LAW SOCIETY OF SOUTH AFRICA

DE REBUS

THE SA ATTORNEYS' JOURNAL

MARCH 2023

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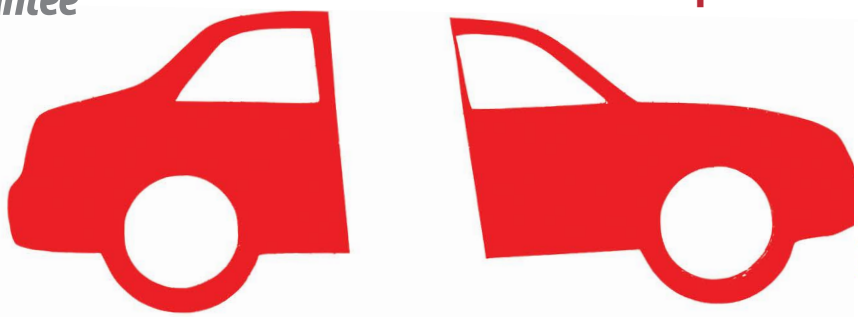

When an order is looked at in the light of the Superior Court Act, there is no ambiguity, error or omission

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South Africa greylisting impact: How can legal practitioners help?

On 24 February 2023, the Financial Action Task Force (FATF) greylisted South Africa (SA), which means that the country is not fully compliant with anti-money laundering and terrorist financing standards. The FATF is the global money laundering and terrorist financing watchdog that sets international standards that aim to prevent these illegal activities and the harm they cause to society.

South Africa's greylisting will signal to investors, global banks and financial institutions that the country is not fully compliant with anti-money laundering and terrorist financing standards. The greylisting comes even after the FATF recently said that the country 'has made significant progress on many of its recommended actions to improve' its situation, however, more work needed to be done to 'increase investigations and prosecutions of money laundering' including the seizure of assets attained by means of crime (Jan Cronje 'South Africa has been greylisted by anti-money laundering watchdog' (www.news24.com, accessed 27-2-2023)). There were eight areas that were identified by the FATF for improvement, these are to –

- 'demonstrate a sustained increase in outbound Mutual Legal Assistance requests that help facilitate money laundering/terrorism financing (ML/TF) investigations and confiscations of different types of assets in line with its risk profile;
- improve risk-based supervision of Designated Non-Financial Businesses and Professions (DNFBPs) and demonstrating that all [Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT)] supervisors apply effective, proportionate, and effective sanctions for non-compliance;
- ensure that competent authorities have timely access to accurate and up-to-date Beneficial Ownership (BO) information on legal persons and arrangements and applying sanctions for breaches of violation by legal persons to BO obligations;
- demonstrate a sustained increase in law enforcement agencies' requests for financial intelligence from the Financial Intelligence Centre for its ML/TF investigations;
- demonstrate a sustained increase in investigations and prosecutions of serious and complex money laundering and the full range of terrorist financing activities in line with its risk profile;
- enhance its identification, seizure, and confiscation of proceeds and instrumentalities of a wider range of predicate crimes, in line with its risk profile;
- update its terrorist financing risk assessment to inform the implementation of a comprehensive national counter-financing of terrorism strategy; and
- ensure the effective implementation of targeted financial sanctions and demonstrating an effective mechanism to identify individuals and entities that meet the criteria for domestic designation' (www.treasury.gov.za, accessed 27-2-2023).

The greylisting implications are many, one being that it will 'hike the cost of doing business in South Africa by increasing the amount of due diligence companies have to carry out' (Cronje (*op cit*)). South Africans will also find sending funds overseas with international banks more difficult. Another implication of greylisting that will affect an already ailing South African economy is that foreign direct investment and portfolio inflows will decline. Subsequently, the Reserve Bank has warned that greylisting could have wide-reaching consequences for the country's financial system. 'Although the bank has warned of capital and currency outflows, the more immediate problem is that it increases transactional, administrative and funding costs for the banking sector' (Tim Cohen 'It's official – South Africa fails to avoid greylisting' (www.dailymaverick.co.za, accessed 27-2-2023)).

Minister of Finance, Enoch Godongwana, has since said that 'Cabinet has considered the action plan put forward by the FATF and had committed to actively work with the watchdog' (Cronje (*op cit*)). In December 2022, President Cyril Ramaphosa signed two key pieces of legislation, the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act 22 of 2022 and the Protection of Constitutional Democracy Against Terrorist and Related Activities Amendment Act 23 of 2022 in an effort to avoid greylisting but clearly the FAFT wants to see whether SA has the will and the ability to manage the structures it has now put in place.

In November 2022, the Law Society of South Africa hosted a hybrid (face to face/virtual) seminar on AML/CFT compliance for legal practitioners in Cape Town and Johannesburg. During the seminar, the Panel indicated that greylisting should be considered in the context of a failure to ensure a robust AML/CFT compliance environment. It was a process that would subject SA to increased monitoring and scrutiny to ensure that it took the necessary corrective actions. South Africa, as a country, would have to focus on working together to correct its deficiencies. The Mutual Evaluation Report: Anti-Money Laundering and Counter-Terrorist Financing Measures – South Africa, 2021 highlighted failures in various industries, particularly in the property practitioners and legal profession sectors. Greylisting would have an international ripple effect in that when dealing with SA, enhanced scrutiny and due diligence would be required, which may lead to a de-risking option being followed internationally rather than having to meet the enhanced due diligence requirements. SA would be seen as a high-risk client by the rest of the world.

Mapula Oliphant – Editor

The Panel discussion held during the LSSA seminar noted that there appeared to be insufficient expertise within the profession around AML/CFT compliance. It was suggested that the profession, rather than seeing AML/CFT compliance as a compliance burden and seeing risk as falling within the domain of governance and having regard to the pending amendment to legislation contained in the Bills and the law, legal practitioners should look for and identify opportunities in this field. By ensuring that they have Risk Management and Compliance Programmes in place, legal practitioners would signal to fraudsters and opportunists that they were likely to be reported if they attempted to take advantage of the legal profession. The risk-based approach was new and presented an opportunity for legal practitioners to enhance their expertise in this field, legal practitioners were invited to seize this new practice area as an opportunity.

Compiled by Shireen Mahomed

People and practices

Garlicke & Bousfield Inc in La Lucia Ridge has two new appointments.

Wynand Nortjé has been appointed as a senior associate in the Property and Conveyancing Department.

Tamsyn Knight has been appointed as an associate in the Estates and Trusts Department.

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

By Maboku Mangena

BLA stalwart laid to rest

The legal profession is reeling with shock after losing one of its own members, Thokwane Phineas Moloto at the age of 73. Mr Moloto who was affectionately known as 'Post' was a practicing attorney for many years before he converted to be an advocate in 2022.

He started his career as an articled clerk in Germiston in 1980 and was admitted as an attorney in 1983. Soon after his admission, he opened his own law firm in Benoni under the name and style of TP Moloto and Company, a law firm that was to become a training centre for many young black students who aspired to become attorneys. The firm is reported to have produced over 65 practicing attorneys some of whom are judges of the High Court.

It is in this context that Constitutional Court Justice RS Mathopo, speaking at the memorial service told the mourners that Mr Moloto had made an immense contribution to the judiciary and deserved much more than he was credited for. He may not have aspired to become a judge, but it would have been a good semblance of an acknowledgment of his contribution if the judiciary could have asked him to sit as an acting judge and tap on his wisdom. It is regrettable that he passed away without the judiciary bestowing this honour on him.

Commenting on his passing, the President of the Black Lawyers Association (BLA), Bayethe Maswazi said that the BLA had lost a committed soldier with an unshakable commitment to the cause for which the BLA stands. The same sentiments were echoed by former Chairperson of the BLA in Gauteng, Chris Mamathuntsha, who described Mr Moloto as 'a fine gentleman, elder and comrade in the struggle for transformation of the society in general and the judiciary in particular … a disciplined member of the BLA to the end'.

A memorial service was held on the 18 January 2023 in Benoni where speaker after speaker reflected on the bravery of Mr Moloto. He was called a trailblazer and path finder who was not afraid to face injustice whenever he met it, sometimes to his own detriment. He had during his lifetime worked tirelessly for black people in South Africa to realise the lofty ideals set out in the Constitution and the Bill of Rights. Mr Mapheto referred to him as a humble servant who lived by the values and ethics of the profession, he so much dedicated his life to.

Delivering a tribute through Mr Nano Matlala, Mathata Tsedu a renowned journalist and former editor of the Sowetan, City Press and the Sunday Times said the following about Mr Moloto:

'He was a language warrior who refused to buy into the hype of 11 official languages. He did not only choose law as a terrain of the struggle, but also what language and what norms influenced the law and dispensing justice. As an activist, he became a one-man army in the courts of our land, arguing that he should be able to argue his cases in Sepedi and went ahead to do so.'

He further described him as 'a practicing Pan-Africanist, who not only believed but knew that freedom was more than the ballot every five years. He knew that the ability to go to school and learn whatever subject in your mother tongue was the height of freedom. He knew too, that the inability to do so was the prime indication of false freedom'.

Indeed, the law reports bears testimony to his zeal to use the law as a tool to advance the struggle for equality in our country. In *Matemane v Magistrate, Alberton, and Another* 1991 (4) SA 613 (W), Mr Moloto single-handedly confronted the Apartheid monstrosity by arguing for the right of the legal representative to present a case on the language they were proficient in. The case started in 1987 before the adoption of the Interim Constitution and the Bill of Rights. Mr Moloto dared the Apartheid government at the height of repression through the state of emergency imposed against black people when he refused to use Afrikaans.

The case demonstrated the bravery of Mr Moloto as he refused to cower to the pressure of the magistrate and asserted the rights of his client. He is on record as having refused to cross-examine a witness in Afrikaans and insisted on using English even though the witness had testified in Afrikaans. His insistence was a direct attack on the foundations of the

Apartheid legal order, which was using the courts and the then law societies to sustain itself in power. In this sense, Mr Moloto became a voice for all the oppressed black lawyers in the country. It is no overstatement to say that all black practicing attorneys and advocates are the beneficiaries of his legacy. If it was not for him, Afrikaans would have still been forced down the throats of lawyers as a language of record in our courts.

The Legal Practice Council (LPC) remembered him as a fearless fighter for legal practitioners. Council member of the LPC, Kathleen Matolo-Dlepu who is also his contemporary said the LPC had lost a dedicated member and is poorer without him.

Mr Moloto's contribution was felt all over the continent of Africa and his death touched many people in Botswana, Namibia, Lesotho, and Zimbabwe where he obtained his LLB degree. Messages of support were received from organisations, such as the Pan African Lawyers Union and Southern African Development Community Lawyers Association for which he was a founding member.

Mr Moloto passed away on the 14 January 2023 after a short illness. He was laid to rest on 21 January 2023 in Tjibeng Village, Limpopo Province. His funeral was attended by dignitaries, which included among others, Judge President of the Mpumalanga Division of the High Court, Francis Legodi, Gauteng Local Division of the High Court, Judge Marcus Senyatsi, and Limpopo Division of the High Court, Judge MG Phatudi who delivered a tribute on behalf of the judiciary. Premier of Limpopo, Stanley Mathabatha together with the Minister of Home Affairs, Dr Aaron Motsoaledi were also in attendance. Mr Moloto is survived by his wife, children, and siblings. He will be missed by his community, the BLA, the legal profession and the country at large.

Maboku Mangena *BProc (UniVen) PG Dip Corporate law (Unisa) Taxation Adv (UP)* is legal practitioner, notary, and conveyancer at Maboku Mangena Attorneys Inc in Polokwane.

Practising in an increasingly complex regulatory environment

By Thomas Harban

The complexities of conducting a legal practice have increased substantially in recent years. Legal practitioners now face multifaceted challenges, including difficult economic and business conditions on the one hand, compounded by the introduction of several new regulatory requirements on the other. The new requirements have a significant impact on all areas of the legal practice, affecting both the way the firm services clients and how the firm as a business entity is managed.

The various pieces of legislation adopt different forms of regulation. In some the regulatory approach is risk based, while in others it can be rules based. Some activities may simultaneously fall into the regulatory ambit of multiple regulators with different regulatory and enforcement approaches. All these factors make for an increasingly complex regulatory environment for legal practitioners.

Taking on the mandate

Long gone are the days when a mandate commenced simply with a general discussion between an attorney and client about the matter, with the attorney making a few cursory notes of the legal issues as outlined by the client, the latter signing a power of attorney or other document confirming the mandate in broad terms and then leaving the attorney's office after a handshake. Granted, an important part of the discussions would have been about the attorney's fee, when and by whom it would be paid. The client may then have been required to make an upfront payment of either the full fee and the anticipated disbursements, if applicable, and the payment may have either been made in person at the attorney's office or later by a deposit into the attorney's trust account. The attorney would been considered to have received full instructions (understood to be placed in sufficient funds) and there was an expectation that the mandate would then be carried out. The client would then have expected the attorney to act as instructed. Factors, such as the existence of possible conflicts of interest, whether the mandate fell within the attorney's area of practice and the client's ability to pay the attorney's fees would have been foremost in the latter's mind when considering whether to accept the instruction. Essentially, attorneys were only subject the ethical rules applicable to practice and the statutory framework applicable to the legal profession. Little, if any, consideration may have been paid to the source of the client's funding for the legal fees or the funds utilised in the underlying transaction. The attorney-client privilege was sacrosanct and the idea of reporting your client's suspicious funds to any regulatory body of other institution was regarded as unthinkable. The regulatory and business worlds have changed significantly since then and, thankfully, so have the ethical responsibilities of attorneys.

