

## PUBLIC POLICY, *JUS COGENS* NORMS AND THE FIDUCIARY CRITERION OF LEGITIMACY

**Statutory obligations of  
legal practitioners in  
respect of trust money**

**The proper interpretation of the word  
'offence' – when an accused commits  
an offence while out on bail**

**Young legal practitioners  
must work hard and  
remain consistent**

**Municipal law:  
What is a  
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employees'  
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**Rule 17.6.3 of the  
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***Ex parte* writ of  
execution for arrear  
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**Requirements for  
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### 13 Public policy, *jus cogens* norms and the fiduciary criterion of legitimacy

Historically states of emergencies are known to correlate with decreased respect for human rights. However, international law attempts to mitigate this risk by subjecting governments to several legal frameworks protective of fundamental human rights. In fact some prohibitions and norms are *jus cogens* and no derogation is permitted. Extraordinary Research Fellow, **Dr Willem van Aardt**, asks how can one differentiate legitimate public policy from unlawful limitations that constitute a violation of international law *jus cogens*? Dr van Aardt also writes that the norms of international human rights and *jus cogens* originate from a fiduciary relationship between the state and those subject to its powers.

### 20 The proper interpretation of the word 'offence' – when an accused commits an offence while out on bail

When an accused allegedly commits an offence referred to in sch 5 of the Criminal Procedure Act 51 of 1977 (the CPA) while out on bail for an offence referred to in the same schedule, the accused will have to apply for bail in terms of s 60(11) (a) of the CPA. Similarly, where an accused has allegedly committed an offence referred to in sch 1 while on bail for an offence referred to in that same schedule, then the accused will have to apply for bail in terms of s 60(11)(b). Lecturer, **Morganambal Padavattan**, focuses on the proper interpretation of the word 'offence' in the phrase 'was released on bail in respect of an offence'. Furthermore, Mr Padavattan contends that a proper interpretation of 'offence' for which an accused was released on bail must be an offence in respect of which there is a reasonable prospect of conviction and not an offence where there is a likelihood that the accused will be acquitted.



### 22 Young legal practitioners must work hard and remain consistent

In this month's Women in Law, *De Rebus* News Reporter, **Kgomotso Ramotsho**, spoke to legal practitioner and Vice-President of the Law Society of South Africa, **Eunice Masipa**. Ms Masipa opened her own practice in 2017 and practices in a number of areas of law but has a special interest in labour and employment law as she feels this gives her the opportunity to contribute to the combatting of unfair labour practices.

#### 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,  
Mohamed Rander, Wenzile Zama

**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](mailto:derebus@derebus.org.za)

**DE REBUS ONLINE:** [www.derebus.org.za](http://www.derebus.org.za)

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

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# LSSA National Wills Week 2022 registration now open

**T**he Law Society of South Africa (LSSA) would like to inform all legal practitioners that the registration for the 2022 LSSA National Wills Week initiative, which will be held from 12 to 16 September 2022 is currently open. Registrations will close on Friday, 8 July 2022.

National Wills Week is now an established highlight among the profession's social outreach and access to justice initiatives. This is thanks to the thousands of attorneys who participate by giving generously of their time and skills. National Wills Week has also attracted increasing coverage in the media, as well as support from major stakeholders.

The aim of the LSSA National Wills Week campaign is twofold, namely to –

- position attorneys as the premier providers of wills and estates services to the public, and to improve the image of the profession generally; and
- encourage members of the public who would not normally make use of the services of an attorney, or who may hesitate to approach an attorney, to

consult an attorney to have a basic will drafted.

## How does the LSSA National Wills Week work?

Your firm will be provided with free, trilingual posters in the language combination of your choice to publicise your participation. Provision is made on the posters for your firm's contact details. Your firm will be listed as a participating firm on the database of participating firms on the LSSA's website.

A national media campaign will be launched early in August. All media and publicity material will invite members of the public to consult the LSSA website for the contact details of participating firms.

## What is expected from you as a participating firm?

- The firm will draw up basic wills free of charge.
- The firm will provide an explanation of the importance of having a properly and profes-



Mapula Oliphant - Editor

sionally drafted will to the client.

- You may not insist that you are appointed as the executor of the estate.
- You must give the client a copy of their will.
- You will not be expected to re-draft or amend existing wills for free, nor will you be expected to draft complex wills involving trusts, etcetera.

For more information, and to register and visit the LSSA's website at [www.LSSA.org.za](http://www.LSSA.org.za).



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

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

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

- Please note that the word limit is 2 000 words.
- Upcoming deadlines for article submissions: 18 July; 22 August and 19 September 2022.

# LETTERS

## TO THE EDITOR

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

### New workplace harassment code - what we need to know

On the 18 March 2022, the Minister of Employment and Labour, Thembelani Nxesi repealed the Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace and replaced it with the new Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace (the Code) in terms of s 54 of the Employment Equity Act 55 of 1998 (the EEA). This Code came into effect on the 18 March 2022.

#### The objective of the Code

The Code aims at creating safe workplaces that are free of harassment by providing guidelines to employers and employees on the elimination, prevention, and management of all forms of harassment in the workplace and in any activity linked to or arising out of work. The Code stipulates the necessary steps that the employer must take to eliminate harassment, this includes the development and implementation of policies and procedures that would contribute to the creation of harassment free workplaces.

#### Who does the Code apply to?

The Code applies to all employees and employers in the working environment. The potential perpetrators and victims of harassment, includes but is not limited to, employers, employees, job applicants,

volunteers, persons in training including interns, apprentices, and person's on learnership, clients, suppliers, contractors, and anyone having dealings with a business.

The Code applies in any situation in which the employee is working or related to their work this includes work related trips, such as training or events and work-related technologies and communications. The Code, in particular, deals with the sexual harassment and racial, ethnic or social origin harassment. The Code defines 'harassment' as -

'4.1.1 unwanted conduct, which impairs dignity;

4.1.2 which creates a hostile or intimidating work environment for one or more employees or ... has the effect of, inducing submission by actual or threatened adverse consequences; and

4.1.3 is related to one or more grounds in respect of which discrimination is prohibited in terms of section 6(1) of the EEA'.

#### Types of harassment

The Code records categories of behaviour that constitute harassment in the workplace, the list includes physical, verbal, and psychological conduct. Such conducts, include but are not limited to the act of bullying, including cyberbullying, intimidation, unwanted sexual conduct, discriminating and sabotaging.

#### Employer's duty

The employer has been entrusted with

the duty to create a working environment that applies an attitude of zero tolerance towards harassment in the workplace. To achieve this, employers must adopt internal harassment policies and such policies must be communicated to the employees. The employer is also required to develop clear internal guidelines that clearly set out the procedures of dealing with harassment in the workplace. These guidelines should make provision for the formal and informal procedures of reporting harassment in the workplace.

Employers are required to create a safe space for employees that allows the victims of harassment to raise their complaints freely and fearlessly. Employers are obligated to attend to the employee's harassment grievances in a manner that is effective, while also ensuring that the identities of the persons involved are kept confidential.

Failure of the employer to comply with above mentioned obligation, means they run a risk of being liable not only under our employment law but also under the general principles of vicarious liability for any misconduct committed by the employee that causes harm to others.

**Nozibusiso Masondo LLM (UKZN)**  
is a legal practitioner at Austen Smith Attorneys in Pietermaritzburg.

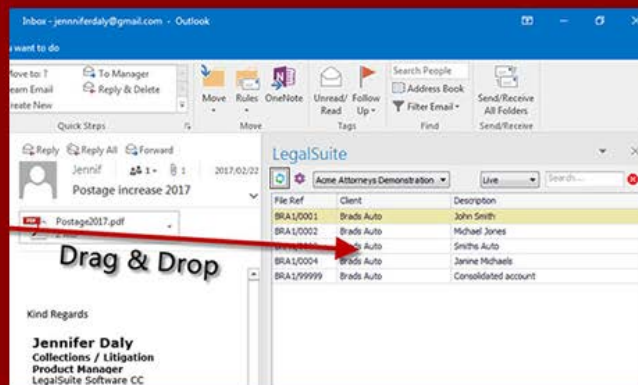


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By  
Isabel  
Joubert

# Launch of the Office of the Legal Services Ombud

**T**he launch of the Office of the Legal Services Ombud (OLSO) was held on 2 June 2022 in Pretoria. At the launch, opening remarks were given by the OLSO Director, Matsie Litheko, and Director-General of the Department of Justice and Constitutional Development, Doctor Mashabane.

Legal Practice Council (LPC) Chairperson, Janine Myburgh, said that everyone represented at the launch has a responsibility, including the LPC, to ensure that there is transformation happening within the legal profession, as well as access to the profession. She said that the objective of the LPC and the OLSO is closely aligned, as the Ombud has to –

- investigate any maladministration of the Legal Practice Act 28 of 2014 (LPA);
- ensure that the profession retains and increases its integrity;
- promote public interest; and
- investigate in a competent and effective way, all complaints, that are received.

Ms Myburgh said: 'We pledge, as the LPC council, to work narrowly with the Ombud.' She added that the profession has been waiting for the launch with bated breath and it is very happy this day has finally arrived. Ms Myburgh told the Ombud that the LPC will continue to help and assist where possible and she added that she is happy that the LPC now has a guardian. Ms Myburgh said: 'We believe in your integrity; we believe in the process and as the LPC we are committed to working with you to ensure we have a better South Africa.'

Justice Siraj Desai welcomed all to the momentous occasion as he said the road to the launch of the OLSO has been a long and difficult one. Justice Desai said 'the right of access to justice is a fundamental right and is embodied in section 34 of the Constitution.' He said that the legal profession does not reflect the demographics of the country and the poor and marginalised have very little hope of their legal issues being favourably resolved because they do not know what their rights are. Justice Desai said that the LPA ushered in a new era of regulation for legal practitioners, it abolished the previous provincial law societies, which were responsible for the disciplining of attorneys, and was replaced by the LPC as the regulatory body of the legal profession.



*Justice Siraj Desai, the first Legal Ombud of South Africa at the launch of the Office of the Legal Services Ombud in Pretoria on 2 June 2022.*

'The self-regulatory function of the legal profession is often the subject of fierce criticism,' Justice Desai said. He explained that legal practitioners are the guardians of the law and one of the custodians of democracy in South Africa (SA), the people in the country need to have faith that those in charge of the law are trustworthy and reference was made to the cases of corruption and lack of integrity of late. Justice Desai pointed out that legal practitioners themselves are often the reason for why the public views the legal profession in a bad light. 'A dysfunctional legal profession has the potential to undermine the stability of the entire justice system, the rule of law and democracy,' said Justice Desai.

Justice Desai explained, due to the long-standing distrust and the profession doing its own policing, the OLSO has been introduced to the profession. The mandate of the OLSO specifically relates to the consumers of legal services and the conduct of legal practitioners. The Ombud also has an overarching mandate to protect, promote and enhance the integrity and independence of the legal profession, as well as striving to improve the public confidence in the legal profession. Justice Desai said 'the independence of this office is integral to the restoration of public confidence in the legal profession.'

Justice Desai explained that he intends

to publish a series of papers on their website to inform and educate the public, as well as embarking on roadshows to increase communication with the media and raise awareness. These papers and roadshows will help inform and educate the public of their rights.

The Ombud explained that the OLSO will improve public confidence through:

- Fearless and independent investigation of complaints through the commitment to democratic values and maintaining a balance between transparency and the confidential nature of all investigations.
- Effectively applied dispute resolution mechanisms.

Justice Desai said the efficacy of the OLSO depends on stakeholder participation and one of the OLSO goals is to strengthen the processes of the LPC itself, to collaborate and share good practices with the stakeholders. The legal profession will be held to account in cases of malfeasance and wrongdoing, which will help restore public trust. Justice Desai explained that the Ombud, if utilised properly, will prevent future violations, and enable the Ombud to examine systemic or structural problems in the dispute resolution mechanisms. He carried on by saying, the Ombud has the power to participate in legal proceedings or launch its own litigation and by selecting strategic cases for maximum impact. 'The Ombud has the long-term objective of improving the overall well-being of society, this objective can be achieved if the Ombud performs his watch dog role with diligence and tenacity,' said Justice Desai. Justice Desai said the Ombud must deliver justice in a manner that is fair, impartial, and confidential, which he aims to do and will be assisted in the task by a legal team. 'The goal is to see ethical justice for all,' he said.

Minister of Justice and Correctional Services, Ronald Lamola, welcomed attendees to the launch and said it is simply a historic moment. He explained that the implementation of the Ombud started when there was no financial backing or resources and the department had to do everything within its power to find some resources to enable the OLSO to start. Mr Lamola said the Department of Justice is glad that the OLSO has become a reality and will continue to support the work of the Ombud so that the public can find a place where they know that they can find accountability for the





**Minister of Justice and Correctional Services, Ronald Lamola, addressing the attendees of the official launch of the Office of the Legal Services Ombud in Pretoria on 2 June 2022.**

legal profession. Mr Lamola said legal services are probably something everyone will come across in their lifetime. Those who use legal services often use them in the most difficult or significant times in their lives, whether it is buying a home, terminating a contract, or terminating a romantic relationship, it is, therefore, significant and important that the legal service one obtains at that moment should be of high standard, ethical and responsive to one's needs. Mr Lamola said it is further difficult providing these services in a distressed society, with the increased cost of living, the increasing cost of petrol, the electricity crisis and inflation all affecting the cost of access to legal services.

Mr Lamola made mention of the South African Law Reform Commission's report released on the cost of legal services (Project 142: Investigation into legal fees, including access to justice and other interventions (the Report)). He said that it is the finding of the Report that legal costs are unsustainable in SA and asked that everyone attending, as well as the public give their comment and input on the Report.

Mr Lamola said President Cyril Ramaphosa appointed Justice Desai as the first South African Ombud for legal services in terms of s 47 of the LPA. Justice Desai is empowered to investigate complaints, alleged maladministration, malfeasance within the ambit of the Act and actions, which may affect the integrity of the legal profession. Mr Lamola stressed that integrity of the profession would only be restored if investigations are done in a manner that is transparent, sufficient, and in a manner that brings to book whoever has been found violating the ethics of the legal profession. He said this is a shift from the self-regula-

tion that the profession was accustomed to. It is aimed to be transparent and accountable.

Mr Lamola explained that the OLSO is an important office to serve the future of the profession. The public will be assured through the work done that the Ombud is going to be successful because respect and confidence is earned. He told Justice Desai: 'It will be while you deal with their complaints decisively and when they find justice through the processes of the Legal [Services] Ombud that the public will trust you. That the public will continue to knock on your door. I want to encourage the Ombud to raise awareness, which we will also do, and I hope everyone here in the room and across the country, even people in deep rural South Africa, must know that they are able to phone, e-mail, WhatsApp ... to the Ombud in order to be able to get the services that they need.' He reiterated that people from rural areas must know that they have someone who will protect them in the legal spectrum.

The Minister said the LPA empowers the public to lodge complaints with the Ombud, as well as report acts of misconduct by legal professionals. 'It is important that professionals are people of high moral standard and standing, of unblemished integrity because it is within the rights of legal practitioners that Ombuds of the future are going to emerge, future judges are going to emerge, future leaders of various professional bodies of our country,' said Mr Lamola. He warned that if a legal practitioner is found wanting in issues of maladministration, misconduct, or dishonesty there is no future for them in the profession and that an Ombud would not be appointed if there were no issues of integrity.

Mr Lamola said it is expected that the Ombud will act independently and not sweep complaints under the carpet, as well as investigate without fear or favour. Mr Lamola said he encourages South Africans to report all acts of misconduct by practitioners from any corner of the country. He explained this Ombud is the people's Ombud here to protect the people's interests. Mr Lamola said: 'As citizens we have a duty to hold government accountable, practitioners themselves accountable, as well as the Ombuds accountable. It is common cause that lawyers must exemplify the highest form of professionalism, they must devote themselves, defending the rights of their clients.'

Minister Lamola mentioned the report from the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (Zondo Commission) and how it brought to light the grand scheme of corruption. He said 'the moral standards have to be restored, and

I believe the Ombud will play a big role to restore those standards.' He said the profession must frown on such unscrupulous practices or practitioners and deal with them decisively. The profession must disassociate itself from such corrupt practitioners, he said. 'The legal professions' ethics and standards must be beyond the one of an ordinary citizen. The conduct of a lawyer in terms of ethical standards or of any professional cannot be the same as that of any other person, it must be different, it must be seen from the actions, it must be seen from wherever you are,' said Mr Lamola.

'I am raising this as a challenge to all of us as legal practitioners that here we do not have to wait to be called by the Ombud to behave in an ethical way, the Ombud must come as an element of last resort,' said Mr Lamola. He said the Ombud should raise awareness among practitioners to prevent things from happening instead of having to deal with them when they have already happened, as the after-effects are very bad. Mr Lamola suggested, when there are resources, to spend them on preventing misconduct and hopefully this can be done with courses. Legal practitioners should be reminded of the ethics because after law school the only time legal practitioners are reminded of ethics is when there is a problem with the trust account. There should be a lifelong engagement with the profession regarding ethics. Mr Lamola said ethical justice for all is the motto of the Ombud.

Mr Lamola ended his address by announcing the official opening of the OLSO on 15 June 2022.

Deputy Minister of Justice and Constitutional Development, John Jeffery, thanked everyone who had contributed to this process of making the OLSO pos-



**Deputy Minister of Justice and Constitutional Development, John Jeffery, closing off the launch of the Office of the Legal Services Ombud in Pretoria on 2 June 2022.**

sible, from the drafters of the legislation and the rules to those who assisted in sharing the office is capacitated and operational, members of Parliament, Minister Lamola for his assistance and support, and finally, and most importantly, Justice Desai for accepting the position and for the leadership he has shown for which he is known and respected.

Mr Jeffery said he thought it significant that when launching the Office of the Ombud that it was being done in the month of June, which is Youth Month, as Justice Desai started his career in June of 1976. He said that some of Justice De-

sai's cases were defending young activists of the Soweto uprising.

On Justice Desai's retirement at the end of 2020, Mr Jeffery said he remembered reading an article in the *Daily Maverick* where Judge Desai, said he was going to miss 'the ability to affect justice on a day-to-day basis'.

Mr Jeffery said he thinks all in attendance and the members of the legal profession are extremely pleased that Justice Desai will continue to be able to affect justice on a day-to-day basis in this new and very important role that he will be playing as our first Legal Services

Ombud and thus ensuring the integrity of the legal profession.

'Judge Desai, we wish you and the office all the very best. Please be assured of our continued support to both yourself and your office as you can continue to ensure access to justice for all,' said Mr Jeffery.

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



By  
Kgomo  
Ramotsho

## High cost of civil and criminal litigation is one of the main barriers to accessing justice

The South African Law Reform Commission (SALRC) handed over a report on Project 142: Investigation into legal fees, including access to justice and other interventions, with final recommendations to the Minister of Justice and Correctional Services, Ronald Lamola in March 2022. Along with the SALRC's final recommendation for law reform, a proposed draft Bill, titled 'Justice Laws General Amendment Bill' was included. The SALRC said the report follows on Issue Paper 36 and Discussion Paper 150, which were published for general information and comment on 7 May 2019 and 18 September 2020 respectively. The organisation added that the discussion papers considered all the input and comment received from its stakeholders, including items from community workshops held in all nine provinces of South Africa (SA), as well as the international conference on 'Access to Justice, Legal and Other Interventions' held in November 2018 in Durban.

In some parts of the summary the SALRC stated that the right to access to courts is a fundamental human right embodied in s 34 of the Constitution. Access to justice comprises of many aspects. These include –

- access to legal information;
- advice or mediation services;
- the use of courts and tribunals; and
- the ability to engage in legal advocacy services.

The introduction of the Legal Practice Act 28 of 2014 (LPA) signals the intention of the Legislature and the Executive that appropriate actions must be taken to address the lack of access to justice for the majority of the South African people.

The SALRC added that legal fees and costs are associated with access to justice at every stage of the legal process. Such expenses constitute a major barrier for those who cannot afford them, and the majority of South African people are unable to access legal practitioners because of unattainable legal fees. The report pointed out that many South Africans live in rural areas, making travelling to a legal practitioner's office a financial battle. The SALRC said that s 35(4) and (5) of the LPA, which came into operation with effect from 1 November 2018, set out the parameters of the investigation to be undertaken by the SALRC within two years, calculated from the latter mentioned date. Section 35(4) of the LPA mandates the SALRC to investigate and report back to the Minister with recommendations on the following –

- (a) the manner in which to address the circumstances giving rise to legal fees that are unattainable for most people;
- (b) legislative and other interventions in order to improve access to justice by members of the public;
- (c) the desirability of establishing a mechanism which will be responsi-

ble for determining fees and tariffs payable to legal practitioners;

- (d) the composition of the mechanism contemplated in paragraph (c) and the processes it should follow in determining fees or tariffs;
- (e) the desirability of giving users of legal services the option of voluntarily agreeing to pay fees for legal services less or in excess of any amount that may be set by the mechanism contemplated in paragraph (c); and
- (f) the obligation by a legal practitioner to conclude a mandatory fee arrangement with a client when that client secures that legal practitioner's services'.

In giving effect to this mandate, the SALRC must, in terms of s 35(5), take the following into consideration:

- '(a) Best international practices;
- (b) the public interest;
- (c) the interests of the legal profession; and

(d) the use of contingency fee agreements as provided for in the Contingency Fees Act, 1997 (66 of 1997)'.

The SALRC said that although the LPA retains, to a large degree, the structure of the divided Bar with its origins in both the Roman-Dutch and English law, however, s 34(2)(b) of the LPA has introduced a third category of a legal practitioner, that is, an advocate that can accept a brief directly from a member of the public or a justice centre for that service, provided that they are in possession of

a Fidelity Fund Certificate and have notified the Legal Practice Council (LPC) of their intention of doing so. Section 3(c) of the LPA provides that the purpose of this Act is to 'create a single unified statutory body to regulate the affairs of all legal practitioners and all candidate legal practitioners in pursuit of the goal of an accountable, efficient, and independent legal profession.'

The SALRC added that it is required to investigate how the existing mechanism for the recovery of fees and costs (party-and-party costs) and attorney-and-client fees payable to legal practitioners for litigious and non-litigious legal services can be improved in order to broaden access to justice by members of the public. The SALRC noted that the overall aim of the Commission's investigation is to find ways to broaden access to justice and to make legal services more affordable to the people while considering the interests of the public and the legal profession.

The SALRC pointed out that the final proposals as set out in the report and the accompanying Justice Laws General Amendment Bill can be summarised as follows:

In line with the categorisation of legal costs as provided in ch 1 of this Report, the mechanism contemplated in s 35(4) of the LPA can be divided into two components, namely –

- a mechanism for party-and-party costs; and
- a mechanism for attorney-and-client fees.

In some parts of the mechanism for party-and-party costs the SALRC is of a view that the Rules Board for the Courts of Law (Rules Board), as presently constituted institutionally in terms of s 3 of the Rules Board for Courts of Law Act 107 of 1985, read with s 5(1) of the LPA, is the appropriate existing mechanism for determining recoverable legal fees and tariffs payable to legal practitioners and juristic entities in litigious matters. Therefore, the SALRC recommended that the mechanism (Rules Board) must adopt an effective consultative process of all the stakeholders involved before determining legal fees and tariffs. That the following stakeholders and role-players, among others, must be consulted –

- the LPC;
- consumers of legal services;
- members and representatives of the legal profession;
- members and representatives of the judiciary;
- representatives of civil society organisations;
- the Minister, or their representative;
- the Competition Commission;
- Legal Aid South Africa;
- law clinics;

- juristic entities;
- the National Economic Development and Labour Council; and
- the Human Sciences Research Council.

With regards to the mechanism for attorney-and-client fees, the SALRC is of a view that the current *status quo* in terms of which there is neither a statutory tariff nor fee guidelines for legal services is contrary to the purpose of the LPA as envisaged in s 3(b)(i) and, therefore, undesirable. Furthermore, it is clear from the representations received, that the current *status quo* is denying many people access to justice. For the reasons advanced in ch 7 of the Report, the SALRC concurs with the view of many respondents who submitted that the imposition of a universal and compulsory tariff is undesirable not only for the legal profession but for the economy of SA too.

