability in relation to the damages to *Floreal*, for which the *Ministère* had lodged a counterclaim for € 10 million.

In November 2019 the appellants, invoking s 261(1)(b), instituted a limitation action against the NPA in the KZD, seeking at the same time to join the *Ministère* to the action. The *Ministère* resisted, arguing that the limitation in s 261(1)(b) did not apply to warships like *Floreal* by virtue of the above-mentioned s 3(6) of the Act. The appellants on the other hand argued the limitation did apply against the *Ministère*, as the party mak-

ing the claim against them, as opposed to *Floreal* itself. They submitted that section 261(1)(b) conferred a wide right that could not be restricted in the way the *Ministère* wanted, that is, by inserting after the words 'any property of any kind' in s 261(1)(b), the words 'save a naval vessel owned by the defence force of any nation'. The KZD refused to join the *Ministère*.

In an appeal the SCA, per Wallis JA (in a unanimous decision) held that the terms of s 261(1)(b) were clear and comprehensive: The right to limit was given to the owner of the ship in respect of all loss or damage to any property or rights of any kind, without qualification, and would include the loss or damage embodied in the *Ministère's* claim. This meant that the focus had to be on the effect of s 3(6), which excluded the bulk of the provisions of the Act from application to both South African and foreign vessels forming part of their country's defence forces. But ch V Part 4 (where s 261 was located) differed from the rest of these provisions since it was focused on the legal liability of owners and its limitation. This was important because s 3(6) did not say that the Act did not apply to owners of ships. It would, moreover, be linguistically inapt to exclude the invocation of limitation by the owners of *Susanna*.

Wallis JA then refuted the *Ministère's* argument that the Act was not concerned with warships. He pointed out that the *Susanna* was a merchant ship that was

engaged in merchant shipping at the time of the incident giving rise to the claims against the appellant and that an exemption from the right to invoke limitation in respect of claims by warships would be inconsistent with international practice. Wallis JA consequently upheld the appeal and joined the *Ministère* as defendant in the action instituted by the appellants.

Other cases

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

- abandonment of default judgment;
- class actions;
- company: Resolution to amend its memorandum of incorporation;
- company: Voidable dispositions made before liquidation;
- Local government: Order to compel state to ensure that funds disbursed in line with earlier court order; and
- pleadings: Requirement that copy of on written contract relied on be annexed to pleadings.

Gideon Pienaar BA LLB (Stell) is a Senior Editor, Joshua Mendelsohn BA LLB (UCT) LLM (Cornell), Johan Botha BA LLB (Stell) and Simon Pieterse BBusSc LLB (UCT) are editors at Juta and Company in Cape Town.



By
Pule
Shaku

Who has to prove that the employee did not participate in an unprotected strike?

Sephai v Barloworld Transport (Pty) Ltd (LC)
(unreported case no JS411/16, 14-12-2021) (Mabaso AJ)

In terms of Labour Relations Act 66 of 1995 (LRA), a strike action must comply with substantive and procedural requirements. The LRA makes a distinction between a protected and unprotected strike action. Certain rights are afforded to employees who participate in a protected strike. In terms of s 67 of the LRA, the participating employees are protected in that –

- they may not be dismissed;
- they may not face criminal charges or civil action; and
- they may be paid in kind.

The LRA does not prohibit employers from taking other measures against employees participating in a protected strike. The employer may reward non-striking employees or seek replacement labour.

In most cases, strikes do not comply

with the requirements set out in the LRA and, therefore, the employees participating in such strikes find themselves facing possible dismissals.

A strike is a collective conduct, which requires more than one employee. It often happens that no employee wants to take accountability for the strike and they all deny participation.

The *Sephai* case has shown us that the onus is on the employees to prove that

they did not participate in the unprotected strike.

Background of the facts

In *Sephai*, the employee failed to report for duty on the days where all drivers were involved in an unprotected strike. The employer charged and dismissed the employee for participation in the unprotected strike.

The employee stated that he did not take part in the unprotected strike and indicated that his manager allowed him to be absent from work on the said days. Therefore, he sought an order from the Labour Court (LC) declaring his dismissal to be both substantively and procedurally unfair and asked for maximum compensation.

Collective action

As indicated that a strike action is a collective conduct, a mass disciplinary inquiry preceded the dismissal, where approximately 82 drivers, including the employee, were found guilty by the chairperson. All the employees were represented by the South African Transport and Allied Workers Union (SATAWU). An interpreter was utilised to interpret the proceedings from English to isiZulu and Setswana.

The employee indicated that he did not agree to be represented by SATAWU and further that he did not know what was happening in the inquiry because the proceedings were interpreted from English to isiZulu.

The LC found that the employer presented uncontested evidence that all the employees had a meeting and agreed to be presented by SATAWU. It was also common cause that the employee did not raise the issue of representation during the disciplinary inquiry. Under cross-examination, the employee changed his version and stated that the proceedings

were interpreted from English to isiZulu and Setswana but alleged that the interpreter was poor in Setswana. The LC rejected the employee's version.

Dismissal for participation

In terms of s 192(2) of the LRA, the employer is required to prove that the dismissal of a particular employee is fair. The LC indicated that it was common cause that the employee did not tender services on the said dates and that the dismissal was as a result of such failure. The employee's representative argued that the employer had the onus to prove that the employee did not get authority to be absent from work. The representative indicated the employer should have called the manager, who the employee allegedly reported to, to testify.

The LC indicated that there is a difference between the onus of proof and evidential burden. The employee had the evidential burden to the issue of being absent from work on the said dates and the employer had the onus to prove that the dismissal was fair. The LC stated that in a dispute where the dismissal relates to the failure of tendering services, it is the employee who must furnish reasons for the failure to tender services. The employer indicated that it kept a strike diary where calls from employees who report challenges about coming to work were noted and the employee's call to his manager would have also been noted.

Although, the LC did not deny that there might be a possibility that the employee called the manager, it found that the balance of probabilities favoured the employer. It concurred with the employer's representative that the employee had a valid defence, which he could have raised in the disciplinary inquiry and furthermore, he is the one who should have called his manager to come and testify. It further indicated that in terms of r 6

of Rules for the conduct of proceedings in the Labour Court, an applicant must indicate the background of facts to be relied on in a statement of case. The employee did not indicate in his statement of case that he was authorised not to report for duty and the only reasonable inference is that the defence is an afterthought.

Conclusion

The court provided the following principles -

- once the employee shows that they were dismissed, the employer bears the onus to prove that the dismissal is fair;
- employees bear the evidential burden to prove their failure to render services; and
- litigants are bound by what is set out in their pleadings.

The key lessons from this judgment are that -

- strike actions are collective conducts, and the employer can charge participants collectively, hold a mass disciplinary hearing if necessary; and
- employees must not only communicate with their employer about their intentions to work during strike but also keep records of such communications.

In essence, explanations such as 'I was not there' or 'I did not strike' is not good enough for the damages or losses that the employer incur or suffer as a result of the unprotected strike. As far as it is possible, employees should refrain from engaging in an unprotected strike action.

Pule Shaku LLB (cum laude) (University of Limpopo) is a candidate legal practitioner at Poswa Inc in Johannesburg.



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By
Dr Michele
van Eck

The lack of contractual capacity – a fatal blow to contingency fee agreements

*Vallaro obo BR v Road Accident Fund 2021 (4) SA 302 (GJ) and
Bouwer obo MG v Road Accident Fund 2021 (5) SA 233 (GP)*

It is trite law that a party must have the requisite contractual capacity to participate in juristic acts. A contract that is concluded with a party that has limited contractual capacity may still be saved by means of a guardian or curator ratifying the transaction. However, when a party has no contractual capacity then the contract is void and cannot be resurrected. Two recent cases illustrate the fatality to contingency fee agreements (CFA) concluded with parties that lacked contractual capacity and raised the question whether such CFAs could be ratified after the fact. The first case, *Vallaro*, is where the court questioned the ability of the curator to ratify a CFA signed by a person with a severe mental disability. Similarly, in the case of *Bouwer* the court questioned the ability of a *de facto* guardian entering a CFA on behalf of a minor and whether CFAs would, at any time, be considered in the best interest of the minor. The principles of both cases are briefly discussed below to illustrate how this may impact the conclusion and the validity of CFAs with clients in a legal practice.

The *Vallaro* case

In the *Vallaro* case an adult male (the claimant) suffered a head injury in a collision, which resulted in severe impairment of his mental faculties (para 1). Subsequently, a curator was appointed to act on behalf of the claimant that had the power to ratify actions already undertaken for the claim against the Road Accident Fund (RAF) (para 2 – 3).

The claim was eventually settled but the court questioned the validity of the CFA that formed part of the papers, particularly that the CFA was signed by the claimant and not the curator (para 4). The issue centred on the claimant's lack of contractual capacity to enter the CFA (para 4), which effectively rendered the agreement void. The rationale for this was that the claimant could neither reach consensus nor participate in a juristic act due to the impairment of his mental faculties (para 8). According to Thompson AJ, '[c]urators cannot ratify agreements which were entered into by

severely mentally disabled persons if the agreement was entered into whilst the severely mentally disabled person laboured under such severe mental disability, as the agreement would be void *ab initio* in such circumstances' (para 12). The CFA was accordingly found to be invalid.