When considering the profile of the client, some firms would have been reluctant to take on matters for parties with adverse reputations or cases that they expected would draw bad publicity for their practices. Unpopular clients and unpopular causes were a no-go area for some firms. The phrase 'politically exposed persons' would have been understood as reference to persons associated with political organisations or causes.

Alas, much has changed in recent years. There is now a host of legislation and regulations that must be complied with, including the Legal Practice Act 28 of 2014 (LPA), the Financial Intelligence Centre Act 38 of 2001 (FICA), the Contingency Fees Act 66 of 1997 and the Protection of Personal Information Act 4 of 2013 (POPIA). These statutes regulate various activities in legal practices, including documenting the terms of the mandate, a duty to do a risk assessment on clients, the requirements to report suspicious activities to the appropriate regulator and how data is processed, securely stored and eventually disposed of. There are numerous other pieces of legislation that also apply. It is important that legal practitioners read each piece of legislation carefully, gain a full understanding of their obligations in

respect of each statute and implement internal systems to ensure ongoing compliance with the regulatory prescripts. It will also be prudent to attend the specialist training sessions on each of the regulatory topics offered by knowledgeable experts, to ensure that staff in the practice are also upskilled and to invest in appropriate practice management systems. Developing systems to regularly audit internal compliance with the various pieces of legislation will be one effective way of mitigating regulatory risks.

Taking the simple scenario sketched above into account, the simple signature of the broadly worded power of attorney will simply not be sufficient. Section 34(1) of the LPA provides that: 'An attorney may render legal services in expectation of any fee, commission, gain, or reward as contemplated in this Act or any other applicable law, upon … request directly from the public for that service.' Rules 35.3, 35.4 and 35.5 of the Rules made under the authority of ss 95(1), 95(3) and 109(2) of the LPA, respectively, prescribe that:

'35.3 When written instructions are given by a client to an attorney the attorney must ensure that they set out the intended scope of the engagement with sufficient clarity to enable the attorney to understand the full extent of the mandate. If the attorney is uncertain as to the scope of the mandate the attorney must seek written clarification of the intended scope of the instruction.

35.4 Where the client instructs the attorney verbally, the attorney must as soon as practically possible confirm the instructions in writing and in particular must set out the attorney's understanding of the scope of the engagement.

35.5 An attorney who is in receipt of instructions from a client must comply with those provisions of legal services, including, without limitation, the provisions of sections 34 and 35 of the Act'.

Where the instruction falls within the ambit of the Contingency Fees Act, a written agreement that meets the requirements of that Act will have to be concluded.

When payments are received from clients or other parties, attorneys, being accountable institutions, will have to comply with their reporting obligations and other obligations set out in the FICA. A risk-based approach to managing financial and other FICA related risks must be adopted by the practice. A degree of professional scepticism is also required when considering explanations given by parties to a transaction. Pose pointed questions regarding the origins of funds, why the transactions are structure in a specific manner, who the ultimate beneficial ownership lies with and do some background checks to verify the information provided to you. Inform the parties to the transactions of your statutory obligations and document as much detail as you can. You must now conduct a due diligence exercise on your clients. Firms need to have a risk management and compliance program.

Executing the mandate

Legal practitioners must guard against intentionally overlooking certain FICA related risks thinking that they are doing so to avoid the risk of losing a client. An instruction, no matter how lucrative it may appear on paper, is not worth risking your professional career, breaching your statutory obligations, and being left to face the consequences. Contrary to a widely held belief, compliance with the FICA involves substantially more than simply obtaining a copy of the client's identity document of proof of address.

You need to have a heightened level of risk awareness throughout the execution of your mandate. There may be developments not initially anticipated that trigger some or other regulatory requirements. Not all types of legal services will attract the same level of regulatory obligations, but all attract some form of obligations. If, for example, your firm invests funds on behalf of a client or clients and it controls or manages those investments, directly or indirectly, it is deemed to be carrying on the business of an investment practice (r 55.1). Firms conducting investment practices must comply with the Financial Advisory and Intermediary Services Act 37 of 2002 (the FAIS Act) and the regulations issued in terms of that Act. Investment practices thus have an additional level of compliance and an additional regulator, the Financial Sector Conduct Authority, to contend with in relation to their conduct falling within the FAIS Act. The investment practice may be ancillary to the legal services provided by the firm and thus also subject to the regulation by the Legal Practice Council.

The increasing cost of compliance

The changes to the regulatory model applicable to financial services industry over the past two-decades led to a huge increase in compliance costs in that industry. It is expected that legal practitioners will also be faced with an increased cost of running their practices as they are required to invest in appropriate systems to ensure compliance. In some instances, this will also require the employment of either more staff or more skilled staff and an increase in staff training costs. Either way, the personnel costs will increase, and these increased costs will have to be passed on to clients. Time will tell whether there will be an emergence of a compliance service industry, as has happened with the financial services industry, offering their services to the legal profession on an outsourced basis. Outsourcing your compliance functions to an outside company does not absolve you entirely of the risks. If something goes wrong, you will still be ultimately responsible.

Navigating the regulatory maze

You attitude towards compliance will be a major factor in determining how successful you are in dealing with the regulatory requirements. The regulatory tone will be set by you as the head of the firm. Do not view compliance as a mere tick-box exercise or another level of bureaucracy. Setting the internal compliance bar at achieving the bare minimum will be setting the bar too low and uncomfortably close to the non-compliance threshold. Create a culture of compliance with the letter and spirit of the law in your firm. Compliance requirements, though onerous in some instances, assist legal practices to conduct business better. Some of the new requirements, such as the FICA requirements, have been implemented to enable South Africa to comply with its international obligations to avoid the risk of a grey listing of the country. Do not view the various compliance requirements in silos. When you view the compliance requirements holistically, you will be able to identify the broader risks and behaviours that the requirements aim to address and then develop a holistic compliance strategy. Check the wording of the insurance policies you have in place and consult with your broker and underwriter to ascertain what insurance cover, if any, you have in place to indemnify you in case a party suffers a loss as a result of a *bona fide* mistake made by your firm or even if you face criminal, administrative or other regulatory action or a fine as a result of such an error. However, you will not be able to get insurance cover for an intentional unlawful act.

Effective compliance with all legislative and good governance requirements across all areas of your practice may assist in giving your firm a competitive advantage over the rest of the market. Prudent, risk averse clients will also be more likely to instruct firms that take regulatory compliance seriously rather than those who have a *laissez-faire* attitude to this important topic. You would not want to be in the embarrassing position where a client questions the effectiveness of your internal regulatory compliance regime or, worse still, be the legal practitioner who was exposed for non-compliance with regulatory requirements or not having sufficient knowledge of the applicable regulatory framework.

Thomas Harban *BA LLB (Wits)* is the General Manager of the Legal Practitioners Indemnity Insurance Fund NPC in Centurion.

Why should you care about cession clauses in lease agreements?

By Siyabonga Skosana

When a lessor and a lessee enter into a lease agreement, there are rights and duties that arise from the agreement. The general rule is that rights arising out of contracts, including lease agreements, often may be ceded to third parties without consent from a counterparty. However, rare instances occur where the rights arising from agreements are intended for the benefit of a specific party to the contract.

General agreements

Generally, agreements allow for a third party to complete contract specific obligations. The absence of a no cession clause is enough to mean that cession of rights and duties of a contract is possible in such general agreements. In fact, where it concerns long term lease agreements, lessors often do not anticipate that one lessee would carry out the obligations throughout the whole term. However, this position has been altered by a recent Constitutional Court (CC) judgment in *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (8) BCLR 807 (CC). The court noted that, where parties are considering whether a cession of duties is possible, they ought to consider a position that is a step ahead of the general rule around the absence of no cession clauses. The court held that parties should interpret agreements, such as the contract's factual matrix, its purpose, and circumstances leading up to its conclusion.

A written no cession clause is often a distinct way to clarify that no party to a contract containing such a clause may cede their rights and/or duties. Such clauses are utilised where agreements are entered into with specific beneficiaries, or person to comply with the obligation, in mind. In instances where the no cession clause is not used, a highly personalised context of a contract is a valid indicator as to the inability to cede the contractual obligations. The common law principle of *delectus personae* prevents delegation of rights and/or duties of one party to another party in such instances. For example, where a patient consents to surgery being conducted by a specific surgeon, such surgeon is a specified person to complete the obligation. Thus, a right of this nature may not be delegated to another surgeon who may have a different set of skills.

The *University of Johannesburg* case

In *University of Johannesburg*, the focus of the matter was whether contractual rights and duties arising out of a lease agreement were lawfully ceded and whether ceding rights in a long-term lease agreement constituted termination of the agreement within context.

This matter concerned the University of Johannesburg (UJ) and Auckland Park Theological Seminary (ATS) concluding a 30-year lease agreement in 1993, which was registered in 1996. The agreement provided, among other rights and duties, that students who registered for theological degrees would be taught other courses by both UJ and ATS. In particular, UJ contractually agreed that ATS would be the lessee when UJ registered the lease agreement with the Minister of Education. In addition, this lease agreement was in terms of the Universities Act 61 of 1955, as well as s 4(2) of the Rand Afrikaans University Act 51 of 1966.

In 2011, ATS ceded its rights arising from the lease agreement to a third party, Wamjay Holdings Investments (Wamjay), for a once off payment of R 6 500 000 without the knowledge of UJ. Wamjay's intention was to establish a religious-based school for primary and high school education on the premises leased by ATS from UJ. When UJ became aware of the cession by ATS, they took the view that the rights in the lease agreement were personal to ATS. In addition, they considered that ATS's act to cede their rights to Wamjay was a repudiation of the original lease agreement between UJ and ATC.

The SCA and CC judgments

The Supreme Court of Appeal (SCA) found that the cession by ATS to Wamjay was legal, despite the personal rights alleged by UJ. The SCA highlighted that the restriction that is placed by the *delectus personae* rule on the cession of rights in long-term lease agreements does not expect that the obligations will be completed by one party. Therefore,

the SCA held that there was nothing in the lease itself that indicated that ATS's rights were *delectus personae* or not intended to be ceded at a later stage (see M Kader 'Cession of rights under long-term lease' (www.lexisnexis.co.za, accessed 1-2-2023)).

However, the CC took a contextual approach to the interpretation of the lease agreement. In its inquiry, the court discussed that evidence introduced to supplement contracts of a personal nature should be such that it considers the circumstances that were present when the contract was concluded. The decision was further informed by the legal principle of *delectus personae* on lease agreements to overturn the decision of the SCA.

It was concluded by the High Court that rights contained in long term lease agreements between specific parties may not to be ceded without specific consent. When determining whether rights under a lease agreement are *delectus personae*, the necessary inquiry is whether the rights are so personal that it makes a reasonable difference who will enforce the rights. If it does, in fact, make a material difference, the rights in an agreement are to be interpreted as incapable of being ceded. As a result of this inquiry, the court found in favour of UJ in that the rights granted through UJ and ATS's lease agreement were personal and specific to ATS. The rights were severely personal in nature that it did make a difference that ATS were suddenly not the party entitled to enforce the rights. Therefore, the High Court concluded that UJ was reasonable to interpret that ATS had repudiated the lease agreement.

Ways to avoid cession without consent

Briefly stated, this judgment affirms that lessors should continuously ensure that their lease agreements contain a no cession clause, a clause that restricts cession of rights completely. Alternatively, lessors should require that lease agreements contain a written clause that restricts cession of rights to a third party unless the lessor consents. These are ways through which lessors can be protected from cession of rights and/or duties without their consent.

In conclusion, the CC judgment clarifies the responsibility to consider when entering into long-term and short-term lease agreements – to have cession clauses to protect oneself should there be a legal dispute over a cession of rights. It is now certain that courts have been directed to analyse contextual evidence of lease agreements to determine if rights are eligible for cession. Therefore, it is fundamental that lessors enter into lease agreements that do not leave the question of cession in doubt. Instead, clearly define the scope of cession of rights and approach an attorney to assist with this. (See D Thompson 'Beware of lease cessions! A discussion of *University of Johannesburg v Auckland Park Theological Seminary and Another* (CCT 70/20) [2021] ZACC 13' (www.cliffedekkerhofmeyr.com, accessed 1-2-2023) and SB Nxumalo 'When are personal rights too personal to be ceded?' (2022) 43 *Obiter* 617)).

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A new twist to claims for damages for a fall

By Leslie Kobrin

The recent judgment of *Lombard v McDonald's Wingtip* (GP) (unreported case no 38117/2020, 14-11-2022) (Vuma AJ), Vuma AJ considered, *inter alia*, whether a disclaimer clause in an establishment, which estopped an injured party from claiming damages for personal injury caused when a customer slipped and fell on a wet floor were applicable. In this instance the court found that the provisions of s 49 of the Consumer Protection Act 68 of 2008 did not avail the plaintiff and, as a result, dismissed her claim.

In his judgment, the acting judge did not deal with the judgments referred to hereunder, the first being *Barkhuizen v Napier* 2007 (5) SA 323 (CC) in which the Constitutional Court considered the enforceability of a time bar clause in an insurance contract.