The SALRC added that the proposal of having attorney-and-client fees pegged at the same level and determined on the same tariff as party-party costs in litigious matters in respect of users of legal services in the lower and middle-income bands, it might at first glance, not find favour with many legal practitioners. However, there are credible arguments in favour of this option. First, this proposal is limited to a certain category of users of legal services, and second, only to certain fora (district and regional/magistrates' courts), where it is not in dispute that legal fees will be lower compared to other fora. Third, the fact that a successful litigant in all respects is still required to pay legal (attorney-and-client) fees despite their success in the matter seems unreasonable to many potential users that legal fees are payable regardless of the outcome of the case. Fourth, considering that courts only grant costs on the attorney-and-client scale in exceptional circumstances, these factors taken may serve as a deterrent to anyone contemplating litigation, notwithstanding the advice a user may obtain to the effect that the prospect of winning the case are high.

The SALRC pointed out that this cannot be in the interest of justice that someone who has an imminently winnable case is deterred from going to court or other fora by the prospect, even in the event of success, of having to pay attorney-and-client fees.

The report among other things includes–

- scenarios to deal with attorney-and-client fees;
- proposed legislative intervention;
- other proposed amendment to the LPA;
- proposed amendments to the Rules Board for the Courts of Law Act.

Mr Lamola said that the report on Project 142, aims to address some of the

major problems bedevilling the South African civil justice system. He pointed out that it takes too long to resolve legal disputes, the system excludes those who cannot afford to litigate in the courts, the average time it takes to resolve a legal dispute range between three to six years, and legal fees have escalated to a point where the majority of people are excluded from the system of dispute resolution. Mr Lamola added that the high cost of litigation in both civil and criminal matters is one of the main barriers to access to justice and questions that must be asked are: What are the factors that give rise to unaffordable legal service? What interventions can be devised to address these challenges in SA? He pointed out that the report deals with these questions.

The full report can be accessed at <https://justice.gov.za/>.



**LAW SOCIETY**  
OF SOUTH AFRICA

## Comment from the LSSA

The Law Society of South Africa (LSSA) submitted comprehensive comments to the SALRC on both the Issue Paper 36 and the Discussion Paper 150, after extensive consultation with members of the legal profession. The LSSA's submissions are available at [www.LSSA.org.za](http://www.LSSA.org.za).

There are some recommendations that the LSSA supported, particularly those that will make the system more effective and efficient. The LSSA noted that there are systemic problems that require a holistic approach and that access to justice will not be achieved without the government playing its part in improving service delivery.

However, some of the recommendations were not supported, notably those regarding a fixed tariff with limited targeting which will, if implemented, have serious and far-reaching consequences for the public and the legal profession.

The LSSA noted with disappointment that its submissions on this crucial aspect were not accepted in the report and will continue to engage in this regard.

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







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**All practitioners and support staff are welcome to contact us for information about the following webinars, seminars and courses:**

**Debt Collection (Webinar): 2 – 3 August 2022**

The course aims to give participants the skills and confidence to do debt collection independently and participants will be taught the debt collection process in chronological order. High priority will be given to enable students to complete debt collection documents independently.

**Time Management (Webinar): 5 August 2022**

Gain the necessary skills in managing your time efficiently while in the office or working from home. This course aims to give delegates a better understanding of time management and to equip delegates to run an efficient practice and serve their client's best interests.

**Accounts Management (Course) (3 day attendance): 10 to 12 August 2022**

This course is primarily aimed at providing legal practitioners with the necessary basic skills and to assist them to prepare for the Legal Practitioners' Accounting (Attorneys' Bookkeeping) examination. This is for conversion of enrolment in terms of s 32 of the Legal Practice Act 28 of 2014 (LPA).

**Court Room Techniques: Virtual hearings and digital deployment (Webinar): 16 August 2022 from 11:00 – 14:00**

In this webinar we deal with virtual hearing, managing electronic files and using technology in court to improve your presentation.

**Insolvency Online (Workshop) (3 day attendance): 17 to 19 August 2022**

This workshop covers the most vital aspects such as liquidation and sequestration applications, aspects of the effects of sequestration and liquidation, the administration of an insolvent estate, including the rules pertaining to the distribution of proceeds, and aspects of business rescue.

**Customary Marriages (Webinar): 25 – 26 August 2022**

Marrying customary unions with modern family law: A practical approach to assist legal practitioners in dealing with the complexities created by our mixed legal system

**Medical Law (10 week Online Course): 15 August to 18 October 2022**

This course focusses on the basic principles in medical law and specifically medical negligence. Increasingly, more legal practitioners are pursuing these types of claims without having received training in this *sui generis* type of delict – the principles of which differ from other delicts.

**Cryptocurrency in Ponzi Schemes (Webinar): 8 September 2022 from 10:00 – 13:00**

This webinar will cover well known Cryptocurrency Ponzi schemes and give a brief update on some that have taken place in South Africa. This webinar is for individuals who represent or intend to represent either clients who has suffered loss or have been asked to investigate a potential Ponzi scheme.

**Child Law (10 week Online Course): 3 October to 11 November 2022**

This course will give legal practitioners easy access to the key concepts of child law as applied in the Family Court and High Court.

**Accounts Management (Bookkeeping) (Online Course): 19 September to 18 November 2022**

The course is essential for all legal practitioners who intend to open their own practice and all legal support staff. It will also benefit practitioners who are currently practicing in their own firms. The course will impart a sound understanding of the basic business principles that will assist a practitioner to conduct a successful and profitable legal practice.

**E-mail: [info@LSSALEAD.org.za](mailto:info@LSSALEAD.org.za) • Tel: +27 (0)12 441 4600**



By  
Arniv  
Badal

# Statutory obligations of legal practitioners in respect of trust money

**T**he topic of the obligations of legal practitioners relating to the handling of trust money is one that has been covered before by the office of the Legal Practitioners' Fidelity Fund (LPFF), but the peremptory nature of these sections stand to be repeated in order for legal practitioners to beware of both the obligations placed on them by the Legal Practice Act 28 of 2014 (LPA) and the consequences of not adhering strictly to these obligations.

In terms of ss 84 and 85 of the LPA, a legal practitioner operating a trust account practice is obliged to apply for and be in possession of a Fidelity Fund Certificate (FFC). In terms of s 84(2), no legal practitioner 'may receive or hold funds or property belonging to any person unless the legal practitioner concerned is in possession of a Fidelity Fund Certificate'. This equally applies to persons employed or supervised by such a legal practitioner, as well as to deposits taken on account of fees or disbursements in respect of legal services to be rendered. An FFC is valid until 31 December of the year in respect of which it was issued. Legal practitioners who are beginning a practice for their own account must, within the period and after payment of the fee determined by the Legal Practice Council (LPC), complete a legal practice management course, which is approved by the LPC (see Rampela Mokoena '[Handling of trust money – dealing with the obligations of a trust account legal practitioner](#)' 2019 (May) *DR* 6).

It must be noted that, in terms of s 84(6), the LPC 'may withdraw a Fidelity Fund Certificate and, where necessary, obtain an interdict against the legal practitioner concerned if he or she fails to comply with the provisions of [the LPA] or in any way acts unlawfully or unethically'.

In terms of ss 86(1) and (2), every legal practitioner that practices for their own account (either alone or in a partnership), or as a director of a practice which is a juristic entity must operate a trust account, which must be kept at a bank with which the LPFF has made an arrangement, in terms of statutory provisions. Legal practitioners have an obligation in terms of s 86(2) to deposit, 'as soon as possible af-

ter receipt thereof, money held by such practice on behalf of any person'. Additionally, in terms of s 86(3) a trust account practice may invest, in a separate trust savings account or other interest-bearing account, money which is not immediately required for any particular purpose in terms of any instruction. It is important to note that interest accrued in terms of the accounts listed above (ss 86(2) and 86(3)) must be paid over to the LPFF and vests in the LPFF (see Mokoena (*op cit*)).

Additionally, and in terms of s 86(4) of the LPA, a legal practitioner operating a trust account practice may, on the specific instruction of a client, open a separate investment account for the purposes of investing money received in the trust account, on behalf of such client over which the trust account practice exercises exclusive control as a trustee, agent, or stakeholder or in any other fiduciary capacity. Legal practitioners must take note that interest accrued on money deposited in terms of s 86(4) of the LPA accrues to the person on behalf of which such money has been invested, provided that 5% of the interest accrued must be paid over to the LPFF and vests in the LPFF.

The LPA under s 87 states legal practitioners operating a trust account practice have a duty and obligation to keep proper accounting records detailing things such as –

- '(a) money received and paid on its own account;
- (b) any money received, held or paid on account of any other person;
- (c) money invested in a trust account or other interest-bearing account referred to in section 86; and
- (d) any interest on money so invested which is paid over or credited to [the legal practice]'

These accounting records may be the subject of an inspection conducted by the LPC or the LPFF, with a view to these organisations satisfying themselves that the provisions of the LPA are being complied with. In the event that non-compliance is identified, the LPC or the LPFF may write up the accounting records and recover both the costs of the inspection and the writing up of the accounting records from the identified trust account practice.

Trust account practitioners occasionally face a situation of unidentified trust money. Section 87(4)(a) of the LPA provides that where the identity of the owner of trust money is unknown or trust money, which is unclaimed after one year, must, after the second annual closing of the accounting records following the date of the deposit, be paid over to the LPFF by the trust account practice. If at any stage the owner of the money is identified, they are not precluded from the right to claim from the LPFF any portion they may be able to prove entitlement to.

Trust account practitioners are advised that any amounts standing to the credit of any trust account does not form part of the assets of the trust account practice or the practitioner and may not be attached by any creditor to the trust account practice. This is subject to the provision of s 88(1)(b) of the LPA, which provides that any excess remaining after all trust creditors have been accounted to, and 'all claims in respect of interest on money invested, are deemed to form part of the assets of the trust account practice concerned'.

The most severe consequence for trust account legal practitioners is contained in s 89 of the LPA, which provides for the LPC or the LPFF, through application to the High Court, to prohibit any trust account legal practitioner from operating in any way on their trust account, and to appoint a *curator bonis* to control and administer that trust account.

Legal practitioners operating trust account practices must follow the peremptory provisions in the LPA relating to the way trust money must be handled in order to remain compliant, and to avoid severe risks and consequences. Legal practitioners should employ relevant risk mitigation tools to ensure continued compliance with these obligations, bearing in mind that the obligation to remain compliant vests with the legal practitioner.

**Arniv Badal LLB (UKZN) is a Practitioner Support Supervisor in the Risk Management Department at the Legal Practitioners' Fidelity Fund in Centurion.**





By  
Eugene  
Opperman

# *Ex parte* writ of execution for arrear maintenance against retirement funds

A recent case handed down by the Gauteng Local Division High Court confirmed the legal position dealing with giving a defaulting father notice that the mother (the respondent) intended to request a writ of execution *ex parte* in cases where a father (the applicant) is in default with a maintenance order.

In the matter of *VDB v VDB and Others* (GJ) (unreported case no 22/11181, 20-4-2022) (Siwendu J) handed down on 20 April 2022 the facts that led to the appeal were based on a divorce settlement between the parties where the applicant would contribute an amount of R 20 000 per month per child for child maintenance, including additional medical and educational expenses. The applicant argued that due to the COVID-19 pandemic, his financial circumstances changed and he subsequently fell into arrears with his monthly maintenance payments.

Without any notice to the applicant, Discovery made a deduction of R 776 661,28 from his retirement annuity following an *ex parte* application by the respondent in terms of s 27(1) and (2) of the Maintenance Act 99 of 1998 after filing a detailed schedule of arrear maintenance for the period between April 2020 to December 2021.

The applicant received no prior notice of the writ of execution and only became aware of the first deduction when he received notification from Discovery (the second respondent in the matter) that the funds were already withdrawn from his retirement annuity in the amount of R 776 661,28. A month later he received a WhatsApp message from the respondent of her intention to again cause a deduction to be made from his retirement annuity to cover the arrear maintenance.

The applicant approached the court on an urgent basis to protect his investment and joined another financial institution as third respondent in order to prevent any further deductions. He claimed, 'that it is unfair for such application to be made without notice to him and without any opportunity granted to him to make representations to the court'.

The procedure for obtaining and serving a writ in the Maintenance Court is clearly defined in s 27(1) and (2) of the Maintenance Act.

Section 27(2)(b) allows for a person in whose favour a maintenance order was issued in taking the necessary steps with assistance of the maintenance officer to facilitate the execution of a warrant.

Neither s 27, nor the forms prescribed for such an application in Maintenance Courts (see J306 Form: 'Application for enforcement of maintenance or other order in terms of section 26 of the Maintenance Act, 1998' ([www.justice.gov.za](http://www.justice.gov.za), accessed 31-5-2022) and J397 Form: 'Warrant of execution against property in terms of section 27 of the Maintenance Act'), 'makes provision for the application to the maintenance court for the authorisation of the issue of a warrant of execution to be on notice to the party against whom the maintenance order had been made. It appears competent for such an application to be made *ex parte*' (*MV v CV* 2014 (3) SA 1 (KZP)).

In the *MV v CV* matter the court held that the only jurisdictional prerequisites necessary were:

- there must be a valid maintenance order (even if subject to appeal);
- a maintenance order against the respondent against whom the warrant is sought;
- arrears of maintenance payments which have remained unsatisfied for a period of ten days.

Koen J noted that if the above 'requirements are satisfied, then the issue of a warrant should be authorised and it will be up to the party against whom the maintenance order operates to invoke any of his remedies in terms of s 27(3) or (4)'.

The court in the *VDB v VDB* case under discussion, rightly so, clarified that in circumstances where there is a dispute about the amount owing under an existing maintenance order, it seems the only remedy for an aggrieved party is found in s 27(3) which provides that:

'A maintenance court may, on application in the prescribed manner by a person against whom a warrant of execution has been issued under this section,

set aside the warrant of execution *if the maintenance court is satisfied that he or she has complied with the maintenance or other order in question*' (my italics).

An aggrieved party wanting to set aside the warrant of execution after the maintenance court was satisfied that the pre-existing maintenance order was complied with could bring such an application by completing the prescribed J435 Form: 'Application for setting aside a warrant of execution in terms of section 27(3) of the Maintenance Act, 1998' ([www.justice.gov.za](http://www.justice.gov.za), accessed 31-5-2022).

Siwendu J ruled that 'where there is a pre-existing Maintenance Court Order, there is no mechanism to resolve a dispute about the quantum owing before the issue of a writ nor a requirement for a notice before the issue of such a writ. The only redress I can discern afforded to the applicant is in section 27(3) as aforesaid.'

Furthermore, the judge remarked that it is clear from the wording of s 27 that the Legislature saw it fit not to afford the applicant a right to a notice before the issue of a writ of execution was issued and accordingly dismissed the appeal.

The clarification in *VDB v VDB* is welcomed and seemingly follows the *September v September* (WCC) (unreported case no A388/11, 15-2-2012) (Binns-Ward J) case where Binns-Ward J emphasised that 'the appellant can adequately protect his interests by paying the arrear maintenance under protest and contingent upon his right to recover the expenditure from the respondent subsequent to obtaining a rectification of the deed of settlement and a consequential amendment of the court order'.

Eugene Opperman *BProc (UFS) LLB Adv Dip Medicina Forensis Adv Dip Business Rescue Management (Unisa)* is a legal practitioner at Oppermans Inc Attorneys in Gordon's Bay.



Picture source: Gallo Images/Getty



## Public policy, *jus cogens* norms and the fiduciary criterion of legitimacy



By Dr  
Willem  
van Aardt

International law acknowledges and permits governments to govern and implement public policy to protect their citizens against external and internal threats. History teaches that rule by decree during declared states of emergency are often known to correlate with decreased respect for human rights.

International law mitigates this risk by subjecting governments to several legal frameworks protective of fundamental human rights, such as international human rights law and international law's regime for regulating emergencies. Within this legal framework, some norms, such as the prohibitions on torture, slavery, arbitrary detention, and medical experi-

mentation without free and informed consent, are regarded as peremptory or *jus cogens* and are of a kind from which no limitation or derogation is permitted (Evan Fox-Decent and Evan J Criddle 'The Internal Morality of International Law' 2018 (63) *McGill Law Journal* 765).

Three questions immediately come to mind:

- What is the definition of a *jus cogens* norm?
- How do *jus cogens* impact the protection of human rights?
- How can we differentiate legitimate public policy from unlawful limitations that constitute a violation of international law *jus cogens*?

This article explains the rudiments re-

lating to *jus cogens* and argues that the fiduciary criterion of legitimacy is helpful in determining the morality and legality of public policy.

### *Jus cogens* defined

From Latin *iūs* (law) and *cogēns*, from *cōgere* (compel), *jus cogens* or 'compelling law', is the technical term given to those norms of international law that are hierarchically superior. It designates peremptory norms from which no derogation is permitted. It stems from Roman law legal principles that certain legal rules cannot be contracted out, given the fundamental values they uphold (Anne Lagerwall '*Jus cogens*' (www.oxfordbibliographies.com, accessed 31-5-2022)). 'The antonym of *jus cogens* is *jus dispositivum*' or law adopted by consent. 'It is the category of international law that consists of norms derived from the consent of States'. '*Jus dispositivum* binds only those States consenting to be governed by it' (Alfred Mwenedata and Joseph Sehorana 'The determination and enforcement of *jus cogens* norms for effective human rights protection' (2016) 21 *IOSR Journal of Humanities and Social Science* 66).

*Jus cogens* have developed as a natural law concept while being incorporated into legal positive and modern international law. 'The definition of the concept of *jus cogens* emerged in international practice from the work of the International Law Commission devoted to the codification and development of the legal regime of international agreements, which resulted in the signing of the 1961 Vienna Convention on the Law of Treaties.

... Article 53 thereof expressly declares void the treaty which, at the time of its conclusion, conflicts with a peremptory norm of General International Law: ...

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of General International Law. For the purposes of the present Convention, a peremptory norm of General International Law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of General International Law having the same character' (Mwenedata and Sehorana (*op cit*) at 68).

This signifies that a government cannot discharge itself from the obligations imposed by the norm of *jus cogens*, even by a treaty. Therefore, it is a 'prohibitive norm constituting an important limitation' to governments' autonomy (Mwenedata and Sehorana (*op cit*) at 69).

The unique function of these peremptory norms is to render void any treaty obligation or state action that conflicts with such a peremptory norm. The peremptory norm acts as a kind of 'super-

norm' to render any conflicting treaty or state action illegitimate. The *jus cogens* norm, therefore, acts as a check on unbridled and unlawful state power. It is further critical to note that '*jus cogens*' principles apply not only to treaties but also to 'any other act or action of States' (Pamela J Stephens 'A categorical approach to human rights claims: *Jus cogens* as a limitation on enforcement' (2004) 22 *Wis. Int'l LJ* 245).

Under an objective approach, *jus cogens* can be defined as 'as a concept embodying the community interest and reinforced by its link with public morality [existing] in modern international law as a matter of necessity' (Alexander Orakhelashvili *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006)). As prognostications of the individual and collective conscience, it materialises as both identity values for society and ordering factors of social practices (Andrea Bianchi 'Human rights and the magic of *jus cogens*' 2008 (19) *European Journal of International Law* 491).

### Non-derogable rights are core human rights *jus cogens*

'Human rights norms do not exist for the benefit of states but the benefit of human beings subject to their power' (Fox-Decent and Criddle (*op cit*)). Several international treaties spell out the specific obligations of governments to respect the human rights of their citizens. The major assumptions behind the internationally recognised human rights are that these rights are -

- immutable, not being able to be taken away by any state party;
- universal, always applying to all persons; and
- interdependent and indissoluble, requiring respect for specific individual rights as mutual reinforcement for respect of all rights (International Covenant on Civil and Political Rights (ICCPR) GA Res 2200A (XXI), 1966, Tom Farer 'The hierarchy of human rights' 1992 (8) *American University International Law Review* 115).

'While these assumptions would seem to dictate that respect for human rights must be unconditional, international law provides governments an exception, ... whereby governments may deviate from the assumption of unconditional respect for some rights during declared states of emergency' (David L Richards and K Chad Clay 'An umbrella with holes: Respect for non-derogable human rights during declared states of emergency, 1996-2004' 2004 (13) *Human Rights Review* 443). In terms of international human rights law, however, certain fundamental rights can never be derogated from under any circumstances, even

in times of a public health emergency. These rights are known as non-derogable rights, because of their normative specificity and status, non-derogable rights are core human rights *jus cogens* and obligations *erga omnes*. Under case law and legal doctrine, *jus cogens* comprise a particular form of constitutional rules, which every government is obligated to follow. Being compelling law, it does not give a government the right to opt-out, as is the case with other international norms deriving from custom or treaty. Peremptory norms limit the ability of the state to create public policy, which would contradict *jus cogens*. Any act, or health policy of the state contrary to *jus cogens*, would represent a breach of the international legal order (Teraa Koji 'Emerging hierarchy in international human rights and beyond: From the perspective of non-derogable rights' 2001 (12) *European Journal of International Law* 917).

Article 4 of the ICCPR specifies a list fundamental human right from which no derogation is allowed. This list, *inter alia*, includes:

- The right not to be arbitrarily deprived life.
- The right not to be subjected to torture.
- The right not to be subjected to cruel, inhuman, or degrading treatment or punishment and not to be subjected to medical or scientific experimentation without free consent.

Other *jus cogens* norms include prohibitions on crimes against humanity, war crimes, genocide, and slavery.

### Fiduciary criterion of legitimacy

To determine whether state action is legitimate and lawful or not, eminent legal scholars and authors of the book *Fiduciaries of Humanity: How International Law Constitutes Authority* (New York: Oxford University Press, 2016), Professors Fox-Decent and Criddle argue that the 'fiduciary criterion of legitimacy' test should *inter alia* be analysed (Fox-Decent and Criddle (*op cit*)).

The fundamental idea is that the norms of international human rights law and *jus cogens* originate from a fiduciary relationship between the state and individuals subject to its powers. The state's primary duty is to provide a system of government that respects human rights norms.

It fulfils this duty, in part, by governing through norms that conform to its international legal obligations (Predrag Zenović 'Human rights enforcement via peremptory norms - a challenge to state sovereignty' Riga Graduate School of Law Research Papers 6 (2012)).

Irrespective of whether government ethics rules have been adopted or implemented, public officials have a gen-

eral 'fiduciary duty to carry out their duties in a manner that is faithful to the public trust'. Even if no ethics code has been adopted, or if no specific ethics code provision is applicable, public officials must act in a manner that aligns with their common-law fiduciary-duty responsibilities (Vincent R Johnson 'The fiduciary obligations of public officials' 2019 (9) *St Mary's Journal on Legal Malpractice & Ethics* 298).

Professors Fox-Decent and Criddle explain:

"The fiduciary criterion of legitimacy is a standard of adequacy for assessing the normative legitimacy and lawfulness of the actions of international public actors. The criterion demands that public actions have a representational character in that, for them to be legitimate and lawful, they must be intelligible as actions taken in the name of, or on behalf of, the persons subject to them' (Criddle and Fox-Decent (*op cit*)).

By their very nature, peremptory norms make illegal public policies that violate core human rights that could never be rationally understood to be implemented in the name of the individual's subject to them. Genocide, torture, slavery, arbitrary detention, and medical experimentation without free and informed consent are not rationally comprehensible as policies that could be adopted in the name of, or in the best

interest of, their victims. In the case of medical experimentation without informed consent, for example, it would be morally reprehensible to mandate citizens to be subjected to a medical experiment that may potentially cause death, disability, or acute ailment.

By distinction, policies that modestly limit fundamental human rights for rational reasons (eg, health warnings on cigarette packages, rules relating to seatbelts, the prohibition against acquiring or selling drugs deemed harmful) are intelligible as public policies that could be adopted in the name of, and in the best interest of, the persons subject to them. Publicly justifiable limitations on certain human rights can, therefore, be consistent with fiduciary norms on condition that these limitations include principles of integrity, morality, and legality (Fox-Decent and Criddle (*op cit*)).

In the case of *jus cogens* norms, no such justification is possible because any infringement of these norms would constitute a wrongful violation of non-derogable fundamental human rights, and as such cannot sensibly be seen as an action taken in the name of, or in the best interest of, the persons made to suffer the violation.

### Conclusion

A *jus cogens* norm is a legal standard 'recognised by the international com-

munity of states as a whole as a norm from which no derogation is permitted' (Ulf Linderfalk 'The effect of *jus cogens* norms: whoever opened Pandora's Box, did you ever think about the consequences?' 2007 (18) *European Journal of International Law* 853).

There is a 'fiduciary principle' within international law analogous to the power-conferring rule *pacta sunt servanda* that transmutes international accords into binding treaties. The fiduciary principle permits states to retain and utilise public powers, but on the condition that those powers are used in the name of or in the best interest of their citizens.

In this context, the fiduciary criterion of legitimacy is a valuable standard to determine the legitimacy of government policy and practice.