The *Bouwer* case

In the *Bouwer* case a minor (who was driving in a vehicle with her great grandmother) was in a collision and sustained injuries and a claim was brought against the RAF (para 1). Although liability for the collision was admitted and the papers were filed, the court took exception to the two CFAs that were entered into on behalf of the minor by her great grandmother (paras 9 and 12). The first CFA was signed with a legal practitioner that had subsequently died and the second CFA was entered into with new legal practitioners that had eventually taken over the matter (para 12).

The court again questioned the validity of the CFAs based on the issue of contractual capacity. An argument was made that the minor's great grandmother was a *de facto* guardian of the minor at the time of signing the CFAs (para 13 – 14), and therefore, had the necessary capacity to enter into the CFAs on behalf of the minor. However, the court noted that the Children's Act 38 of 2005 (the Act) provides specific categories of guardians that may act on behalf of a minor (para 33), and a *de facto* guardian did not constitute a new category of guardians under the Act (para 35). Furthermore, nothing in the Act granted the great grandmother guardianship over the minor, and the parental responsibilities and rights under the Act still remained with the minor's biological mother (para 38 – 39).

In addition to this, van der Westhuizen J noted that '[t]he clear and unambiguous intention of the Children's Act has at its core the best interest of the child. The concluding of an onerous agreement to the estate of a child can never be in the best interest of a child. A contingency fee agreement can never be in the best interest of a child' (para 41). The court

concluded that there was no possibility that the curator could ratify the CFAs, as there was not a valid CFA in the first place, and that CFAs would not be in the best interest of the minor in that it would negatively impact a large portion of the minor's estate (para 45).

Conclusion

Contingency fee agreements are important to the functioning of litigation practices. Although these agreements must comply with the requirements under the Contingency Fees Act 66 of 1997, they must still embody the common law requirements for valid and enforceable contracts. The *Vallaro* and *Bouwer* cases illustrate the importance of ensuring that the signatory to a CFA has the necessary contractual capacity to enter into such an arrangement and that not all juristic acts are capable of ratification. In the words of Thompson AJ in the *Vallaro* case, one cannot attempt to '[blow] life into the void agreement' by means of ratification (para 6). It is up to the legal practitioner to confirm that their clients have the necessary contractual capacity not only to sign such a CFA but also to be able to provide a mandate to act in litigation matters. The *Bouwer* case, however, raises an additional practical question, and that is whether CFAs can be entered into with minors (whether represented or not). Van der Westhuizen J's comments in the *Bouwer* case is indicative that CFAs would never be in the best interest of a child which logically follows that CFAs with children (whether represented or not) cannot be concluded. If this is the case, then the *Bouwer* case may have significant impact on how legal practitioners manage their litigation matters with minors in their legal practices.

Dr Michele van Eck BCom (Law) LLB LLM (UJ) LLD (UP) is a senior lecturer and head of the Department of Private Law at the University of Johannesburg.





By
Thabo
Mohale

Protected Disclosures Act: Interdicting the employer for 'occupational detriments'

*NEHAWU obo N Phathela v Office of the
Premier: Limpopo Provincial Government and Others*
(LC) (unreported case no J1480/2021, 7-2-2022) (Tulk AJ)

The Protected Disclosures Act 26 of 2000 (PDA), colloquially known as the 'Whistle-blowing Act', provides protection to whistle-blowers in the private and public sector who disclose information regarding unlawful or irregular conduct by their colleagues or employers.

The question that arose in the *Phathela* case was whether the court has the jurisdiction to grant a final order interdicting an employer from disciplining an employee who had allegedly made a protected disclosure.

Facts

The employee, without informing her employer, had received gifts from the employer's service provider. When she finally informed her employer, the employer brought two charges against her namely, that the employee accepted/received gifts from a supplier, and that she failed to disclose in time that she was receiving gifts from such supplier.

The National Education, Health and Allied Workers' Union (NEHAWU), on behalf of the employee, brought an application for a final order prohibiting the impending disciplinary hearing against the employee on the grounds that she made a protected disclosure and her impending disciplinary action amounts to an occupational detriment and an unfair labour practice.

What is a protected disclosure?

Section 1 of the PDA defines a 'protected disclosure' as the disclosure of information by an employee regarding any conduct of an employer or any of its employees, which is criminal or morally opprobrious.

In terms of s 3 of the PDA, an employee who has made a protected disclosure may not be subjected to any occupational detriment by the employer as a result of having made such a protected disclosure. An occupational detriment would be any form of disciplinary action, harassment, intimidation, or any decision or action by the employer that adversely affects the employee.

The truthfulness or accuracy of the disclosure is not a requirement for protection. The test is whether the employee reasonably believed that the information disclosed in good faith was true. This was confirmed by the Labour Appeal Court (LAC) in *John v Afrox Oxygen Ltd* [2018] 5 BLLR 476 (LAC) where it was held that an onus to prove the accuracy of the information disclosed, would place a burden on the employee higher than that intended by the PDA, which requires merely a reasonable belief, by the employee, that the information is accurate. The same approach was followed in *Chowan v Associated Motor Holdings (Pty) Ltd and Others* 2018 (4) SA 145 (GJ) where the court held that the employee's reasonable belief that she was being discriminated against, however inaccurate, coupled with the fact that she acted in good faith, was enough to afford her protection.

Remedies – an approach to interdicts

Section 4 of the PDA sets out remedies available to an employee who has, is, or is about to be subjected to an occupational detriment. It provides, *inter alia*, that the employee may approach any court with jurisdiction in order to seek 'appropriate relief or pursue any other process allowed or prescribed by any law' (*Phathela* at 8).

Section 191(13) of the Labour Relations Act 66 of 1995 (LRA) confers jurisdiction on the Labour Court (LC) where it is alleged that an employee has been subjected to an occupational detriment that is deemed an unfair labour practice.

In *Phathela*, the court, as per Tulk AJ at para 7, correctly identified that where the employee is a victim of an occupational detriment short of dismissal, such as being subjected to a disciplinary hearing, such occupational detriment would amount to an unfair labour practice as contemplated in part B of sch 7 to the LRA. In terms of s 4(2)(b) of the PDA, where the occupational detriment amounts to an unfair labour practice, the dispute must be referred for conciliation as per the provi-

sions of the LRA, and if it remains unresolved, then the employee may approach the LC for appropriate relief.

Tulk AJ was essentially applying the principle of *stare decisis* in following the precedents set in *Grieve v Denel (Pty) Ltd* (2003) 24 ILJ 551 (LC) and *Feni v Pan SA Language Board* (2011) 32 ILJ 2136 (LC) where the court held that in terms of s 191(13) of the LRA, where an employee may 'approach the Labour Court on an urgent basis for an order to prevent or stay a disciplinary hearing. The Labour Court will, however, only issue an interim order pending the final resolution of the dispute to be referred to conciliation' (*Feni* at para 18). The court in *Feni* at para 20 also reiterated that a dismissal in contravention of the PDA is automatically unfair in terms of s 187(1)(h) of the LRA. In terms of s 191(5)(b)(i) of the LRA, once a certificate of non-resolution has been issued, the employee may refer the automatically unfair dismissal dispute to the LC for adjudication.

Tulk AJ did not have to consider the merits of the dispute because the court was not vested with jurisdiction. It would have been just about comical for him to have found that a disclosure by an employee about their own malfeasance and/or other misconduct would amount to a protected disclosure. The legislature could not have envisaged a scenario where an employee could claim immunity against being disciplined by the employer on the ground that the perpetrating recalcitrant employee disclosed that misconduct.

Conclusion

The essence of the Tulk AJ's judgment is that the employee's referral of the matter to the LC for a final order was premature. The employee should have sought an interim order pending the outcome of conciliation. With a certificate of non-resolution, the employee could then seek a final order at the LC.

Thabo Mohale LLB (Wits) LLM (Business Law) (UKZN) is a legal practitioner at Mota Africa in Pretoria. □

By Lauren
Lloyd and
Lizelle
Rossouw

New legislation

*Legislation published from
7 March – 1 April 2022*

Acts

Critical Infrastructure Protection Act 8 of 2019

Date of commencement of ss 1 – 7(1) (b), 7(3), 7(4), 7(5), 8, 9(1), 9(2), 12, 14(5), 14(6), 14(7), 15 and 27(1), 27(5), 27(7) and 27(8). Proc 54 GG46024/10-3-2022.

Financial Sector Regulation Act 9 of 2017

Amendment of notice of commencement. GenN942 GG46158/31-3-2022.

South African Revenue Service

Customs and Excise Act 91 of 1964

Amendment of sch 2 and sch 6. GN R1888 GG46054/17-3-2022 and GN R1893 GG46056/18-3-2022.

Bills and White Papers

Older Persons Amendment Bill, 2022

Introduction in Parliament in terms of r 276 (1) of the National Assembly. GN1872 GG46032/11-3-2022.

Department of Justice and Constitutional Development

Magistrate Bill, 2022

Invitation for public comments. GenN912 GG46088/25-3-2022.

Department of Mineral Resources and Energy

Radioactive Waste Management Fund Bill, 2022

For public comment. GN1950 GG46147/31-3-2022.

Government, General and Board Notices

Department of Agriculture, Land Reform and Rural Development (DALRRD)

Fees for the DALRRD Quota Allocation of Import and Export Permits. GN R1889 GG46056/18-3-2022.

Agricultural Product Standards Act 119 of 1990

Standards and requirements regarding control of the export of leguminous seeds: Amendment. GN1920 GG46088/25-3-2022.