In writing the majority judgment (which in this instance upheld the validity of such a clause) Ngcobo J (as he was then) at paras 35 and 36 said:

'Under our legal order all law derives its force from the Constitution and is thus subject to constitutional control. Any law that is inconsistent with the Constitution is invalid. No law is immune from constitutional control. The common law of contract is no exception. And courts have a constitutional obligation to develop common law, including the principles of the law of contract, so as to bring it in line with values that underlie our Constitution. When developing the common law of contract, courts are required to do so in a manner that "promotes the spirit, purport and objects of the Bill of Rights". Section 39(2) of the Constitution says so. All this is, by now, axiomatic. Courts are equally empowered to develop the rules of the common law to limit a right in the Bill of Rights "provided that the limitation is in accordance with s 36(1)".

The proper approach to this matter is, therefore, to determine whether clause 5.2.5 is inimical to the values that underlie our constitutional democracy, as given expression to in s 34 and thus contrary to public policy.'

He continued at para 46 and para 52 in ruling:

'The question whether public policy tolerates time-limitation clauses in contracts must be considered in the light of the fact that time limitations are a common feature both in our statutory and contractual terrain. Their effect is the same whether they occur in a statute or a contract. They deny the right to seek the assistance of a court once the action gets barred because an action was not instituted within the time allowed. This is true of all of them, regardless of the amount of time they allow. These clauses therefore limit the right to seek judicial redress.'

'In my judgment … redress is consistent with the notions of fairness and justice which inform public policy. There

is no reason in principle why this test should not be applicable in determining whether a time-limitation clause in a contract is contrary to public policy.'

In *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ), Heaton-Nicholls J (as she was then) considered the existence of disclaimer clauses where in a store or at a shopping centre, or in a hotel it was sought to exclude liability for any harm befalling a member of the public who is injured while in the store or hotel or in a mall, arising out of possible negligence of the owner or its employees agents or servants. In this matter, Naidoo was a guest at the hotel where there was disclaimer notice pinned to the back of the entrance door to his room and where on hotel property a gate fell on him causing injury.

The judge was alive to the dictum of *Barkhuizen* and Naidoo where at para 53 she states:

'In summary, although I am of the view that the exemption clause, in which liability for negligently causing bodily injuries or death is excluded, will not pass constitutional muster, this is not the issue before me. In applying the principles … in *Barkhuizen* a further enquiry is necessary where a contractual clause limits a person's right to a judicial remedy. This is whether in the circumstances of a particular case the enforcement of such a contractual term would result in an injustice. I have come to the conclusion that in the circumstances of this particular case, to enforce the exemption clause would be unfair and unjust. In the words of Ngcobo J: "A court will bear in mind the need to recognise freedom of contract, but the court will not let blind reliance on the principle of freedom of contract override the need to ensure that contracting parties must have access to courts."'

I am of the view that when it comes to applying the validity or otherwise of the contents of a disclaimer notice, which precludes an injured victim from recovering damages for personal injury caused by the negligence of the owner of the property or establishment or his agent or servant it will be held to be contrary to public policy on the grounds that such exclusion from liability will be inimical to the norms and values of South Africa's Constitution, as set out in the Bill of Rights, and on the grounds that such an exclusion of liability will be unfair and will lead to injustice.

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Forfeiture in divorce

By Lulama Kamfer Phiri

It is a requirement in divorce proceedings that the party instituting the divorce action should attribute reasons for the irretrievable breakdown of the marriage. Adultery and infidelity are common grounds of divorce in South Africa. In most instances, the aggrieved party is likely to plead for forfeiture because of the nature of the marriage they entered. The purpose of forfeiture is to ensure that a person does not benefit from a marriage, which they have intentionally broken down.

There are three matrimonial property systems as indicated by the Matrimonial Property Act 88 of 1984. Marriage in community of property, the principle of marriage in community of property promotes equal powers of spouses wherein two estates become one. The norm is that when you are married in community of property and a court finds that there are grounds for the bonds of marriage to be dissolved, the estate is equally divided between the two parties.

Marriage out of community of property with accrual, where the principle applied is the spouse whose estate shows a smaller growth earns the right to claim from the spouse's estates with the most growth, and marriage out of community of property excluding the accrual where spouses have separate estates. If the accrual has been excluded the general rule is that the parties do not share each other's estate. Notwithstanding the above principles spouses may still benefit each other by ways of a donation or a will. A spouse is also able to benefit through intestate succession where the other spouse has died without a valid will.

The relevant legal principles for one to claim forfeiture are to be found in s 9(1) of the Divorce Act 70 of 1979. The Act provides as follows:

'When a decree of divorce is granted on the ground of the irretrievable breakdown of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the breakdown thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other by unduly benefited.'

It is the duty of the court to scrutinise the undue benefit of the other party if the order for forfeiture is not granted in favour of the aggrieved party. There are three elements that the court will take in consideration namely -

- the duration of the marriage;
- the circumstances that gave rise to the breakdown of the marriage and any substantial misconduct on the part of either of the parties; and
- the fact that an undue benefit may accrue to the one part in relation to the other if an order for forfeiture is not granted.

It is a requirement that each of the factors should be given due consideration without requiring the presence of each of them, including their accumulative effect.

In the case of *KT v MR* 2017 (1) SA 97 (GP) the court dealt with forfeiture of patrimonial benefits that was claimed by the husband. Regarding the duration of the marriage, the court stated that it was a short marriage as the parties were only married to each other for 20 months, the court also considered that the larger part of the estate was established by the husband prior to him marrying his wife. The court ordered partial forfeiture to the wife.

There are many grounds that may give rise to the breakdown of the marriage, in the case of *Molapo v Molapo* (FB) (unreported case no 4411/10, 14-3-2013) (Kruger J) the defendant had attempted to burn down the family house, assault-

ed the plaintiff and failed to take care of his family.

Examples of substantial misconduct are assault, adultery, financial misconduct and physical or emotional abuse. In the case of *Matyila v Matyila* 1987 (3) SA 230 (W) the court held that if a party failed to prove substantial misconduct, forfeiture could not be ordered. In the case of *Wijker v Wijker* [1993] 4 All SA 857 (AD) the court held that adultery may support an allegation on the breakdown of the marriage, but if it is not necessarily substantial misconduct for the purpose of a forfeiture order. The court further stated that it must be found that is 'so obvious and gross that it would be repugnant to justice to let the guilty spouse get away with the spoils of the marriage' (*Matyila* at 235). Along with irretrievable breakdown of the marriage one may also reply on mental illness and continued unconsciousness as one of the grounds for divorce. However, s 9(2) of the Divorce Act provides as follows: 'In the case of a decree of divorce granted on the ground of the mental illness or continuous unconsciousness of the defendant, no order for the forfeiture of any patrimonial benefits of the marriage shall be made against the defendant'.

The intention of the court in granting forfeiture is to ensure that the rights of the defenceless parties are protected, ensuring that the party who is the main cause of the divorce will walk away with little or nothing at all.

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By The Financial Intelligence Centre

Legal practitioners can help fight financial crime

Recognised globally as being vulnerable to misuse for money laundering, terrorist financing and proliferation financing, legal practitioners should be aware of the financial crime risks they face.

Criminals often seek out the services of gatekeepers such as legal practitioners for laundering money and hiding the proceeds of crime. Gatekeepers are described as entities or persons who provide access to the financial system, through which potential users can do business with financial institutions without revealing their own identities.

Legal practitioners have a role to play in combating money laundering, terrorist financing and proliferation financing in South Africa by ensuring their services are not knowingly or unwittingly exploited.

How can legal practitioners assist in combating financial crime?

The Financial Intelligence Centre Act 38 of 2001 (FIC Act) requires that accountable institutions, such as legal practitioners, file certain reports with the Financial Intelligence Centre (FIC). These include reports on suspicious and unusual transactions, cash transactions above the prescribed threshold, and where a client has been identified as a designated person on a targeted financial sanctions (TFS) list.

To identify reportable transactions, transaction monitoring is an essential element of South Africa's anti-money laundering, counter-terrorism financing and proliferation financing (AML/CTF and PF) regime.

The information contained in these regulatory reports assists the FIC in its development of financial intelligence which law enforcement, prosecutorial authorities and other competent authorities can use for their investigations, prosecutions and applications for asset forfeiture.

Register before reporting

The first step before a legal practitioner can file a report is to register with the FIC. Registration is free and must be done via the FIC's online registration and reporting system called goAML accessible via www.fic.gov.za. Recent amendments have been made to the FIC Act to consider the Legal Practice Act 28 of 2014, which designated certain advocates who accept briefs directly from the public, as accountable institutions.

Reporting

The three main regulatory reporting streams for accountable institutions consist of –

- cash threshold reports;
- suspicious and unusual transaction reports; and
- terrorist property reports.

Cash threshold reports (CTRs)

Section 28 of the FIC Act requires an accountable institution to file a report when a cash transaction is concluded with a client above the prescribed threshold of R 49 999,99. CTRs must be submitted to the FIC as soon as possible but no later than three days after becoming aware that a cash transaction(s), namely cash received or paid out by the institution, has exceeded the prescribed threshold.

Suspicious and unusual transaction reports (STRs)

Where legal practitioners suspect a transaction or an activity involves money laundering, terrorist financing or a contravention of financial sanctions, they must report this suspicion to the FIC as an STR.

A suspicion may involve several factors that on their own could seem insignificant but taken together may arouse suspicion concerning that situation. A reporter should evaluate the transactions, as well as the client's financial history, background, and behaviour when determining whether a transaction or activity is suspicious or unusual.

Legal practitioners must report STRs as soon as possible and can elect to continue with the transaction even if the report has been submitted to the FIC.

Terrorist property reports (TPRs)

A legal practitioner must submit a TPR when they become aware that they possess, are in control of property of a person or entity that is designated on a United Nations Security Council targeted financial sanctions list. The consolidated targeted financial sanctions list is accessible on the FIC website (www.fic.gov.za).

These reports must be filed within five days of becoming aware that the institution possesses or controls property of a person or entity, which has committed or attempted to commit a terrorist act.

Not only is there a reporting duty where a person is a designated person, there is also an obligation to freeze all assets. In other words, when filing a TPR it is an offence to continue with the transaction or deal with the property in question.

Legal privilege and the FIC Act

Section 37 of the FIC Act protects the common law right to legal professional privilege between an attorney and their client in respect of communications made in confidence relating to legal advice or litigation.

Any information that is not connected with the giving of legal advice or litigation will not be privileged even if made in confidence, and a legal practitioner's reporting duties and obligations to provide information to the FIC would not be affected. In addition, privilege does not apply if the client obtains legal advice to perpetrate a crime.

In essence, no duty of secrecy or confidentiality – apart from privilege in the circumstances indicated – prevents a legal practitioner from complying with an obligation to file a report under the FIC Act. This should be kept in mind by legal practitioners when submitting reports to the FIC.

For more information and guidance offered to accountable institutions, refer to the FIC website (www.fic.gov.za). Alternatively, contact the FIC's compliance contact centre on +27 12 641 6000 or log an online compliance query on the FIC website.

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The antenuptial contract – incorporating or excluding accrual resulting in s 7(3) of the Divorce Act being applicable

By Alick Costa

Picture source: Gallo Images/Getty

I found it disheartening and unjust that my female clients married by antenuptial contract out of community of property involved in a divorce action had no proprietary claim against the husband and only the cold comfort of a possible claim for maintenance. At the South African National Council for Child Welfare Conference held on 23 October 1974, I delivered a paper titled 'Aspects of the South African Marriage and Divorce Laws'. Briefly, I expressed the view that 'our marriage laws are anachronistic, highly inequitable and in need of radical amendments'. I proposed, *inter alia*, in respect of marriages out of community of property a form of financial relief on termination of the marriage by death or divorce.

Then came the renaissance on 1 November 1984 with the introduction of s 7(3) of the Divorce Act 70 of 1979. It gave financial relief to the financially disadvantaged spouse (read wife) on termination of the marriage by divorce. Section 7(3) enables 'the court granting a decree of divorce in respect of a marriage out of community of property [entered into] before 1 November 1984' (*GKR v Minister of Home Affairs and Others* 2022 (5) SA 478 (GP) at para 1) with a discretion to order the transfer of assets from one party to the other party as the court may deem just having regard to the factors enunciated in the subsections.

Chapter 1 of the Matrimonial Property Act 88 of 1984 (MPA) provides that every marriage out of community of property entered into from 1 November 1984, in terms of an antenuptial contract, is subject to the accrual system except insofar as that system is expressly excluded in terms of the antenuptial contract. I was appalled at the choice excluding the accrual system. It was a retrogressive enactment and flew in the face of the enlightened rationale for the introduction of s 7(3). I found as a notary that discussions became unpleasant when the one party (usually the husband) insisted on excluding the accrual system. Invariably she (usually the wife) agreed because she loved him, she found commercial bargaining unpalatable, and she was disadvantaged because of the unbalanced economic power dynamics. Unsurprisingly, I found that it was unfortunately an invitation for marital discord and a sure road to the divorce court.