Dr Willem van Aardt *BProc (cum laude) LLM (UP) LLD (NWU)* is an Admitted Attorney of the High Court of South Africa, Admitted Solicitor of the Supreme Court of England and Wales and an Extraordinary Research Fellow at North-West University - Research Unit Law Justice and Sustainability Potchefstroom Campus.

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# The proper interpretation of the word 'offence' – when an accused commits an offence while out on bail

By  
Morganambal  
Padavattan

Where an accused has allegedly committed an offence referred to in sch 5 of the Criminal Procedure Act 51 of 1977 (the CPA) while they were on bail for an offence referred to in sch 5 of the CPA, that accused person will have to apply for bail in terms of s 60(11)(a) of the CPA. Similarly, where an accused has allegedly committed an offence referred to in sch 1 of the CPA while they were on bail for an offence referred to in sch 1 of the CPA, such an accused would have to apply for bail in terms of s 60(11)(b) of the CPA.

In the matter of *S v Dlamini*; *S v Dladla*

and Others; *S v Joubert*; *S v Schietekat* 1999 (4) SA 623 (CC), the Constitutional Court (CC), among others, declared the provisions of s 60(11)(a) and 60(11)(b) of the CPA, constitutional. The CC in *Schietekat* was never called on to consider any of these specific provisions listed in sch 5 and sch 6 of the CPA. This article concerns the proper interpretation to be given to the word 'offence' in the phrase 'was released on bail in respect of an offence' referred to in both sch 5 and sch 1 of the CPA. The article also contends that the proper interpretation to be given to that word is that the offence for which an accused was on bail must be an offence in respect of which there is a reasonable prospect of conviction and not an offence where, on a balance of probabilities, there is a likelihood that an accused will be acquitted.

Where an accused person does not adduce evidence, which establishes on a balance of probabilities that the ac-

cused will in all likelihood be acquitted, a prosecutor can rest easy in the knowledge that there is no duty on the state to adduce any evidence concerning the strength of the state's case (see in this regard *S v Mathebula* 2010 (1) SACR 55 (SCA)). Where an accused relies on the fact that the state's case against them is weak, and that bail should be granted as a result thereof, such an accused is required to adduce evidence, which establishes on a balance of probabilities that they will be acquitted (see *Mathebula*). Section 60(11)(a) and s 60(11)(b) of the CPA, respectively, complicates this rather easy task.

As pointed out earlier, where an accused person has allegedly committed an offence referred to in sch 5 of the CPA while they were on bail for an offence referred to in sch 5 of the CPA, that accused person will have to apply for bail in terms of s 60(11)(a) of the CPA. Schedule 5 of the CPA has a similar provision,



which provides that where an accused has allegedly committed an offence referred to in sch 1 of the CPA while they were on bail for an offence referred to in sch 1 of the CPA, such an accused would have to apply for bail in terms of s 60(11)(b) of the CPA.

In both these instances, the mere fact that an accused was released on bail for an offence referred to in sch 5 or sch 1 is the fact which triggers the application of s 60(11)(a) of the CPA. This provides that an accused shall be detained in custody unless they adduce evidence, which satisfies the court that 'exceptional circumstances' exist and will permit their release from custody. (As to the meaning of 'exceptional circumstances' and the constitutionality thereof, see *Schietekat* at paras 58 to 80).

The applicability of s 60(11)(b) of the CPA, provides that the court shall order that the accused be detained in custody unless the accused adduces evidence that satisfies the court that the 'interest of justice' permits their release from custody. (As to the meaning of the phrase 'interest of justice' and the constitutionality thereof, see *Schietekat* at paras 47 to 50 and para 101).

When bail is granted on the basis that the accused has adduced evidence, which establishes on balance of probabilities that they will be acquitted for the offence that – for purposes of this article – is an offence referred to in either sch 5 or sch 1 of the CPA (and the accused is subsequently charged for having committed an offence referred to in either sch 5 or sch 1 of the CPA) the fact that the accused will be acquitted for the offence for which they had been granted bail is or appears, at face value, to be irrelevant. The purpose of these provisions in sch 5 and sch 6 of the CPA, alluded to above, and what it is aimed at, is the refusal of bail where it is established that an accused has the propensity to commit offences referred to in either sch 1 or sch 5 of the CPA, as the case may be (see in this regard *S v Rudolph* 2010 (1) SACR 262 (SCA) where the propensity to commit violence was a factor taken into account in the refusal of bail).

Where there is a likelihood that an accused will, if released on bail, among others, commits an offence referred to in sch 1 of the CPA, the 'interests of justice' does not permit the release of an accused on bail and in those circumstances and it is very likely that a presiding officer will refuse bail considering the provisions of s 60(4)(a) of the CPA. It provides that the interest of justice does not permit the accused to be released on bail where there is a likelihood that the accused, if released on bail, will commit an offence referred to in sch 1 of the CPA. The same would apply, I submit, where there is a likelihood that an accused will commit an offence referred to in sch 5 of

the CPA were they to be released on bail. In the scenario postulated by this article the likelihood that an accused has the propensity to commit either an offence referred to in sch 1 or sch 5 of the CPA will be established by the fact that the accused was granted bail for an offence referred to in either sch 1 or sch 5 of the CPA, as the case may be.

The legislature could have never contemplated that there could be a scenario where the offence referred to in sch 1 or sch 5 of the CPA, as the case may be, and for which the accused was on bail could be an offence for which the accused will be acquitted or would, in all probability, be acquitted or in one respect of which there is no reasonable prospect of conviction. The reason for this contention is that a prosecutor may only charge an accused person where the prosecutor concerned has reasonable and probable cause to believe that the accused is guilty of an offence (see *Minister of Police and Another v Du Plessis* 2014 (1) SACR 217 (SCA) para 28 to 31). There must be a reasonable prospect of conviction, otherwise a prosecution should not be commenced or continued (see *S v Doorewaard and Another* 2021 (1) SACR 235 (SCA), where Ponnann JA at para 83 cites with approval DWM Broughton 'The South African prosecutor in the face of adverse pre-trial publicity' 2020 (23) *PER/PELJ* 1 at 12 to 13).

The offence concerned must be one in respect of which there is a reasonable prospect of conviction and not one which will in all probability result in an acquittal. Such an interpretation is one which accords with s 39(2) of the Constitution, in that it promotes an interpretation of sch 5 and sch 6 of the CPA which promotes the spirit, purport and objects of the Bill of Rights and is also an interpretation which does not lead to absurdity (as to the proper method of interpretation see in this regard *Cool Ideas* 1186 CC v *Hubbard and Another* 2014 (4) SA 474 (CC) at para 28; see also *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)).

An interpretation of the word 'offence' in the phrase 'was released on bail in respect of an offence' in sch 5 and sch 6 of the CPA, as alluded to above, as an offence in respect of which the accused will in all probability be acquitted would result in an interpretation, which limits s 12(1)(a) of the Constitution which provides that 'everyone has the right to freedom and security of the person, which includes the right –

(a) not to be deprived of freedom arbitrarily or without just cause'.

In the same vein, an interpretation of the word 'offence' in the phrase 'was released on bail in respect of an offence' referred to in sch 5 or sch 6 of the CPA holds that the word 'offence' can be one in respect of which there is no reason-

able prospect of conviction or that evidence, which establishes that there is no reasonable prospect of conviction is irrelevant, such an interpretation will contravene s 12(1)(a) of the Constitution. This will amount to an arbitrary deprivation of the right to freedom or a deprivation of the right to freedom without just cause, particularly where bail is refused on the basis that the accused has the propensity to commit an offence referred to in either sch 1 or sch 5 of the CPA. These are all cogent reasons why the word 'offence' in the phrase 'was released on bail in respect of an offence' referred to in sch 5 and sch 6 of the CPA must be interpreted to mean an offence in respect of which there is a reasonable prospect of conviction and not one in respect of which, on a balance of probabilities, an accused will likely be acquitted.

While bail proceedings are not primarily concerned with the question of guilt or innocence (see *Schietekat* at para 11), criminal proceedings against an accused in terms of the CPA must start from the premise that there is at least a reasonable prospect of conviction in respect of an offence for which an accused is charged, (see *Doorewaard*), and not an offence in respect of which, on a balance of probabilities, there is a likelihood that the accused will be acquitted. Consequently, any court hearing a bail application for the offence which was allegedly committed while an accused was released on bail for an offence referred to in either sch 1 or sch 5 of the CPA would be duty bound to consider evidence from the applicant. This will establish whether the offence for which they were granted bail was one in respect of which the court, who heard the first bail application and for which bail was granted, found that the accused will or would in all probability be acquitted or that there was no reasonable prospect of conviction for purposes of establishing whether s 60(11)(a) or s 60(11)(b) of the CPA, as the case may be, finds application at all. A failure to do so by the presiding officer could lead to an arbitrary deprivation of freedom and, therefore, result in prejudicing the accused.

Practitioners will be well advised to ascertain the basis upon which an accused was previously granted bail as this may determine whether an application for bail is one in terms of sch 1, sch 5 or sch 6 of the CPA.

**Morganambal Padavattan LLB LLM (Unisa) LLM (Corporate Law)** is a lecturer at the University of Fort Hare in East London.





# Young legal practitioners must work hard and remain consistent



By  
Kgomotso  
Ramotsho

**D**e Rebus News Reporter, Kgomotso Ramotsho, spoke to legal practitioner and Vice-President of the Law Society of South Africa (LSSA), Eunice Masipa. Ms Masipa originally hails from Polokwane in the Limpopo Province, and she is the first-born child of three. Her father is a retired school principal, and her mother is a practicing nurse. Ms Masipa matriculated in 2006 from an all-girls catholic school. She then enrolled for an LLB degree at the University of Limpopo in 2008 and completed her degree in 2011.

Ms Masipa served her articles with Selo-lo Tlou Attorneys Inc, a medium-sized law firm based in Pretoria. On completion of her articles and admission as a legal practitioner, Ms Masipa added that she was employed as a Senior Industrial Relations Consultant at LabourNet, where she served the company for two years before moving to Lipco Law for All as a Senior Legal Advisor. Ms Masipa opened a practice in 2017 under Masipa Attorneys, based in Arcadia, Pretoria.

**Kgomotso Ramotsho (KR): Which area of law are you practising in and why?**

**Eunice Masipa (EM):** I practice in the following areas -

- third party litigation with a focus on Road Accident Fund claims;
- labour and employment law;
- immigration; and
- general civil litigation.

These are the areas of law I have always had a special interest in, most particularly labour and employment law as it gives me the opportunity to contribute in the combat against unfair labour practices and related matters.

**KR: Why did you choose to study law?**



*Legal practitioner and Vice-President of the Law Society of South Africa, Eunice Masipa, says young legal practitioners must work hard and be consistent in their work.*

**EM:** I knew immediately that any profession, which requires maths and science, would be a misfit for me. But on a more serious note, the pursuit of justice has always been my fundamental reason. My grandfather was shot and killed in his shop in 2006 and to date no one has been arrested. This was a way for me to ensure that those who are less privileged, and indigent can access justice and that it not be reserved for those with financial means only.

**KR: You run your law firm, while some legal practitioners' dream of working for a big law firm, why did you choose to open your law firm?**

**EM:** I have always been a very diplomatic person who wanted the freedom to exercise my own discretion. I wanted to create my own path and have the freedom of taking instructions, which are meaning-

ful and align with my moral fibre. In so doing I have had the opportunity to take instructions that protect and advocate for human rights which has been a very fulfilling experience.

**KR: What are some of the challenges you faced when starting your own law firm, especially as a young woman?**

**EM:** It has been a very challenging road. One of the most prevalent challenges I faced in my first couple of years of practice was when prospective clients and senior legal practitioners would ask for my 'Principal'. It was also difficult trying to find a balance between being a young mother and the long hours that I had to put in at the office. But having a mentor and being surrounded by such great leaders assisted in that I was able to put measures and systems in place to create that balance.

**KR: How did it feel when you were nominated one of the Vice-Presidents of the LSSA?**

**EM:** I was truly humbled by the confidence that my colleagues and constituency had in my capabilities. It was also a victory for women and more particularly young women. This is an opportunity to continue advocating for gender transformation.

**KR: Do you think the youth in the legal profession is visible enough? Would you say they have a voice, and are they being heard?**

**EM:** Yes, I believe the youth is being heard. The LSSA is a constituency-based organisation and I believe most constituencies have a youth desk where issues affecting young legal practitioners are ventilated and/or addressed. One can say a case in point is being appointed as Vice-President of the LSSA as a young person, which indicates that young people are being taken seriously by the profession.

**KR: Who is your mentor and why?**

**EM:** My mentor is Selolo Tlou. He is one of the people I looked up to and he contributed in my studying towards an LLB. The way he approaches the practice of law always inspires me and I aspire to reach the great lengths that he has reached. There are other great leaders whom I look up to that have shaped me to be the legal practitioner I am today.

**KR: When you were still a candidate legal practitioner, did you ever imagine that you would one day play a role in some of the positions you are holding in the legal profession now?**

**EM:** I have always participated in professional related activities from tertiary level and made sure that I made meaningful contributions where I had the capabilities to do so. I believe it was not by chance or luck that I am in the position I am today. However, I never imagined that one day I would be in this position. I am extremely humbled.

**KR: There are a lot of young black female candidate legal practitioners looking up to you, who might want to walk the same path as you, what advice would you give to them?**

**EM:** Firstly, be an honourable and credible person before anything. Be a genuine good human being and do not forget to walk closely with God. Work hard and remain consistent. Never stop reading as we all know that the law is ever evolving, and one needs to stay on top of things. Never lose sight of the reason why you entered the profession, it will keep you grounded. Lastly, but most important, get a mentor.

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



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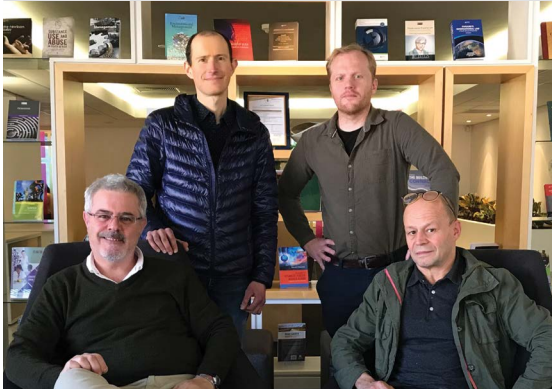
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P.O Box 3326 | Fax: 086 212 6339

### Pretoria Office:

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# THE LAW REPORTS



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

May 2022 (3) South African Law Reports  
(pp 1 – 320); May 2022 (1) South African  
Criminal Law Reports (pp 447 – 556)

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, Grahams-town  
MM: Mpumalanga Division, Mbombela (Nelspruit)  
GP: Gauteng Division, Pretoria  
SCA: Supreme Court of Appeal  
WCC: Western Cape Division, Cape Town

## Children

**Hague Convention on the Civil Aspects of International Child Abduction – assessment of art 13(b) defence to application for return of unlawfully abducted child: *LD v Central Authority (South Africa)* and *Another* 2022 (3) SA 96 (SCA)** dealt with an appeal to the SCA against the dismissal, by a Full Court of the GP, of an application under art 12 of the Hague Convention on the Civil Aspects of International Child Abduction. The application was brought by the appellant, LD, for the return of his minor child, E, to her place of habitual residence in Luxembourg after her abduction to South Africa (SA) by her mother, PH, in October 2018. The SCA was asked to decide whether PH should succeed in her art 13(b) defence to E's return on the ground that there was a grave risk that it would expose her 'to physical or psychological hardship or otherwise place [her] in an intolerable situation'.

E was born in Belgium in August 2014. At the time LD, who was Belgian and PH, who was French, were living together in Belgium with S, PH's son from a previous marriage. They then moved to Luxembourg, but shortly afterwards PH and LD

separated. E's primary residence was with PH in Luxembourg. During 2016 to 2018 Luxembourg courts steadily increased LD's rights, eventually granting him joint parental authority, including the right to determine E's place of residence.

In 2018, PH married a South African man and applied to a Luxembourg court for leave to take E with her to live in SA. The court refused PH's application and increased LD's visitation and accommodation rights. Then, in open violation of the court's orders, PH removed E from Luxembourg to SA without LD's consent. LD obtained an order in the Luxembourg court that PH return to Luxembourg with E.

LD's Hague Convention application was launched in the GP in January 2019. Collis J ordered E's return to Luxembourg but a Full-Bench appeal by PH was successful. LD was then granted special leave to appeal to the SCA.

A majority of the SCA Bench (Plasket JA and Gorven JA, with Saldulker ADP and Hughes JA concurring) rejected the appeal. While describing PH's abduction of E as 'deplorable', they pointed out that the focus nevertheless had to be on the best interests of E. If this had the effect of rewarding PH for her bad behaviour, that was an unfortunate but unavoidable result.

The judges went on to state that it would indeed be in the best interests of E that she remains in SA, because returning her to Luxembourg would likely have a profound adverse effect on her. She had a strong bond with PH, her half-brother S, and PH's new husband. There was a grave risk that breaking these

bonds and dismantling the family unit would expose E to the 'psychological hardship' and 'intolerable situation' referred to in art 13(b).

In her dissenting judgment, Mocumie JA pointed out that the focus of art 13(b) was the risk of harm to the child in the event of return. PH had failed to prove her case in this regard, the crux of which was that she herself faced the risk of harm in that she might be arrested on her return to Luxembourg. PH had in any event failed to prove any such risk since the Central Authority for Luxembourg had confirmed that there was no warrant out for her arrest and undertaken to ensure that she would not be prosecuted.

## Constitutional law

**Freedom of expression and the Public Protector's findings on Helen Zille's 'colonialism' tweets:** In March 2017, Helen Zille, then Premier of the Western Cape, created her infamous tweets regarding the benefits of colonialism, for which she duly apologised. The Public Protector (PP), acting on a complaint by a member of the provincial legislature, found that they violated the right to dignity in s 10 of the Constitution and in addition constituted incitement to violence contrary to s 16(2)(b) of the Constitution. When the WCC refused to set aside the PP's findings, Ms Zille appealed to the SCA. In its judgment, reported as *Premier, Western Cape v Public Protector and Another* 2022 (3) SA 121 (SCA), the SCA (per Molemela JA in a unanimous judgment) ruled that the PP's finding on the violation of s 10 was based, irrationally, on Ms Zille's apology rather than on



the tweets themselves. As to the finding on incitement, the judge pointed out that the PP had failed to adopt the required objective approach in the interpretation of the tweets or to provide a basis for her conclusion that they were likely to incite violence. The SCA, therefore, set aside the PP's findings against Ms Zille.

***Lex non cogit ad impossibilia* (the impossibility principle) in constitutional context:**

In *Van Zyl NO v Road Accident Fund* 2022 (3) SA 45 (CC) the parties were Ms Phillipa Susan van Zyl, the *curatrix ad litem* of one Jacobs, who had been mentally incapacitated by brain injuries he sustained in a motor vehicle accident. Crucially, he was unable to lodge his claim for compensation against the Road Accident Fund (RAF). His mother had lodged it on his behalf, but only some seven years after the accident, in January 2017. Subsequently, in November 2017, Ms Van Zyl (the appellant in the CC) was appointed Mr Jacobs' *curatrix ad litem*. So, when, in March 2018, the appellant instituted an action for damages in the ECG, the RAF (the respondent in the CC) predictably responded by pleading prescription under s 23(1) of the Road Accident Fund Act 56 of 1996 (the RAF Act). The plea was upheld, and Mr Jacobs claim duly dismissed.

It appeared that, despite the debilitating effects of his injuries, Mr Jacobs did not fall in any of the classes of persons s 23 expressly protected against prescription, namely minors, persons detained under mental-health legislation and persons under curatorship. The appellant's invocation of ss 12(3) and 13(1) (a) of the Prescription Act 68 of 1969, under which the running of prescription would have been suspended, floundered because s 23 explicitly excluded the operation of 'any law' that would allow for a prescription period different to that specified in s 23.

In an appeal, the SCA ruled that s 23 of the RAF Act exclusively governed the prescription of claims against the RAF and that the invoked provisions of the Prescription Act could, therefore, not save Mr Jacobs' claim from prescribing. The SCA never addressed the appellant's impossibility argument, namely that the maxim *lex non cogit ad impossibilia* (the impossibility principle) should operate to rescue Mr Jacobs' claim from prescription. Instead, it invoked *Road Accident Fund and Another v Mdeyide* 2011 (2) SA 26 (CC), in which the CC held that s 12(3) of the Prescription Act did not apply to RAF claims, pointing out that prescription could have been avoided if Mr Jacobs had been timeously detained under mental health legislation or if a curator had been appointed and instituted his claim in time.

In a further appeal to the CC, a majority of the judges agreed with the appel-

lant's argument that since Mr Jacobs' injuries had made it 'impossible' for him to have instituted his action within the three years required by the RAF Act, it could not have been the intention of the legislature to visit it with prescription. The respondent in turn argued that the exclusion of persons like Mr Jacobs (called 'affected persons' in the judgment) from protection against prescription was justified, since to include them would result in an intolerable economic and administrative burden on the RAF. The respondent further argued that the expeditious, cost-effective finalisation of claims was a legitimate governmental purpose to which s 23 was rationally connected.

The CC delivered three judgments –

- one by Pillay AJ (with Mogoeng CJ and Khampepe J agreeing);
- a concurring one by Jafta J (with Madlanga J, Majiedt J, Mhlantla J, Tlaletsi AJ and Tshiqi J agreeing); and
- a dissenting one by Theron J.

Pillay AJ wrote that the common law should, by means of the impossibility principle, protect affected persons like Mr Jacobs from the prescription of their road accident claims. He pointed out that the *Mdeyide* judgment did not deal with affected persons or deny them protection against prescription if the common law, in the guise of the impossibility principle, were to come to their rescue. The impossibility principle – which was grounded in nature, science, and reality – had been recognised in our courts as the appropriate instrument to excuse non-compliance with the impossible. To conclude that the 'any law' exclusion in s 23(1) excluded the application of the impossibility principle would amount to an unconstitutional perversion of justice, contrary to the rights to human dignity and access to the courts. Hence the appeal should succeed.

Jafta J agreed with Pillay AJ that Parliament could not have intended that affected persons should do the impossible. The s 23 exclusions amounted to an absurdity that could not have been contemplated by Parliament. While it was true that s 23 superseded other laws on prescription, it did not exclude the impossibility principle because that principle did not regulate prescription but rather relieved a person from complying with the requirements of a law in circumstances where it was impossible to comply. Nor was it clear what legitimate government purpose would be served by a provision that required individuals to do the impossible, something no sensible parliament would ever do. Jafta J, therefore, agreed with Pillay AJ that the appeal should succeed.

In her dissenting judgment, Theron J argued that the majority failed to explain why the impossibility principle was not expressly excluded by the 'any law' ex-

clusion of s 23. The majority judgments did not suggest that the impossibility principle was not a law or that it did not operate contrary to s 23 but failed to then adequately explain why it did not fall within the exclusion. Section 23 unequivocally excluded the operation of any law allowing for a prescription period different to that which it specified, and there was no authority for the proposition that Parliament could not exclude the impossibility principle – in fact, it had to enjoy such power. While the Constitution might require that the relevant common-law principles should be applicable in a situation such as the present, the proper place for such an argument was a frontal challenge of the constitutional validity of s 23(1). For these reasons Theron J would have dismissed the appeal.

**Life partnership – the constitutionality of the omission of the surviving partner from the categories of 'spouse' and 'survivor' in respectively the Intestate Succession Act 81 of 1987 and Maintenance of Surviving Spouses Act 27 of 1990:** The CC's decision in *Bwanya v The Master of the High Court and Others* 2022 (3) SA 250 (CC) arose from the WCC's dismissal of a challenge to the constitutionality of the definition of 'survivor' under s 1 of the Maintenance of Surviving Spouses Act. The definition of a surviving 'spouse' in a 'marriage' dissolved by death effectively excluded partners in a permanent heterosexual life partnership in which the partners had undertaken reciprocal duties of support from an entitlement to claim maintenance in terms of the Maintenance of Surviving Spouses Act.

The facts were that the applicant, Ms Jane Bwanya and Mr Anthony Ruch had been involved in a relationship that comprised most, if not all, characteristics of a marriage. They met and became romantically involved in 2014. Later that year Ms Bwanya permanently moved in with Mr Ruch. From then on, they split their time between Mr Ruch's Camps Bay and Seaways properties. Ms Bwanya retained her own place at The Meadows, where she was employed as a domestic worker. The couple's friends were aware of the relationship. At social gatherings Mr Ruch would introduce Ms Bwanya as his wife, and they often hugged and kissed in the presence of others. By October 2015, they were contemplating cementing the relationship with a baby. In November 2015, Ms Bwanya accepted a marriage proposal from Mr Ruch. Mr Ruch died in April 2016, before the proposed marriage could be consecrated.