Veterinary and Para-Veterinary Professions Act 19 of 1982

Regulations relating to veterinary and para-veterinary professions: Amendment. GenN893 GG46059/18-3-2022.

Department of Basic Education

National Education Policy Act 27 of 1996

2023 school calendar for public schools. GN1911 GG46061/18-3-2022.

Department of Co-operative Governance and Traditional Affairs

Disaster Management Act 57 of 2002

Extension of a National State of Disaster (COVID-19). GN R1875 GG46042/14-3-2022.

Traditional and Khoi-San Leadership Act 3 of 2019

Recognition of Misuzulu Sinqobile Zulu as the King of AmaZulu Kingship in the Republic of South Africa. GN1895 GG46057/17-3-2022.

Department of Employment and Labour Compensation for Occupational Injuries and Diseases Act 130 of 1993

Erratum notice on documents to be provided by employers to the Compensation Fund. GenN879 GG46032/11-3-2022.

Disaster Management Act 57 of 2002

Code of Practice: Managing Exposure to SARS-CoV-2 in the Workplace, 2022. GN R1896 GG46058/15-3-2022.

Employment Equity Act 55 of 1998

Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace. GN R1890 GG46056/18-3-2022.

Department of Forestry, Fisheries and the Environment

Disaster Management Act 57 of 2002

Withdrawal of various directions regarding measures to address, prevent and combat the spread of COVID-19. GN1914 GG46075/22-3-2022.

National Environmental Management: Protected Areas Act 57 of 2003

Declaration of land to be part of the mountain Zebra-Camdeboo protected environment in terms of the Act. GN1916 GG46079/23-3-2022.

Meerkat National Park declared in terms of the Act: Correction notice. GN1923 GG46088/25-3-2022.

National Environmental Management: Waste Act 59 of 2008

National norms and standards for the treatment of organic waste. GN1984 GG46169/1-4-2022.

National Forests Act 84 of 1998

Declaration of four tree species which are protected under s 12. GN1935 GG46094/25-3-2022.

Department of Health

Medical Schemes Act 131 of 1998

List of registered schemes for 2022. GenN880 GG46032/11-3-2022.

Department of Higher Education and Training

High Education Act 101 of 1997

Institutional Statute: Cape Peninsula University of Technology. GN1906 GG46059/18-3-2022.

Report of the Independent Assessor into

the Affairs of the Mangosuthu University of Technology, Professor Anthony Staak to the Minister of Higher Education, Science and Innovation, Dr BE Nzimande. GN1931 GG46088/25-3-2022.

Department of Justice and Constitutional Development

Legal Aid South Africa Act 39 of 2014

Notice of tabling in Parliament of amendments to the Legal Aid Manual. GenN870 GG46018/9-3-2022.

Magistrates' Court Act 32 of 1944

Conversion of certain places for the holding of court (branch courts), and periodical court as courts at which all court-related services are provided. GenN928 GG46132/30-3-2022.

Creation of magisterial districts and the establishment of district courts in respect of the Free State Province, KwaZulu-Natal Province, Eastern Cape Province, Western Cape Province. GenN929, GenN930, GenN931, GenN932 GG46132/30-3-2022.

National Prosecuting Authority Act 32 of 1998

Determination of powers, duties and functions of a special director of public prosecutions. Proc56 GG46164/1-4-2022.

Department of Mineral Resources and Energy

Mineral and Petroleum Resources Development Act 28 of 2002

Publication of the Artisanal and Small Scale-Mining Policy 2022 and the Mine Community Resettlement Guidelines 2022 for implementation. GN1938 GG46124/30-3-2022 and GN1939 GG46125/30-3-2022.

Special Investigating Units and Special Tribunals Act 74 of 1996

Referral of matters to existing special investigating unit. Proc55 GG46055/17-3-2022.

Department of Public Works and Infrastructure

Infrastructure Development Act 23 of 2014

South Africa's National Infrastructure Plan 2050. GN1852 GG46028/11-3-2022.

Department of Social Development

Child Justice Act 75 of 2008

Accredited diversion service providers and diversion programmes. GN1909 GG46059/18-3-2022.

Department of Sports, Arts and Culture

Disaster Management Act 57 of 2002

Measures to prevent and combat the spread of COVID-19: Sport, arts and culture: Amendment. GN1985 GG46171/1-4-2022.

South African Geographical Names Council Act 118 of 1998

Publication of official geographical names. GN1886 GG46049/16-3-2022.

Department of Trade, Industry and Competition

Competition Act 89 of 1998

Guidelines on collaboration between competitors on localisation initiatives. GN1904 GG46059/18-3-2022.

Merchandise Marks Act 17 of 1941

Prohibition on the use of the logo for the Border Management Authority (BMA). GenN951 GG46170/1-4-2022.

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

Code of conduct for persons involved in controlled non-proliferation activities. GN R1919 GG46081/25-3-2022.

Sugar Industry Agreement, 2000

Notice under clause 82 of the Agreement, 2000. GN1932 GG46088/25-3-2022.

Department of Transport

Disaster Management Act 57 of 2002

Determination of extension for the validity period of learner's licences, driving licence cards, licence discs, professional driving permits and registration of motor vehicles for adjusted alert level 1. GN1983 GG46168/1-4-2022.

Independent Communications Authority of South Africa

Electronic Communications Act 36 of 2005

Call Termination Regulations, 2014: Findings document on the review of the 2014 pro-competitive remedies imposed on licensees. GN1937 GG46107/28-3-2022.

Equipment Authorisation Regulations, 2022: Reasons document. GN1948 GG46145/31-3-2022.

Must Carry Amendment Regulations, 2022: Reasons document. GN1952 GG46148/31-3-2022.

Explanatory Memorandum on the draft End-user and Subscriber Service Charter Amendment Regulations, 2022. GN1959 GG46154/31-3-2022.

Mobile Broadband Services Regulations, 2022: Reasons document. GN1960 GG46155/31-3-2022.

Independent Regulatory Board for Auditors

Audit Profession Act 26 of 2005

Registration of registered auditors and registered candidate auditors. BN225 GG46032/11-3-2022.

Promotion of Access to Information Act 2 of 2000

Manual in terms of s 14 of the Act. BN228 GG46088/25-3-2022.

Independent Communications Authority of South Africa

Notice regarding the location of the opt-in round for qualified bidders for the licensing process for international mobile telecommunications for the Provision of Mobile Broadband Wireless Access Services for Urban and Rural Areas using

bands, IMT700, IMT800, IMT2600 and IMT3500 published in GG45628/10-12-2021. GenN869 GG46013/7-3-2022.

Electronic Communications Act 36 of 2005

Submission of annual forecast of licence fees and Universal Service And Access Fund (USAF) contribution 2021/2022 by Broadcasting and Electronic Communications Services (ECS) and Electronic Communications Network Services (ECNS) Licensees. GN1723 GG45859/4-2-2022. Notice regarding the National Radio Frequency Plan, 2021. GenN911 GG46088/25-3-2022.

Sentech SOC Ltd Universal Service and Access Licence Obligations (USAOs). GenN918 GG46092/25-3-2022.

National Treasury

Division of Revenue Act 9 of 2021

Publication of allocations and frameworks. GN1847 GG46014/7-3-2022.

Education Infrastructure Grant: Stopping of funds in respect of non-spending province and re-allocation of funds to another province. GN1881 GG46046/16-3-2022.

Publication of allocations and frameworks in terms of the Act. GN1936 GG46046/25-3-2022.

Public Finance Management Act 1 of 1999

Exemption in terms of s 92 - Transnet SOC Ltd. GenN941 GG46157/31-3-2022.

Parliament

Independent Commission for the Remuneration of Public Office Bearers Act 92 of 1997

Explanatory memorandum for annual remuneration recommendations for 2021/2022. GenN920 GG46120/30-3-2022.

South African Revenue Service

Customs and Excise Act 91 of 1964

Imposition of Provisional Payment (PP/162) and (PP/163). GN R1894 GG46056/18-3-2022 and GN R1980 GG46165/1-4-2022.

Rules, regulations, fees and amounts

Civilian Secretariat for the Police Service

Private Security Industry Regulation Act 56 of 2001

Publication of amendment to the regulations made under the Act. GenN874 GG46027/11-3-2022.

Security Officers Act 92 of 1987

Publication of amendment to the regulations made under the Act. GenN874 GG46027/11-3-2022.

Department of Agriculture, Land Reform and Rural Development

Agricultural Products Standards Act 119 of 1990

Inspection fees. GenN877 GG46032/11-3-2022.

Fertilizers, Farm Feeds, Agricultural

Remedies and Stock Remedies Act 36 of 1947

Regulations relating to the tariffs for the registration of fertilizers, farm feeds, agricultural remedies, stock remedies, sterilizing plants and pest control operators, appeals and imports: Amendment. GN R1978 GG46165/1-4-2022.

Liquor Products Act 60 of 1989

Regulations: Amendment. GN R1917 GG46081/25-3-2022.

Veterinary and Para-Veterinary Professions Act 19 of 1982

Regulations relating to veterinary and para-veterinary professions: Amendment. GenN893 GG46059/18-3-2022.