Accordingly, I authored an article titled 'A plea for enlightened reform' in which I reviewed laws relating to marriage published in 2003 (May) *DR* 28. Briefly, I dealt, *inter alia*, with the 'need to introduce legislation to –

- amend s 7(3) of the Divorce Act 70 of 1979 to make it applicable to all marriages out of community of property … regardless of the date of marriage and regardless of whether the antenuptial contract is subject to or excludes accrual sharing, and to make it applicable also on the termination of the marriage by the death of a spouse'.

I argued, *inter alia*, that: 'It is immoral, against the *boni mores* of the community and possibly unconstitutional that a party be allowed to enter into a marriage which will not give rise to a patrimonial claim on its termination'.

After all, 'marriage is a partnership between two people (who find each other physically attractive initially), in which they –

…

- contribute their respective skills and seek to fulfil each other's needs; and
- are entitled to expect emotional and financial security'.

Then came the enlightened judgment by Van der Schyff J delivered on 11 May 2022 in the case of *GKR*.

Mr and Mrs G were married out of community of property, excluding the accrual system, in March 1988. The applicant Mrs G sought an order declaring s 7(3)(*a*) of the Divorce Act unconstitutional and invalid to the extent that it limits the operation of s 7(3)(*a*) to marriages excluding community of property and excluding accrual sharing that were entered into before the commencement of the MPA namely, before 1 November 1984 – 'the cut off date'.

The court was called on 'to decide whether it is constitutional for spouses married out of community of property with the exclusion of the accrual system after 1 November 1984 to be deprived of the relief provided for in s 7(3) of the Divorce Act' (*GKR* at para 3). The respondents did not oppose the application and they abided by the court's decision. Shortly before the hearing the Pretoria Attorneys Association applied and was admitted as *amicus curiae*.

Infringement of s 9(1) of the Constitution

Mrs G submitted that: 'Section 7(3)(*a*) arbitrarily and irrationally differentiates between people married before and after 1 November 1984, being the date on which the Matrimonial Property Act … commenced' (*GKR* at para 6). Consequently, the differentiation infringes the equality right in terms of s 9(1) of the Constitution. Mrs G submitted a report by clinical psychologist Judith Ancer dealing with patriarchy and its adverse effects on women.

Mrs G contended that 'no legitimate government purpose justifies the differentiation that denies persons married out of community of property with the exclusion of the accrual system after 1 November 1984, of the potential protection of a just and equitable remedial judicial order' (*GKR* at para 9). Mrs G's counsel submitted that the choice argument is illusory and advanced sound reasons for his submission.

Violation of s 9(3) of the Constitution

Mrs G further contended that 'the cut-off date in s 7(3)(*a*) disproportionally impacts women. The blanket deprivation of excluding spouses from the potential benefits of a just and equitable redistribution order constitutes unfair discrimination based on sex, gender, marital status, culture and religion' (*GKR* at para 11). The joint report by Professor Elsje Bonthuys and Dr Anzille Coetzee sketching the context of gender inequality in South Africa was submitted by Mrs G.

Further extracts from the judgment are instructive. 'The inequality at hand is caused when, after the conclusion of the marriage, a distortion is caused by the fact that one spouse contributes directly or indirectly to the other's maintenance or the increase of the other's estate without any *quid pro quo*. … The [s 7(3)(*a*)] remedy is currently available only to spouses married before 1 November 1984. … The differentiation amounts to discrimination based on the date on which a marriage was concluded because economically disadvantaged parties' human dignity is impaired if they cannot approach the court to exercise the discretion provided for in s 7(3) of the Divorce Act' (*GKR* at para 57 – 58).

The *amicus* raised several objections to declaring the cut-off date in s 7(3) unconstitutional. The court briefly dealt and rightly disagreed with each of the objections.

The court comprehensively dealt with and advanced sound reasons for the summarised orders:

- Section 7(3)(*a*) of the Divorce Act 70 of 1979 is unconstitutional in that it limits its operation to marriages entered into before 1 November 1984.
- Section 7(3)(*a*) is to be 'read as though the words "entered into before the commencement of the Matrimonial Property Act, 1984" do not appear in the section' (*GKR* at para 71).
- In terms of s 172(1)(*b*) of the Constitution, the above orders 'shall not affect the legal consequences of any act done or omission or fact existing in relation to a marriage out of community of property with the exclusion of the accrual system concluded after 1 November 1984, before this order was made' (*GKR* at para 71).
- The orders are referred to the Constitutional Court (CC) for confirmation.
- Each party is to pay its own costs.

Section 7(3) is not sexist legislation, and it is also available to the 'house husband'. However, the judgment is an enlightened renaissance reform in the amelioration of the plight of married women.

I interpret summarised order three not to have any retrospective effect regarding marriages excluding accrual sharing, which were terminated either by a decree of divorce or death before the date of the order.

The CC has yet to confirm the orders.

It was not relevant for Mrs G to deal with the need for s 7(3)(*a*) to be applicable also on the termination of the marriage by death of a spouse (as argued by me in my 2003 article). However, the defect is likely to be remedied as appears from the case argued before the CC in the matter of *Estelle Booysen v Jacobus Cornelius van Eden NO and Another* (CC) (case number CCT 364/2021).

Mrs Booysen and the deceased were married on 23 April 1983 out of community of property in terms of an antenuptial contract. Mrs Booysen instituted divorce proceedings against her husband, which included a claim for redistribution of assets in terms of s 7(3)(*a*) of the Divorce Act. After *litis contestatio* but before the divorce action could be determined and finalised, her husband died on 20 April 2016 resulting in dissolution of the marriage.

It was then argued by the then executor that the claim could not be pursued anymore because the marriage had been dissolved and she would only be entitled to enforce such a claim as part of a decree of divorce. The Gauteng Division of the High Court, Pretoria then dealt with the legal question by way of a stated case, as to whether the applicant's claim for redistribution of assets in terms of s 7(3) of the Divorce Act, had been extinguished by virtue of the death of the deceased and the marriage having been dissolved automatically.

Prinsloo J granted an order on 21 June 2019 as follows: 'It is consequently declared that henceforth the first portion of section 7(3) … should be read as follows:

"A court granting a decree of divorce *or a court considering an asset redistribution claim based on the provisions of this subsection following the dissolution of the marriage by the death of one or both of the spouses* in respect of a marriage out of community of property"' (my italics) – another enlightened renaissance reform.

Mrs Booysen and her daughter reached a settlement agreement as to the division of the estate of the deceased, but van Eden refused to apply the settlement agreement and refused to finalise the estate in the absence of confirmation of the court order of Prinsloo J by the CC.

Mrs Booysen applied to the CC in terms of s 172(2)(*d*) of the Constitution (in which she and her daughter Estemari Richardson were additional respondents as the substituted joint – executrixes) for confirmation of the court order that was granted by Prinsloo J.

Mrs Booysen argued that spouses married after 1 November 1984 including the accrual system have a claim against each other's estate after the death of one of the spouses. Spouses married before 1 November 1984 out of community of property only have a right to a distribution order in terms of s 7(3) on the termination of the marriage by a decree of divorce and not on the termination of the marriage as a result of the death of a spouse. Thus, discrimination has arisen between these two categories of spouses, which I submit is unfair discrimination in terms of s 9 of the Constitution as there is no conceivable rational basis or government interest in making such a differentiation between the two categories of spouses.

The hearing took place during the week ended 26 August 2022. Mrs Booysen sought confirmation of the order of Prinsloo J. The judgment has not yet been delivered.

Parties negotiating the terms of an antenuptial contract including the accrual system must guard against provisions in the contract, which largely negate an accrual claim, such as –

- the overstating of asset valuations in the commencement value of a party – each party should prepare a detailed statement of their assets and liabilities duly supported by underlying documents and proper valuations where necessary and to be furnished to each other well before concluding the contract; and
- excluding assets of a party having regard to the nature and type of the asset excluded, such as the interest in their business.

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Picture source: Gallo Images/Getty

The importance of protecting the Judicial Service Commission from interference

By Mpho Titong and Kagiso Matong

The Republic of South Africa (SA) is a country that has been through a lot of strain and impediments, and this has left some sort of trauma on the whole country. It is important to take note of the past injustices when seeking to develop the laws of the country, irrespective of which law it is – it may be a law regulating dogs, or a law regulating the succession of estates. The injustices SA endured in the past are now common knowledge.

Judicial independence is an extremely important principle for the democracy of a country (L Siyo and JC Mubangizi 'The independence of South African judges: A constitutional and legal perspective' (2015) 18 *PELJ* 817). This ultimately results in the judiciary being just as important, for the smooth operation of a country. In considering the importance of the judiciary, one also ends up looking at the processes of appointing people to serve on the Bench (judicial appointment). In SA, the appointment is made by the President on the recommendation made by the Judicial Service Commission (JSC) (PE Andrews 'The South African judicial appointments process' (2006) 44 *OHLJ* 565 at 567 – 568).

The JSC was established in terms of the Constitution to play a vital role in the process of appointing judges to the courts (Andrews (*op cit*) 568).

Although the JSC has been lauded for its transparency when conducting interviews for candidates to serve in the judiciary, it has been involved in many legal cases and media scrutiny in recent years (MK Radebe 'The unconstitutional practices of the Judicial Service Commission under the guise of judicial transformation: *Cape Bar Council v Judicial Service Commission* [2012] 2 All 143 (WCC)' (2014) 17 *PELJ* 1196 at 1202; K Malan 'Reassessing judicial independence and impartiality against the backdrop of judicial appointments in South Africa' (2014) 17 *PELJ* 1965 at 1974 – 1981). This article seeks to deal with the issues surrounding the JSC.

The basis on which the JSC operates

South Africa is governed by a constitu-

tion that was drafted with the intention of shifting the country from a parliamentary sovereignty to a constitutional supremacy (MD Moremi *A critical analysis of political influence on judicial appointments process in South Africa* (LLM dissertation, North West University, 2019) 49).

The smooth operation of the judiciary ensures that society trusts and has confidence in the judiciary and that there is proper administration of justice (MD Moremi (*op cit*) 49), which highlights the importance of the work the JSC is doing.

The independence of the judiciary has been described as the 'ultimate shield against the incremental and invisible corrosion of our moral universe', so overthrowing that shield will entail the overthrowing of the foundations of the Republic's democracy (WH Gravett 'Towards an algorithmic model of judicial appointment: The necessity for radical revision of the Judicial Service Commission's interview procedures' (2017) 80 *THRHR* 267 at 268).

The protection of judicial independence is a process that requires more than just mere visible independence by the judiciary. Such independence begins with the process of appointing judges (Gravett (*op cit*) 268; Judges Matter 'New research on the JSC appointments process shows cause for concern, but there is hope' (www.judgesmatter.co.za, accessed 27-1-23)).

In a democratic republic such as SA, the judiciary plays an extremely important role in the protection and upholding of the basic human rights of the country's citizens. Judicial independence is enforced by s 165 of the Constitution (Moremi (*op cit*) xii).

The JSC is a body that was established by the Constitution, which was founded by a democratic and sovereign state. This is the foundation of the entire judicial appointment process and the founding principles of the Republic (see s 1 of the Constitution).

The South African system of judicial appointment recognises the need to appoint judges that will protect and uphold the independence and legitimacy of the judiciary (Pierre de Vos 'Time to talk about the appropriate political role of the JSC' (https://constitutionallyspeaking.co.za/, accessed 27-1-2023)).

Fairness is an essential value, which not only the JSC must have but must also be seen to exercise (De Vos (*op cit*)). Political interference and any other detrimental intrusion to the operations of the JSC ultimately threaten social justice and judicial independence, among other essential qualities that govern the judiciary (Moremi (*op cit*) 2).

The JSC would not make recommendations for the appointment of people who will be expected to be impartial in doing their work if it was not expected to act impartially in the process of making such recommendations. It is essential for the JSC to operate without external influence - especially not politics, because law and politics do not mix.

A look at the transgressions of the JSC

Judicial appointments in SA are inherently doomed to be manipulated by politics. This is because at the top of the appointment power-chain is the President of the country, who is a political figure, while on the other hand rests the Minister of Justice (another political figure) (Moremi (*op cit*) xi).

The Commission's interviewing processes have been described as a charade, a sham, intrusive in nature and interrogative, among other and negatively descriptive phrases, that speak to the commission's lack of moderate ethical standards (C Rickard 'How biased commission picks judges' (www.iol.co.za/, accessed 27-1-2023); Gravett (*op cit*) 271).

The JSC has been struggling for several years now. This does not in any way imply that it has not been successful in executing its duties. There have been issues identified, issues that the JSC has gone through and is still facing (Judges Matter 'Issues facing the judiciary in 2021' (www.judgesmatter.co.za, accessed 27-1-2023)).

The JSC has its own flaws. For instance, it has been unable to inspire confidence that it acts in the best interests of an independent judiciary (Gravett (*op cit*) 268). Politics has been a long-standing issue, which the JSC has had to deal with. Politics include inequality and the violation of human rights as issues the JSC has had to deal with.

The influence of politics on the Commission raises questions as to the legitimacy of the JSC and indicates that the Commission is materially politically influenced (Gravett (*op cit*) 268 - 269).

During early 2011, the JSC was deemed to have acted unconstitutionally by the Cape Bar Council, in a matter that was in front of the Western Cape High Court (Radebe (*op cit*) 1196). The matter involved the failure of the Commission to fill vacancies at the Western Cape High Court, including failure to provide reasons for its recommendations: The commission argued that it 'was not legally required to provide reasons' (Radebe (*op cit*) 1196), but its conduct was nonetheless deemed to be unconstitutional by the court.