Ms Bwanya then lodged two claims against Mr Ruch's intestate estate (a will left by Ruch had failed) –

- a claim for maintenance under the Maintenance of Surviving Spouses Act; and

- a claim for inheritance under the Intestate Succession Act.

Ms Bwanya's claim was, however, rejected by the executor on the ground that neither the Maintenance of Surviving Spouses Act nor the Intestate Succession Act made provision for a claim by a surviving partner of the kind of relationship Mr Ruch and Ms Bwanya had enjoyed. This prompted Ms Bwanya to institute the WCC proceedings, in which she alleged that the Maintenance of Surviving Spouses Act's omission of a partner such as herself was a violation of her constitutional rights to equality and dignity.

Before the matter was heard, the parties settled, but Ms Bwanya persisted nonetheless for declarators that the omissions were indeed unconstitutional and invalid. She met with mixed success, the WCC finding that while it was precluded from any invalidation of s 2(1) of the Maintenance of Surviving Spouses Act by established precedent, she was entitled to an order declaring the Intestate Succession Act omission in its s 1(1) invalid. Ms Bwanya applied for leave to appeal the finding in respect of the Maintenance of Surviving Spouses Act and for confirmation of that in respect of the Intestate Succession Act.

The CC (per Madlanga J, with Khampepe J, Majiedt J, Pillay AJ, Theron J and Tlaletsi AJ concurring), having found that the maintenance issue plainly engaged its jurisdiction, granted leave to appeal, upheld the appeal, and confirmed the declaration of invalidity. In coming to its decision, the CC found that while the maintenance matter would be, as between the parties, of no practical effect and thus moot, it was nonetheless in the interests of justice to hear it on account of the importance of the point implicated – it affected substantial numbers of South Africans – and on the further ground that comprehensive arguments had been advanced. However, standing in the way of an inclusion of heterosexual life partnerships in s 2(1) of the Maintenance Act was *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC), in which the CC itself had concluded that the section's omission of such partnerships was discriminatory, but not unfairly so – a finding that CC now considered wrong, though not clearly so. However, the *Volks* no-unfairness finding could be bypassed and a finding of unfairness made. The *Volks* finding rested on the assumption that couples who had not married had refrained from doing so out of a mutual choice to that end. However, the female partner often had no choice in this regard even where she was desirous of marriage. *Volks'* finding that it was inappropriate to burden a partner's estate with a maintenance duty had been eroded by the subsequent common-law recognition of a claim for loss of a partner's support.

There was no convincing justification

for excluding surviving partners from s 2(1)'s benefit. Its purpose would not be thwarted by the inclusion of the survivor and doing so would not undermine the institution of marriage.

When it came to the Intestate Succession Act, its exclusion of opposite sex life partnerships amounted to unfair discrimination. Pertinent in this regard was that same sex life partners already enjoyed the benefits of the section and the vulnerability of the female partner in an opposite sex life partnership.

The CC accordingly made an order declaring unconstitutional the omission, from 'survivor' in s 1 of the Maintenance of Surviving Spouses Act and 'spouse' in s 1 of the Intestate Succession Act, of surviving life partners in the position of Ms Bwanya.

## Criminal law

**Trials can be conducted in any official language, but any record submitted to High Court must be translated into English:** In *S v Ndlangamandla* 2022 (1) SACR 546 (MM) the accused was convicted in a magistrates' court of a contravention of s 31 of the Maintenance Act 99 of 1998 for having failed to pay maintenance, and sentenced to one year imprisonment, suspended for five years. Unfortunately, the interpreter failed to interpret parts of the trial, which were in isiZulu, and the missing parts of the record could not be retrieved from the recording system.

On review, Ratshibvumo J (with Greyling-Coetzer AJ concurring) noted that the trial appeared to have been fully conducted in one or two of the official languages, except in those instances where the magistrate would communicate with either the witnesses and/or the accused in isiZulu, and those parts of the trial had not been interpreted into English. He noted further that there was nothing wrong in having a trial conducted in any of the official languages, as all of them were equal and needed to be given equal treatment, but where the trial was conducted in any language other than the court language of record, the presiding officer had a duty to see to it that the record that was submitted to the High Court was translated into English. It was also incumbent on every judicial officer, before embarking on a trial in any other language, to make sure that there were resources to take care of the translation, without causing the wheels of justice to grind to a halt, and thereby prejudicing any of the parties involved.

The court ruled that, in the circumstances, the proceedings were not in accordance with justice where there was no proper trial record to be reviewed, and the conviction and sentence had to be set aside.

## Other criminal law cases

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

- appeal against sentence – facts and circumstances occurring after imposition of;
- admissibility – hearsay evidence;
- bail – renewed application;
- culpable homicide – sentence;
- rape – sentence – life imprisonment;
- seizure – application for return of goods seized;
- sentence – imposition – formulation of;
- trial record – judgment – reasons for;
- trial record – language – duties of magistrate; and
- sentence – imprisonment – non-parole period.

## Prescription

**Prescription of maintenance obligations in consent paper made order of court:** In *SA v JHA* 2022 (3) SA 149 (SCA), Ms JHA had issued a writ of execution against Mr SA in respect of arrear maintenance going back to July 1993, the date of their divorce. The divorce order incorporated a consent paper setting out the applicant's cash maintenance obligations. Although Mr SA failed to pay the maintenance stipulated in the consent paper, Ms JHA did not make any attempt to recover the arrear maintenance until December 2018.

Mr SA approached the WCC for a declaratory order that maintenance obligations under the consent paper which accrued before 1 March 2017 – the due date for payment of maintenance three years prior to the date of service of the writ – had been extinguished by prescription.

At issue was whether such obligations amounted to a 'judgment debt' prescribing after 30 years as contemplated in s 11(a)(ii) of the Prescription Act 68 of 1969 or amounted to 'any other debt' prescribing after three years (s 11(d)). The High Court rejected the application, holding that s 11(a)(ii) applied.

In Mr SA's appeal to the SCA, he contended that the maintenance order did not constitute a final judgment for the purposes of the Prescription Act because it could be varied by the court which granted it for sufficient reason or good cause. He also relied on the fact that the ss 24(1) and (2) of Maintenance Act 99 of 1998 drew a distinction between maintenance orders and orders for a once-off payment of a specified sum of money, with only the latter being described as a civil judgment.

The SCA (per Smith AJA (Dambuza JA and Hughes JA concurring)) held that authoritative case law on the nature of a 'judgment debt' and settlement agree-

ments made orders of court, made it clear that maintenance orders possessed the essential nature and characteristics of civil judgments. That a maintenance order was subject to variation did not detract from the fact that the court granting the maintenance order did so on a consideration of the facts placed before it at the time. Its decision, either by way of a reasoned judgment or by agreement between the parties, disposed of the *lis*, which was in existence between the parties at that point in time. An application for variation of that order, thus introduced a new *lis*, the party applying for such an order having to show changed circumstances justifying a reconsideration of the original decision. The matter was, therefore, *res judicata* on the facts before the court that made the original maintenance order. An aggrieved party who wished to challenge the soundness of the original decision without establishing changed circumstances, could only do so by way of an appeal.

As to Mr SA's attempt to draw a distinction between an 'order' and a 'judgment', the SCA held that it was contrived and did not find support in decided cases. Section 24(1) of the Maintenance Act provided that a maintenance order had the effect of an order or direction of the court made in a civil action. This meant that a maintenance order had the same legal consequences which flowed

from an order made in a civil action. There could be no clearer declaration of the legislature's intention to visit on a maintenance order the legal characteristics of a civil judgment. The court *a quo* was found to have made the correct order, and the appeal was accordingly dismissed.

## Tax

**What is 'voluntary disclosure' for tax purposes?** In *Purveyors South Africa Mine Services (Pty) Ltd v Commissioner, South African Revenue Service* 2022 (3) SA 139 (SCA) the taxpayer had requested a meeting with the South African Revenue Service (Sars) to regularise its value-added tax (VAT) liability, after its auditors advised it that it was supposed to have paid over VAT on the import of an aircraft. The South African Revenue Service confirmed liability, also for penalties. Further correspondence between the taxpayer and Sars followed but the taxpayer took no further steps to regularise its liability for VAT and penalties until 4 April 2018 when it applied for voluntary disclosure relief in terms of s 226 of the Tax Administration Act 28 of 2011 (the TAA).

The South African Revenue Service rejected the taxpayer's application for voluntary disclosure relief on the grounds that the disclosures were not 'voluntary' as contemplated in s 227(a); it did not

contain the facts of which Sars was unaware as those facts had already been disclosed to it prior to the voluntary disclosure application. The taxpayer subsequently approached the High Court for relief which include a prayer for a declaratory order to the effect that its disclosures were voluntary for the purposes of s 227(a). The High Court agreed with Commissioner.

In the taxpayer's appeal to the SCA, it held (per Mathopo JA (Petse AP, Schippers JA, Mokgohloa JA and Molefe AJA concurring)) that whether a voluntary disclosure was prompted by a compliance action was question of fact, to be determined by examining the circumstances in which it was made. The facts showed that from the outset – and well before the submission of its voluntary disclosure application – the taxpayer knew that it was liable for the import value-added tax on the aircraft and penalties, which were not going to be waived. It was prompted by Sars' compliance action, not motivated by any desire to come clean but rather to avoid the payment of fines and penalties. The taxpayer's disclosure to Sars was not made in the context of a voluntary disclosure relief application, and it would, therefore, be unconscionable to treat it any different. Granting the relief sought would be at odds with the purposes of the voluntary disclosure programme – to enhance vol-

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untary compliance with the tax system by enabling errant taxpayers to disclose defaults of which Sars is unaware, and to ensure the best use of Sars' resources. The taxpayer's application did not pass the test. It was not voluntarily made and did not disclose information of which the Commissioner was unaware. The appeal was accordingly dismissed.

## Other cases

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

- asylum seekers;
- attachment of pension interest in divorce matters;
- security for costs in appeals; and

- the validity of the process for the removal of the Public Protector.

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



By  
Kgomotso  
Ramotsho

# Constitutional Court sets aside conviction of former law student

*Tuta v S (CC) (unreported case no CCT308/20, 31-5-2022)  
(Unterhalter AJ (Madlanga J, Majiedt J, Mathopo J,  
Mhlantla J, Theron J and Tshiqi J concurring))*

In a matter between Liqhayiya Tuta (the applicant) and the state (the respondent) the Constitutional Court (CC) upheld the appeal and set aside the sentence and the conviction of the appellant. The CC gave reasons for its decisions on 31 May 2022. This was after the applicant approached the CC to challenge his sentencing that was handed down by the Gauteng Division of the High Court, Pretoria in 2019.

## Background

According to the evidence adduced by the state on 2 March 2018, the applicant, who was the accused at the time, was crossing the street, and walking with another man. According to the testimony of Constable Lawrence Makgafela on patrol duty, one of the men was hiding what looked like a laptop under his tracksuit jacket, which appeared suspicious. Makgafela further stated that the lighting in the street was good, and he and his partner, Constable Nkosinathi Sithole, kept the men under surveillance. The policemen followed the applicant and the man he was with, which led to a chase, with Constable Makgafela pursuing the two men on foot while Constable Sithole was in a car, which he used to block the two men.

According to the evidence, Constable Sithole managed to trip the man carrying the laptop, who fell and caused the laptop to slide away from the man's body.

Constable Sithole then pinned the man down by stepping on his back and neck behind his shoulders. The man struggled to get away, but was pinned down. The policeman identified themselves and asked the man why he attempted to run away and received no answer. The policemen proceeded to tell the man that he was arrested for possession of suspected stolen property and proceeded with the arrest. According to the state after Constable Makgafela returned from fetching handcuffs, he was hit on the left side of the face, to a point where he felt dizzy. He also realised at the time that something had happened to his colleague Constable Sithole.

According to the state's evidence, Constable Makgafela was bleeding and could not even use his phone due to the blood dripping all over his phone. The evidence further added that the two constables were assisted by a young man who went and reported the incident to a nearby police station. However, the defence stated that Mr Tuta was defending himself, from two men who never identified themselves as policemen. Mr Tuta was under the impression that the two men were about to rob and kidnap him.

The defence stated that Mr Tuta was a law student at the University of South Africa who resided in Sunnyside, a suburb in Pretoria, at the time of the incident. He was accompanying a friend on the night of the incident. According to the defence, Mr Tuta carried a knife in his trouser pocket due to the fact that it

was a dangerous area. While walking on the sidewalk he noticed a car approaching at speed. The defence stated that the occupants in the car addressed Mr Tuta and his friends in a language they did not understand.

The defence added that Mr Tuta and his friend ignored the occupants and proceeded walking, until one of the occupants exited the car with a gun, which he cocked, causing Mr Tuta and his friend, to run to a nearby Shell garage where his friend caught up with him. According to the defence the same man with the gun caught up with them, which led to Mr Tuta and his friend running again. The man with the gun chased them in the middle of the street, when the car driving at speed stopped right in front of Mr Tuta.

The defence stated that Mr Tuta was tripped, and he fell on his back and the man stepped on his chest. Mr Tuta asked the man what they had done, he was, however, insulted and sworn at. He was pulled to his feet and taken to the car. According to the defence, Mr Tuta was forcefully pushed into the car. He resisted and took out his knife and stabbed the man who at the time held a taser. Mr Tuta tried to run after seeing a blue light in the distance, but he was apparently blocked by the second man. Mr Tuta stabbed the second man as well. According to the defence, Mr Tuta said he did not see where he stabbed the two men.

The defence stated that Mr Tuta managed to break free and ran away, seek-

ing help at the first place of business he found open, but he was chased away by security. He then ran to his place of residence and alerted security and later his friends and his sister whom he told over the phone. According to the defence, the following morning of the incident, Mr Tuta accompanied by his sister went to report the incident at the police station in Sunnyside, explaining what had happened. However, the police said he could not open a docket, but instead, supplied Mr Tuta with a telephone number but did not say whose number it was. Mr Tuta was turned away by the police. He was later arrested and handed in the denim jacket he was wearing at the time. He denied he had a laptop with him that night and denied the men involved had identified themselves as police to him.

The defence pointed out that after he was arrested, Mr Tuta made a statement to a police officer and went on to point out the places where the incidents occurred. According to Mr Tuta's, fellow student and friend J Nkuna, while walking down the street noticed a vehicle behind them and people calling in an unknown language. Mr Tuta said they must walk faster lest they got robbed. A person then shouted behind them, and they heard the cocking of a firearm. The two started running and split up. Mr Nkuna was distressed by the incident of a cocking firearm and decided to go home. He did not meet with Mr Tuta again that night. On his way home he came across a scene surrounded by a crowd. On the ground were two people but he could not see them. He heard one person cry out that the police and an ambulance should be called. According to Mr Nkuna, he did not see bulletproof vests that night and he did not hear anybody calling out that they were 'police'.

In deciding the issue, the High Court said it had to consider all the evidence, including circumstantial evidence holistically. The High Court added that Constable Makgafela made a good impression as a witness, that he did not contradict himself and his evidence was clear and satisfactory in every material respect. The High Court said that the following uncontested circumstances were material:

(i) The two experienced policemen were tasked to patrol the crime ridden area of Sunnyside in accordance with a police project called *Fielu*, when they noticed two pedestrians.

(ii) The policemen followed the two pedestrians for some time down several streets, for a considerable distance, and even losing sight of them at a stage. The policemen kept their vigilance and got sight of them again and decided to move in'.

The High Court said the reason why the policemen followed the two men was

that they suspected that one of them was in a possession of a suspected stolen object that looked like a laptop. Although the laptop was never recovered. The High Court added that, the version of Constable Makgafela had a ring of truth. That otherwise it had to be inferred that the policemen for an unknown reason targeted two innocent pedestrians. The High Court said that it did not make sense.

The High Court found that the state had proved its case beyond reasonable doubt and that Mr Tuta's version of putative self-defence should be rejected as false, subsequently concocted, and not reasonably possibly true.

The High Court convicted Mr Tuta on both counts as charged namely, count 1: Murder; and count 2: Attempted murder.

## The CC's majority judgment

In the majority judgment by Unterhalter AJ, he said that he was fortified in his conclusion that the trial judge made an error of law in the assessment of the applicant's evidence at trial. He added that he engaged this inquiry, not to determine whether the trial judge failed to apply the law, a matter, standardly, outside of the CC's jurisdiction, but rather to consider whether the trial judge sought to make findings as to the applicant's state of mind, free of considerations of reasonableness.

The court pointed out that the trial judge approached the case on the basis that if he believed Constable Makgafela's evidence, the applicant must be disbelieved, more particularly as to whether Constable Makgafela had informed the applicant that his pursuers were police officers. Unterhalter AJ added that this binary approach failed to consider whether the applicant, in fact, appreciated what had been said to him. The applicant's evidence was that he was sworn at by his pursuers in a language he did not fully understand. Whether the applicant's version was reasonably possibly true required a careful assessment of what occurred after the applicant had stabbed the police officers.

Unterhalter AJ said that the applicant's evidence was that, after the stabbing, he told the security guards in the vicinity that he was being pursued and sought help. He then went to his residence and reported the matter to the security guards there; he telephoned his sister and told her what had happened. He explained that he stabbed two men who tried to rob and abduct him. The next day, the applicant and his sister went to the police station to report the matter.

The court added that the police declined to open a case because the ap-

plicant could not identify his attackers. Later, the applicant was arrested at his residence. Since Constable Makgafela testified that he did not know the applicant the overwhelming likelihood is that the police only knew of the applicant's place of residence, because of the applicant's report to the police. He said that the evidence of what occurred after the stabbing was not challenged by the prosecution. Yet the trial judge rejected it as inconsistent and improbable and did so absent of any explanation as to how the police came to learn of the applicant's identity and place of residence, save for the report that the applicant had made to the police. He pointed out that the applicant's account of what he did after the stabbing is consistent with his version that he thought he was being attacked by assailants, that his life was in danger, and that he had stabbed the deceased and Constable Makgafela in the belief that he needed to protect himself.

Unterhalter AJ said that the trial judge focused his assessment on the applicant's state of mind, and he could not have simply rejected the post-stabbing conduct of the applicant as improbable. He added that it was, after all, uncontradicted and borne out by the arrest of the applicant. It was evidence supportive of the applicant's account and his state of mind. He said what this illustrates is that the trial judge did not have the applicant's state of mind at the forefront of his assessment. Rather, his assessment of the applicant's defence was marked by what he reasoned to be objective considerations and probabilities.

The court held that it is the very ambiguity that lies at the heart of the trial judge's formulation of the test for putative private defence. The state of mind of an accused is to be judged, the trial judge stated, based on 'what the accused had in mind, objectively considered', and hence on the basis of reasonableness. He said that is not the correct test. But it appears to have been the operative test used by the trial judge. He added that this too, then, supports the interpretation of the test for putative private defence enunciated by the trial judge in the extempore judgment, as being a test that references objective considerations.

The CC pointed that the trial judge made an error of law going to the heart of the applicant's defence. The conviction and sentence of the applicant by the trial judge cannot survive this error. The applicant's appeal on this ground succeeds, and his conviction and sentence for murder and attempted murder must be set aside. He said that for these reasons, the CC issued the order on 13 May 2022 in which it upheld the applicant's appeal, set aside the order of the High Court, acquitted the applicant, and ordered his immediate release.

## The dissenting judgment

The dissenting judgment by Kollapen J (Mlambo AJ concurring) looked at whether a constitutional issue arose and whether there was ‘something more’ than *Bogaards v S* 2012 (12) BCLR 1261 (CC) alludes to present in these proceedings? The CC said that in his written submissions, the applicant contended that, while sentencing ordinarily involves the exercise of a true discretion by a court, in the context of the provisions of the Act, the existence or otherwise of substantial and compelling circumstances involves a value judgment as opposed to the exercise of a discretion. The court added that this issue is not a novel one and had come before the court on numerous occasions and in approaching the matter, one must be careful to distinguish between what is regarded as the general sentencing discretion of a court as opposed to the determination of substantial and compelling circumstances.

The CC cited *S v Salzwedel and Others* [2000] 1 All SA 229 (A), where the Supreme Court of Appeal (SCA) held that –

‘the determination of a proper sentence for an accused person fell primarily within the discretion of the trial judge and that this court should not interfere with the exercise of such a discretion merely because it would have exercised that discretion differently if it had been sitting as the court of first instance. This submission is undoubtedly correct, but it is clear that:

“[t]he court of appeal, after careful consideration of all the relevant circumstances as to the nature of the offence committed and the person of the accused, will determine what it thinks the proper sentence ought to be, and if the difference between that sentence and the sentence actually imposed is so great that the inference can be made that the trial court acted unreasonably, and therefore improperly, the court of appeal will alter the sentence.”

The CC added that similar sentiments were expressed by this Court in *Bogaards* when it said that: ‘Ordinarily, sentencing is within the discretion of the trial court. An appellate court’s power to interfere with sentences imposed by courts below is circumscribed’.

The CC pointed out that in these circumstances where the sentencing court exercises a sentencing discretion in the true sense, the scope for appellate interference is circumscribed.

In *Wijker v Wijker* 1993 (4) SA 720 (A), the SCA after referring to *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd* (*Perskor*) 1992 (4) SA 791 (A) described a true discretion and the limitation on appellate interference therewith as follows:

‘However, as I stated above, the

word discretion is used here in a wide sense. Henning “Diskresie-uitoefening” in 1968 THRHR 155 at 158 quotes the following observation concerning discretionary powers:

“[A] truly discretionary power is characterised by the fact that a number of courses are available to the repository of the power” (Rubinstein *Jurisdiction and Illegality* (1956) at 16).’

The CC said that the essence of a discretion in this narrower sense is that, if the repository of the power follows any one of the available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a court would have preferred him to have followed a different course among those available to him. I do not think the power to determine those certain facts constitute an unfair labour practice is discretionary in that sense. The CC added that such a determination is a judgment made by a court in the light of all relevant considerations, does not involve a choice between permissible alternatives. In respect of such a judgment a court of appeal may, in principle, welcome a different conclusion from that reached by the court *a quo* on the merits of the matter.

The CC pointed that while those views correctly express the law as far as it relates to the general exercise of a discretion by a court and the limited scope of appellate interference. The more limited issue that arises in these proceedings, and one that the directions issued sought to engage with, was confined to the nature of the decision of a court in the context of minimum sentences and the character of that decision as it relates to the existence of substantial and compelling circumstances.

The CC added that in *S v GK* 2013 (2) SACR 505 (WCC), the court expressed similar views and explained how the exercise of a sentencing discretion and that of a value judgment were different, but existed within the same sentencing framework that governs minimum sentences when it said:

‘It is appropriate first to say something concerning the approach of an appellate court to a trial court’s finding as to the presence or absence of substantial and compelling circumstances. I do not think a trial court’s finding on this question is a matter with which an appellate court can interfere only if there has been a material misdirection or if the sentence is “disturbingly” inappropriate or induces a sense of “shock”. That is the approach when an appellate court considers a sentence imposed in the exercise of the trial court’s ordinary sentencing discretion. In terms of s 51 of the Criminal Law Amendment Act 105 of 1997 certain minimum sentences are prescribed and the court is

deprived of its ordinary sentencing discretion, unless substantial and compelling circumstances are present. The presence or absence of such circumstances is thus the jurisdictional fact (to borrow an expression from administrative law) on which the presence or absence of the ordinary sentencing discretion depends. A determination that there are or are not substantial and compelling circumstances is not itself a matter of sentencing discretion.

The question whether such circumstances are present or absent involves a value judgment, but unless there are clear indications in the Act that this value judgment has been entrusted solely to the discretion of the trial court, an appellate court may form its own view as to whether such circumstances are or are not present. The fact that a judicial power involves a value judgment does not in itself mean that it is a discretionary power in the sense that an appellate court’s power to interfere is circumscribed’ (see *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd* 1992 (4) SA 791 (A) at 800C-G).

The CC pointed out that the reference to *S v Malgas* 2001 (1) SACR 469 (SCA) where the court set the basis for the determination of substantial and compelling circumstances as to whether an injustice would occur, accords with the approach that the court is ultimately exercising a value judgment when it decides on the existence or not of substantial or compelling circumstances. The CC said this would in turn permit a widened scope for appellate interference as opposed to where the sentencing court exercises a discretion in the true sense.