Department of Employment and Labour Compensation for Occupational Injuries and Diseases Act 130 of 1993

Annual increase in medical tariffs for medical services providers: Private hospitals, ambulance, renal, physiotherapist, chiropractor, social worker and psychology, dental, occupational therapy, wound and blood services, dietician and radiography, prosthetics and orthotics, doctors, speech audio and optometrist. GenN921 - GenN927, GenN934 - GenN936, GenN938 - GenN940 GG46121/31-3-2022 - GG46123/31-3-2022, GG46128/31-3-2022 - GG46131/31-3-2022, GG46138/31-3-2022 - GG46140/31-3-2022, GenN938 GG46149/31-3-2022, GG46150/31-3-2022 and GG46156/31-3-2022.

Department of Co-operative Governance and Traditional Affairs

Disaster Management Act 57 of 2002

Amendment of regulations issued in terms of s 27(2). GN R1915 GG46078/22-3-2022.

Local Government: Municipal Systems Act 32 of 2000

Local Government: Upper limits of total remuneration packages payable to municipal managers and managers directly accountable to municipal managers. GN1912 GG4606218-3-2022.

Department of Employment and Labour Occupational Health and Safety Act 85 of 1993

Hazardous biological agents regulations. GN R1887 GG46051/16-3-2022.

Department of Health

Dental Technicians Act 19 of 1979

Regulations relating to the registration of dental laboratories and related matters: Amendment. GN1870 GG46032/11-3-2022.

South African Dental Technicians Council: Notice regarding annual fees payable to the Council. GN1929 GG46088/25-3-2022.

Health Professions Act 56 of 1974

Regulations relating to the registration of forensic pathology officers. GN1927 GG46088/25-3-2022.

Medical Schemes Act 131 of 1998

Adjustment to fees payable to brokers. GenN881 GG46032/11-3-2022.

Occupational Diseases in Mines and Works Act 78 of 1973

Increase of pension benefits. GN1928 GG46088/25-3-2022.

Amendment of amounts to increase benefits. GN1930 GG46088/25-3-2022.

Adjustment of levies paid by controlled mines and works. GN1972 GG46164/1-4-2022.

Department of Mineral Resources and Energy

Geoscience Act 100 of 1993

Geoscience Act Regulations, 2022. GN1940 GG46126/30-3-2022.

Department of Public Works and Infrastructure

Infrastructure Development Act 23 of 2014

South Africa's National Infrastructure Plan 2050. GN1874 GG46033/11-3-2022.

Department of Justice and Constitutional Development

Extradition Act 67 of 1962

Mutual Legal Assistance Treaty and Extradition Treaty. GN1975 GG46164/1-4-2022.

Department of Social Development

Social Assistance Act 13 of 2004

Increase in respect of social grants. GN1947 GG46144/31-3-2022.

Social Service Professions Act 110 of 1978

Amended regulations relating to nomination and election of members of the South African Council for Social Service Professions. GN R1982 GG46165/1-4-2022.

Electoral Commission

Political Party funding Act 6 of 2018

Regulations regarding the funding of political parties issued in terms of s 24(2) of the Act. GenN950 GG46167/1-4-2022.

Financial Sector Conduct Authority

Financial Markets Act 19 of 2012

Approved amendments to the A2X (Pty) Ltd Trading Rules. BN231 GG46164/1-4-2022.

Health Professions Council of South Africa

Health Professions Act 56 of 1974

Rules relating to the registration by medical practitioners and dentists of additional qualifications. BN224 GG46032/11-3-2022.

Independent Communications Authority of South Africa (ICASA)

Electronic Communications Act 36 of 2005

Amendment regulations governing aspects of the procedures of the Complaints and Compliance Committee of ICASA and Reasons Document, 2022. GenN917 GG46091/25-3-2022.

Independent Regulatory Board for Auditors

Auditing Profession Act 26 of 2005

Disciplinary Rules of the Independent Regulatory Board for Auditors (IRBA). BN227 GG46088/25-3-2022.

Equipment Authorisation Regulations. GN1949 GG46146/31-3-2022.

Must Carry Amendment Regulations, 2022. GN1951 GG46148/31-3-2022.

Notice regarding the increase of administrative fees in relation to service licences and type approval. GN1954 and GN1956 GG46151/31-3-2022.

Notice in terms of reg 9A of Radio Frequency Spectrum Licence fee amendment regulations. GN1955 GG46151/31-3-2022.

Mobile Broadband Services Regulations, 2021. GN1960 GG46155/31-3-2022.

Postal Service Act 124 of 1998

Notice regarding the fees increase in relation to unreserved Postal Service Regulations, 2020. GN1953 GG46151/31-3-2022.

National Treasury

Banks Act 94 of 1990

Amendments to regulations. Gen N943 GG46159/31-3-2022.

South African Revenue Service

Income Tax Act 58 of 1962

Fixing of rate per kilometre for the purposes of s 8(1)(b)(ii) and (iii) of the Act. GN R1848 GG46015/8-3-2022.

Customs and Excise Act 91 of 1964

Amendment of rules (DAR230) and (DAR231). GN R1892 GG46056/18-3-2022 and GN R1981 GG46165/1-4-2022.

Legislation for comment

Department of Agriculture, Land Reform and Rural Development

Animal Diseases Act 35 of 1984

Animal Diseases Regulations: Proposed amendment. GN1854 GG46032/11-3-2022.

Spatial Planning and Land Use Management Act 16 of 2013

Notice of the draft Karoo Regional Spatial Development Framework in terms of s 18(4) of the Act. GenN884 GG46047/16-3-2022.

Department of Basic Education

National Education Policy Act 27 of 1996

Proposed 2024 Calendar for public schools: Call for comment. GN1910 GG46060/18-3-2022.

Department of Communications and Digital Technologies

Electronic Communications Act 36 of 2005

Proposed amendment of policy on high demand spectrum and policy direction on the licensing of a wireless open access network. GN1853 GG46031/11-3-2022.

Department of Co-operative Governance

Disaster Management Act 57 of 2002

Invitation for public comment: Disaster Management Amendment Regulations. GN R1941 GG46127/29-3-2022.

Department of Forestry, Fisheries and the Environment

National Environmental Management Act 107 of 1998

Consultation on the intention to publish

the National Biodiversity Offset Guideline. GN1924 GG46088/25-3-2022.

National Environmental Management: Waste Act 59 of 2008

Extended producer responsibility scheme for the lubricant oil sector, pesticide sector and portable battery sector. GN1943 GG46134/30-3-2022, GN1944 GG46136/30-3-2022 and GN1945 GG46137/30-3-2022.

Department of Health

Hazardous Substances Act 15 of 1973

Group I, Category A and B, Hazardous Substances: Declaration. GN1925 and GN1926 GG46088/25-3-2022.

International Health Regulations Act 28 of 1974

Regulations relating to public health measures in points of entry. GN1883 GG46048/15-3-2022.

Department of Higher Education and Training

National Qualifications Framework Act 67 of 2008

Proposed occupational qualifications for registration on the Qualifications Sub-framework for Trades and Occupations: Call for comments. GN1942 GG46133/30-3-2022.

Department of Human Settlements

Rental Housing Act 50 of 1999

Regulations under the Act. GN1913 GG46063/18-3-2022.

Department of Justice and Constitutional Development

Promotion of National Unity and Reconciliation Act 34 of 1995

Invitation for public comments on new version of draft regulations relating to assistance to victims in respect of higher education and training. GenN946 GG46164/1-4-2022.

Department of Trade, Industry and Competition

Competition Act 89 of 1998

South African Fresh Produce Market Inquiry: Terms of reference: Draft for public comment. GN1934 GG46093/25-3-2022.

Standards Act 8 of 2008

Standards matter: For comment. GN1933 GG46088/25-3-2022.

Marketing of Agricultural Products Act 47 of 1996

Amendments to a statutory measure and establishment of a new statutory measure. GenN905 GG46088/25-3-2022.

Amendment of the statutory measure relating to weekly records and returns in respect of maize to include wheat: Invitation to comment. GenN906 GG46088/25-3-2022.

Request for the continuation of statutory measures relating to levies, registration and records and returns in the pork and red meat industry. GenN907 GG46088/25-3-2022 and GenN908 GG46088/25-3-2022.

Department of Transport

Merchant Shipping Act 57 of 1951

Draft merchant shipping (construction

and equipment of fishing vessels of 24 metres in length and over): Regulations, 2022. GenN883 GG46032/11-3-2022.

Department of Forestry, Fisheries and the Environment

National Environmental Management: Waste Act 59 of 2008

Consultation on the draft Industry Waste Tyre Management Plan. GN1849 GG46017/9-3-2022.

Department of Higher Education and Training

National Qualifications Framework Act 67 of 2008

Call for comment on the proposed Occupational Qualifications for Registration on the Occupational Qualifications Sub-Framework for Trades and Occupations. GN1850 GG46025/10-3-2022.

Department of Water and Sanitation

National Water Act 36 of 1998

Determination of water resource classes and resource quality objectives in the Thukela catchment in the Pongola-Mtamvuna Management Area. GN1873 GG46032/11-3-2022.

Financial Sector Conduct Authority

Financial Markets Act 19 of 2012

Proposed amendments to the Johannesburg Stock Exchange listing requirements – Annual Improvement Project: Publication for comment. BN230 GG46164/1-4-2022.

Independent Communications Authority of South Africa

Electronic Communications Act 36 of 2005

Draft regulations regarding standard terms and conditions for individual licences under ch 3 of the Act. GenN885 GG46050/16-3-2022.

Draft amendment: Numbering Plan Regulation, 2016. GenN900 GG46080/23-3-2022.