The JSC has acted blatantly unfairly during interviews, on top of a 'lack of transparency in its selection criteria and evaluation processes' (Gravett (*op cit*) 269). It may be argued that missteps are inevitable, but so is change - a change in the appointment processes of the JSC.

During late January 2021, the JSC released two shortlists. Due to the COVID-19 pandemic, the sittings in April and October 2020 were cancelled (Judges Matter (*op cit*)). This resulted in the JSC having to sit for ten days interviewing 88 candidates for the positions that were left unfilled between September 2019 and 2021 (Judges Matter (*op cit*)).

In early 2022, the JSC was 'accused of playing politics and overstepping' the boundaries of the appointment of SA's next Chief Justice (B Chimombe 'JSC accused of playing politics and overstepping its mandate regarding Chief Justice role' (www.sabcnews.com, accessed 27-1-2023)). The political party, the Congress of the People (COPE) and the President of the country (Cyril Ramaphosa) have stated that the JSC had 'exceeded its mandate by recommending Justice Mandisa Maya for the position of Chief Justice' (Chimombe (*op cit*)).

Conclusion

The judiciary plays an essential role in the development of the country's laws, the advancement of human rights, as well as the protection and fulfilment of such human rights. With this essential role to fill, the right people ought to be appointed into the judiciary - hence the need for the appointment process to be protected.

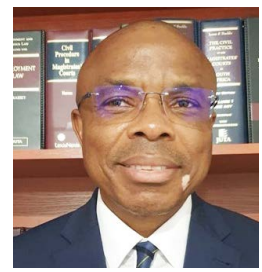
The Constitution undoubtedly brought major changes to the country but moving forward is imperative - the JSC has been struggling and needs serious improvement in its operational procedures.

The issues surrounding the JSC have been outlined above, it is important to note that the JSC's missteps do not supersede the good work that the Commission has done over the course of time.

Mpho Titong *LLB LLM (NWU)* and Kagiso Matong *LLB (NWU)* are law graduates in Mafikeng. ❑

Picture source: Gallo Images/Getty

Should general damages form part of the joint estate at the dissolution of marriage in community of property?



By Dr James D Lekhuleni

Section 18(*a*) of the Matrimonial Property Act 88 of 1984 (the Act), expressly excludes non-patrimonial damages suffered by a spouse during the marriage from forming part of the joint estate. This section provides as follows: 'Notwithstanding the fact that a spouse is married in community of property –

(*a*) any amount recovered by him or her by way of damages, other than damages for patrimonial loss, by reason of a delict committed against him or her, does not fall into the joint estate but becomes his or her separate property.'

The problem, however, arises in instances where a spouse recovered general damages from a delict committed against that spouse before the conclusion of the marriage. The question is, do those general damages automatically form part of the joint estate, or are they excluded in terms of s 18(*a*) of the Act? In *Van den Berg v Van den Berg* 2003 (6) SA 229 (T) and *LH v ZH* 2022 (1) SA 384 (SCA), the courts, particularly the Supreme Court of Appeal (SCA), grappled with whether these damages must be excluded at the dissolution of the marriage in community of property. This article revisits these cases and traverses the best approach for courts to follow in dealing with non-patrimonial damages recovered before the conclusion of the marriage at divorce.

Summary of facts

In *Van den Berg*, the plaintiff and the defendant were married in community of property on 27 June 1992, and had two minor children born of the marriage. The plaintiff (wife) instituted divorce proceedings against the defendant (husband) and sought, among others, a decree of divorce and an order for the equal division of their joint estate. The defendant defended the matter and filed a plea and counterclaim. In his counterclaim, the defendant sought an order declaring all amounts or part thereof he received from insurance companies due to a shooting incident that occurred on 23 February 1998, wherein he was injured not to form part of the joint estate and that the plaintiff should forfeit the benefits arising from the marriage in community of property. Alternatively, the defendant sought an order that the joint estate be equally divided, provided that the proceeds he received as compensation for his injuries be excluded from the joint estate. The damages the defendant sought to exclude from the joint estate arose from a shooting incident on 23 February 1998. The defendant was a member of the Military Police. While on his way to attend a meeting at Swartkop Base Headquarters, he unfortunately, came across a robbery in progress. He was shot and sustained head, shoulder, and back injuries. He had several insurance policies, which paid him certain sums of money as compensation for disablement. The defendant took out some of the insurance policies before his marriage to the plaintiff. During the divorce proceedings, the plaintiff argued that the proceeds received by the defendant from the insurance policies must form part of the joint estate because the *causa* is contractual and not delictual. On the other hand, the defendant argued that the proceeds arose from the delict and were excluded by s 18(*a*) of the Act. The court was called on to consider *in limine* whether money recovered by the defendant from insurance companies arising from a shooting incident wherein he was injured and rendered medically unfit to work forms part of the joint estate or not, considering the provisions of s 18(*a*) of the Act.

Shongwe J, as he then was, found that it was common cause that the defendant sustained injuries because of a delict as he was shot accidentally. The court found that the damages recovered were

not special damages. The compensation recovered, the court found, was for a loss or injury sustained. The court rejected the argument that the *causa* was contractual and found the same untenable. Furthermore, the court found that the money received by the defendant arose from a delict committed against the defendant and therefore fell outside the joint estate. The court concluded that the non-patrimonial damages the defendant received were personal and did not form part of the joint estate as envisaged by s 18(*a*) of the Act.

I submitted that the court's reasoning in this matter was correct and spot on. Unlike special damages, which in truth increases the value of the joint estate, the non-patrimonial damages suffered by the defendant were personal and related to his disfigurement. The damages did not increase the value of the joint estate but instead amounted to a diminution of the defendant's physicality. It was intended to be used by the defendant for deprivation of what, in truth, could never be restored by money even after the parties were divorced. Therefore, the legislature saw it fit, and quite correctly so, in my view, to exclude these types of damages from the joint estate in s 18(*a*) of the Act.

While we thought the law was settled on this point, the recent judgment of the SCA in *LH v ZH* raised more questions than answers. This case was concerned with the interpretation of s 18(*a*) of the Act. The parties were married in community of property on 22 December 2015. Prior to the conclusion of the marriage, the respondent (wife) was involved in a motor vehicle accident and was awarded non-patrimonial damages in the sum of R 800 000. Of this amount, she invested R 550 000 (the investment) with Standard Bank. In 2018, the appellant (husband) instituted divorce proceedings in the regional court, seeking a decree of divorce and division of the joint estate. In turn, the respondent pleaded in her counterclaim that the investment did not form part of the joint estate and should be excluded as it contained non-patrimonial damages received because of a delict committed against her in terms of s 18(*a*) of the Act. On conclusion of the trial, the regional court ordered the division of the joint estate but excluded the investment from the division. It found that the investment fell outside the joint estate in terms of s 18(*a*) of the Act. Aggrieved by this decision, the appellant appealed to the Full Court of the Eastern Cape Division of the High Court. The Full Court was divided on the issue. The majority, per Majiki and Jaji JJ, confirmed the regional court's order excluding the investment from the joint estate. The majority acknowledged that s 18(*a*) applied only to a spouse injured after the conclusion of their marriage but further stated that 'the non-reference to the spouses who were injured and paid before their marriage in community of property … appears to be more of an omission than an exclusion' (*LH v ZH* at para 6). In a dissenting judgment, Mbabane AJ reasoned that s 18(*a*) 'by its design, applies where there is a joint estate' and that 'the concept of joint estate comes into being on the date of the marriage' (*LH v ZH* at para 7). Mbabane AJ contended that the respondent had a choice to exclude the investment by marrying out of community of property. He concluded that to the extent that the parties were married in community of property, the investment formed part of the joint estate. The appellant appealed the majority decision to the SCA. At the SCA, the appellant relied on the *Van den Berg* decision. However, the majority at the SCA found that the decision of *Van den Berg* was irrelevant as it dealt primarily with 'the question of whether damages received by a spouse during the course of a marriage in community of property were either contractual or delictual' (*LH v ZH* at para 4). The majority found that from the plain reading of s 18(*a*), it is evident that non-patrimonial damages received by a spouse during a marriage in community of property become the property of the injured spouse and must be excluded from the division of the joint estate on divorce. The court concluded that damages recovered by the respondent, which were received before the marriage, were the property of the respondent before the marriage, and on being married in community of property, the property of each party to the marriage fell into the joint estate inclusive of the damages for non-patrimonial damages. In a dissenting judgment, Mocumie JA invoked s 39(2) of the Constitution and adopted a purposive interpretation of s 18(*a*) and found that the Regional Court was correct in its approach 'that the division of the estate must be determined at the … dissolution of the marriage, not when the marriage was entered into' (*LH v ZH* at para 20). Mocumie JA relied on the Constitutional Court decision of *Van der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as* Amicus Curiae*)* 2006 (4) SA 230 (CC) where the apex court found s 18(*b*) of the Act to be inconsistent with the Constitution to the extent that it did not protect spouses married in community of property in recovering damages as opposed to those who were married out of community of property.

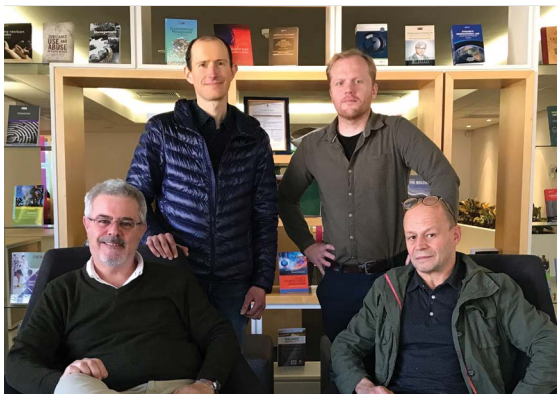
I submit that the interpretation of Mocumie JA is preferable and is to the point. Damages do not change form by the mere conclusion of a marriage. The approach of the SCA in using the conclusion of a marriage in community of property as a determining factor for the payment of non-patrimonial damages is problematic. It is problematic in that, in a broader context, it ignores the purpose of s 18 and the nature and rationale for granting general damages. The court's reasoning ignores delictual damages arising from domestic violence committed by a guilty spouse before the conclusion of the marriage. The court's reasoning suggests that those damages recovered before marriage from a guilty spouse would automatically form part of the joint estate on the innocent party marrying the perpetrator. This, view, cannot be correct. I submit that in such a case, the diminution of the innocent spouse's physicality after the conclusion of the marriage would remain. The rationale for the exclusion of these damages cannot be overtaken by the conclusion of the marriage in community of property.

More importantly, I submit that the decision of the SCA renders s 18(*a*) unconstitutional in that it draws 'an impermissible differentiation between spouses married in and out of community of property in respect of the right to recover patrimonial damages suffered from bodily injury' (*Van der Merwe* at para 58). Those who are married out of community of property are protected because even after the marriage is concluded, their general damages recovered from a delictual act against them before marriage would not be recovered by the other spouse on divorce. In contrast, it is different to those married in community of property. I submit that the differentiation in s 18(*a*) of the Act unjustifiably limits the right to equal protection and benefit of the law guaranteed by s 9(1) of our Constitution for spouses married in community of property.

Conclusion

In conclusion, I submit that in an open and democratic society based on human dignity, equality, and freedom, the conclusion of a marriage in community of property cannot be considered as a waiver of the right to a spouse's general damages acquired before the marriage. Therefore, the general damages paid to the respondent in *LH v ZH* pursuant to a diminution of her physicality and aimed at placing her in the same position she would have been but, for the accident should have been excluded in the division of the joint estate. As the minority judgment noted, the legislature should urgently address this anomaly by amending s 18(*a*) and make express provision to exclude general damages from the joint estate recovered before the conclusion of the marriage.

Dr James D Lekhuleni *BProc LLB (UL) LLM LLM (UP) LLM LLD (UWC)* is a Judge at the Western Cape High Court.



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

THE LAW REPORTS

January 2023 (1) South African Law Reports (pp 1 – 320); January 2023 (1) South African Criminal Law Reports (pp 1 – 111)

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

Abbreviations

CC: Constitutional Court
ECG: Eastern Cape Division, Grahamstown
FB: Free State Division, Bloemfontein
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
ML: Mpumalanga Division, Middelburg
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Access to information

The media's right of access to report on accounting irregularities commissioned by Steinhoff, a private body: *Tiso Blackstar Group (Pty) Ltd and Others v Steinhoff International Holdings NV* 2023 (1) SA 283 (WCC) concerned the right of access, under the Promotion of Access to Information Act 2 of 2000 (PAIA), of the media to a report (the Report) produced pursuant to an investigation into alleged accounting irregularities in the affairs of the respondent, Steinhoff International Holdings NV (Steinhoff), uncovered during an audit by Deloitte Accountants BV (Deloitte) of Steinhoff's annual statements. Steinhoff's attorneys, Werkmans, had commissioned PriceWaterhouseCoopers Advisory Services (Pty) Ltd (PwC) to produce that report shortly after it had become public knowledge that Deloitte had refused to sign off on Steinhoff's financial statements and Steinhoff's Chief Executive Officer, Mr Markus Jooste (Jooste), had resigned. During March 2019, PwC handed its report to Steinhoff and Werkmans. On 15 March 2019, Steinhoff published what it termed the 'Overview of Forensic Investigation'.