The CC said in *S v SMM* 2013 (2) SACR 292 (SCA), the SCA also spoke of an ‘appropriate sentence in the context of minimum sentences as one that would not be unjustly disproportionate if regard was had to the offence, the offender and the interests of society’. *S v SMM* held: ‘Life imprisonment is the most severe sentence which a court can impose. It endures for the length of the natural life of the offender, although release is nonetheless provided for in the Correctional Services Act 111 of 1998. Whether it is an appropriate sentence, particularly in respect of its proportionality to the particular circumstances of a case, requires careful consideration. A minimum sentence prescribed by law which, in the circumstances of a particular case, would be unjustly disproportionate to the offence, the offender and the interests of society, would justify the imposition of a lesser sentence than the one prescribed by law. As I will presently show, the instant case falls into this category. This is evident from the approach adopted by this court to sentencing in cases of this kind.’



The CC added that the existence of what may be described as two different sentencing approaches that the court in *S v PB* 2013 (2) SACR 533 (SCA) made reference to is clearly justified and warranted by the far-reaching nature that the Correctional Services Act has introduced into our law. The CC said while it has not removed the sentencing discretion, it has fettered it to some extent and with that comes the likelihood of a sentencing framework that may pose a significantly higher risk to the freedom of the individual and considerations of a fair trial.

The CC added that in those circumstances an error in a finding of substantial or compelling circumstances is inherently more damaging to the constitutional values of freedom and liberty, justifying at the level of principle a wider scope for appellate interference. Reverting to the question posed in *Bogaards* whether the appeal raises a constitutional issue as the applicant says it does, the answer must be no. The CC pointed out that the law is settled that a court brings out

a value judgment when it makes a determination on the existence of substantial and compelling circumstances. An appellate court is entitled to interfere with that decision if an error has occurred and *Malgas* sets the threshold for such interference as being a sense of injustice with the sentence imposed. The CC said that the issue advanced by the applicant that the High Court erred in finding that there were no substantial and compelling circumstances does not raise a constitutional issue. The CC added that no other basis for interference with the sentence was advanced other than simply the contention that the sentence is disproportionate. *Bogaards* reminds us that this is not a basis for intervention. The CC said it is for those reasons that the application for leave to appeal against sentence must fail. The CC pointed out that it would therefore have refused leave to appeal against conviction and sentence.

On 13 May 2022, the CC made the following order:

'1. Leave to appeal was granted.

2. The appeal is upheld and the conviction and sentence are set aside.

3. The order of the High Court of South Africa, Gauteng Division, Pretoria is replaced with the following:

"The accused is found not guilty and acquitted."

4. The Head of the Kgosi Mampuru II Central Correctional Centre, Pretoria, alternatively the Head of the Johannesburg Correctional Service or, the Head of the relevant facility where the applicant has been transferred to, is directed to release the applicant, Mr Liqhaya Tuta, from prison immediately.

Reasons for this shall be given at a later date'.

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



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By Lauren  
Lloyd and  
Lizelle  
Rossouw

# New legislation

*Legislation published from  
3 May – 3 June 2022*

## Acts

### **Customs and Excise Act 91 of 1964**

Amendment of sch 1 part 5A (no 1/5A/172) and sch 6 part 3 (no 6/3/59). GN R2124 and GN R2125 GG46465/1-6-2022.

Amendment of sch 5 part 2 (no 5/2/119). GN R2093 GG46380/20-5-2022.

### **Social Assistance Amendment Act 16 of 2020**

Amendment of ss 1, 4, 14, 24, 29 and 32, substitution of ss 6, 13 and 18 and insertion of s 12A of the Social Assistance Act 13 of 2004. *Commencement:* 30 May 2022. Proc62 GG46454/30-5-2022.

## Bills and White Papers

### **Non-Profit Organisations Amendment Bill, 2021**

Invitation to comment. GN2074 GG46349/10-5-2022.

### **Relocation of Parliament Bill, 2022**

Notice of intention to introduce a Private Member's Bill into Parliament and invitation for comment. GenN1049 GG46422/27-5-2022.

### **White Paper on National Transport Policy, 2021**

Announcement to the public of an Approved Revised Policy. GenN1050 GG46422/27-5-2022.

**White Paper on the National Rail Policy**  
Published for general information. GN2077 GG46356/12-5-2022.

## Government, General and Board Notices

### **Animal Disease Act 35 of 1984**

Control measures relating to foot and mouth disease in certain areas. GN2075 GG46350/10-5-2022.

### **Commissions Act 8 of 1947**

Amendment of the terms of reference for Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State. Proc64 GG46469/2-6-2022.

### **Competition Act 89 of 1998**

Amendment of effective date in respect of conditional exemption for the Day Hospital Association. GN2067 GG46322/6-5-2022.

Notification of decision to approve nine large mergers. GenN1014 GG46322/6-5-2022.

### **Customs and Excise Act 91 of 1964**

Imposition of provisional payment (PP/164). GN R2081 GG46358/13-5-2022.

### **Debt Collectors Act 114 of 1998**

Notice in terms of s 12(5) of the Act. BN269 GG46322/6-5-2022.

### **Department of Forestry, Fisheries and the Environment**

Request information on chemicals to be recommended for listing at the tenth Conference of the Parties under the Stockholm and Rotterdam Conventions. GN2073 GG46347/10-5-2022.

### **Department of Transport**

2022 Comprehensive Maritime Transport Policy (CMTTP) Decade Plan: Unpacking the maritime value chain competition (1). GenN1017 GG46341/9-5-2022.

CMTTP 2022: Trophy/Statue Design Competition (2). GenN1018 GG46341/9-5-2022.

Comprehensive Maritime Transport Policy Decade Plan, 2022 notice of contestants: Unpacking the Maritime Value Chain Competition and Trophy/Statue Design Competition. GenN1045 GG46416/26-5-2022.

### **Electronic Communications Act 36 of 2005**

Notice regarding termination of Information and Communications Technology COVID-19 National Disaster Regulations. GenN1021 GG46352/11-5-2022.

### **Employment Equity Act 55 of 1998**

Public Register Notice. GN2064 GG46322/6-5-2022.

### **Employment of Educators Act 76 of 1998**

Withdrawal of the policy on improvement in conditions of service for educators employed in terms of the Act: Teacher incentives. GenN1025 GG46365/13-5-2022.

### **Financial Markets Act 19 of 2012**

Approved amendments to the Johannesburg Stock Exchange (JSE) listing requirements – Annual Improvement Project and Actively Managed Certificates. BN285 and BN286 GG46471/3-6-2022.

### **Heraldry Act 18 of 1962**

Application for registration of heraldic representations and objections in terms of ss 7, 7A and 7B of the Act. GN2115 GG46422/27-5-2022.

### **Interpretation Act 33 of 1957**

Data Dissemination Standard of the Department of Higher Education and Training, 2021. GenN1028 GG46366/13-5-2022.

### **Labour Relations Act 66 of 1995**

Bargaining Council for the Civil Engineering Industry (BCCEI): Extension of Conditions of Employment Consolidated Collective Agreement to Non-Parties, cancellation of GN BCCEI: Exemptions Collective Agreement, Extension of Con-

solidated Wage and Task Grade Collective Agreement to Non-Parties and Extension of Consolidated Exemptions Collective Agreement to Non-Parties, Conditions of Employment Collective Agreement and Wage and Task Grade Collective Agreement. GN R2119, GN R2120, GN R2121, GN R2122, R2123 and GN R2124 GG46423/27-5-2022.

List of bargaining councils and private agencies that have been accredited by the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of the provisions of the Act. GenN1062 and GenN1063 GG46471/3-6-2022.

National Bargaining Council of the Leather Industry of South Africa: Extension to non-parties of the agency shop amending collective agreement for employees. GN R2078 GG46358/13-5-2022 and GN R2090 GG46380/20-5-2022.

Variation of scope of the Furniture Bargaining Council. GN2065 GG46322/6-5-2022.

### **Liquor Products Act 60 of 1989**

Defining of Production Area: Lanseria. BN288 GG46471/3-6-2022.

### **Local Government: Municipal Demarcation Act 27 of 1998**

Notice for general information. BN284 GG46471/3-6-2022.

### **Local Government: Municipal Structures Act 117 of 1998**

Policy framework for the designation of full-time councillors. Proc63 GG46457/31-5-2022.

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

Notification of registration of medicines in terms of s 17 of the Act. GN R2079 GG46358/13-5-2022.

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

Inshore Code of Practice for Commercial Diving. GN R2091 GG46380/20-5-2022.

### **Pharmacy Act 53 of 1974**

Competency Standards for Pharmacy Support Personnel in South Africa. BN276 GG46422/27-5-2022.

Restoration requirements and process for pharmacists removed from the register: Correction Notice. BN277 GG46422/27-5-2022.

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

Terms and conditions on which claims for compensation shall be administered. BN271 GG46322/6-5-2022.

Withdrawal of the substitution of the RAF 1 Third Party Claim Form. BN281 GG46456/31-5-2022.

### **Special Investigating Units and Special**

**Tribunals Act 74 of 1996**

Appointment of Tribunal President and additional members of the Special Tribunal. Proc60 GG46342/9-5-2022.

**Tax Administration Act 28 of 2011**

Returns to be submitted by a person in terms of s 25 of the Act. GN2130 GG46471/3-6-2022.

**Taxation Laws Amendment Act 17 of 2009**

Allocations to metropolitan municipalities of general fuel levy revenue. GN2083 GG46366/13-5-2022.

**Use of Official Languages Act 12 of 2012**

Implementation of the Reviewed Language Policy for the Department of Forestry, Fisheries and the Environment. GN2088 GG46379/19-5-2022.

Reporting on the use of Official Languages including South African Sign Language. BN290 GG46476/3-6-2022.

**Veterinary and Para-Veterinary Professions Act 19 of 1982**

Notice in terms of s 33(3)(b4) of the Act. GenN1060 GG46471/3-6-2022.

## Rules, regulations, fees and amounts

**Civil Aviation Act 13 of 2009**

Twenty Fourth Amendment Regulations, 2022. GNR2069 GG46343/9-5-2022.

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

Imposition of levies on medical schemes

issued in terms of s 2 of the Act. GenN1048 GG46422/27-5-2022.

**Financial Markets Act 19 of 2012**

Approved amendments to the JSE Derivatives Rules: Delta option trades and structures option trades and Trading Rules: Matched Principal Trade Type. BN275 GG46422/27-5-2022 and BN282 GG46463/1-6-2022.

Approved amendments to A2X Trading Rules: Matched Principal Trade Type. BN283 GG46464/1-6-2022.

**Higher Education Act 101 of 1997**

Institutional Statute of the Cape Peninsula University of Technology: Correction notice. GenN1039 GG46382/20-5-2022.

**Interpretation Act 33 of 1957**

Data Dissemination Standard of the Department of Higher Education and Training, 2021. GenN1038 GG46382/20-5-2022.

**National Environmental Management Act 107 of 1998**

Amendments to the Financial Provisioning Regulations, 2015. GN2087 GG46378/19-5-2022.

**National Health Act 61 of 2003**

Amendment to regulations relating to the surveillance and the control of notifiable medical conditions. GN2060 GG46319/4-5-2022.

**National Nuclear Regulator Act 47 of 1999**

Notice in terms of s 28 of the Act on fees for nuclear authorisations. GN2128 GG46471/3-6-2022.

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

Determination of permit fees under s 23(2) of the Act. GN2084 GG46366/13-5-2022.

Regulations on Notifiable Railway Occurrences and Railway Safety and Security. GenN1066 and GenN1067 GG46471/3-6-2022.

**Nursing Act 33 of 2005**

Notice regarding fees payable to the Council in terms of the regulations regarding fees and fines payable to the South African Nursing Council. GN2111 GG46422/27-5-2022.

Regulations regarding the Scope of Practice for Nurses and Midwives. GN2127 GG46471/3-6-2022.

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

Commercial Diving Regulations, 2022. GN R2091 GG46380/20-5-2022.

Asbestos Abatement Regulations, 2020: Amendment. GN R2092 GG46380/20-5-2022.

**Petroleum Products Act 120 of 1977**

Liquefied Petroleum Gas Rollout Strategy. GN R2080 GG46358/13-5-2022.

Regulations for the single maximum national retail price for illuminating paraffin, maximum retail price for liquefied petroleum gas and amendment of the regulations of petroleum products. GN R2057, GN R2058 and GN R2059 GG46303/3-5-2022, GN R2121, GN



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R2122 and GN R2123 GG46460/31-5-2022.

#### **Pharmacy Act 53 of 1974**

Rules relating to the services for which a pharmacist may levy a fee and guidelines for levying such a fee or fees. BN287 GG46471/3-6-2022.

#### **Plant Breeder's Rights Act 15 of 1976**

Regulations relating to plant breeder's rights: Amendment. GN2098 GG46382/20-5-2022.

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

Rate of interest on government loans and statement of the national revenue, expenditure and borrowings as at 31 March 2022 issued by the Director-General at the National Treasury. GenN1029 and GenN1030 GG46366/13-5-2022.

Regulations on Accounting Standards: Generally Recognised Accounting Practice 25. GN2114 GG46422/27-5-2022.

Statement of the National Revenue, Expenditure and Borrowings as at 30 April 2022 issued by the Director-General National Treasury. GenN1058 GG46458/30-5-2022.

Borrowing powers of water boards listed under sch 3 part B of the Act. GN2129 GG46471/3-6-2022.

#### **Remuneration of Public Office-bearers Act 20 of 1998**

Determination of upper limits of the salaries, allowances and benefits of different members of municipal councils. GN R2126 GG46470/2-6-2022.

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

Adjustment of statutory limit in claims for loss of income and loss of support. BN272 GG46322/6-5-2022.

Road Accident Fund Regulations, 2008: Substitution of Road Accident Fund 1 Third Party Claim Form and effective date for terms and conditions upon which claims for compensation shall be administered. BN280 GG46422/27-5-2022.

#### **Rules Board for Courts of Law Act 107 of 1985**

Amendment of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court, Magistrates' Courts and Supreme Court of Appeal. GN R2133, GN R2134 and GN R2135 GG46475/3-6-2022.

#### **Social Assistance Act 13 of 2004**

Regulations relating to the application for and payment of social assistance and the requirements or conditions in respect of eligibility for social assistance. GN R2119 GG46459/31-5-2022.

Regulations relating to the lodging of applications for social assistance appeals and the consideration and adjudication of appeals by the independent tribunal issued in terms of s 32, read with s 18 of the Act. GN R2120 GG46459/31-5-2022.

## **Legislation for comment**

#### **Civil Aviation Act 13 of 2009**

Civil Aviation Regulations, 2011: Draft

amendment. GN2085 GG46366/13-5-2022.

#### **Competition Act 89 of 1998**

Board of Healthcare Funders notice of application for an exemption from certain provision of the Act. GN2066 GG46322/6-5-2022.

#### **Electronic Communications Act 36 of 2005**

Applications for the transfer of ownership of Individual Electronic Communications Service (IECS) and Individual Electronic Communications Network Service (IECNS) licences from Mindspring Computing (Pty) Ltd to Molotel (Pty) Ltd. GenN1034 GG46381/19-5-2022.

Applications for the transfer of ownership of IECS and IECNS licences from Octanox (Pty) Ltd to the proposed new shareholders. GenN1040 GG46390/20-5-2022.

Applications for the transfer of ownership of IECS and IECNS licences from Dark Fibre Africa (Pty) Ltd to Business Venture Investments no 2213 (Pty) Ltd. GenN1041 GG46391/20-5-2022.

Notice inviting interested persons to public hearings regarding an application received by Telkom SA SOC Ltd. GenN1043 GG46411/24-5-2022.

#### **Financial Markets Act 19 of 2012**

Proposed amendments to the JSE debt listing requirements regarding sovereign issuers. BN270 GG46322/6-5-2022.

Proposed amendments to the JSE Trading Rules - Matched Principal Trade: Publication for comment. BN273 GG46354/12-5-2022.

#### **Health Professions Act 56 of 1974**

Proposed amendments to the Ethical Rules of Conduct for practitioners registered under the Act. BN278 GG46422/27-5-2022.

Rules relating to the registration by medical practitioners and dentists of additional qualifications: Amendment. BN279 GG46422/27-5-2022.

#### **Independent Communications Authority of South Africa Act 13 of 2000**

Notice to extend the closing date or written submissions for the draft End-user and Subscriber Service Charter Amendment Regulations, 2022. GN2086 GG46375/17-5-2022.

#### **Infrastructure Development Act 23 of 2014**

Country Investment Strategy for comment. GN2118 GG46426/27-5-2022.

#### **Labour Relations Act 66 of 1995**

Notice of intention to cancel the registration of a trade union. GN R2068 GG46323/6-5-2022.

#### **Local Government: Municipal Systems Act 32 of 2000**

Local Government: Municipal Planning and Performance Management Regulations, 2001 for comment. GN R2080 GG46380/20-5-2022.

#### **Marketing of Agricultural Products Act 47 of 1996**

Invitation to directly affected groups in

the oilseeds industry to forward comments regarding the request from the South African Cultivar and Technology Agency, for the continuation of levies on soybeans for breeding and technology purposes. GenN1035 GG46382/20-5-2022 and GenN1046 GG46422/27-5-2022.

Request for the implementation of statutory measures (relating to levies, records and returns and registration) on imported meat and poultry products. GenN1047 GG46422/27-5-2022.

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

Suspension and postponement of compliance with the minimum emission standards and the applications for the issuance of Provisional Atmospheric Emission Licences. GN2076 GG46355/12-5-2022.

#### **National Environmental Management: Waste Act 59 of 2008**

Consultation on the intention to take a decision on applications for the exclusion of a waste stream or a portion of such a waste stream for beneficial use from the definition of waste. GN2106 GG46389/20-5-2022.

#### **National Health Act 61 of 2003 and International Health Regulations Act 28 of 1974**

An extension of comment period for the amendment of regulations relating to the surveillance and the control of notifiable medical conditions; public health measures in points of entry; management of human remains; and environmental health. GN2061 GG46319/4-5-2022.

#### **National Small Enterprise Act 102 of 1996**

National Integrated Small Enterprise Development Masterplan as the National Small Business Support Strategy. GN2070 GG46344/10-5-2022.

#### **National Water Act 36 of 1998**

Proposal for the amendment of the Vaal River Catchment Management Agency Area through extension of the boundaries and area operational to include Orange Water Management Area in terms of s 78(4) of the Act. GN2116 GG46422/27-5-2022.

Intention to disestablish Sedibeng Water and transferring of staff, assets and liabilities into both Magalies Water and Bloem Water. GN2107 GG46393/20-5-2022 and GN2117 GG46422/27-5-2022.

Lauren Lloyd and Lizelle Rossouw are Editors: National Legislation at LexisNexis South Africa. □



By  
Monique  
Jefferson

# Employment law update

## Requirements for constructive dismissal

In *Shoprite Checkers (Pty) Ltd v Nkosi and Others* [2022] 5 BLLR 469 (LC) the employer approached the Labour Court (LC) to review an arbitration award by the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of which the CCMA had found that the employee had been constructively dismissed.

In this case, there was a long history of the employee submitting complaints and grievances to management and then management attempting to address the situation by transferring the employee to another store. The employer had commenced employment at a particular store but had raised several complaints regarding challenges that he had with his managers. The employer considered these complaints and transferred the employee to another store. After another complaint regarding his personal safety, the employee was sent back to the original store. He was then later transferred again to a third store. While the employee was working at this third store, the employee was invited to attend a disciplinary hearing. The employee then referred a dispute to the CCMA alleging victimisation. This dispute was withdrawn when he was transferred to another store. At this new store he submitted more complaints alleging that he had been victimised and intimidated because he had inquired about a promotion. He also accused the manager of using racist language and informing him that he would never be promoted. After making this complaint, he received disciplinary warnings. He refused to sign these warnings as he believed he did nothing wrong. At this point he referred another dispute to the CCMA but withdrew it on the recommendation of the commissioner that he refer an unfair labour practice dispute instead, but he took no further steps in relation to this complaint after withdrawing this dispute. The employee was subsequently issued with a final written warning for storming out of a disciplinary hearing and for not responding to the alarm. He then agreed and accepted a transfer to

another branch. While working at this new store, he complained about transport and was accommodated by being permitted to leave early each day provided that his tasks had been completed. An incident then arose on a day when he was not permitted to leave early as the store was being prepared for a visit by the divisional team. The employee was issued with three warnings that night and lodged a grievance challenging those warnings. The manager then also lodged a complaint against the employee. A meeting was held at a regional office to deal with both complaints and the outcome was that both the employee and his manager agreed to work together amicably. Thereafter, the employee alleged that he was still being treated badly by the manager as the manager demanded to be addressed as *Meneer* (sir). He then alleged that his manager and the person who had convened the amicable meeting at the regional office were 'coming up with tricks' but no details of the tricks were provided.

The employee then resigned a month later and referred a constructive dismissal dispute after serving his notice period. The CCMA found that the employee had in fact been constructively dismissed.

On review, the LC referred to the well-established requirements for a constructive dismissal, namely -

- the employee's employment must have terminated;
- the termination must have been due to intolerable circumstances; and
- these intolerable circumstances must have been caused by the employer.

The court also remarked that the test is an objective one in that the conduct of the employer toward the employee and its cumulative impact, must, when viewed objectively, be such that the employee could not reasonably be expected to cope with such conduct. Resignation must accordingly have been a reasonable step for the employee to take in the circumstances to escape the intolerable working environment.

In the employee's resignation letter, he cited that the reasons for his resignation were that he had become frustrated because he had not been promoted, he had

not been paid overtime, he was unhappy with the outcome of his grievances, and he had to work late when there was no public transport, which was a safety concern.

Reference was made by the LC to the decision in *Gold One Ltd v Madaleni and Others* [2021] 2 BLLR 198 (LC) at para 46 in which it was held that 'intolerability is a high threshold, far more than just a difficult, unpleasant or stressful working environment or employment conditions, or for that matter an obnoxious, rude and uncompromising superior who may treat employees badly. Put otherwise, intolerability entails an unendurable or agonising circumstance marked by the conduct of the employer that must have brought the employee's tolerance to a breaking point.' Reference was also made to the Constitutional Court decision in *Booi v Amathole District Municipality and Others* [2022] 1 BLLR 1 (CC), where it was also held that 'the bar of intolerability is a high one. The term "intolerable" implies a level of unbearability, and must surely require more than the suggestion that the relationship is difficult'. It was held that the employee did not meet this threshold.

In this regard, the LC considered the fact that he had withdrawn two of his disputes regarding the grievances and that he had resigned without doing anything about his final complaint to the regional manager. In regard to his complaints about not being promoted, there was no evidence that he had applied for positions. It was found that the employer had tried to deal with the employee's complaints by transferring him to other stores and had explored possibilities to keep him even though there had been disciplinary issues with the employee. It was, therefore, held that the employee had failed to prove that his employment conditions were intolerable. Furthermore, he failed to prove that the employer was responsible for the alleged intolerable conditions.

It was accordingly held that the commissioner had misconstrued the nature of the inquiry and the arbitration award was accordingly set aside and replaced with an order that the employee had failed to prove that he had been dis-

missed and, therefore, the CCMA lacked jurisdiction to determine the dispute.

## Unfair labour practice in relation to a bonus

In *Muller v Public Investment Corporation (SOC) Ltd and Others* [2022] 5 BLR 458 (LC) the employee was employed by the Public Investment Corporation (PIC) in an executive position. The Minister of Finance (Minister) at the time revised incentive bonuses payable to PIC employees with the effect that the amount that the employee was owed was reduced by almost half and a further amount of about R 2,5 million was deferred to a later date. This revision and deferment resulted in a short payment of the employee's short-term incentive and a non-payment of his long-term incentive. This aggrieved the employee, and he lodged an internal grievance, which was not resolved to his satisfaction. The employee then resigned from his employment and reserved his rights to sue PIC for damages. Prior to his resignation, the employee had referred an unfair labour practice dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) in relation to the short payment of the short-term incentive and the non-payment of the long-term incentive.

In terms of the pre-arbitration agreement between the parties the two issues that the CCMA had to determine were whether the CCMA had jurisdiction to determine the dispute and whether the PIC

had committed an unfair labour practice. The CCMA held that the Minister should have been joined to the proceedings and dismissed the unfair labour practice dispute.

The matter was then taken on review and the employee alleged that the finding by the CCMA that the Minister should have been joined to the proceedings was a material error of law and the commissioner lacked competence to dismiss the matter. The Labour Court (LC) found that given the pre-arbitration agreement the commissioner was not authorised to determine the issue of non-joinder as that was not one of the issues agreed to in the pre-arbitration agreement. Therefore, this was a gross irregularity. Furthermore, the commissioner's view that the Minister was an interested party was wrong because the Minister had no substantial interest in the matter and would not have been prejudiced by the successful outcome of the unfair labour practice dispute.