Draft amendment regulations on the processes and procedures for applications, amendments, renewals, surrender and transfer of individual licences and applications for special temporary authorisations. GenN901 GG46084/24-3-2022.

Application for the renewal of an individual commercial sound broadcasting service and radio frequency spectrum licences. GenN904 GG46087/24-3-2022.

Draft Radio Frequency Spectrum Assignment Plan for International Mobile Telecommunication in the frequency band 450 MHz to 470 MHz – 3400 MHz to 3600 MHz. GN1961 GG46160/31-3-2022 – GN1970 GG46160/31-3-2022.

Independent Communications Authority of South Africa Act 13 of 2000

Discussion document on the optimisation of the frequency modulation sound broadcasting. GN1957 GG46152/31-3-2022.

Draft End-user and Subscriber Service Charter Amendment Regulations, 2022. GN1958 GG46153/31-3-2022.

National Health Act 61 of 2003

Regulations relating to the surveillance and the control of notifiable medical conditions: Amendment. GN1882 GG46048/15-3-2022.

Regulations relating to the management of human remains and environmental health. GN1884 and GN1885 GG46048/15-3-2022.

Independent Regulatory Board for Auditors

Auditing Profession Act 26 of 2005

Proposed amendments to the code of professional conduct for registered auditors. BN229 GG46088/25-3-2022.

Legal Practice Council

Legal Practice Act 28 of 2014

Proposed amendment to Code of Conduct. GenN948 GG46164/1-4-2022.

National Treasury

Preferential Procurement Policy Framework Act 5 of 2000

Publication of draft Preferential Procurement Regulations, 2022 for public comment. GN R1851 GG46026/10-3-2022.

Lauren Lloyd and Lizelle Rossouw are editors at LexisNexis in Durban.



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By
Monique
Jefferson

Employment law update

Private arbitration clauses in employment contracts

In *Gerber v Stanlib Asset Management (Pty) Ltd* [2022] 3 BLLR 251 (LAC) the employee sought to appeal the decision of the Labour Court (LC) in terms of which the LC refused to determine an allegedly automatically unfair dismissal claim on the basis that the employee's employment contract contained a private arbitration clause.

In this case, the employee was dismissed and referred an alleged unfair dismissal claim to the LC. The employer raised a point *in limine* that the LC did not have the jurisdiction to determine the dispute as the employee was bound by a private arbitration clause in the employment contract. The employee argued that this was not the case as the private arbitration clause was referred to in the grievance and disciplinary procedure and not in his employment contract. The employer argued that the grievance and disciplinary procedure was incorporated in the employment contract. This point *in limine* was upheld by the LC and the matter was referred to arbitration.

On appeal, the Labour Appeal Court (LAC) had to determine whether the LC had the jurisdiction to determine the unfair dismissal claim and, if so, whether the matter should have been stayed or

referred to private arbitration. According to the employee the private arbitration clause had not been included in the disciplinary procedure at the time that he concluded the employment contract. He alleged that it was contained in a 'secret' document of which he had no knowledge. The court concluded that the employment contract referred to and incorporated the Employee Relations Handbook, as well as the disciplinary procedure and that the Employee Relations Handbook also made reference to mandatory private arbitration. It was held that the employee should have considered these documents prior to signing the employment contract. The employee also argued that the disciplinary procedure and the Employee Relations Handbook did not apply to him after his employment relationship ended but this argument was found to be without merit as the dispute was related to the disciplinary process that was followed with the employee.

It was accordingly held that the LC had correctly found that the disciplinary procedure and Employee Relations Handbook were incorporated in the employment contract and this agreement was binding on the employee. The appeal was accordingly dismissed.

Regarding whether it was appropriate for the LC to exercise its discretion and

refer the matter to private arbitration, the LAC considered that the judge of the LC had found that the LC should not determine the matter 'sitting as an arbitrator' as the employee had not made out a case that justified making such a determination. It was held that the LAC could not interfere with this decision as it could only interfere if the discretion exercised was influenced by incorrect principles or a misdirection on the facts, or if the LC judge had reached a decision, which could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. Reference was also made to the fact that it is trite that a party resisting a stay of court proceedings based on a private arbitration clause has the onus to demonstrate to the court that the stay should be refused based on exceptional circumstances. The LAC held that a private arbitration agreement will be upheld unless there are compelling reasons and therefore the LC had correctly found that there were no exceptional circumstances to justify continuing with the matter.

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



By
Moksha
Naidoo

Introduction of admission policy: Managerial prerogative or unilateral change to terms and conditions of employment?

Solidarity obo members and Another v Ernest Lowe, a Division of Hudaco Trading (Pty) Ltd (LC) (unreported case no J49/22, 14-3-2022) (Makhura AJ).

On 13 December 2021, the respondent employer issued a notice to its employees informing them that beginning the new year, only employees who were fully vaccinated or those who could produce a weekly negative COVID-19 test result; may enter its premises. In the same no-

tice the employer further advised its employees that while it was not forcing employees to vaccinate, it would not contribute towards the weekly cost of the COVID-19 test should any employee decide not to vaccinate.

On 4 January 2022, the second respondent employee, was refused entry onto the employer's premises because she could not provide a certificate demonstrating she was vaccinated or produce a negative COVID-19 test result.

Pursuant to an exchange of correspondence between the employer's and the union's legal practitioners, the union and employee filed an urgent application at the Labour Court (LC) on 21 January 2022 seeking an order that the employer's admission policy was unlawful.

At the hearing the union's case cen-

tred on the employer's admission policy, which according to the union, unlawfully denied unvaccinated employees from tendering services and earning a salary under circumstances where they did not produce a weekly negative COVID-19 test result.

From the union's standpoint the employer's admission policy amounted to a unilateral change in terms and conditions of employment in that its members' employment contracts did not provide for mandatory vaccination nor for an employee providing a weekly negative COVID-19 test result at their own expense; in order to tender their services.

In addition, the union argued that the employer's admission and mandatory vaccination policies, at various instances, breached the *Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces* (GN R499 GG44700/11-6-2021), and/or the Occupational Health and Safety Act 85 of 1993 (OHSA), which legislations ought to be both read into the employees' contracts of employment as implied, alternatively tacit terms.

The employer's defence was that the union failed to demonstrate that its admission policy equated to a mandatory vaccination policy and hence disputed that it breached any employee's employment contract or unilaterally changed the employees' terms and conditions of employment.

Having found that the matter was urgent, the court dispensed with the employer's 'exception' and 'special plea' and thereafter turned to the merits of the matter.

As a starting point the court reiterated

that the union's argument was underpinned by the alleged unlawfulness of the employer's policy and not whether same was reasonable and/or fair. Thus, the issue before the court was whether the admission policy was in breach of the employee's contracts of employment alternatively in breach the Directive by the Minister of Employment and Labour and/or the OHSA.

Addressing the first question, that being whether there was a breach or a unilateral change to the employees' employment contracts, the court held:

'The applicant referred to various provisions of the contract. Thereafter, they argued that the contract does "*not contain any provision, to the effect that the second applicant's continued employment is subject to producing a negative PCR test weekly*", and certainly not at her own expense.

Essentially, the applicants were unable to point to any specific term of the contract that was breached because of or by the adoption of the admission policy. Further, there was no provision of the contract of employment that the applicants alleged was unilaterally changed by the introduction of the admission policy.

In the absence of any specific reliance on a particular term and/or condition of the contract of employment that [had] been breached or unilaterally changed, I am unable to find that there was any breach of contract that occurred because of the introduction and implementation of the admission policy. Equally, there are no provisions of the contract of employment that need to be restored as the employee's contract had not been changed'.

The second question was whether the admission policy breached the Directive or the OHSA. The Directive essentially sets out the procedure an employer must adopt prior to adopting a mandatory vaccination policy.

Was the employer's admission policy a mandatory vaccination policy? If not, and according to the court, the employer could not be found wanting in respect of any alleged breach to the Directive or the OHSA.

The court found that the admission policy was not a mandatory vaccination policy. Employees who did not want to get vaccinated had the option of producing a negative COVID-19 test result every seven days to continue rendering services without the need to take the vaccine. The union was aware of the employer's stance on this issue as early as mid-December 2021 yet choose not to establish in its founding affidavit why it took the view that the admission policy was a mandatory vaccination policy. While the court accepted that the employer encouraged its employees to be vaccinated, it did not force them to receive a vaccination by way of its admission policy. Following this finding the court held that the employer did not breach any term of the Directive or the OHSA.

The application 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). □



By
Kathleen
Kriel

Recent articles and research

Abbreviation	Title	Publisher	Volume/issue
ADRY	African Disability Rights Yearbook	Pretoria University Law Press (PULP)	(2021) 9
SAIPLJ	Southern African Intellectual Property Law Journal	Juta	(2021)
SAJEJ	South African Judicial Education Journal	South African Judicial Education Institute, Office of the Chief Justice	(2021) 4.1
SAJHR	South African Journal on Human Rights	Taylor & Francis	(2021) 37.1 (2021) 37.2
SLR	Stellenbosch Law Review	Juta	(2021) 32.3

Administrative law

De Beer, MN 'Reviewable mistakes of law and fact' (2021) 4.1 *SAJEJ* 65.

Plasket, C 'The understated revolution: The development of administrative law in the Appellate Division of The Supreme Court of South Africa in the 1980s and 1990s' (2021) 4.1 *SAJEJ* 1.