The first applicant, media group Tiso Blackstar, and the third applicant, the non-profit amaBhungane Centre for Investigative Journalism, each sought access to the Report under s 53(1) of PAIA. Steinhoff refused, claiming that the Report was subject to legal privilege as intended in s 67 of PAIA. In response, the applicants sought orders in the WCC setting aside Steinhoff's decisions to refuse access to the Report and directing Steinhoff to provide Tiso Blackstar and amaBhungane with copies of the Report.

The WCC, per Nuku J, held that to succeed, the applicants had to identify the right they sought to protect in seeking the Report and explain why it was required for the exercise or protection of that right. The applicants relied on the right to freedom of expression in s 16 of the Constitution, which included freedom of the press and the freedom to receive or impart information or ideas. The WCC confirmed that a requester could rely on the right to freedom of expression when seeking access to records, including those in possession of a private body like Steinhoff. The WCC emphasised that Steinhoff's refusal limited the applicants' freedom of expression and that access to information was crucial for accurate reporting and hence the communication of accurate information to the public.

The WCC then addressed the question whether the Report was subject to legal privilege under s 67 of PAIA, in which case Steinhoff would have been justified in refusing access. The WCC pointed out that this would be the case if Steinhoff were able to establish that the Report was obtained or brought into existence for the purpose of submitting it to Werksmans for legal advice, in respect of litigation which was either pending or contemplated as likely at the time. But Steinhoff failed to produce sufficient objective facts about the nature of the allegedly contemplated litigation or those against whom it was allegedly contemplated. The WCC accordingly directed Steinhoff to grant the applicants access to the Report.

Architects

The ambit of an architect's duties of supervision: In *Turn Around Investments 7 (Pty) Ltd and Others v Marcus Smit Architects CC and Another* 2023 (1) SA 300 (WCC), the first and second plaintiffs contracted in writing with second defendant, a building contractor, to construct a wine cellar. The plaintiffs under a separate oral agreement employed the first defendant, an architectural firm, to render the services of an architect and principal agent. The first defendant agreed to regularly inspect the works to satisfy itself that they were being carried out in accordance with the plans. It also agreed to exercise reasonable professional skill and diligence in performing its mandate.

As it turned out, the works were not properly carried out, the structures being replete with material defects. The plaintiffs decided to sue the first and second defendants out of the WCC for breach of agreement and their resultant damages. The issue in respect of the first defendant was whether it had breached its obligations as architect and principal agent.

The WCC, per Bremridge AJ, emphasised that it was an accepted legal principle there was a common-law duty on an architect, as principal agent, to supervise the works to ensure they were carried out in accordance with the governing agreement. Supervision in this context did not entail monitoring and direct-

ing the works on a day-to-day basis, but rather that the principal agent should inspect the works with sufficient frequency and care to ascertain that they were being carried out in accordance with the requirements and specifications of the agreement and then give the contractor such instructions as were necessary to ensure the works were properly carried out or rectified.

The WCC held that the first defendant's contractual obligation to regularly inspect the works to satisfy itself that the work was being done in accordance with the plans, and to exercise reasonable professional skill and diligence in so doing, accorded with the common-law obligation of supervision described above. Had the first defendant properly supervised the works and exercised reasonable care and diligence, the first defendant would have observed that the works were not being carried out in a proper manner and would have taken steps to have the poor workmanship rectified. But the first defendant had failed to do so, thereby breaching its obligations as principal agent. The WCC accordingly upheld the plaintiffs' claim and found the first defendant liable in damages for the costs required to remedy the defects arising from the breach of its obligations.

Companies

Multimillion rand mine plant transaction challenged: In *Africa Wide Mineral Prospecting & Exploration (Pty) Ltd v Platinum Group Metals (RSA) (Pty) Ltd and Others* 2023 (1) SA 98 (GJ) the plaintiff Africa Wide Mineral Prospecting and Exploration (Africa Wide) and first defendant Platinum Group Metals (PTM) were, respectively, the minority and majority shareholders of third defendant, Maseve Investments (Maseve), a mining company that owned a platinum mine near Rustenburg. When, in 2016, Maseve ran into financial difficulties it was bailed out by PTM in return for pledging its assets, including the Rustenburg mine, as security. Keen to sell either the mine or Maseve itself, PTM took steps to amend Maseve's memorandum of incorporation (MOI) – which contained the usual minority protections – by incorporating a 'drag-along' clause that would oblige Africa Wide to go along with any offer to purchase Maseve's full shareholding. The amendment was passed by special resolution in June 2017. The Africa Wide-appointed director dissented.

By this time the second defendant, Royal Bafokeng Platinum Ltd (RB Platinum), had indicated an interest in acquiring all Maseve's assets. But its offer was rebuffed by PTM, which did not want to sell them separately from its shareholding. Eventually a two-part transaction was agreed on:

The sale of Maseve's ore processing plant to the fourth defendant, RB Resources (a subsidiary of RB Platinum).

The disposal of the entire Maseve shareholding to RB Platinum via a 'scheme of arrangement' under ss 114 and 115 of the Companies Act 71 of 2008.

Although the processing plant transaction (also referred to as the Sale of Business Agreement) was purportedly self-standing, the evidence showed that the US$ 58 million/US$ 12 million splits between shares and plant was fictional and intended to enable PTM to get quick access to the larger sum (the share transfer required government approval that was notoriously slow in coming). The scheme was subsequently sanctioned by court, which made it binding on all shareholders.

Unhappy with what amounted to an expropriation of its shareholding in Maseve, Africa Wide sought to collapse the scheme by attacking the plant transaction. It claimed that the minority protections Maseve's MOI meant that its consent was required for the plant transaction. By taking this common-law route Africa Wide sought to escape the stranglehold imposed by the statutory machinery in ss 114 and 115 which, it argued, did not expressly exclude reliance on the common law.

For their part the defendants argued that Africa Wide was unable to show that the minority protections it relied on were triggered or, even if they were, that the approval of the scheme did not in any event mean that its claim was barred by s 115. The defendants pointed out that Africa Wide's reliance on common-law rights was contrary to the speed-driven purpose of s 115, and that the court's *imprimatur* in any event meant that a scheme's effectiveness was derived from statute and could not be altered or affected by extraneous rights.

The GJ, per Fisher J, ruled that the true intention of the plant transaction was neither to dispose of the plant in a vacuum nor to change the nature of Maseve's business, but to facilitate the transfer of shares in accordance with the scheme. Given plant transaction was intended to be an integral and indivisible part of the share transaction, the effect of the drag-along clause in Maseve's MOI was that Africa Wide had to go along with all of it.

While this finding meant that it was not necessary to deal with the defendants' special plea in terms of s 115, Fisher J nevertheless did so as it was independently dispositive of the case. The issue here was whether a scheme of arrangement could be challenged outside of the machinery prescribed by the Act or put differently, whether Africa Wide's claim, based as it was on the common law, was barred by the Act.

Fisher J pointed out that making schemes susceptible to the vagaries of review litigation would stymie their purpose of overcoming minority resistance to attempts to save a company. Africa Wide also failed to take account of the fact that the scheme had been approved by company resolution and was thus enforceable by and against the scheme participants unless reviewed and set aside. Fisher J emphasised that if a challenge to a scheme entailed a direct or indirect attack on the resolution approving the scheme, it could only be brought under s 115, which it was not. In the event, the GJ dismissed Africa Wide's claim.

Criminal law

The importance of proper citation of company employee in charge-sheet: In *S v Lotz* 2023 (1) SACR 88 (KZP) the appellant was charged in a magistrate's court with contravening s 50(1) of the National Land Transport Act 5 of 2009 and sentenced to a fine of R 15 000 or ten months' imprisonment, in that he had personally operated a public-transport-service vehicle on a public road without holding the necessary permit or operating licence.

The appellant had been neither the driver nor the owner of the vehicle but an employee of a company that rented out motor vehicles. The company also provided a passenger service to clients from time to time, and in this case was transporting four United Kingdom nationals from the airport in Johannesburg to a hunting lodge near Dundee in KwaZulu-Natal. The vehicle was stopped and impounded while being driven by a different employee of the company who had been instructed to undertake the journey. On the following day the driver and the appellant drove down to Dundee from Johannesburg to collect the vehicle. It was then that the appellant was arrested and convicted of 'the offence of contravening s 50(1) read with ss 1, 124, 126 and 127 of Act 5 of 2009'. The prosecution appeared to have been conducted without any reference to the provisions of s 332 of the Criminal Procedure Act 51 of 1977 (CPA), which permitted liability to be visited on a corporate body for criminal conduct by way of citing a person as representative of the corporate body.

On appeal to the KZP, Mossop J (Koen J concurring) noted that the qualification in s 332(2)(*d*) of the CPA that the person in such circumstances had to be cited in the charge-sheet as a representative of the corporate body, was of singular significance. While the warm-bodied accused was dealt with as if he had personally committed the offence committed by the corporate body, any conviction that followed was the conviction of the corporate body, and not the warm-bodied accused, unless he was also charged and

convicted in his personal capacity. Difficulties for the state immediately became apparent in that the appellant at no stage personally operated a vehicle in breach of the Act; he was not the owner of the business; he was not the owner of the vehicle; and neither was he the driver thereof. He was not even in the province of KwaZulu-Natal when the offence was allegedly committed. There was, therefore, no evidence to demonstrate that he personally conducted the service that the state found offensive and contrary to the law. Furthermore, since the appellant was never charged in his capacity as a representative of the company, although he ought to have been, he personally acquired a criminal conviction. Further problems included that there was no ss 124, 126 and 127 in the Act and what sections were relied on by the state were, therefore, unknown. The conviction and sentence were accordingly set aside.

Other criminal law cases

Apart from the cases summarised above, the January 2023 SACR contained cases dealing with –

- forfeiture orders;
- review where criminal proceedings not finalised;
- the onus in bail applications;
- the reservation of questions of law in appeals; and
- warrantless searches.

Eviction

Monetary limit on jurisdiction of magistrates' courts in eviction cases: *Miya v Matleko-Seifert* 2023 (1) SA 208 (GJ) concerned an appeal against a magistrates' court eviction order to the High Court. One of the grounds of the appeal was that the magistrate court did not have jurisdiction to grant the order since the monetary value of right of occupation of the property in question exceeded the district court's jurisdiction under s 29(1)(*b*) of the Magistrates' Courts Act 32 of 1944, which was R 200 000 at the time.

The appellant's contended for right to occupy arose from her claimed right to ownership of the property, the capital value of which rendered the value of disputed right of occupation more than R 200 000. The respondent argued that Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act) nonetheless conferred jurisdiction on a magistrates' court to grant an eviction order, even if otherwise beyond the jurisdiction established by s 29(1)(*b*) of the Magistrates' Courts Act.

The GJ (Gilbert AJ (Manoim J concurring)) held that s 9 of PIE Act expanded the magistrates' court's jurisdiction by expressly providing that: 'Notwithstanding any provision of any other law, a magistrate's court has jurisdiction to issue any order … authorised by the provisions of [the PIE] Act'. A magistrates' court would, therefore, have jurisdiction to grant an eviction order in terms of s 4 of the PIE Act regardless of the value of the disputed right of occupation, provided that the property was in its area of jurisdiction and the eviction sought fell within the ambit of the PIE Act.

Evidence

Reliance by an expert witness on scientific literature: The facts in *MF v Road Accident Fund* 2023 (1) SA 52 (SCA) were that the appellant was involved in a motor vehicle accident in which he sustained an injury to the soft tissue of his neck. Then, ten months later, he developed a disorder called dystonia, which manifests in involuntary muscle contractions. The appellant sued the Road Accident Fund out of the GP for the damages flowing from his injury. The narrow issue before the GP was whether the soft tissue injury was the factual cause of the dystonia. From there the issue was further narrowed to whether the dystonia was anatomically related to the site of the injury, a diagnostic criterion for the post-traumatic variant of the disorder. The GP found that such a relationship had not been established, and accordingly that factual causation was not proved. It granted leave to appeal to the SCA.

The SCA, per Mabindla-Boqwana JA in a unanimous judgment, examined the evidence of the appellant's expert, and specifically whether there was a logical basis for his opinion that the anatomical-link criterion had been established. The SCA affirmed that an expert may (as here) quite acceptably rely on medical literature, provided the expert affirmed the correctness of the statements made in the publication concerned and provided further that the publication was authored by a person of repute or experience in the field. The SCA ultimately concluded, as the GP had done, that the anatomical-relationship criterion had not been proved, and accordingly that a causal relationship of the injury to the dystonia had not been established. The SCA accordingly dismissed the appeal.

Financial institutions

The recovery of dissipated trust assets: *Living Hands (Pty) Ltd and Others v Old Mutual Trust Managers Ltd* 2023 (1) SA 164 (GJ) involved an attempt by Living Hands to recover the losses it suffered when fraudster J Arthur Brown, having gained control of Living Hands' forerunner Mantadia Asset Trust Co (Matco), looted R 861 million of the R 1,2 billion it had administer on behalf of 52 000 widows and orphans of mineworkers who had died in service. Living Hands accused Old Mutual of allowing Fidentia to access the funds without performing any due diligence or exercising proper precautions.