The LC also found that the contract of employment was between the employee and the PIC. The powers of the Minister were to approve the payment of benefits, but he did not have the authority to revise or defer payments. Therefore, the employee's claim was a claim based in contract. It was held that the employee was deprived of bonuses to which he was contractually entitled because of an invalid instruction by the Minister to revise or defer bonus requirements.

It was held that these incentives are

benefits within the meaning of s 186(2) (a) of the Labour Relations Act 66 of 1995. The employee had satisfied all the requirements of the bonus and yet the PIC refused to pay him. It was held that because the Minister did not have authority to revise or defer payments the PIC could not rely on this as a basis for not performing in terms of the contract with the employee. The failure of the PIC to perform its contractual obligations in these circumstances was found to amount to unfair conduct on the part of the PIC and, therefore, amounted to an unfair labour practice. It was found that the commissioner did not reach a reasonable decision because he considered irrelevant considerations and did not apply his mind to the PIC's failure to pay the benefit and whether that failure was fair. Therefore, the arbitration award was reviewable.

The LC accordingly set aside the arbitration award and replaced it with an order that the PIC committed an unfair labour practice and was ordered to pay the employee the shortfall in the short-term incentive and the amount of the long-term incentive, with interest.

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



By  
Moksha  
Naidoo

## Terminating employees' services based on age: Automatically unfair or fair?

*Solidarity obo Strydom and Others v State Information Technology Agency SOC Ltd* (LC) (unreported case no C 148/18; JS 49/18; JS 67/18 JS 68/18; JS 338/18; JS 195/18, 9-5-2022) (Nkutha-Nkontwana J).

The employees in this matter were members of a pension fund, which determined that the normal age of retire-

ment was at 60 years old. Three of the employees turned 60 in 2016 while one employee turned 60 in 2015 and the other in 2014.

It was common cause that all the employees continued to tender their services after they turned 60 years old.

In 2017, the employer handed a notice of termination to each employee on grounds that they had already reached their retirement age.

Subsequent to conciliation and by way of a statement of claim, the applicant union referred an automatically unfair dismissal dispute to the Labour Court alleging that its members had been dismissed based on their age.

Section 187(1)(f) of the Labour Relations Act 66 of 1995 states:

'A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is -

(f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility'.

As a defence, the employer invoked the provisions of s 187(2)(b) which reads:

'A dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity.'

Relying on the employer's conditions of service - the relevant clause stating that with written consent of the employer, an employee can continue to work after reaching the normal age of retirement up until they reach the age of 67 - the employees firstly argued that the employer consented to them working beyond the age of 60 years old and that the agreed date of retirement was when they turned 67.

Alternatively, once the employer allowed them to continue working post the normal age of retirement and absent an agreement to a new retirement date, the employer could not rely on s 187(2) (b) as a defence, which in turn, strengthened their claim for automatically unfair dismissals.

In support of its first argument, the employees tendered a letter from the employer signed in 2016 and addressed to them individually, wherein the employer confirmed that they would all receive a salary increase effective in April 2016. At the time each employee received this let-



ter they had already turned 60 and continued to tender services. According to the union, this letter served as a written agreement confirming that the employer extended the employees' age of retirement to 67 years old.

Having had sight of other relevant clauses in the employment contracts, read together with the letter referred to, the court rejected this argument and held that the letters were nothing more than amending the employees' salary scales. Prior to addressing the employees' alternate argument, the court examined the jurisprudence around s 187(2)(b) and reaffirmed the following principles.

Firstly, the conditions which must be met for the section to find application is that the dismissal must be based on age, the employer must have a normal or agreed on age in which the employee will retire, and the employee had reached the normal or agreed on retirement age. Once these conditions had been satisfied, then the law dictates that the dismissals are fair. Put differently, the courts can go no further than to accept that the dismissals are fair, as per a reading of the section.

Secondly, the two instances in which a defence can be raised, that being either when the employee reaches the normal age of retirement or the agreed on age

of retirement, are mutually exclusive. Simply put, absent any agreement, an employee's normal age of retirement is relevant.

Thirdly and quoting from a past judgment the court held:

"The consequence of allowing the employee to work beyond an agreed or normal retirement age was well articulated by Snyman AJ in *Bank v Finkelstein t/a Finkelstein and Associates* [(LC) (unreported case no JS219/15, 26-10-2016) (Snyman AJ)]:

"... where an employee works beyond an agreed or normal retirement age. The harsh reality is that such an employee is in effect working on "borrowed time". The employer, unless it can be proven that the employer specifically waived its rights to apply the retirement age, would remain entitled to at any point after the employee had attained the normal or agreed retirement age place the employee on retirement. In *Rubenstein v Price's Daelite (Pty) Ltd* [(2002) 23 ILJ 528 (LC)] the court held, with specific reference to section 187(2)(b), that: "It says a dismissal is fair if the employee has reached retirement age, not when he reaches it." In *Rockliffe v Mincom (Pty) Ltd* [(2008) 29 ILJ 399 (LC)], the court approved of the above ratio in *Rubenstein* and further said:

"Accordingly in an automatically unfair dismissal claim the enquiry ends at the point where, if a defence of having reached an agreed age is raised, such age has been reached. What happened afterwards is immaterial unless a defence of waiver is successfully raised."

Applying the above to the merits at hand, the court found that the employees conceded that 60 was the normal age of retirement. They further argued, in the alternative, that there was no agreed on age of retirement. The conclusion thus being that the normal age of retirement was, therefore, applicable. The fact that the employees tendered their services beyond the normal age of retirement did not preclude the employer from placing the employees on retirement in 2017 and on the strength of the fact that they had at the time reached the normal age of retirement.

The action 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).

# People and practices

Compiled by Shireen Mahomed

**Garlicke & Bousfield Inc** in La Lucia Ridge has appointed Michelle Posemann as a director in the employment law department.



**Dyason Attorneys** in Pretoria has appointed Cindy Horn and Thato Bopape to the Board of Directors.



Cindy Horn



Thato Bopape



THE SA ATTORNEYS' JOURNAL

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By  
Kathleen  
Kriel

# Recent articles and research

| Abbreviation | Title                            | Publisher  | Volume/issue |
|--------------|----------------------------------|--|--------------|
| AHRLJ        | African Human Rights Law Journal | Centre for Human Rights, Department of Law, University of Pretoria | (2022) 21.2  |

## Abortion law

**Adebite, FR** 'Rethinking abortion laws in Nigeria: The trauma of rape victims of Boko Haram' (2022) 21.2 *AHRLJ* 1036.

## Administrative law

**Eloff, D** 'The rationality test in lockdown litigation in South Africa' (2022) 21.2 *AHRLJ* 1157.

## African Charter on Human Rights

**Dersso, S** 'Forty years of the African Charter and the reform issues facing the discourse and practice of human rights' (2022) 21.2 *AHRLJ* 649.

**Rudman, A** 'The African Charter: Just one treaty among many? The development of the material jurisdiction and interpretive mandate of the African Court on Human and Peoples' Rights' (2022) 21.2 *AHRLJ* 699.

## African Commission on Human Rights

**Murray, R and Long, D** 'Monitoring the implementation of its own decisions: What role for the African Commission on Human and Peoples' Rights?' (2022) 21.2 *AHRLJ* 836.

## African court protocol

**Makunya, TM** 'Decisions of the African Court on Human and Peoples' Rights during 2020: Trends and lessons' (2022) 21.2 *AHRLJ* 1230.

## African foreign policy

**Jordaan, E** 'Worthy of membership? Rwanda and South Africa on the United Nations Human Rights Council' (2022) 21.2 *AHRLJ* 907.

## African human rights

**Durojaye, E** 'An analysis of the contribution of the African human rights system to the understanding of the right to health' (2022) 21.2 *AHRLJ* 751.

**Okafor, OC and Dzah, GEK** 'The African human rights system as "norm leader": Three case studies' (2022) 21.2 *AHRLJ* 669.

**Orao, B** 'Protecting the right to life during assemblies: Legal and jurisprudential developments in the African human rights system' (2022) 21.2 *AHRLJ* 728.

**Sánchez, KT** 'The right to reparations in the contentious process before the African Court on Human and Peoples' Rights: A comparative analysis on account of the revised Rules of Court' (2022) 21.2 *AHRLJ* 812.

## Climate change

**Oamen, PE and Erhagbe, EO** 'The impact of climate change on economic and social rights realisation in Nigeria: International cooperation and assistance to the rescue?' (2022) 21.2 *AHRLJ* 1080.

## COVID-19 – socio-economic rights

**Oamen, PE and Ekhatior, EO** 'The impact of COVID-19 on the socio-economic rights of older persons in Africa: The urgency of operationalising the Protocol on the Rights of Older Persons' (2022) 21.2 *AHRLJ* 782.

## COVID-19 policies

**Agaba, DK** 'Tackling inequality and governance challenges: Insights from the COVID-19 pandemic' (2022) 21.2 *AHRLJ* 877.

## Customary international law

**Dyani-Mhango, N** 'Revisiting personal immunities for incumbent foreign heads of state in South Africa in light of the *Grace Mugabe* decision' (2022) 21.2 *AHRLJ* 1135.

## Human rights – corporate social responsibility

**Amodu, N** 'Business and human rights versus corporate social responsibility: Integration for victim remedies' (2022) 21.2 *AHRLJ* 853.

## Infant abandonment

**Rosenberg, W** 'Mechanisms adopted in curbing unsafe infant abandonment: A

comparison between Namibia and South Africa' (2022) 21.2 *AHRLJ* 938.

## International Criminal Court

**Adeyemo, DD** 'The right of victims of core international crimes to reparation in Nigeria' (2022) 21.2 *AHRLJ* 1057.

## International human rights law

**Buzard, DA** 'Ethnocentric nationality in the Democratic Republic of the Congo: An analysis under international human rights law' (2022) 21.2 *AHRLJ* 985.

## Legislative reform

**Kabumba, B** 'The right to "unlove": The constitutional case for no-fault divorce in Uganda' (2022) 21.2 *AHRLJ* 1181.

## Militarisation

**Namwase, S** 'Securing legal reforms to the use of force in the context of police militarisation in Uganda: The role of public interest litigation and structural interdict' (2022) 21.2 *AHRLJ* 1203.

## Right to health care

**Olumese, O** 'Duty without liability: The impact of article 12 of the International Covenant on Economic, Social and Cultural Rights on the right to health care in Nigeria' (2022) 21.2 *AHRLJ* 1112.

## Right to sustainable development

**Mekonnen, SD** 'The right to sustainable development in article 43(3) of the Ethiopian Constitution' (2022) 21.2 *AHRLJ* 1009.

## Transitional justice

**Koko, S** 'Implementing transitional justice in post-transition Central African Republic: What viable options?' (2022) 21.2 *AHRLJ* 954.

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



By  
Lindumusa  
Makamu

# Rule 17.6.3 of the Rules of the Legal Practice Act declared unconstitutional

In *Ex Parte Lindumusa Hopewell Makamu* (unreported case no 304/2021), the applicant brought an *ex parte* application for his admission as a legal practitioner before the Mpumalanga Division of the High Court. In support of the application, the applicant had annexed his academic record as proof that he had satisfied the requirements of an LLB degree as required by s 26 of the Legal Practice Act 28 of 2014 (the LPA). The court was not satisfied that the applicant had met the requirements considering r 17.6.3 of the Rules made under the authority of ss 95(1), 95(3) and 109(2) of the LPA. The r 17.6.3 reads as follows:

‘17.6. Copies of the following documents must be attached to the founding affidavit of the applicant, whether for admission as an attorney or as an advocate, and must be certified as being true copies of the originals by a notary or by a commissioner of oaths –

...  
17.6.3. degree certificate or certificates of the applicant.’

The applicant had not annexed a degree certificate, or the certificates as required by the Rules because the university had withheld the applicant’s degree certificate because he owed the university outstanding fees.

The applicant filed substantive heads of arguments and submitted that the court should grant the application in that the rule did not apply to him because he was being admitted in terms of the previous regime namely, Admission of Advocates Act 74 of 1964, whereby there was no rule requiring the degree certificate. The substantive heads of arguments prompted the court to invite further submissions from the applicant and other interested parties such as the Legal Practice Council and the Minister of Justice and Correctional Services.

The invitation directed all interested parties to make submissions on the following questions:

‘Does the provision in Rule 7.6.3 place an additional duty on the applicant which are not one of the requirements in terms of section 26(1) of the Act?’

If it does, is Rule 17.6.3 not *ultra vires*?

Is the provision of Rule 17.6.3 not unconstitutional in that it offends the right to equality, dignity, and profession in the Bill of Rights?

Does the fact that the applicant is indebted to the university without any arrangements to pay his indebtedness [leave the applicant] open to the finding that the applicant is not fit and proper to be admitted and enrolled as a legal practitioner as contemplated in terms of section 24(2)(c) of the Act?’

The applicant and interested parties submitted their heads of argument.

After the court had perused the written heads of argument submitted by the applicant, and other parties, the court declared r 17(6)(3) of the Rules inconsistent with the Constitution to the extent that it did not afford the court a discretion to admit a legal practitioner under the LPA in the absence of a copy of their degree certificate.

The court made its order based on the following reasons.

In para 56 the court held: ‘Rule 17.6.3 goes beyond what section 26(1)(a) requires. Notwithstanding, the Minister was empowered to make rules by s 95(k) and the Minister exercised [his] powers, therefore, the rules are not *ultra vires*.

In para 57, the court held that in its view r 17.6.3 offends the spirit, and purport and objects of the Bill of Rights, the rule makes it impossible for applicants who seek admission or enrolment as legal practitioners to make an application for admission without a degree certificate even though they may have complied with the provisions of s 26(1)(a). It unfairly discriminates against a person who may not be able to obtain their degree because they still owe their university money, therefore, it violates such applicants right to equality, human dignity and freedom of trade, occupation and profession.

The court also relied on *Ex parte Feetham* 1954 (2) SA 468 (N), in which Holmes J held ‘the relevant qualification should be the applicant’s passing of the LLB examination, and not the extraneous act of the university in conferring the degree’ and *Ex Parte Tlotlego* (GJ) (unreported case no 2017/34672, 8-12-2017)

(Victor J), where it was held ‘the courts become a role player/gatekeeper in the debtor/creditor relationship between student and University.’ The executive through r 17.6.3 became the role player and gatekeeper.

Even though the court agreed that the rule goes beyond what is required by s 26(1)(a) and that it is inconsistent with the Constitution, it still questioned whether the applicant was fit and proper to be admitted. In para 59 the court asked whether a person who owes a debt to a university (as in this instance) and who does not show that the debt is going to be purged and how they intend to purge the debt, is a fit and proper person for admission in that is such a person of complete honesty, reliability and integrity? The court answered no. It went further to state that in the absence of proof that the debt is going to be paid and how it is going to be paid, the high bar for integrity and honesty that is expected from the legal practitioner is not cleared.

## Conclusion

I disagree with the court in this instance, the question of honesty and integrity cannot be placed with such a high bar. The court is worried that the applicant after admission will continue to practice without the LLB degree certificate and never settle the university fees. I submit that this is not the concern of the court or any court as the debtors have remedies to recover money that is due to them, and the court should not concern itself with this aspect.

The court declared r 17.6.3 of the Rules to be unconstitutional for the purpose of admission.

Lindumusa Makamu BA LLB (Univen) is a legal practitioner at Makamu Law Chambers in Mbombela. Mr Makamu was the applicant in the above matter. □



By  
Neels  
Engelbrecht

# Municipal law: What is a penalty rate?

In the recent Supreme Court of Appeal (SCA) judgment of *City of Johannesburg Metropolitan Municipality v Zibi and Another* (SCA) (unreported case no 234/2020, 9-7-2021) (Saldulker, Mbha, and Schippers JJA and Carelse and Poyo-Dlwati AJJA), the question to be decided was whether a municipality was entitled to levy a so-called penalty rate without formally notifying the owner of a property of the change in the category use of the property, namely, from residential to unauthorised use, and without complying with ss 78 and 79 of the Local Government: Municipal Property Rates Act 6 of 2004 (the Rates Act) that requires publication of the change of category use in the provincial *Gazette*.

## The facts

The simplified facts were the following: The applicants (in the court *a quo*) acquired their home in Auckland Park, Johannesburg in 2013 and soon thereafter started renting out rooms in the house to students. Sometime in 2014, the respondent realised that the applicants were renting out the rooms in contravention of the zoning of the property (residential) and instructed the applicants to stop the unauthorised use, which the applicants eventually did in 2018.

The judgment of the court *a quo*:

The applicants approached the Local Division of the High Court in Johannesburg for a declarator to decide the question as set out above and was successful. In short, the court found, per Fourie AJ, that the respondent is bound by the Rates Act and its rates policy and that the so-called penalty rate was unlawfully raised by the respondent. Fourie AJ relied on the case of *Smit v City of Johannesburg Metropolitan Municipality* (GJ) (unreported case no 02181/2016, 28-11-2017) (De Villiers AJ), where De Villiers AJ, made the same finding on broadly the same facts against the City of Johannesburg. The ratio of both matters were identical, namely the City of Johannesburg is bound to comply with the Rates Act and its rates policy.

## The SCA: The majority judgment

On appeal to the SCA, the majority, Mbha JA (Saldulker JA and Poyo-Dlwati AJA concurring) found that effectively the municipality does not have to comply with the Rates Act and the rates policy for the following reasons:

- The municipality is entitled to rely on s 75A of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) to levy the so-called penalty

rate and in doing so did not act *ultra vires*.

- That the penalty tariff is not applied as a category under the rates policy (although it is clearly identified as such in the rates policy), but that the penalty charges are directed against the landowner's illegal conduct and not the property (para 26).
- It would place an unreasonable administrative burden on the municipality if a 'supplementary valuation roll had to be published in respect of every unlawful use of a property'.

In para 33 of the judgment the judge of appeal assumed that 'the penalty or higher tariff the municipality validly (sic) imposed in respect of the respondents' property, only seeks to address the current situation to the extent and for the duration of the illegal land use in operation'. Not only is this assumption incorrect, as the municipality is still levying the penalty more than three years after the owners stopped the so-called illegal use, but the judge also contradicts himself if regard is had to bullet two above, namely that the penalty levy is directed against the conduct of the owner.

## The minority judgment

The minority by Schippers JA (Carelse AJA concurring), disagreed for the following reasons. Section 75A of the Systems Act is 'inapplicable for the simple reason that the municipality did not act under that provision when it determined the illegal use category and imposed the penalty tariff', but acted in terms of ss 3 and 8 of the Rates Act. 'A decision deliberately and consciously taken under the wrong statutory provision cannot be validated by the existence of another statutory provision authorising that action' (para 49 with reference to the Constitutional Court (CC) case of *Minister of Education v Harris* 2001 (4) SA 1297 (CC) and *Howick District Landowners Association v uMngeni Municipality and Others* 2007 (1) SA 206 (SCA)).

Schippers JA went further and listed several reasons (see para 52 to 58) why the rates act does not permit illegal use as a category of rateable property –

- illegal use is not a use as such;
- the uses of property in s 8(1) of the Rates Act constitutes lawful uses;
- it is impossible to determine a value for illegal use;
- the penalty tariff is not a rate; and
- the illegal use category cannot be applied equitably.

Simply put Schippers AJ found that the so-called penalty rate is not a rate at all.

Lastly, 'in determining the illegal use category and imposing the penalty tariff, the municipality acted contrary to the prohibition in s 19(1) of the Rates Act, to which s 8(1) is expressly rendered subject'. (para 59).

## The principle of legality

The minority also referred to the principle of legality as set out in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at paras 56 and 58 and the *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para 85.

The principle of legality is now firmly entrenched in our law being an 'aspect of the rule of law [that] requires that a body exercising a public power ... must act within the powers lawfully conferred on it'. In *Fedsure* and in *Pharmaceutical Manufacturers Association of SA*: 'The principle required that the exercise of public power should not be arbitrary or irrational'.

The minority found that the 'action by the municipality in determining an illegal use category of rateable property and imposing the penalty tariff, ostensibly in terms of ss 3 and 8 of the Rates Act, violates the principle of legality in both respects. The action is beyond the powers conferred on the municipality. It is also arbitrary because it is not rationally [connected] to the purpose for which the power to levy rates was given' (para 63). In coming to the conclusion that the majority did, it ignored both the Constitutional Court (CC) cases and SCA case referred to above.

I am of the opinion that the minority judgment is correct in all respects.

The judgment of the majority is simply wrong and glaringly so, although, in my view, the judge is correct in one respect, namely that the penalty tariff is indeed directed against the conduct of the owner. The problem with this is that neither the Rates Act nor the Systems Act makes provision for penalising the conduct of the owner in this way and is, therefore, clearly *ultra vires*.

The applicants appealed to the CC, which refused to hear the matter without furnishing reasons.

Neels Engelbrecht LLB (UP) is a legal practitioner in Randburg. Mr Engelbrecht is the attorney on record for the applicant. □

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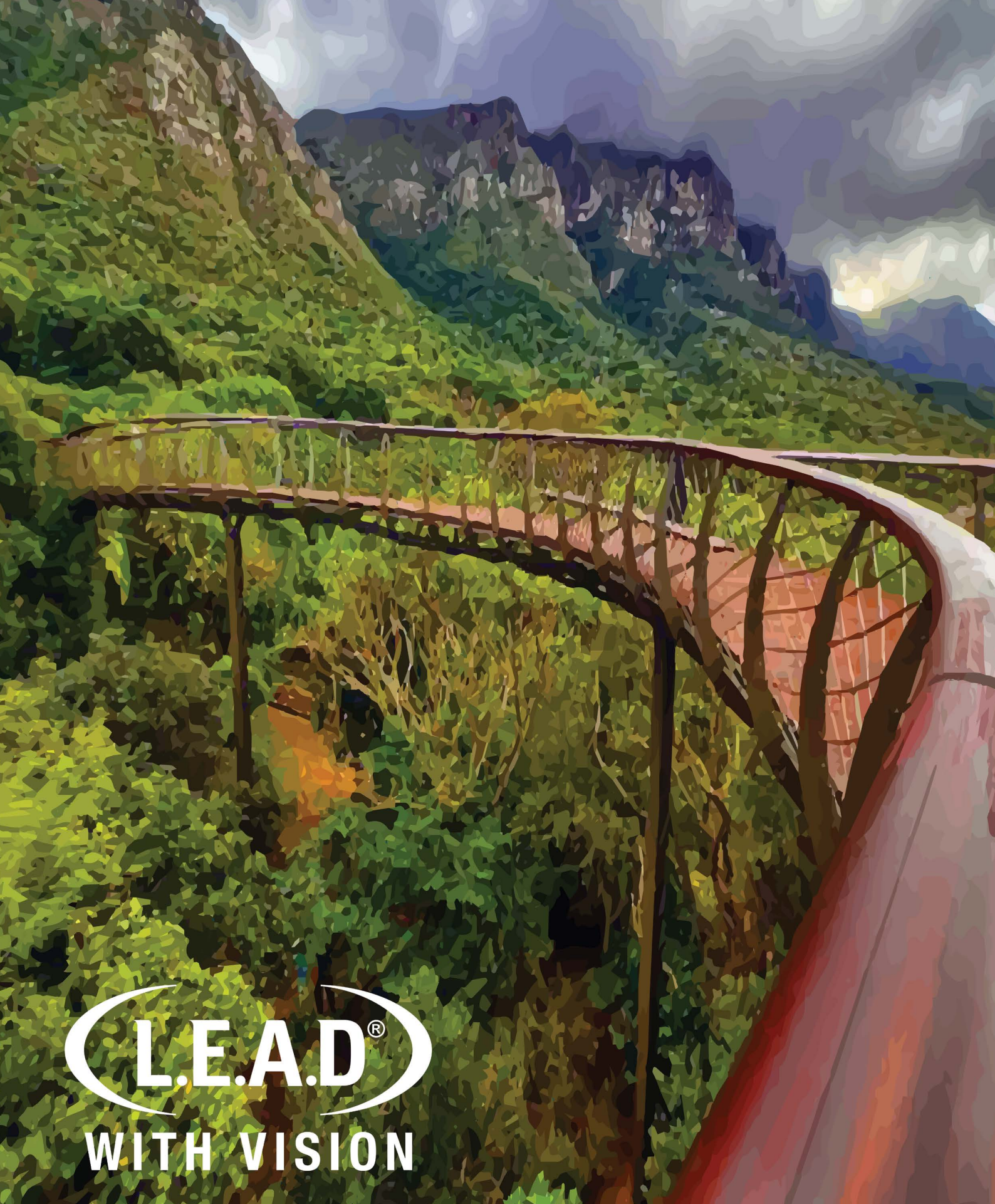
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- Training and Development of management and staff on performance management, appraisals, dispute / conflict resolutions. Review and audit of all HR processes on an ongoing basis to ensure full compliance with South African and United Kingdom Labour legislation;
- Conduct investigations into allegations of misconduct and draft recommendations on disciplinary steps; Prepare charge sheets; Attend or Chair disciplinary inquiries; Responsible for providing day-to-day, tactical and legal advice and guidance to Management on Labour matters (e.g., coaching, counselling, career development, disciplinary actions and representing the company in labour dispute in various forums such as the CCMA and Labour Court).
- Be involved in various statutory and regulatory reporting in different jurisdictions including but not limited to Dept. of Labour, SETA, SARS, Home Affairs, FSCA, and FCA.