Business rescue proceedings

Marumoagae, C and Phiri, S 'Potential constitutional concerns regarding employees' rights during business rescue proceedings' (2021) 32.3 *SLR* 496.

Children's rights

Bekink, M 'The protection of disabled child victims within the South African criminal justice system: Shining a light on the invisible and forgotten victims of crime' (2021) 9 *ADRY* 23.

Kruger, H 'Allowing competent children in South Africa to refuse medical treatment: Lessons from England' (2021) 32.3 *SLR* 410.

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Broodryk, T 'Inappropriately assessing appropriateness of class proceedings: *Nkala v Harmony Gold Mining Company Ltd*' (2021) 37.1 *SAJHR* 21.

Handmaker, J 'Introduction to special issue: Class action litigation in South Africa' (2021) 37.1 *SAJHR* 1.

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Jooste, C 'A right to read object code – software copyright law and the development of a decompilation exception in South Africa' (2021) *SAIPLJ* 35.

Moloto, TM '*Gallo Africa Ltd v Sting Music (Pty) Ltd* 2010 (6) SA 329 (SCA) – revisiting the justiciability of cross-border copyright infringement in South African courts' (2021) *SAIPLJ* 67.

COVID-19 - education

Veriava, F and Ally, N 'Legal mobilisation for education in the time of COVID-19' (2021) 37.1 *SAJHR* 230.

COVID-19 – evictions

Boggenpoel, ZT and Mahomed, S 'Evictions during the COVID-19 pandemic and beyond – *Discussion of South African Human Rights Commission v City of Cape Town* 2021 (2) SA 565 (WCC)' (2021) 32.3 *SLR* 482.

COVID-19 – human rights

Bohler-Muller, N; Roberts, B; Gordon, SL; Davids, YD 'The "sacrifice" of human rights during an unprecedented pandemic: Reflections on survey-based evidence' (2021) 37.2 *SAJHR* 154.

COVID-19 – labour law

Runciman, C 'Worker rights and the neoliberal state under COVID-19' (2021) 37.2 *SAJHR* 255.

COVID-19 – regulations

Brown, J 'Lawfare under lockdown: Challenges to South Africa's COVID Regulations, March to August 2020' (2021) 37.2 *SAJHR* 302.

COVID-19 – socio-economic rights

Liebenberg, S 'Austerity in the midst of a pandemic: Pursuing accountability through the socio-economic rights doctrine of non-retrogression' (2021) 37.2 *SAJHR* 154.

COVID-19 – tax

Mufamadi, K and Koen, L 'Independent contractors and COVID-19 relief: Tax and social insurance legislative reform to extend protection to independent contractors' (2021) 37.2 *SAJHR* 277.

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Albertyn, C and Adams, R 'Introduction: Special issue on "The COVID-19 pandemic, inequalities, and human rights in South Africa", part 1' (2021) 37.2 *SAJHR* 147.

Durojaye, E and Nanima, RD 'The realisation of the right to health of persons with disabilities in the COVID-19 era: Evaluating South Africa's (non) inclusive response' (2021) 9 *ADRY* 52.

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Albertyn, C 'Section 9 in a time of COVID-19: Substantive equality, economic inclusion, and positive duties' (2021) 37.2 *SAJHR* 205.

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Intellectual property – artificial intelligence (AI)

Oriakhogba, DO 'DABUS gains territory in South Africa and Australia: Revisiting the AI-inventorship question' (2021) *SAIPLJ* 87.

Intellectual property

Forere, MA 'Ownership of intellectual property rights: Did Vodacom "sell" its rights in *Makate v Vodacom*?' (2021) *SAIPLJ* 18.

International children's rights

Purmah, NR 'Inclusive education for learners with disabilities in Mauritius: The "rights" way forward' (2021) 9 *ADRY* 160.

International human rights

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Pillay, N 'South Africa's engagement with international human rights law' (2021) 32.3 *SLR* 365.

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Masuku, KP; Bornman, J and Johnson, E 'Access to healthcare for persons with disabilities in Eswatini: A triadic exploration of barriers' (2021) 9 *ADRY* 138.

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Wakene, DB; Yoon, P and Mengistu, T 'Country report: Ethiopia' (2021) 9 *ADRY* 212.

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Juma, PO and Orao, B 'To what extent is global and regional jurisprudence on the right to health of persons with disabilities reflected in Kenyan courts?' (2021) 9 *ADRY* 72.

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Online contracts

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Patent law

Du Bois, M 'Some views from the South African Constitutional Court on patent

revocation and infringement matters: *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others* 2020 (1) SA 327 (CC) (2021) *SAIPLJ* 1.

Property law

Fick, S 'Airbnb in the City of Cape Town: How could the regulation of short-term rental in Cape Town affect human rights?' (2021) 32.3 *SLR* 455.

Religious practices

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Rights of persons with disabilities

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Flynn, E 'The rights of older persons with disabilities in the Protocol to the African Charter on Human and Peoples' Rights: A critical analysis' (2021) 9 *ADRY* 254.

Reimer-Kirkham, S; Ero, I; Mgijima-Konopi, I; Strobell, E and Astle, B 'Mothering and Albinism: Recommendations for disability rights in Africa' (2021) 9 *ADRY* 254.

Rule of law

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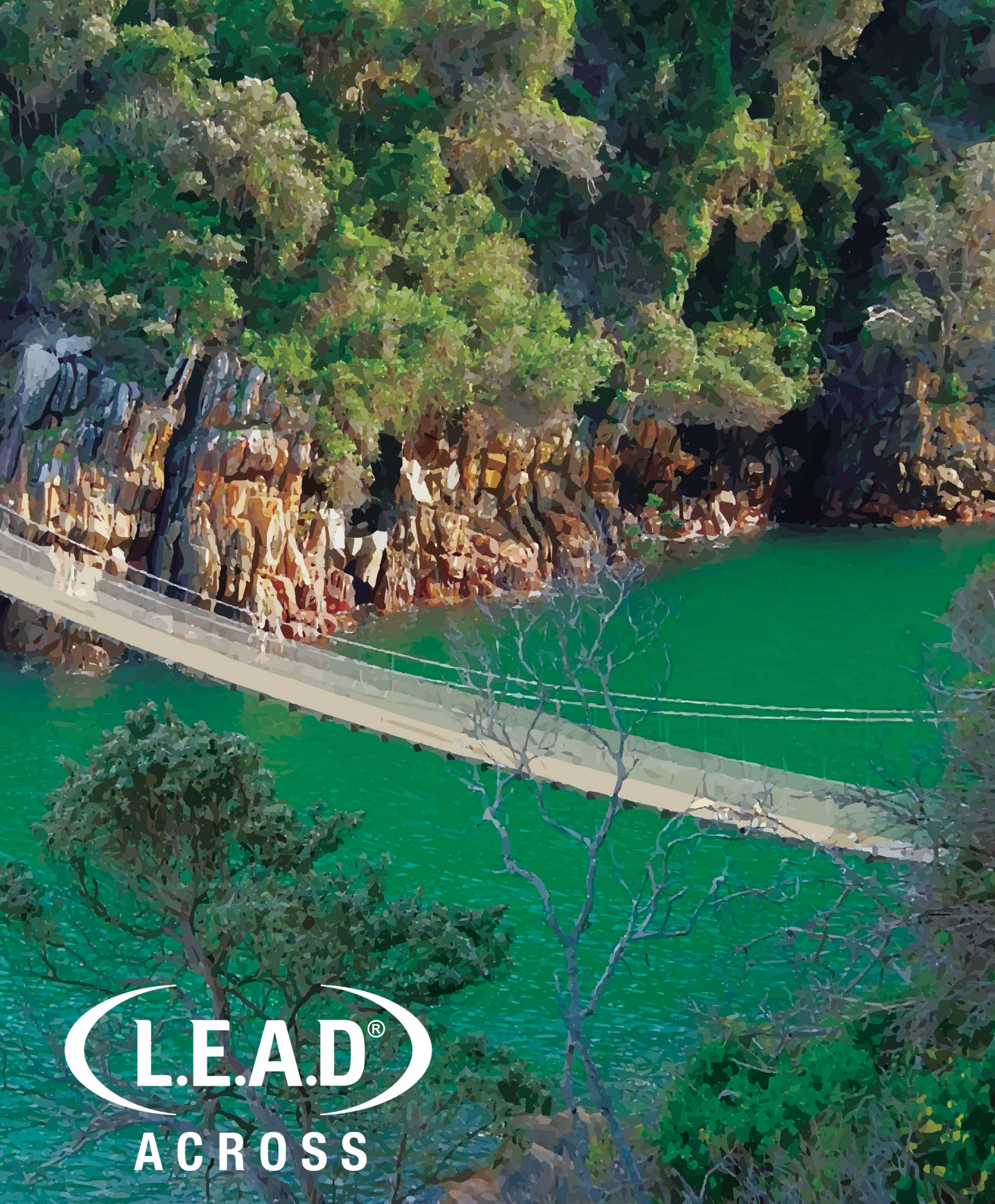
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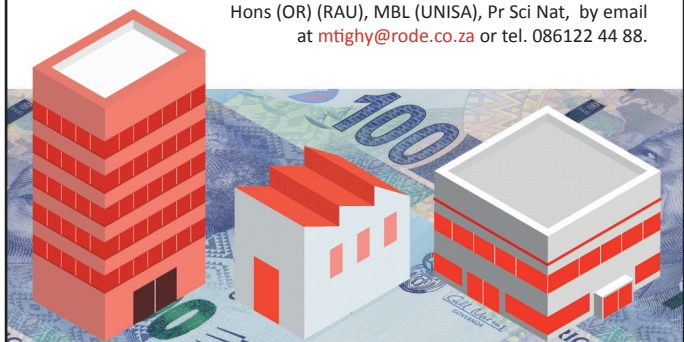
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IN THIS EDITION

RISK MANAGEMENT COLUMN

- Frequently asked questions on the Master Policy 1

RISK MANAGEMENT COLUMN

FREQUENTLY ASKED QUESTIONS ON THE MASTER POLICY

Introduction
This is the last edition of the Bulletin for the current policy year (the 2021/2022 insurance year).