In what appeared to be a premeditated strategy to gain access to the funds, Fidentia in October 2004 bought Matco for R 93 million and replaced its directors with Fidentia directors (Brown and his colleagues). A Fidentia-controlled entity, Fidentia Asset Management (Pty) Ltd (FAM), was then appointed as Matco's 'investment manager', with full discretionary powers to deal with the Matco portfolio. As a sort of test run for what was to follow, FAM on 15 October 2004 instructed Old Mutual to pay R 150 million from the Matco portfolio into FAM's bank account. Old Mutual refused on various grounds. But a few days later Old Mutual received and complied with an instruction by FAM to immediately liquidate Matco's entire portfolio. The upshot was that Old Mutual had by early November 2004 paid the entire R 1,2 billion into Matco's bank account. Old Mutual argued throughout that the service level agreement it had concluded with Matco had obliged it implement Matco's instructions.

Living Hands instituted an action in delict in the GJ against Old Mutual to recover the R 861 million plus interest from Old Mutual. The GJ (per Siwendu J) ruled that there were sufficient grounds to hold Old Mutual liable. She pointed out that the sheer size of the portfolio, the material risks and the detrimental consequences were foreseeable and would have been foreseen by a prudent manager, and that Living Hands had thus established factual and legal causation. In addition, public and legal policy considerations dictated that liability for the loss of the funds should be imposed on Old Mutual. She accordingly ordered Old Mutual to pay the R 854 650 643 plus R 854 650 643 in interest at the *in duplum* level. Old Mutual indicated that it intended to appeal the judgment.

National Credit Act

May the Registrar grant default judgments in respect of matters falling under the NCA? In *Gcasamba v Mercedes-Benz Financial Services SA (Pty) Ltd and Another* 2023 (1) SA 141 (FB), the FB (per Snellenburg AJ) heard an application brought by the applicant, Mr Gcasamba, for the rescission, under r 42, of a default judgment granted by the Registrar in favour of the first respondent, Mercedes-Benz. That default judgment concerned the enforcement by Mercedes-Benz of an instalment sale entered between itself and Mr Gcasamba, as purchaser, in terms of which it sold to the applicant a used Mercedes-Benz. Importantly, the agreement fell under the National Credit Act 34 of 2005 (NCA). Mr Gcasamba argued that the default judgment was erroneously granted because only the courts, not the Registrar, could grant judgments falling under the auspices of the NCA.

He relied on s 130(3) of the NCA, which provided that 'in any proceedings commenced in a *court* in respect of a credit agreement to which this Act applies, the *court* may determine the matter only if the *court* is satisfied that' the conditions set out in paras (*a*) to (*c*) had been met. There was conflicting authority on the question; most recently the full court of the ML in *Nedbank Ltd v Mollentze* 2022 (4) SA 597 (ML), which held that the Registrar was empowered to grant default judgments in matters resorting under the NCA by virtue of having been granted the authority of a court by s 23 of the Superior Courts Act 10 of 2013.

The FB upheld Mr Gcasamba's argument that the Registrar could not grant default judgments in matters falling under the NCA. It did so for two main reasons: Firstly, because the decision in *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2016 (6) SA 596 (CC) (2016 (12) BCLR 1535 (CC); (2016) 37 ILJ 2730 (CC)) was binding authority to the effect that, under ss 129 and 130 of the NCA, only courts could determine matters to which the NCA applied. Secondly, even ignoring CC authority, a proper interpretation of the NCA led one to the conclusion that it was only a court that could grant judgments to which the NCA applied. This was because s 130(3) of the NCA clearly demanded judicial oversight before proceedings initiated by a credit provider may be finally determined, in order to ensure that there had been compliance with the matters mentioned in the section. Furthermore, should the legislature have intended to depart from what was usually understood by 'court', namely, 'a judge sitting in open court', it would have done so in express terms, which it did not do. The FB accordingly rescinded the default judgment and order granted by the Registrar.

Revenue

Liability for assisting taxpayer in dissipation of assets: In *Commissioner, South African Revenue Service v Wiese and Others* 2023 (1) SA 119 (WCC) the Commissioner sought to hold the defendants liable under s 183 of Tax Administration Act 28 of 2011 (the TAA), for 'knowingly assist[ing] in dissipating a taxpayer's assets in order to obstruct the collection of a tax debt of the taxpayer'. Under s 183 such a person would be 'jointly and severally liable with the taxpayer for the tax debt to the extent that the person's assistance reduces the assets available to pay the taxpayer's tax debt'.

South African Revenue Service (Sars) had issued a notice in terms of s 80J(1) of the Income Tax Act 58 of 1962 (the ITA) on 16 November 2012, of its intention to make adjustments to the taxpayer's 2007 assessment, raising a corresponding assessment on 21 August 2013. At the time of the s 80J notice the taxpayer's only asset was a loan claim. Sars claimed that on 19 April 2013 the second defendant, on instructions of the first defendant, assisted the taxpayer in dissipating the loan claim by declaring and transferring it as a dividend *in specie* to its holding company.

The WCC, per Le Grange J, considered two separate issues. The first was the meaning of 'tax debt' for purposes of s 183 of the TAA. Sars' case was that the dissipation was affected at a time when, to the knowledge of the defendants, the intended adjusted liability constituted debts due to Sars for the purposes and in terms of s 169 of the TAA. The defendants, relying on the impugned distribution having made on 19 April 2013, namely, before the assessment, contended that a 'tax debt' must be interpreted in the context of an assessment that had been raised, so that Sars was required to have issued an assessment to the taxpayer before invoking s 183.

On this issue the WCC held that a 'tax debt' in s 183 existed irrespective of an assessment having been made. It must be read as a reference to an amount of tax due or payable in terms of the TAA

– as advanced by Sars. The defendants who arranged the declaration of the dividend *in specie* could, therefore, be held liable in terms of s 183 of the TAA in the absence of an assessment at the time of the dissipation.

The second separated issue was whether Sars, for the purposes of proving its claim under s 183, could rely on transcribed evidence together with documents to which reference was made during testimony of three of the defendants at an inquiry held in 2015 and 2016 in terms of s 50 the TAA. Section 56(4), under the heading 'Confidentiality of proceedings', provides that '[s]ubject to section 57(2) [which prevents its use in criminal proceedings], Sars may use evidence given by a person under oath or a solemn declaration at an inquiry in a subsequent proceeding involving the person or another person'. This issue turned on whether the word 'proceedings' in s 56(4) was limited to tax court proceedings; and if admissible, for what purpose.

The WCC held that attributing a meaning to the word 'proceedings' that excluded judicial proceedings in court, whether civil or criminal, could not be supported as it would undermine Sars ability to collect tax. It made no sense at all to read the TAA as on the one hand giving substantial powers of information gathering, investigation and inquiry and then regard that evidence so obtained at an inquiry as inadmissible in subsequent court proceedings. Accordingly, this separated issue would also be decided in favour of Sars.

Universities

Students' right to legal representation in disciplinary proceedings: In *Dyantyi v Rhodes University and Others* 2023 (1) SA 32 (SCA), Ms Dyantyi was found guilty of kidnapping and other offences by the respondent university's disciplinary committee and expelled. The question was whether she was entitled to legal representation. It appeared that the university had during the course of the proceedings postponed the matter to date on which her counsel was unavailable and refused her request for a further postponement. As a consequence of these rulings neither Ms Dyantyi nor her counsel took further part in the proceedings.

Ms Dyantyi approached the ECG, which dismissed her review application based on procedural unfairness. She appealed to the SCA, which found (per Van der Merwe JA in a unanimous judgment) that, in subjecting Ms Dyantyi to a disciplinary inquiry, the University was exercising a public power, with the result that the Promotion of Administrative Justice Act 3 of 2000 (PAJA) was applicable. The SCA pointed out that there was no general right to legal representation under PAJA unless exceptional circumstances were present. Here, these resided in the legal complexities and the potential seriousness of an adverse finding against Ms Dyantyi. The University's failure, through its above-mentioned rulings, to allow her the services of counsel, violated her right to procedural fairness under PAJA. The SCA accordingly upheld the appeal and remitted the matter to the University for reconsideration.

Other civil cases

Apart from the cases and material dealt with above, the September SALR also contained cases dealing with –

- irregularities in government tenders;

the removal of members of a municipality's executive committee;

- the rationality of a tariff increase for a private supplier of bulk water;
- the registration of immovable property owned by the state;
- the validity of legislation pertaining to artificial insemination; and
- dispositions without value prior to insolvency.

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.

❑

When an order is looked at in the light of the Superior Court Act, there is no ambiguity, error or omission

By Kgomotso Ramotsho

Minister of Finance v Sakeliga NPC (Previously Afribusiness NPC) and Others 2022 (4) SA 401 (CC)

In the case of *Sakeliga*, the Constitutional Court (CC) dismissed the application with costs. After the applicants applied for direct access to the CC on an urgent application seeking a variation of the order that dismissed his application at the CC. The CC said that according to the applicant, he claims that the CC order lacked clarity and is thus susceptible to variation. According to the applicant the only thing that gives rise to the perceived problem with the order is the footnote in the minority judgment.

The CC stated that this is how the problem is said to arise. The CC added that with reference to the Supreme Court of Appeal's (SCA) 12-month suspension of the declaration of invalidity, the footnote says '[t]he period of suspension expired on 2 November 2021'. The CC pointed out that the 2 November 2021 date is the end of 12 months from the date of the SCA's order. The CC said that the applicant observes that the statement in the footnote was 'very respectfully in conflict with section 18(1) of the Superior Courts Act [10 of 2013]'. The CC pointed out that the applicant correctly highlights the fact that the CC's majority judgment does not respond to the content of the footnote.

The CC added that the applicant says, 'the incorrect statement [in the footnote] is the only articulation of this … court's position on the suspension period granted by the [SCA]'. The applicant concluded that the majority's omission to address the content of the footnote has resulted in lack of clarity. The CC said to its understanding the applicant correctly suggests that this is exacerbated by the

fact that the CC's order simply says the appeal is dismissed and 'does not purport to set aside, replace, substitute or in any way vary the order of the [SCA]'.

The CC pointed out that the applicant claims the confusion gave rise to three possible interpretations of the CC's order. First, the CC said that the applicant submits that in terms of s 18(1) of the Superior Courts Act the operation of the order of the SCA was suspended from the date the applicant lodged an application for leave to appeal to the CC on 23 November 2020. And the operation of that order started running again when the CC dismissed the appeal on 16 February 2022. Second, the CC added that the order may be interpreted to mean that the Preferential Procurement Regulations, 2017 (the Regulations) were invalidated with immediate effect and prospectively from the date of dismissal of the appeal and without any suspension.

Third, the CC said that in accordance with the doctrine of objective constitutional invalidity, the order may be interpreted to mean that the invalidation is with effect from the date the Regulations were promulgated. The CC added that the applicant avers that each of these interpretations has support from the different interest groups. The CC pointed out that the applicant submitted that because of these three possible interpretations, the CC's order is a candidate for variation in terms of r 42(1)(b) of the Uniform Rules of Court, which is made applicable to the CC by r 29 of the Rules of the Constitutional Court.

The CC explained that Rule 42(1)(b) provides that '[t]he court may … *mero motu* [of its own accord] or upon the application of any party affected, rescind or vary: … An order … to the extent of such ambiguity, error or omission'. The CC said the applicant submitted that variation is the 'cleanest and least burdensome' way to correct that lack of clarity in the order. The CC pointed out that variation would require only minor clerical edits to the order of the majority judgment and a correction of the footnote in the minority judgment.

The CC said that the first respondent, Sakeliga NPC, which was previously known as Afribusiness NPC, in the application for leave to appeal to the CC, opposes the present application brought by the applicant. Other respondents have opted not to enter the fray. The CC pointed out that Sakeliga contends that the application by the Minister of Finance is an exercise in futility, an abuse of the process of the CC and waste of judicial resources. Sakeliga argues that there is no need for the relief sought by the applicant as the period of suspension is regulated by the Superior Courts Act. That is so because, when the order is looked at in the light of the Superior Courts Act, there is no ambiguity, error, or omission.

The CC said that according to Sakeliga, this entails a simple calculation in accordance with the provisions of s 18(1) of the Superior Courts Act. And what the applicant is seeking to achieve is an amendment of the order of the SCA, which stands as a result of the CC's dismissal of the appeal. The CC when looking at the merits, said the springboard of this application is the perceived confusion caused by the content of footnote 28 of the minority judgment. The CC said that the majority judgment opened by clearly stating what it agrees with in the minority judgment.

The CC pointed out that it does not include the content of footnote 28. The CC added that in any event, a minority judgment is just that. Unless parts of it have been adopted either expressly or impliedly. The CC said it does not understand how it can affect the meaning of an order granted by the majority. The CC added that the footnote has certainly not been adopted expressly. The CC said that it does not see the basis for an argument that it has been adopted impliedly. The CC added that it is worth noting that the applicant said the majority judgment was 'silent' on the footnote.

The CC said there is no basis whatsoever for suggesting that the majority judgment adopted the content of footnote 28 of the minority judgment. Therefore, the CC said it could not have given rise to any confusion in its order. The CC pointed out that the applicant is aware of the import of s 18(1) of the Superior Courts Act. According to the CC the applicant said that in terms of s 18(1) the operation of the order of the SCA was suspended from the date the applicant lodged an application for leave to appeal to the CC on 23 November 2020. The CC said the law is and has always been clear on the issue.