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#### REQUIREMENTS

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- Ability to do research, interpret case law and draft legal opinions
- Have demonstrable experience in labour law practice and industrial relations with a proven track record in employment legal matters in a similar environment;
- Demonstrate sound knowledge of South African labour legislation and industrial relations knowledge including the LRA, BCEA, Skills Development and Employment Equity Acts
- Excellent Planning, Prioritizing and Organizing abilities
- Excellent communication skills, both written and verbal
- Ability to work in a structured and high performing environment
- Minimum of 5 years relevant experience

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- Review legal agreements to ensure that the statutory compliance requirements are met and risks have been mitigated.

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- Excellent Planning, Prioritizing and Organizing abilities.
- Excellent communication skills, both written and verbal.
- 5 to 8 year's retirement fund experience

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## Services offered



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**Odete Da Silva:**  
Telephone: +27 (0) 11 463 1214  
Cell: +27 (0)82 553 7824  
E-mail: [odasilva@law.co.za](mailto:odasilva@law.co.za)

**Avril Pagel:**  
Cell: +27 (0)82 606 0441  
E-mail: [pagel@law.co.za](mailto:pagel@law.co.za)

## ITALIAN LAWYERS

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

### Anthony V. Elisio

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

**Rome office**  
Via Aureliana 53  
00187 Rome, Italy

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

**Milan office**  
Galleria del Corso 1  
20122 Milan, Italy

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



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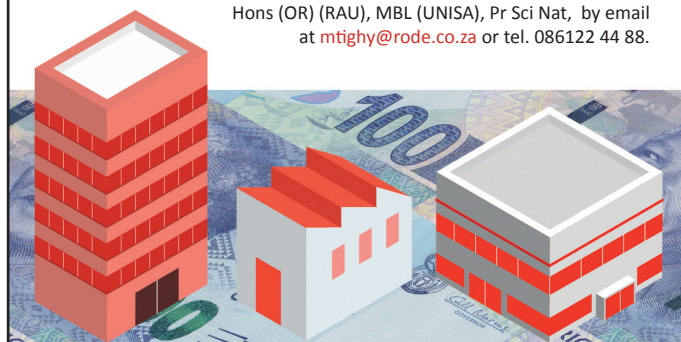
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Telephone: (011) 463 1214  
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E-mail: [kelly@pagelinc.co.za](mailto:kelly@pagelinc.co.za)



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# RISKALERT

JULY 2022 NO 3/2022

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## RISK MANAGEMENT COLUMN

### NOTICE: LPIIF POLICIES FOR THE 2022/2023 INSURANCE YEAR

The Legal Practitioners Indemnity Insurance Fund NPC's 2022/2023 insurance scheme year commences on 1 July 2022.

The Master Policy (and all related documents) for the 2022/2023 scheme year is published in this edition of the Bulletin. The executor bond policy, application form and the resolution required in terms of clause 3.10 of that policy are also included in this Bulletin. The respective policies will also be available on the LPIIF website ([www.lpiif.co.za](http://www.lpiif.co.za)) from 1 July 2022.

As indicated in the May 2022 edition of the Bulletin, no changes have been made to the policies as they are as applied in the 2021/2022 scheme year.

Should you require risk management training for the legal practitioners and staff in your practice, please send a request to [Risk.Queries@lpiif.co.za](mailto:Risk.Queries@lpiif.co.za). The risk management training is provided at no cost to the law firm. In the



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

current operating environment, the training can either be done virtually or physically depending on what suits your practice best. Questions on the policies can also be addressed to that email address.

We wish you a claim free 2022/2023 scheme year.

**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](http://www.lpiif.co.za) • Twitter handle: @AIIFZA

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



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





**Legal Practitioners  
Indemnity Insurance  
Fund NPC**  
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## THE 2022/2023 LPIIF MASTER POLICY

### PREAMBLE

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

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

### DEFINITIONS:

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

c) is required to be registered in any Deeds Registry in the Republic of South Africa, in terms of any relevant legislation;

- IX Cybercrime:** Any criminal or other offence that is facilitated by or involves the use of electronic communications or information systems, including any device or the internet or any one or more of them. (The device may be the agent, the facilitator or the target of the crime or offence). Hacking of any of the electronic environments is not a necessity in order for the offence or the loss to fall within this definition;
- X Defence Costs:** The reasonable costs the **Insurer** or **Insured**, with the **Insurer's** written consent, incurs in investigating and defending a **Claim** against an **Insured**;
- XI Dishonest:** Bears its ordinary meaning but includes conduct which may occur without an **Insured's** subjective purpose, motive or intent, but which a reasonable legal practitioner would consider to be deceptive or untruthful or lacking integrity or conduct which is generally not in keeping with the ethics of the legal profession;
- XII Employee:** A person who is or was employed or engaged by the **Legal Practice** to assist in providing **Legal Services**. (This includes in-house legal consultants, associates, professional assistants, candidate legal practitioners, paralegals and clerical staff but does not include an independent contractor who is not a **Practitioner**);
- XIII Excess:** The first amount (or deductible) payable by the **Insured** in respect of each and every **Claim** (including **Claimant's Costs**) as set out in schedule B;
- XIV Fidelity Fund Certificate:** A certificate provided for in terms of section 84 of the **Act**, read with Rules 3, 47, 48 and 49 of the South African Legal Practice Council Rules made under the authority of section 95(1) of the **Act**;
- XV Innocent Principal:** Each current or former **Principal** who:
  - a) may be liable for the debts and liabilities of the **Legal Practice**; and
  - b) did not personally commit or participate in committing the **Dishonest**, fraudulent or other criminal act and had no knowledge or awareness of such act;
- XVI Insured:** The persons or entities referred to in clauses 5 and 6 of this policy;

- XXVII Insurer:** The Legal Practitioners Indemnity Insurance Fund NPC, Reg. No. 93/03588/08;
- XXVIII Insurance Year:** The period covered by the policy, which runs from 1 July of the first year to 30 June of the following year;
- XIX Legal Practice:** The person or entity listed in clause 5 of this policy;
- XX Legal Services:** Work reasonably done or advice given in the ordinary course of carrying on the business of a **Legal Practice** in the Republic of South Africa in accordance with the provisions of section 33 of the **Act**. Work done or advice given on the law applicable in jurisdictions other than the Republic of South Africa are specifically excluded, unless provided by a person admitted to practise in the applicable jurisdiction;
- XXI Practitioner:** Any attorney, advocate referred to in section 34(2)(b) of the **Act**, notary or conveyancer as defined in the **Act**;
- XXII Prescription Alert:** The computerised back-up diary system that the **Insurer** makes available to the legal profession;
- XXIII Principal:** An advocate referred in section 34(2)(b) of the **Act**, sole **Practitioner**, partner or director of a **Legal Practice** or any person who is publicly held out to be a partner or director of a **Legal Practice**;
- XXIV Risk Management Questionnaire:** A self-assessment questionnaire which can be downloaded from or completed on the **Insurer's** website ([www.lpiif.co.za](http://www.lpiif.co.za)) and which must be completed annually by the advocate referred to in section 34(2)(b) of the **Act**, sole practitioner, senior partner, director or designated risk manager of the **Insured** as referred to in clause 5. The annual completion of the **Risk Management Questionnaire** is prescribed by this policy (see clause 23) and the South African Legal Practice Council Rules (the Rules) made under the **Act**;
- XXV Road Accident Fund claim (RAF):** A claim for compensation for losses in respect of bodily injury or death caused by, arising from or in any way connected with the driving of a motor vehicle (as defined in the Road Accident Fund Act 56 of 1996 or any predecessor or successor of that Act) in the Republic of South Africa;
- XXVI Senior Practitioner:** A **Practitioner** with no less than 15 years' standing in the legal profession, with experience in professional indemnity insurance law;
- XXVII Trading Debt:** A debt incurred as a result of the undertaking of the **Insured's** business or trade. (Trading debts are not compensatory in nature and this policy deals only with claims for compensation). This exclusion includes (but is not limited to) the following:
- a refund of any fee or disbursement charged by the **Insured** to a client;
  - damages or compensation or payment calculated by reference to any fee or disbursement charged by the **Insured** to a client;

- payment of costs relating to a dispute about fees or disbursements charged by the **Insured** to a client; and/or
- any labour dispute or act of an administrative nature in the **Insured's** practice.

## WHAT COVER IS PROVIDED BY THIS POLICY?

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

## WHO IS INSURED?

- 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 sole **Practitioner**;
  - a partnership of **Practitioners**;
  - an incorporated **Legal Practice** as referred to in section 34(7) of the **Act**; or
  - an advocate referred to in section 34 (2)(b) of the **Act**. For purposes of this policy, an advocate referred to in section 34(2)(b) of the **Act**, will be regarded as a sole practitioner.
- 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 **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**;
  - a previous **Principal** of a **Legal Practice** providing **Legal Services**, provided that that **Principal** had a **Fidelity Fund Certificate** at the time of the circumstance, act, error or omission giving rise to the **Claim**;
  - an **Employee** of a **Legal Practice** providing **Legal Services** at the time of the circumstance, act, error or omission giving rise to the **Claim**;
  - the estates of the people referred to in clauses 6(a), 6(b) and 6(c);

# RISKALERT

- e) subject to clause 16(c), a liquidator or trustee in an insolvent estate, where the appointment is or was motivated solely because the **Insured** is a **Practitioner** and the fees derived from such appointment are paid directly to the **Legal Practice**.

## AMOUNT OF COVER

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

## INSURED'S EXCESS PAYMENT

10. The **Insured** must pay the **Excess** in respect of each **Claim**, directly to the claimant or the claimant's legal representatives, immediately it becomes due and payable.  
Where two or more **Claims** are made simultaneously, each **Claim** will attract its own **Excess** and, to the extent that one or more **Claims** arise from the same circumstance, act, error or omission, the **Insured** must pay the **Excess** in respect of each such **Claim**;
11. The **Excess** is calculated by reference to the number of **Principals** that made up the **Legal Practice** on the date of the circumstance, act, error or omission giving rise to the **Claim**, and the type of matter giving rise to the **Claim**, as set out in Schedule B.
12. The **Excess** set out in column A of Schedule B applies:
- a) in the case of a **Claim** arising out of the prescription of a **Road Accident Fund claim**. This **Excess** increases by an additional 20% if **Prescription Alert** has not been used and complied with by the **Insured**, by timeous lodgement and service of summons in accordance with the reminders sent by **Prescription Alert**;
  - b) in the case of a **Claim** arising from a **Conveyancing Transaction**.
13. In the case of a **Claim** where clause 20 applies, the **excess** increases by an additional 20%.
14. No **Excess** applies to **Approved costs** or **Defence costs**.
15. The **Excess** set out in column B of Schedule B applies to all other types of **Claim**.

## WHAT IS EXCLUDED FROM COVER?

16. This policy does not cover any liability for compensation:
- a) arising out of or in connection with the **Insured's Trading Debts** or those of any **Legal Practice** or business managed by or carried on by the **Insured**;
  - b) arising from or in connection with misappropriation or unauthorised borrowing by the **Insured** or **Employee** or agent of the **Insured** or of the **Insured's** predecessors in practice, of any money or other property belonging to a client or third party and/or as referred to in section 55 of the **Act**;
  - c) which is insured or could more appropriately have been insured under any other valid and collectible insurance policy available to the **Insured**, covering a loss arising out of the normal course and conduct of the business, or where the risk has been guaranteed by a person or entity, either in general or in respect of a particular transaction, to the extent to which it is covered by the guarantee. This includes but is not limited to Misappropriation of Trust Funds, Personal Injury, Commercial and Cybercrime insurance policies;
  - d) arising from or in terms of any judgment or order(s) obtained in the first instance other than in a court of competent jurisdiction within the Republic of South Africa;
  - e) arising from or in connection with the provision of **Investment Advice**, the administration of any funds or taking of any deposits as contemplated in:
    - (i) the Banks Act 94 of 1990;
    - (ii) the Financial Advisory and Intermediary Services Act 37 of 2002;
    - (iii) the Agricultural Credit Act 28 of 1996;
    - (iv) any law administered by the Financial Sector Conduct Authority and/or the South African Reserve Bank and any regulations issued thereunder; or
    - (v) the Medical Schemes Act 131 of 1998 as amended or replaced;For purposes of this Clause, **Investment Advice** means any recommendation, guidance or proposal of a financial nature furnished to any client or group of clients –
    - a) in respect of the purchase of any financial product; or
    - b) in respect of the investment in any financial product; or
    - c) to engage any financial service provider.
  - f) arising where the **Insured** is instructed to invest money on behalf of any person, except for an instruction to invest the funds in an interest-



bearing account in terms of section 86(4) of the Act, and if such investment is done pending the conclusion or implementation of a particular matter or transaction which is already in existence or about to come into existence at the time the investment is made;

This exclusion does not apply (subject to the other provisions of this policy) to funds which the **Insured** is authorised to invest in his or her capacity as executor, trustee, curator or in any similar representative capacity;

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

- o) arising out of **Cybercrime**. Losses arising out of **Cybercrime** include, payments made into an incorrect and/or fraudulent bank account where either the **Insured** or any other party has been induced to make the payment into the incorrect bank account and has failed to verify the authenticity of such bank account;

For purposes of this clause, "verify" means that the **Insured** must have a face-to-face meeting with the client and/or other intended recipient of the funds. The client (or other intended recipient of the funds, as the case may be) must provide the **Insured** with an original signed and duly commissioned affidavit confirming the instruction to change their banking details and attaching an original stamped document from the bank confirming ownership of the account.

- p) arising out of a **Claim** against the **Insured** by an entity in which the **Insured** and/or related or interrelated persons\* has/have a material interest and/or hold/s a position of influence or control\*\*.

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

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

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

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

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

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

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

## FRAUDULENT APPLICATIONS FOR INDEMNITY

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

## CLAIMS ARISING OUT OF DISHONESTY OR FRAUD

18. Any **Insured** will not be indemnified for a **Claim** that arises:
  - a) directly or indirectly from any **Dishonest**, fraudulent or other criminal act or omission by that **Insured**;
  - b) directly or indirectly from any **Dishonest**, fraudulent or other criminal act or omission by another party and that **Insured** was knowingly connected with, or colluded with or condoned or acquiesced or was party to that dishonesty, fraud or other criminal act or omission.  
Subject to clauses 16, 19 and 20, this exclusion does not apply to an **Innocent Principal**.
19. In the event of a **Claim** to which clause 18 applies, the **Insurer** will have the discretion not to make any payment, before the **Innocent Principal** takes all reasonable action to:
  - a) institute criminal proceedings against the alleged **Dishonest** party and present proof thereof to the **Insurer**; and/or
  - b) sue for and obtain reimbursement from any such alleged **Dishonest** party or its or her or his estate or legal representatives;  
Any benefits due to the alleged **Dishonest** party held by the **Legal Practice**, must, to the extent allowable by law, be deducted from the **Legal Practice's** loss.
20. Where the **Dishonest** conduct includes:
  - a) the witnessing (or purported witnessing) of the signing or execution of a document without seeing the actual signing or execution; or
  - b) the making of a representation (including, but not limited to, a representation by way of a certificate, acknowledgement or other document) which was known at the time it was made to be false;  
The **Excess** payable by the **Innocent Insured** will be increased by an additional 20%.

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

## THE INSURED'S RIGHTS AND DUTIES

22. The **Insured** must:
  - a) give immediate written notice to the **Insurer** of any circumstance, act, error or omission that may give rise to a **Claim**; and
  - b) notify the **Insurer** in writing as soon as practicable, of any **Claim** made against them, but by no later than one (1) week after receipt by the **Insured**, of a written demand or summons/counterclaim or application. In the case of a late notification of receipt of the written demand, summons or application by the **Insured**, the **Insurer** reserves the right not to indemnify the **Insured** for costs and ancillary charges incurred prior to or as a result of such late notification;
23. Once the **Insured** has notified the **Insurer**, the **Insurer** will require the **Insured** to provide a completed **Risk Management Questionnaire** and to complete a claim form providing all information reasonably required by the **Insurer** in respect of the **Claim**. The **Insured** will not be entitled to indemnity until the claim form and **Risk Management Questionnaire** have been completed by the **Insured**, to the **Insurer's** reasonable satisfaction and returned to the **Insurer**.
24. The **Insured**:
  - 24.1. shall not cede or assign any rights in terms of this policy;
  - 24.2. agrees not to, without the **Insurer's** prior written consent:
    - a) admit or deny liability for a **Claim**;
    - b) settle a **Claim**;
    - c) incur any costs or expenses in connection with a **Claim** unless the sum of the **Claim** and **Claimant's Costs** falls within the **Insured's Excess**;  
failing which, the **Insurer** will be entitled to reject the **Claim**, but will have sole discretion to agree to provide indemnity, wholly or partly.
25. The **Insured** agrees to give the **Insurer** and any of its appointed agents:
  - 25.1. all information and documents that may be reasonably required, at the **Insured's** own expense.
  - 25.2. assistance and cooperation, which includes, but not limited to, preparing, service and filing of notices and pleadings by the **Insured**

as specifically instructed by the **Insurer** at the **Insurer's** expense, which expenses must be agreed to in writing.

26. The **Insured** also gives the **Insurer** or its appointed agents the right of reasonable access to the **Insured's** premises, staff and records for purposes of inspecting or reviewing them in the conduct of an investigation of any **Claim** where the **Insurer** believes such review or inspection is necessary.

27. Notwithstanding anything else contained in this policy, should the **Insured** fail or refuse to provide information, documents, assistance or cooperation in terms of this policy, to the **Insurer** or its appointed agents and remain in breach for a period of ten (10) working days after receipt of written notice to remedy such breach (from the **Insurer** or its appointed agents) the **Insurer** has the right to:

- a) withdraw indemnity; and/or
- b) report the **Insured's** conduct to the regulator; and/or
- c) recover all payments and expenses incurred by it.

For the purposes of this paragraph, written notice will be sent to the address last provided to the **Insurer** by the **Insured** and will be deemed to have been received five (5) working days after electronic transmission or posting by registered mail.

28. By complying with the obligation to disclose all documents and information required by the **Insurer** and its legal representatives, the **Insured** does not waive any claim of legal professional privilege or confidentiality.

29. Where a breach of, or non-compliance with any term of this policy by the **Insured** has resulted in material prejudice to the handling or settlement of any **Claim** against the **Insured**, the **Insured** will reimburse the **Insurer** the difference between the sum payable by the **Insurer** in respect of that **Claim** and the sum which would in the sole opinion of the **Insurer** have been payable in the absence of such prejudice. It is a condition precedent of the **Insurer's** right to obtain reimbursement, that the **Insurer** has fully indemnified the **Insured** in terms of this policy.

30. Written notification of any new **Claim** must be given to:  
**Legal Practitioners Indemnity Insurance Fund NPC**  
 1256 Heuwel Avenue|Centurion|0127  
 PO Box 12189|Die Hoewes|0163 Docex 24 | Centurion  
 Email: [claims@lpiif.co.za](mailto:claims@lpiif.co.za) Tel:+27(0)12 622 3900

## THE INSURER'S RIGHTS AND DUTIES

31. The **Insured** agrees that:  
 a) the **Insurer** has full discretion in the conduct of

the **Claim** against the **Insured** including, but not limited to, its investigation, defence, settlement or appeal in the name of the **Insured**;

b) the **Insurer** has the right to appoint its own legal representative(s) or service providers to act in the conduct and the investigation of the **Claim**; The exercise of the **Insurer's** discretion in terms of a) will not be unreasonable.

32. The **Insurer** agrees that it will not settle any **Claim** against any **Insured** without prior consultation with that **Insured**. However, if the **Insured** does not accept the **Insurer's** recommendation for settlement:

- a) the **Insurer** will not cover further **Defence Costs** and **Claimant's Costs** beyond the date of the **Insurer's** recommendation to the **Insured**; and
- b) the **Insurer's** obligation to indemnify the **Insured** will be limited to the amount of its recommendation for settlement or the **Insured's** available **Annual Amount of Cover** (whichever is the lesser amount).

33. If the amount of any **Claim** exceeds the **Insured's** available **Annual Amount of Cover** the **Insurer** may, in its sole discretion, hold or pay over such amount or any lesser amount for which the **Claim** can be settled. The **Insurer** will thereafter be under no further liability in respect of such a **Claim**, except for the payment of **Approved Costs** or **Defence Costs** incurred prior to the date on which the **Insurer** notifies the **Insured** of its decision.

34. Where the **Insurer** indemnifies the **Insured** in relation to only part of any **Claim**, the **Insurer** will be responsible for only the portion of the **Defence Costs** that reflects an amount attributable to the matters so indemnified. The **Insurer** reserves the right to determine that proportion in its absolute discretion.

35. In the event of the **Insured's** material non-disclosure or misrepresentation in respect of the application for indemnity, the **Insurer** reserves the right to report the **Insured's** conduct to the regulator and to recover any amounts that it may have incurred as a result of the **Insured's** conduct.

36. If the **Insurer** makes payment under this policy, it will not require the **Insured's** consent to take over the **Insured's** right to recover (whether in the **Insurer's** name or the name of the **Insured**) any amounts paid by the **Insurer**;

37. All recoveries made in respect of any **Claim** under this policy will be applied (after deduction of the costs, fees and expenses incurred in obtaining such recovery) in the following order of priority:

- a) the **Insured** will first be reimbursed for the amount by which its liability in respect of such **Claim** exceeded the **Amount of Cover** provided by this policy;
- b) the **Insurer** will then be reimbursed for the amount of its liability under this policy in



respect of such **Claim**;

- c) any remaining amount will be applied toward the **Excess** paid by the **Insured** in respect of such **Claim**.

38. If the **Insured** gives notice during an **Insurance Year**, of any circumstance, act, error or omission (or a related series of acts, errors or omissions) which may give rise to a **Claim** or **Claims**, then any **Claim** or **Claims** in respect of that/those circumstance/s, act/s, error/s or omission/s subsequently made against the **Insured**, will for the purposes of this policy be considered to fall within one **Insurance Year**, being the **Insurance Year** of the first notice.

39. This policy does not give third parties any rights against the **Insurer**.

## HOW THE PARTIES WILL RESOLVE DISPUTES

40. Subject to the provisions of this policy, any dispute or disagreement between the **Insured** and the **Insurer** as to any right to indemnity in terms of this policy, or as to any matter arising out of or in connection with this policy, must be dealt with in the following order:

- written submissions by the **Insured** must be referred to the **Insurer's** internal complaints/dispute team at [disputes@lpiif.co.za](mailto:disputes@lpiif.co.za) or to the address set out in clause 30 of this policy, within thirty (30) days of receipt of the written communication from the **Insurer** which has given rise to the dispute;
- should the dispute not have been resolved within thirty (30) days from the date of receipt by the **Insurer** of the submission referred to in a), then the parties must agree on an independent **Senior Practitioner** who has experience in the area of professional indemnity insurance, to whom the dispute can be referred for a determination. Failing such an agreement, the choice of such **Senior Practitioner** must be referred to the Chairperson of the Legal Practice Council to appoint the **Senior Practitioner** with the relevant experience;
- the parties must make written submissions which will be referred for
- determination to the **Senior Practitioner** referred to in b). The costs incurred in so referring the matter and the costs of the **Senior Practitioner** will be borne by the unsuccessful party; the determination does not have the force of an arbitration award. The unsuccessful party must notify the successful party in writing, within thirty (30) days of the determination by the **Senior Practitioner**, if the determination is not accepted to it;

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

## SCHEDULE A

Period of Insurance: 1<sup>st</sup> July 2022 to 30<sup>th</sup> June 2023 (both days inclusive)

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

## SCHEDULE B

Period of Insurance: 1<sup>st</sup> July 2022 to 30<sup>th</sup> June 2023 (both days inclusive)

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

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

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



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

## RISK MANAGEMENT SELF-ASSESSMENT QUESTIONNAIRE

### LPIIF RISK MANAGEMENT SELF-ASSESSMENT QUESTIONNAIRE

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

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

### IMPORTANT NOTES AND FREQUENTLY ASKED QUESTIONS

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

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

You may complete the questionnaire at any time, even if your firm does not have any claims pending. (In order to make it easier and save time, you might wish to complete it at

the time when you complete your top-up insurance proposal or Fidelity Fund Certificate application. In that way, you will have much of the information at your fingertips.)