The 2022/2023 insurance year commences on 1 July 2022. The Master Policy for the upcoming year will be published in the July 2022 edition of the Bulletin and will also be available on the Legal Practitioners Indemnity Insurance Fund NPC's (the LPIIF) website (www.lpiif.co.za). No changes will be made to the policy for the upcoming insurance year.

FREQUENTLY ASKED QUESTIONS

In this edition of the Bulletin, I address 10 questions frequently posed by legal practitioners (and members of the public, sometimes) to the LPIIF team:

1. 'Who does the LPIIF insure?'

The statutory framework for the insurance cover provided by the LPIIF is set out in section 77 of the Legal Practice Act 28 of 2014. The LPIIF issues one Master Policy annually setting the terms on which the insurance cover is provided in the relevant scheme year.

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Thomas Harban,
Editor
and General Manager
LPIIF, Centurion
Email: thomas.harban@lpiif.co.za
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- (a) a sole practitioner;
- (b) a partnership of attorneys;

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 • Email address info@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.



Legal Practitioners' Indemnity Insurance Fund NPC
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LEGAL PRACTITIONERS' FIDELITY FUND
SOUTH AFRICA

RISK MANAGEMENT COLUMN continued...

- (c) an incorporated legal practice as contemplated in section 34 (7) of the Legal Practice Act; or
- (d) as a trust account advocate are covered by the LPIIF.

Legal practices conducted in any other form are excluded from the LPIIF cover (see clauses 5, 6 and 16(t) of the policy). If, for example, the legal practice was conducted in the form of a trust, state owned entity or a private company falling outside of the entities listed above, it will not be covered. Banks, estate agents, financial services providers, legal expense insurance companies and other entities who may offer some form of legal services are also thus not covered by the LPIIF.

Previous practitioners will be covered by the LPIIF if they were in possession of a Fidelity Fund certificate when the cause of action arose. Employees of the legal practice are also covered under the limit of indemnity afforded to the firm.

Members of the public are urged to ask to see the current Fidelity Fund certificate of an attorney or trust account advocate before instructing the practitioner or paying any funds to the practitioner. Practising without a Fidelity Fund certificate is a breach of the Legal Practice Act and the Legal Practitioners' Fidelity Fund (the Fidelity Fund) will not indemnify third parties who suffer losses after purportedly entrusting funds to such practitioners. The LPIIF, similarly, will not indemnify such practitioners in the event of a professional indemnity claim being brought against them.

For more information, see:

- Sithembinkosi Joseph Kunene, 'Succession planning for sole practitioners in incorporated practices and pointers on the authorised forms of practice', *De Rebus* (April 2022) (www.derebus.org.za/succession-planning-for-sole-practitioners-in-incorporated-practices-and-pointers-on-the-authorised-forms-of-practice/);
- 'Is your firm the type of entity it pur-

ports to be?', *De Rebus* (March 2018) (www.derebus.org.za/firm-type-entity-purports/); and

- *NW Civil Contractors CC v Anton Ramaano Inc & Another* (1024/2018, 1076/2018) [2019] ZASCA 143; 2020 (3) SA 241 (SCA) (14 October 2019).

2. 'What must a legal practice do to be insured by the LPIIF?'

Cover under the LPIIF policy is granted automatically to firms who meet the definition of an insured in the policy. An insured is defined in clause XVI as 'the persons or entities referred to in clauses 5 and 6 of this policy.'

For ease of reference, the relevant clauses of the policy are quoted in full below.

'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**.

....

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 [Legal Practice] Act; or
 - d) an advocate referred to in section 34(2)(b) of the [Legal Practice] Act. For purposes of this policy, an advocate referred to

in section 34(2)(b)..., 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 the **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 a **Claim**;
- d) the estates of the people referred to in clauses 6(a), 6(b) and 6(c);
- e) subject to clause 16(c), a liquidator or trustee in an insolvent estate, where the appointment is or was motivated solely because the **Insured** is a **Practitioner** and the fees derived from such appointment are paid directly to the **Legal Practice**.'

The words and phrases in bold print are defined in the policy.

A short answer to question 2 is that the legal practice must ensure that the manner in which it is conducted meets the requirements of clauses 5 and 6 to be an insured in terms of the LPIIF policy.

3. 'How much insurance cover does the firm have under the LPIIF policy?'

The amount of cover (limit of indemnity) afforded to each insured legal

RISK MANAGEMENT COLUMN continued...

practice is provided an annual aggregate basis. Some policies in the commercial insurance market provide cover up to a specified limit per claim. The annual amount of cover is defined in the policy as:

'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 Claimant's Costs** in respect of any **Legal Practice** as set out in schedule A;'

The annual amount of cover afforded to a legal practice is determined by the number of directors/ partners (called principals in the policy) in the firm on the date that the cause of action arose. The annual amount of cover afforded to insured practices is as follows:

SCHEDULE A

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

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

The annual amounts of cover will remain the same in the upcoming insurance year. Each time a claim, approved costs or claimant's costs are paid the amount of cover available is eroded and could be expunged in an insurance year. The legal practice will then be self-insured if it does not have top-up insurance cover available. Top-up cover is addressed in question 5 below.

For more information on the amount of cover afforded under the LPIIF policy, see:

□ 'Who does the LPIIF cover and for how much?', *Risk Alert Bulletin* (November 2020) (https://lpiif.co.za/wp-content/uploads/2020/10/WEB_RAB_NOV2020.pdf)

4. 'Is there an excess payable under the LPIIF policy and, if so, how much is it?'

The excess is defined in clause XIII the policy as '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.'

The excess payable is also determined by the number of principals in the legal practice on the date that the cause of action arose. The current schedule of excesses payable is as follows:

'SCHEDULE B

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

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

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

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

RISK MANAGEMENT COLUMN continued...

It will be noted that the riskier areas of practice attract a higher excess. The excess will become payable when the insurer pays a claim and/or claimant's costs. The excess payable will not change in the coming insurance year. You can read more about the excess payable in the following article:

- 'The excess payable in terms of the LPIIF policy explained', *Risk Alert Bulletin* (December 2020) (<https://lpiif.co.za/wp-content/uploads/2020/11/RISK-ALERT-BULLETIN-DECEMBER-2020.pdf>).

The payment of claims and/or excesses is a matter that can be addressed in your partnership agreement. The liability for a claim will be a significant debt for the practice. Experience shows that the payment of the excess or an uninsured amount by the firm can lead to significant internal disagreements in a legal practice. This is exacerbated when the party who the parties in the firm allege is responsible for the claim has left the practice. See:

- 'Until a claim do us part: Does your partnership agreement address the event of a claim against your firm?', *De Rebus* (October 2017) (www.derebus.org.za/wp-content/uploads/2017/10/De-Rebus-October_2017.pdf).

5. 'My firm requires additional insurance cover. Is this provided by the LPIIF and what is the premium for the additional insurance cover?'

The LPIIF only provides the primary layer of insurance cover – this is sometimes referred to

as the base layer of profession indemnity insurance cover. The additional amount of professional indemnity insurance cover is commonly referred to as 'top-up' insurance and can be purchased in the commercial market. Speak to your specialist insurance broker or insurer regarding top-up insurance. The LPIIF does not have any formal relationship with any of the companies that offer top-up insurance and does not endorse or recommend any insurer over the others. The purchase of top-up insurance is done entirely independently of the LPIIF.

The differences between the LPIIF and commercial insurers are set out in the following judgement:

- *Propell Specialised Finance (Pty) Ltd v Attorneys Insurance Indemnity Fund NPC and others* (16864/2013) [2017] ZAWHC 71; [2017] All SA 1005 (WCC) (30 June 2017).

6. 'Is the LPIIF insurance cover granted by the law society or Legal Practice Council?'

No, the insurance cover afforded under the LPIIF policy is not provided through the Legal Practice Council (under the Legal Practice Act, currently) and was not previously provided through the law societies under the now repealed Attorneys Act 53 of 1979. The LPIIF is, and always has been, independent of the Legal Practice

Council or its predecessors in the statutory law societies. As stated above, the LPIIF provides the insurance services as contemplated in section 77 of the Legal Practice Act. The LPIIF is a non-profit company that does not have any issued share capital and thus does not have any shareholders. The company, however, has one member being the Fidelity Fund. The LPIIF is a licenced short-term insurer in terms of the Insurance Act 18 of 2017. The licence authorises the company to provide two lines of insurance, being liability (the professional indemnity insurance provided under the Master Policy) and guarantees (the bonds of security in favour of the Master of the High Court). The two lines of insurance business are in line with the provisions of section 77 of the Legal Practice Act and the Memorandum of Incorporation of the company. The LPIIF thus carries out a *quasi*-statutory function.