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

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

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

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

### 1. SECTION 1

#### 1.1. General practice information:

1.1.1. Name under which practice is conducted

.....

1.1.2. Practice number .....

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

.....

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

.....

1.2. Principal office details:

1.2.1. Address and postal code:.....

1.2.2. Telephone number:.....

1.2.3. Email:.....

1.2.4. Docex:.....

1.2.5. Website:.....

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

.....

1.3. Composition of the practice:

1.3.1. Partners/directors:.....

1.3.2. Professional Assistants/ Associates/ Consultants :.....

1.3.3. Candidate Attorneys:.....

1.3.4. Paralegals:.....

1.3.5. Other staff including secretaries:.....

1.3.6. Total:.....

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

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

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

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



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

## 2. SECTION 2

### 2.1. Risk Management Information

| Risk Question |  | Yes | No |
|---------------|--|-----|----|
| 2.1.1.        | Do you have a dedicated risk management resource/ a person responsible for risk management and/or quality control?                     |     |    |
| 2.1.2.        | Are all instructions recorded in a letter of engagement?   |     |    |
| 2.1.3.        | Does your practice screen prospective clients?   |     |    |
| 2.1.4.        | Do you assess whether or not you have the appetite, the resources and the expertise to carry out the mandate within the required time? |     |    |
| 2.1.5.        | Has your firm registered all time-barred matters with the LPIIF's Prescription Alert unit?   |     |    |
| 2.1.6.        | Are regular file audits conducted?   |     |    |
| 2.1.7.        | Is the proximity the prescription date taken into account when accepting new instructions and explained to clients?                    |     |    |
| 2.1.8.        | Is a peer review system implemented in the firm?   |     |    |
| 2.1.9.        | Is advice to clients always signed off by a partner/ director?   |     |    |
| 2.1.10.       | Do you have a dual diary system in place for professionals and support staff?  |     |    |
| 2.1.11.       | Do you have a formal handover process when a file is transferred from one person to another within the firm?                           |     |    |
| 2.1.12.       | Is more than one contact number obtained for clients?  |     |    |
| 2.1.13.       | Are instructions, consultations and telephone discussions confirmed in writing?  |     |    |
| 2.1.14.       | Does your firm have documented minimum operating standards/ standard operating procedures?   |     |    |
| 2.1.15.       | Does your practice have effective policies on uniform file order?  |     |    |
| 2.1.16.       | Is there a formal structure and process for supervision of staff and delegation of duties?   |     |    |
| 2.1.17.       | Do you have a formal training program in place?  |     |    |
| 2.1.18.       | Does the training program include risk management training?  |     |    |
| 2.1.19.       | Do you have any executor bonds of security issued by the LPIIF?  |     |    |
| 2.1.20.       | If yes, have the estate funds been audited as part of your annual regulatory audit? please provide a copy of the annual audit report   |     |    |
| 2.1.21.       | Are background checks (including criminal records and professional history) conducted on new employees?                                |     |    |
| 2.1.22.       | In respect of the financial functions, has an adequate system been implemented which addresses:  |     |    |
| 2.1.22.1.     | Segregation of duties?   |     |    |
| 2.1.22.2.     | Checks and balances?   |     |    |
| 2.1.22.3.     | The internal controls prescribed by Rule 54.14.7 with regards to the safeguarding of trust funds?                                      |     |    |
| 2.1.22.4.     | Compliance with FICA and the investment rules?   |     |    |
| 2.1.22.5.     | The verification of the payee banking details and any purported changes as required by Rule 54.13?                                     |     |    |

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

.....

.....

.....

.....

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

|     |  |    |  |
|-----|--|----|--|
| Yes |  | No |  |
|-----|--|----|--|

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

|     |  |    |  |
|-----|--|----|--|
| Yes |  | No |  |
|-----|--|----|--|

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

|     |  |    |  |
|-----|--|----|--|
| Yes |  | No |  |
|-----|--|----|--|

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

|     |  |    |  |
|-----|--|----|--|
| Yes |  | No |  |
|-----|--|----|--|

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

|     |  |    |  |
|-----|--|----|--|
| Yes |  | No |  |
|-----|--|----|--|

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

|     |  |    |  |
|-----|--|----|--|
| Yes |  | No |  |
|-----|--|----|--|

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

|     |  |    |  |
|-----|--|----|--|
| Yes |  | No |  |
|-----|--|----|--|

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

**Henri Van Rooyen (Practitioner Support Executive – Email: [henri.vanrooyen@LPIIF.co.za](mailto:henri.vanrooyen@LPIIF.co.za)**

**Thomas Harban (General Manager) – Email: [thomas.harban@LPIIF.co.za](mailto:thomas.harban@LPIIF.co.za)**

NAME: .....

CAPACITY: .....

SIGNATURE: .....

DATE OF COMPLETION: .....



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

## PROFESSIONAL INDEMNITY CLAIM FORM

### CLAIM FORM

This claim form should be read in conjunction with the applicable LPIIF Policy for the specific insurance year, a copy of which can be found on the LPIIF website: [www.lpiif.co.za](http://www.lpiif.co.za)  
Please send the completed claim form to [claims@lpiif.co.za](mailto:claims@lpiif.co.za)

| 1. FIRM |  |
|---------|--|
| 1.1     | Name of firm :   |
| 1.2     | In which Legal Practice Council jurisdiction is your firm practising?  |
| 1.3     | Firm number with the applicable Legal Practice Council:  |
| 1.4     | <div> <div>Does your firm practice in the jurisdiction of more than one Legal Practice Council?</div> <div> <div>YES <input type="checkbox"/></div> <div>NO <input type="checkbox"/></div> </div> </div> <div> <div>• If Yes, state the Legal Practice Council and the firm number in that jurisdiction:</div> <div> <div>_____</div> <div>_____</div> <div>_____</div> </div> </div>                  |
| 1.5     | <div>Does your firm have any branch offices?</div> <div> <div>YES <input type="checkbox"/></div> <div>NO <input type="checkbox"/></div> </div> <div> <div>• If Yes, please give us the full details of each branch office.</div> <div> <div>_____</div> <div>_____</div> <div>_____</div> </div> </div>  |
| 1.6     | <div>Is your practice conducted as a sole practitioner, a partnership or incorporated practice?</div> <div> <div>Sole practitioner <input type="checkbox"/></div> <div>Partnership <input type="checkbox"/></div> <div>Incorporated practice <input type="checkbox"/></div> </div> <div> <div>• If incorporated please provide registration number:</div> <div>Registration number: _____</div> </div> |
| 1.7     | <div>Is your trading name the same as the registered name?</div> <div> <div>YES <input type="checkbox"/></div> <div>NO <input type="checkbox"/></div> </div> <div> <div>• If No, please specify trading name and registered name:</div> <div> <div>Trading : _____</div> <div>Registered: _____</div> </div> </div>  |



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|  |   |
|--|---|
| <p>1.8 Has the name of your firm changed in the last 5 years:</p> <ul style="list-style-type: none"> <li>If Yes, please provide details of previous names and the dates when changed:</li> </ul>   | <p>YES <input type="checkbox"/> NO <input type="checkbox"/></p> <p>-----</p> <p>-----</p> <p>-----</p>              |
| <p>1.9 If a partnership, how many years has the partnership been in existence?</p>   | <p>Years <input type="text"/></p>   |
| <p>1.10 Is the name of your current partnership the same as any previously dissolved partnership you may have been involved in?</p> <ul style="list-style-type: none"> <li>If Yes, please provide details and the date when the previous partnership was dissolved:</li> </ul>   | <p>YES <input type="checkbox"/> NO <input type="checkbox"/></p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> |
| <p>1.11 Number of partners / directors in the firm at the date the alleged circumstance, act error or omission giving rise to the claim occurred: (See explanatory Note 1)</p> <p>1 / 2 / 3 / 4 / 5 / 6 / 7 / 8 / 6 / 7 / 8 / 9 / 10 / 11 / 12 / 13 / 14 or more: -----</p>  |   |
| <p>1.12 Physical address :</p>   |   |
| <p style="text-align: right;">Code :</p>   |   |
| <p>1.13 Postal address :</p>   |   |
| <p style="text-align: right;">Code :</p>   |   |
| <p>1.14 Telephone number :</p>   |   |
| <p>1.15 Fax number :</p>   |   |
| <p>1.16 Contact person:</p>  |   |
| <p>1.17 Email address:</p>   |   |
| <p>1.18 Vat registration number:</p>   |   |
| <p>1.19 Firm's FFC number:</p>   |   |
| <p>1.20 Firms MMS number:</p>  |   |
| <p>1.21 Does your firm have "top-up" insurance?</p> <ul style="list-style-type: none"> <li>If YES, please give details of broker, insurer and policy number for the LPIIF record purposes:</li> </ul> <p>PLEASE NOTE THAT IT REMAINS YOUR RESPONSIBILITY TO NOTIFY YOUR TOP-UP BROKER/INSURER ABOUT THIS CLAIM AND TO UPDATE THEM ON ALL DEVELOPMENTS. THE LPIIF DOES NOT TAKE ANY RESPONSIBILITY WHATSOEVER FOR ANY POSSIBLE REPUDIATION DUE TO YOUR NON-COMPLIANCE WITH YOUR TOP-UP POLICY REQUIREMENTS.</p> | <p>YES <input type="checkbox"/> NO <input type="checkbox"/></p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> |

| 2. DETAILS OF PERSON WHO DEALT WITH THE MATTER   |   |
|--|---|
| 2.1 Surname:   |   |
| 2.2 Full names:  |   |
| 2.3 Capacity:  | <div> Candidate Attorney <input type="checkbox"/> Consultant <input type="checkbox"/> </div> <div> Legal Secretary <input type="checkbox"/> Paralegal <input type="checkbox"/> </div> <div> Partner / Director <input type="checkbox"/> Associate <input type="checkbox"/> </div> <div> Professional Assistant <input type="checkbox"/> Pupil <input type="checkbox"/> </div> <div> Advocate <input type="checkbox"/> </div><br><ul style="list-style-type: none"> <li>If Partner/Director/Professional Assistant/Associate /Consultant, please provide practitioner number:</li> </ul> |
| 2.4 If the person who dealt with the matter is a Candidate Legal Practitioner, Paralegal or Legal Secretary or in some other capacity as a member of your support staff, please provide the details of the supervising legal practitioner: | Name and surname: _____<br>Legal Practitioner number: _____   |
| 2.5 Fidelity Fund Certificate number of the supervising legal practitioner:  |   |
| 2.6 Direct telephone number of the supervising legal practitioner:   |   |
| 2.7 Direct e-mail address of the supervising legal practitioner:   |   |

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

| 3. CLAIM   |   |
|--|---|
| 3.1 Are you notifying the LPIIF of a potential claim?<br><br><ul style="list-style-type: none"> <li>If Yes, please advise the date the person dealing with the matter first became aware of the possibility of a claim:</li> <li>Attach a detailed report on the circumstances surrounding this possible claim.</li> </ul> | YES <input type="checkbox"/> NO <input type="checkbox"/><br><br>-----<br>Report Attached:<br>YES <input type="checkbox"/> NO <input type="checkbox"/>               |
| 3.2 Did you receive a letter of demand or any other correspondence giving an intimation of a claim?<br><br><ul style="list-style-type: none"> <li>If Yes, please provide a copy of the correspondence.</li> </ul>  | YES <input type="checkbox"/> NO <input type="checkbox"/><br><br>Letter attached:<br>YES <input type="checkbox"/> NO <input type="checkbox"/>                        |
| 3.3 Did you receive a summons or counterclaim wherein the liability of your firm is pleaded or intimated?<br><br><ul style="list-style-type: none"> <li>If Yes, please provide copies of all notices and pleadings served to date.</li> </ul>  | YES <input type="checkbox"/> NO <input type="checkbox"/><br><br>Summons and/or Pleadings attached:<br>YES <input type="checkbox"/> NO <input type="checkbox"/>      |
| 3.4 Did you serve a notice of intention to defend/notice of intention to oppose?<br><br><ul style="list-style-type: none"> <li>If Yes, please provide a copy.</li> <li>If No, please serve one immediately to avoid default judgment. (See explanatory Note 2)</li> </ul>  | YES <input type="checkbox"/> NO <input type="checkbox"/><br><br>Notice of intention to defend attached:<br>YES <input type="checkbox"/> NO <input type="checkbox"/> |

# RISKALERT

|  |  |  |                       |                      |        |                                   |                                   |                      |              |            |             |              |            |            |             |                    |                                |                                |       |                                      |       |
|--|--|--|-----------------------|----------------------|--------|-----------------------------------|-----------------------------------|----------------------|--------------|------------|-------------|--------------|------------|------------|-------------|--------------------|--------------------------------|--------------------------------|-------|--------------------------------------|-------|
| <p>3.5 Are you in possession of your original file, relating to your conduct of the matter out of which this claim arises?</p> <ul style="list-style-type: none"> <li>If No, who is currently in possession of the original file?</li> <li>If No, did you retain copies of the file contents?</li> <li>If Yes, please provide copies of entire file contents.</li> </ul>   | <p>YES <input type="checkbox"/> NO <input type="checkbox"/></p> <p>-----</p> <p>YES <input type="checkbox"/> NO <input type="checkbox"/></p> <p>Copies of file attached:</p> <p>YES <input type="checkbox"/> NO <input type="checkbox"/></p> |  |                       |                      |        |                                   |                                   |                      |              |            |             |              |            |            |             |                    |                                |                                |       |                                      |       |
| <p>3.6 Please specify the claim type by marking the correct option: (See explanatory Note 3.)</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%;">RAF prescription (<i>See Explanatory Note 2</i>)</td> <td style="width: 50%;">Patents &amp; Trade Marks</td> </tr> <tr> <td>RAF under settlement</td> <td>Marine</td> </tr> <tr> <td>MVA common law claim prescription</td> <td>Trustees/Executors/Administrators</td> </tr> <tr> <td>General prescription</td> <td>Liquidations</td> </tr> <tr> <td>Litigation</td> <td>Matrimonial</td> </tr> <tr> <td>Conveyancing</td> <td>Labour law</td> </tr> <tr> <td>Commercial</td> <td>Investments</td> </tr> <tr> <td>Defamation/Iniuria</td> <td>Wrongful arrest of 3rd parties</td> </tr> <tr> <td>Prescribed medical malpractice</td> <td>Wills</td> </tr> <tr> <td>Medical malpractice under settlement</td> <td>Other</td> </tr> </table> |  | RAF prescription ( <i>See Explanatory Note 2</i> ) | Patents & Trade Marks | RAF under settlement | Marine | MVA common law claim prescription | Trustees/Executors/Administrators | General prescription | Liquidations | Litigation | Matrimonial | Conveyancing | Labour law | Commercial | Investments | Defamation/Iniuria | Wrongful arrest of 3rd parties | Prescribed medical malpractice | Wills | Medical malpractice under settlement | Other |
| RAF prescription ( <i>See Explanatory Note 2</i> )   | Patents & Trade Marks  |  |                       |                      |        |                                   |                                   |                      |              |            |             |              |            |            |             |                    |                                |                                |       |                                      |       |
| RAF under settlement   | Marine   |  |                       |                      |        |                                   |                                   |                      |              |            |             |              |            |            |             |                    |                                |                                |       |                                      |       |
| MVA common law claim prescription  | Trustees/Executors/Administrators  |  |                       |                      |        |                                   |                                   |                      |              |            |             |              |            |            |             |                    |                                |                                |       |                                      |       |
| General prescription   | Liquidations   |  |                       |                      |        |                                   |                                   |                      |              |            |             |              |            |            |             |                    |                                |                                |       |                                      |       |
| Litigation   | Matrimonial  |  |                       |                      |        |                                   |                                   |                      |              |            |             |              |            |            |             |                    |                                |                                |       |                                      |       |
| Conveyancing   | Labour law   |  |                       |                      |        |                                   |                                   |                      |              |            |             |              |            |            |             |                    |                                |                                |       |                                      |       |
| Commercial   | Investments  |  |                       |                      |        |                                   |                                   |                      |              |            |             |              |            |            |             |                    |                                |                                |       |                                      |       |
| Defamation/Iniuria   | Wrongful arrest of 3rd parties   |  |                       |                      |        |                                   |                                   |                      |              |            |             |              |            |            |             |                    |                                |                                |       |                                      |       |
| Prescribed medical malpractice   | Wills  |  |                       |                      |        |                                   |                                   |                      |              |            |             |              |            |            |             |                    |                                |                                |       |                                      |       |
| Medical malpractice under settlement   | Other  |  |                       |                      |        |                                   |                                   |                      |              |            |             |              |            |            |             |                    |                                |                                |       |                                      |       |
| <p>3.7 If RAF prescription, was the matter registered with Prescription Alert? (See explanatory Note 4)</p>  | <p>YES <input type="checkbox"/> NO <input type="checkbox"/></p>  |  |                       |                      |        |                                   |                                   |                      |              |            |             |              |            |            |             |                    |                                |                                |       |                                      |       |
| <p>3.8 Has your firm notified the insurer of any other claims against it since 1 July 2016?</p> <ul style="list-style-type: none"> <li>If Yes, please provide the reference number under which that claim was registered and the name of the claimant.</li> </ul>  | <p>YES <input type="checkbox"/> NO <input type="checkbox"/></p> <p>-----</p> <p>-----</p> <p>-----</p>   |  |                       |                      |        |                                   |                                   |                      |              |            |             |              |            |            |             |                    |                                |                                |       |                                      |       |
| <p>3.9 Please provide an estimate of the quantum of the claim:</p>   | <p>R-----</p>  |  |                       |                      |        |                                   |                                   |                      |              |            |             |              |            |            |             |                    |                                |                                |       |                                      |       |
| <p>3.10 Full names of the claimant:</p>  |  |  |                       |                      |        |                                   |                                   |                      |              |            |             |              |            |            |             |                    |                                |                                |       |                                      |       |
| <p>3.11 Identity number / Registration number of Claimant:</p>   |  |  |                       |                      |        |                                   |                                   |                      |              |            |             |              |            |            |             |                    |                                |                                |       |                                      |       |

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

## 4. RISK MANAGEMENT

|   |  |
|---|--|
| <p>4.1 Please provide full details of the circumstances, errors or omissions which led to the claim:</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> |  |
|---|--|



|     |  |
|-----|--|
| 4.2 | <p>Please provide full details of the risk management measures that have been put in place in the aftermath of this claim to prevent further claims in the future:</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>                  |
| 4.3 | <p>If no or insufficient risk management measures have been put in place, please provide us with a detailed plan on how your firm will avoid similar claims from arising in future:</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> |

SIGNED.....

NAME.....

CAPACITY.....

DATE.....

## EXPLANATORY NOTES:

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



## EXECUTOR BONDS POLICY

### 1. GENERAL PROVISIONS

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

### 2. EXCLUSIONS

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

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

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

### 3. TERMS AND CONDITIONS

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

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

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

## 4. LIMITS

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

## 5. SOLE RECORD OF THE AGREEMENT

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

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

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

## 6. DOMICILIUM

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

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

## 7. DECLARATION

If the bond is granted, I agree:

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

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

DATED AT ..... ON THIS .....

DAY OF ..... 20.....

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

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

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





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

## APPLICATION FORM FOR EXECUTOR BOND

### 1. APPLICANT

1.1 Surname :

1.2 Full names :

1.3 Identity number :

1.4 Practitioner number :

1.5 Fidelity fund certificate number :

1.6 Residential address :

Code :

1.7 Cell number :

1.8 Work telephone number :

1.9 Work email address :

1.10 Are you a practising attorney?

YES ☐ NO ☐

1.11 When were you admitted as an attorney?

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

YES ☐ NO ☐

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

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# RISKALERT

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

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

# RISKALERT

(a) If YES, please provide details :

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

YES ☐ NO ☐

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

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

YES ☐ NO ☐

(a) If YES, please provide details :

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

YES ☐ NO ☐

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



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

## 2. FIRM

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

|  |   |
|--|---|
| 2.4 Physical address :   |   |
| Code :   |   |
| 2.5 Postal address :   |   |
| Code :   |   |
| 2.6 Telephone number :   |   |
| 2.7 Fax number :   |   |
| 2.8 Does your firm have misappropriation of trust monies insurance?<br><br>• If YES, please, state insurer and the limit of Indemnity. | YES <input type="checkbox"/> NO <input type="checkbox"/><br><br>----- |
| 3. DECEASED  |   |
| 3.1 Surname :  |   |
| 3.2 Full names :   |   |
| 3.3 Identity number :  |   |
| 3.4 Date of birth :  |   |

|   |   |
|---|---|
| <p>3.5 Date of death :</p> <ul style="list-style-type: none"> <li>A copy of the death certificate must be attached to this application form.</li> </ul>   |   |
| <p>3.6 At which Master's office was the estate reported?</p>  | <p>Province : _____</p> <p>Division : _____</p>                                   |
| <p>3.7 Master's reference / Estate number :</p>   |   |
| <p>3.8 Did the deceased die testate or intestate?</p> <ul style="list-style-type: none"> <li>If testate a copy of the will must be attached to this application form.</li> </ul>  | <p>Testate <input type="checkbox"/></p> <p>Intestate <input type="checkbox"/></p> |
| <p>3.9 In terms of the inventory please advise the following :</p> <ul style="list-style-type: none"> <li>A copy of the inventory must be attached to this application.</li> </ul>  | <p>Assets : R _____</p> <p>Liabilities : R _____</p>                              |
| <p>3.10 Would appropriate insurance for the insurable assets in the estate be in place on your appointment?</p> <ul style="list-style-type: none"> <li>Please refer to clause 3.3.3 of the terms and conditions.</li> </ul> | <p>YES <input type="checkbox"/> NO <input type="checkbox"/></p>                   |

## THE FOLLOWING DOCUMENTS ARE REQUIRED FOR A BOND TO BE ISSUED:

1. A covering letter on the applicant's official company letterhead;
2. Proof of practice or firm number;\*
3. Proof of practitioner or member number;

# RISKALERT

4. The original form J262E (Bond of Security) which must be completed and signed by the applicant, whose signature must be attested to by two witnesses;
5. Copy of the will (if applicable);
6. Copy of certified death certificate (a copy of the death notice, if there is no death certificate);
7. Copy of court order (if applicable);
8. Inventory or statement of assets & liabilities of the estate;
9. Copy of any directions from the Master as to the security required;
10. Proof of Master's estate reference number;
11. Nomination forms by the beneficiaries/person appointing the applicant as executor;
12. The executor's acceptance of trust as executor;
13. A certified copy of the executor's identity document;
14. The executor's current fidelity fund certificate;
15. If applicant is not a director/partner a letter on the firm's letterhead signed by one of the partners confirming that the appointee is employed by the firm and has been authorised to apply for bonds of security in the name of the firm and to administer the estate on behalf of the firm. This letter must be accompanied by the certified current fidelity fund certificate of the partner/ director;
16. Applicant's abridged curriculum vitae (CV);
17. A resolution as contemplated in clause 3.10 of the terms and conditions, where applicable.

- **The application documents may be emailed to confirm compliance and outstanding requirements, prior to the submission of the original documents. Original documents will still be required as the J262E must be submitted to the Master of the High Court in its original format.**
- The application forms and requirements are available on our website [www.lpiif.co.za](http://www.lpiif.co.za).

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

Alternatively, you may contact:

- × Ms Patricia Motsepe on 012 622 3927 - email [patricia.motsepe@lpiif.co.za](mailto:patricia.motsepe@lpiif.co.za)
- × Mr Sifiso Khuboni on 012 622 3935 - email [Sifiso.khuboni@lpiif.co.za](mailto:Sifiso.khuboni@lpiif.co.za)



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

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

.....

WITNESS (Full names & signature)

.....

APPLICANT (Full names & signature)

.....

WITNESS (Full names & signature)



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

## RESOLUTION IN TERMS OF CLAUSE 3.10

In the matter of:- Estate Late

-----  
----- [the firm of attorneys]  
herein represented by:

1. -----
2. -----
3. -----
4. -----
5. -----

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

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

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

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

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Director / Partner 1 Signature

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Director / Partner 2 Signature

-----  
Director / Partner 3 Signature

-----  
Director / Partner 4 Signature

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Director / Partner 5 Signature