7. 'My firm has received a summons alleging that we did not properly carry out our mandate. The plaintiff is seeking compensation from the firm. How do I go about notifying the LPIIF of the claim?'

The procedure for notifying the LPIIF of a claim is set out in the policy and on the LPIIF website. It can be summarised as follows:

RISK MANAGEMENT COLUMN continued...

Receipt of trigger document

The insured receives a written demand, summons, counterclaim or application in which a demand to pay compensation is made.

Notification to the insurer

The LPIIF must be notified in writing within one week of receipt of the trigger document.

Send a copy of the trigger document to the LPIIF, complete and submit the risk management questionnaire and claim form.

Prepare a detailed background report including full details of the circumstances, error or omission that led to the claim.

The LPIIF will also request your complete office file.

If the firm has top-up insurance, it is prudent to notify your top-up insurer/ broker simultaneously with the notification to the LPIIF.

LPIIF Assessment of the claim

The assessment includes whether the claim is indemnified in terms of the Master Policy, the applicable scheme year and whether insured has a valid defence to the claim or is liable for the amount claimed and on the basis alleged in the trigger document.

RISK MANAGEMENT COLUMN continued...

In the question, as posed, the summons is the trigger document. The summons must be sent to the LPIIF when the claim is notified (email claims@lpiif.co.za) within one week after it has been served on the insured legal practice (see clause 20 of the policy).

It is prudent to also do the following:

- Prepare a comprehensive background report setting out the full details of the firm's handling of the matter. The background report must also cover the details of the alleged breach of mandate (if the claim is framed in contract), failure to meet the standard of care expected of a reasonable legal practitioner (if the delictual claim is framed as a breach of a duty of care) or the breach of the fiduciary duty. If the firm has a defence to the claim that must also be set out in full;
- Complete and submit the risk management questionnaire and the claim form as required in clause 23. If you have completed a risk management questionnaire when you applied for a Fidelity Fund certificate, you can provide that document;
- Send the Fidelity Fund certificate applicable in the year that the cause of action arose. Remember the provisions of clauses 5 and 6 that refer to the date that the cause of action arose;
- Send your full file of papers (including all file notes) to the LPIIF;
- Remember not to cede or assign any rights in terms of the policy. Do not, without the LPIIF's written consent:
 - (i) admit or deny liability for a claim;
 - (ii) settle a claim; or
 - (iii) incur any costs or expenses in connection with a claim unless the quantum of the claim and the claimant's costs fall within your excess.
- Refer the client to another legal practitioner. You are conflicted and cannot continue to act for the client;
- If you have top-up insurance, inform your broker and/or insurer of the claim simultaneously with the notification to the LPIIF. Check the wording of your top-up insurance policy to see what your obligations are. You have the responsibility to notify your top-up insurer. The LPIIF has no knowledge whether or not you have top-up insurance and has no obligation to notify the insurer on your behalf. The quantum of the claim may exceed the amount of cover available under the LPIIF policy and you should not risk the top-up insurer repudiating your application for indemnity on the basis of late notification. Top-up insurers sometimes re-

pudiate/reject claims on the basis that they were not disclosed at the time that the proposal form for the renewal of the policy was submitted;

- Throughout the claim (and litigation) process provide your assistance and co-operation to the LPIIF and any other insurer that is on risk; and
- If the firm is liable, prepare the necessary funds to pay the excess when it becomes due.

8. 'My client's claim prescribed in the hands of another attorney. Can we have a claim form and can the summons to be served on the LPIIF?'

Only insured legal practitioners have rights to apply for indemnity in terms of the LPIIF policy. The policy does not give any rights to former clients or any other third parties to claim directly from the LPIIF (see clause 39). In the circumstances set out in this question, action will need to be instituted against the former attorney. If the practitioner is struck-off or suspended when the claim is brought, the claim must still be brought against that practitioner. The practitioner against whom the action is brought must then notify the LPIIF of the claim and apply for indemnity in terms of the policy. The executor of the estate of a deceased practitioner needs to

RISK MANAGEMENT COLUMN continued...

notify the LPIIF of a claim against the late practitioner (see clause 6(d) of the policy).

The client cannot claim directly from the LPIIF and will thus not be issued with a claim form. The action should also not be instituted against the LPIIF, and it follows that the insurer must thus not be cited as a party to the proceedings. The summons must not be served on the LPIIF. If the plaintiff cites the LPIIF in the circumstances set out in this question, the company will seek a punitive costs order against the plaintiff and his/her legal representative. There is no legal relationship between the LPIIF and the plaintiff and there can be no basis for claiming compensation from the company. Remember the *res inter alios acta* and *aliis nec nocet nec prodest* maxims.

Your client's claim against the correct defendant (the former attorney) may prescribe in your hands while you are vigorously pursuing the incorrect defendant. You will then be faced by a professional indemnity claim from your client.

The only circumstances where a claimant may have a right to claim from an insurer is where section 156 of the Insolvency Act 24 of 1936 applies. Legal practitioners acting for plaintiffs against sequestrated or liquidated insureds, as the case may be, must read section 156 and the judgements that have dealt with the requirements

of that section very carefully before instituting a claim.

The following resources will also assist legal practitioners faced with this question:

- 'Instituting a PI claim on behalf of a client: Some considerations to be taken into account', *De Rebus* (March 2017) (www.derebus.org.za/wp-content/uploads/2017/02/DR_March2017.pdf);
- 'Professional indemnity claims against attorneys: do not cite the AIIF', *Risk Alert Bulletin* (August 2018) (https://lpiif.co.za/wp-content/uploads/2018/07/RAB_August2018_WEB.pdf);
- *Coetzee v Attorneys' Insurance Indemnity Fund* (126/2001) [2002] ZASCA 94 (02 September 2002), [2002] 4 All SA 509 (SCA), [2002] 4 All SA 1 (SCA);
- *Propell Specialised Finance v Attorneys Insurance Indemnity Fund NPC* (1147/2017) [2018] ZASCA 142 (28 September 2018); and
- *Propell Specialised Finance (Pty) Ltd v Attorneys Insurance Indemnity Fund NPC and others* (16864/2013) [2017] ZAWHC 71; [2017] All SA 1005 (WCC) (30 June 2017)

9. 'When should a claim be notified to the LPIIF?'

The prudent approach is to notify the LPIIF as soon as you become aware of circumstances that may

lead to a claim. This is sometimes referred to as the intimation of a claim. At times you may not have the full details yet, but this should not stop you from notifying the claim and informing your insurer/s that you are still investigating the matter. Even though it will be a potential claim at that stage, your insurer can then get involved to assist in protecting your interests and, depending on the circumstances, to mitigate the damages. Do not wait for action to be instituted against your firm. A late notification will put your right to indemnity at risk.

The relevant clauses of the LPIIF policy read as follows:

'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

RISK MANAGEMENT COLUMN continued...

costs and ancillary charges incurred prior to or as a result of such late notification.'

Once again, the onus is on the insured to check the wording of a top-up policy for its obligations on that layer of cover (if available).

The following articles give useful insight into this question:

□ Wim Cilliers, 'Notification of circumstances which may give rise to a claim', *Risk Alert Bulletin* (May 2018); and

□ 'What to do in the event of a claim or intimation of a claim', *Risk Alert Bulletin* (March 2019).

10. 'We have been requested to submit proof of insurance. Can the LPIIF provide us with a letter confirming that we are insured?'

This request usually comes from practices that are preparing documents in response to an advertisement calling for expressions of interest from firms that wish to provide legal services to a particular entity.

The LPIIF's position is stated on its website. I quote what is stated there:

'Confirmation of LPIIF cover'

Every practitioner, who is in possession of a valid Fidelity Fund Certificate, automatically enjoys

a certain level of professional indemnity cover in terms of the LPIIF policy. (Please refer to the policy for the applicable limits of indemnity and deductibles). The LPIIF has one Master Policy applicable to all insured firms.

In previous years, insurance certificates were issued to firms. This was primarily done at the request of the financial institutions on whose panels the firms served. However, the LPIIF Board of Directors has decided that no insurance certificates will be issued with effect from the 2013/2014 insurance year. This decision and the reasons therefore have been communicated to the major financial institutions, the profession and Docomply.

A copy of the LPIIF policy is available on this website at [<https://lpiif.co.za/wp-content/uploads/2021/07/2021-2022-Master-Policy-Final.pdf>]. In terms of the policy, the limit of indemnity and deductible of an insured is determined by the number of partners/directors in the firm at the time the cause of action arose. The LPIIF does not have records of:

1. The practitioners who have either been issued with Fidelity Fund certificates or who are obliged to apply for such certificates;

2. The names and/or number of practitioners practicing or the number of partners/directors in each firm.

This information is available from the regulators that issue Fidelity Fund Certificates to practitioners and keep records of the practitioners in each of their areas of jurisdiction. The LPIIF only deals with insureds when a claim is notified and indemnity applied for in terms of the policy.

The onus is on the practitioners to satisfy interested third parties that they are in possession of a valid Fidelity Fund Certificate."

Conclusion

I hope that the contents of this Bulletin have provided clarity on the LPIIF and its functions. Should you need any additional information on the LPIIF, the questions above or require risk management training in your firm, please send an email to Risk.Queries@lpiif.co.za. The risk management training is provided at no cost to insured legal practitioners.