The CC said that plainly, execution of a judgment means giving effect to the judgment. Reference to 'execution of the judgment in any other manner appropriate to the nature of the judgment appealed from' gives a wide meaning to the word 'execution'. The CC said put simply, it means giving effect to the order, whatever its nature. So, the suspension of the execution of judgment means 'the judgment cannot be carried out and no effect can be given thereto'. The CC said that applies to whatever it is that is required to be done or must take place in terms of the judgment. The CC pointed out that in what effectively amounted to 'a restatement of the common law', r 49(11) of the Uniform Rules of Court provided:

'Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs.'

The CC said that based on the clear statutory position, the operation and execution of the order of the SCA was halted. The CC added that in practical terms, what happened immediately after that order was granted was that the countdown on the 12-month period of suspension began. The CC said but the countdown was halted on the 21st day by the lodgement of the application for leave to appeal in the CC. Because s 18(1) suspends the operation and execution of a judgment 'pending the decision of the application [for leave to appeal]', the countdown resumed after the CC dismissed the appeal on 16 February 2022. The CC added that unsurprisingly, the applicant does realise that this is how the order ought to be interpreted.

Consequently, the court dismissed the application with costs, including costs of two counsel.

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

Be wary when calling up a construction guarantee

By Sechaba Mchunu

Millenium Aluminium and Glass Services CC and Others v Group Five Construction (Pty) Ltd and Another (SCA) (unreported case no 693/2021, 14-12-2022) (Zondi JA (Mothle JA and Nhlangulela, Salie-Hlophe and Siwendu AJJA concurring))

On 14 December 2022, the Supreme Court of Appeal (SCA) in *Millenium Aluminium and Glass Services CC*, handed down a judgment, which underpins the approach to be followed when considering whether the requirements of a construction guarantee have been followed.

Facts

Group Five Construction (Pty) Ltd (Group Five Construction) was appointed as a contractor to execute construction works in a project in Umhlanga, KwaZulu-Natal (KZN).

A portion of the works included the design, supply and installation of residential windows and shopfronts. An entity by the name of Millenium Aluminium and Glass Services CC (Millenium) was appointed as a sub-contractor by Group Five Construction through its agents Group Five Coastal (Pty) Ltd (Group Five Coastal) to execute this portion of works.

Millenium was obliged in terms of the sub-contract agreement to provide Group Five Construction with security in the form of a construction guarantee. A construction guarantee was thus issued by Constantia Insurance Company Limited (Constantia) in favour of Group Five Construction.

The construction guarantee stipulated the grounds on which Group Five Construction would be entitled to call it up, as follows:

'4.1 A copy of a first written demand issued by the Contractor to the Subcontractor stating that payment of a sum certified by the Contractor in a payment advice has not been made in terms of the Agreement and failing such payment within seven (7) calendar days, the Contractor intends to call upon the Guarantor to make payment in terms of clause 4.2.

4.2 A first written demand issued by the Contractor to the Guarantor at the Guarantor's *domicilium citandi et executandi* with a copy to the Subcontractor stating that a period of seven (7) calendar days has elapsed since the first written demand in terms of clause 4.1 and the sum certified has still not been paid; therefore the Contractor calls up this N/S Construction Guarantee and demands payment of the sum certified from the Guarantor.

4.3 A copy of the said payment advice which entitles the Contractor to receive payment in terms of the Agreement of the sum certified in clause 4.'

On 18 May 2018, Group Five Coastal acting on behalf of Group Five Construction sent a letter of demand to Millenium calling on it to make payment of the certified amount of R 12 239 967,24 within seven calendar days. The letter of demand was accompanied by a payment certificate and reconciliation statement issued by Group Five Coastal under its new trading name, Group Five KZN (Pty) Ltd (Group Five KZN).

On 28 May 2018, with no payment forthcoming from Millenium, Group Five Coastal made a payment demand to Constantia in respect of Millenium's indebtedness. Constantia refused to make payment and subsequently Group Five Construction approached the High Court for a claim in terms of the construction guarantee.

The High Court

Group Five Construction instituted an application against Constantia and Millenium for an order directing the payment of the claimed amount in terms of the construction guarantee. The application was only opposed by Millenium on the grounds that –

- there was no proper demand made by Group Five Construction to Constantia in accordance with the construction guarantee; and
- the payment advice relied on did not entitle Group Five Construction to receive the payment sought on the basis that the payment certificate concerning the claimed certified amount was issued by Group Five KZN, which is not a party to the construction contract or guarantee.

The High Court rejected Millenium's argument. The High Court took the view that Group Five KZN was the same company as Group Five Coastal as the registration number remained unchanged. The High Court held that Millenium was aware of the change of name and could not plead confusion as to the identity and source on which the demand emanated from.

In the premises, it was held that Group Five Construction had properly issued the demand to Constantia and sufficiently complied with the requirements of the construction guarantee.

Consequently, judgment was granted in favour of Group Five Construction with Millenium and its co-debtors ordered to pay or indemnify Constantia in respect of the demand made on the construction guarantee.

The SCA

The judgment of the High Court was appealed against in the SCA by Millenium. In challenging the High Court's decision, Millenium argued that strict compliance is the acceptable standard, which should be adhered to in respect of construction guarantee demands as is the case with a letter of credit. Millenium relied on *OK Bazaars (1929) Ltd v Standard Bank of South Africa Ltd* 2002 (3) SA 688 (SCA) and *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others* 2010 (2) SA 86 (SCA). In these cases, the SCA underscored the need for strict compliance with the requirements of demand guarantees.

Millenium's main contention remained

that the absence of the name of a party to the construction guarantee on the payment certificate and reconciliation statement rendered the demand process followed by Group Five Construction as defective and non-compliant with the requirements for calling up the construction guarantee.

The SCA had to consider the interpretation of the demand guarantee and whether there had been compliance with the requirements and in circumstances where a party, which made the demand was distinct to that which issued a payment certificate and reconciliation statement.

The SCA in a taking a standpoint on the necessity of strict compliance relied on recent judgments of the SCA wherein an approach was adopted which considered the interpretation of a particular guarantee. The approach encourages an assessment into whether compliance has been achieved notwithstanding prevailing circumstances. This approach seems to deviate from the narrow and unbending principle of strict compliance and looks to determine whether the necessary steps have been followed without giving much attention to trivial technicalities.

The SCA in making its decision confirmed the High Court's view that Group Five KZN remained the same company as Group Five Coastal. Group Five Coastal was listed as a party acting on behalf of Group Five Construction in the construction guarantee. The identity of Group Five Construction acting through its agents Group Five Coastal/Group Five KZN was clear to Constantia and Millenium. The content and nature of the demand made for payment made it clear as to who the source of the demand is, the relevant role players in the contract and what the demand related to.

The SCA thus held that Group Five Construction had properly issued the demand to Constantia in terms of the construction guarantee, notwithstanding the issues concerning the name change. The SCA further held that all the requirements of the guarantee had been fulfilled.

Conclusion

This SCA judgment underpins the approach followed in relation to a dispute concerning compliance with the terms of a construction guarantee. This judgment arguably imposes an additional duty on guarantors to assess compliance subject to the interpretation of that particular construction guarantee – which may be tricky. This requires guarantors in circumstances where a demand may be found wanting, to consider whether the defect is such that it cannot be reconciled with the requirements of the guarantee or is simply a minor technicality, which does not render the demand process defective and ultimately non-compliant.

That said, to err on the side of caution, contractors need to be wary of how they formulate their written demands and ensure that the demands comply with the terms of the construction guarantee as far as possible. Where the content of the letter is attacked for lack of conformity and compliance, that demand may be prone to rejection due to non-compliance.

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By Nkosilathi Andrew Moyo

'Gotta be the solution to this pollution' – a rather precarious balancing exercise

Mukuru Financial Services (Pty) Ltd and Another v Department of Employment and Labour (2022) 43 ILJ 1171 (WCC)

South Africa (SA) is highly regarded for its 'commitment to upholding human rights and the rights of asylum-seekers and refugees' (FC Mukumbang, AN Ambe and BO Adebiyi 'Unspoken inequality: How COVID-19 has exacerbated existing vulnerabilities of asylum-seekers, refugees, and undocumented migrants in South Africa' (2020) 19:141 *International Journal for Equity in Health*). This, in part, 'make[s] the country an attractive destination' for migrants, 'particularly those from the Southern African Development Community (SADC) countries' (FC Mukumbang, AN Ambe and BO Adebiyi (*op cit*)).

In *Mukuru*, the thrust of the *Mukuru* group of companies' case was that 'foreign workers were essential to their business, permitting them to offer clients a service through consultants that were able to communicate with them in their own language and to relate to them on a cultural plane' (para 4). The companies argued that despite a diligent search, there were no suitably qualified citizens or permanent residents possessing the requisite 'language skills or the ability to relate on a cultural and ethnic basis' (para 4). On this basis, the companies applied for a corporate visa under the provisions of s 21 of the Immigration Act 13 of 2002 to enable them to employ foreigners. The Department of Employment and Labour rejected the applications 'on the basis that the skills were available in the country and that the foreign language requirement was discriminatory to local citizens' (para 1). The companies applied to the High Court for a review of this decision.

On review, the court's point of departure was the preamble to the Immigration Act, which it found as having captured the essence of the 'Gotta be the solution to this pollution' clarion call of Peter Tosh's song titled 'The Poor Man Feel it' (1981). The court understood the sentiment expressed behind these lyrics as reaffirming the need 'for the mainte-

nance of the policy connection between foreigners working in the country and the training of South African citizens' (para 17). While the court accepted that the companies had shown that it is necessary for their business to have persons who speak foreign languages, it found that the inquiry does not end there. The companies needed 'to demonstrate the fairness of the discrimination' and 'ensure that their conduct does not adversely impact … the rights and expectations of South African citizens' (as stated the preamble to the Immigration Act) (para 16).

The court found that the Immigration Act imposed a duty on the companies to equally address both 'the need of foreign nationals to work in their establishments in South Africa as well as the training of South African citizens to address that specific need' (para 20). Ultimately, the companies' omission of the training of South African citizens as an important consideration was deemed as a serious oversight as it unfairly excluded South African citizens from employment opportunities in SA in favour of foreign nationals. The review application was dismissed.

At the heart of the court's reasoning was the companies' failure to redress the socio-economic ills stemming from SA's past Apartheid regime and the resultant structural unemployment and poverty afflicting the country's citizens. However, literature points out several factors that present barriers to migrants in accessing formal financial services. Further to the language barriers echoed throughout the companies' case, one must consider the documentation required by most financial service providers in respect of undocumented migrants and a general lack of trust in the mainstream financial sector as chief among the challenges faced by migrants in this regard. According to FC Mukumbang, AN Ambe and BO Adebiyi (*op cit*), while some governmental organisations have provided specialised services for refugees and migrants such as coordinating 'with the major banks of SA', so they do 'not freeze the bank accounts' of undocumented migrants, the International Labour Organization 'also suggests that governments should include asylum-seekers, refugees, and undocumented migrants in their national income and related policy responses' (FC Mukumbang, AN Ambe and BO Adebiyi (*op cit*)). In my view, in order to assist the court with what seems to be a precarious balancing exercise in determining the fairness of the companies' discrimination, the applicants should have urged the court to consider the inequality exacerbated by existing 'vulnerabilities of asylum-seekers, refugees and undocumented migrants in South Africa' in accessing the mainstream financial market against the need to train South African citizens (FC Mukumbang, AN Ambe and BO Adebiyi (*op cit*)).

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By Shanay Sewbalas and Johara Ally

New legislation

Legislation published from 28 December 2022 – 27 January 2023

Acts

Children's Amendment Act 17 of 2022
Date of commencement: 5 January 2023. Amends ss 1, 24, 45, 105, 142, 150, 155, 156, 157, 159, 183, 185 and 186 of the Children's Act 38 of 2005. GenN1543 *GG*47828/5-1-2023.

Customs and Excise Act 91 of 1964
Amendment of part 4 of sch 5 (no 5/4/121), sch 4 (no 4/384) and sch 1 (no 1/1/1894). GN R2923, GN R2924 and GN R2925 *GG*47823/6-1-2023.
Amendment to part 1 of sch 3 (no 3/1/749). GN R2934 *GG*47876/20-1-2023.

Financial Intelligence Centre Act 38 of 2001
Commencement of ss 31 and 56 of the Act. Proc 111 *GG*47883/20-1-2023.

General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act 22 of 2022
Replaces GN1532 *GG*47802/29-12-2022. Date of commencement to be proclaimed. Amends ss 1, 6, 8, 10, 11, 19 and 20 of the Trust Property Control Act 57 of 1988. Inserts s 11A of the Trust Property Control Act 57 of 1988. Amends ss 2, 5, 12, 13, 18, 21, 24 and 29 of the Nonprofit Organisations Act 71 of 1997. Inserts ch 3A of the Nonprofit Organisations Act 71 of 1997. Amends ss 1 – 5, 21B, 21C, 21D, 21F, 21G, 21H, 26B, 26C, 27A, 28A, 34 – 37, 40, 41A, 42, 49A, 50, 52, 57, 59, 64, 75, 79A, 79B, sch 2, sch 3A and sch 3B of the Financial Intelligence Centre Act 38 of 2001. Substitutes s 26A and the index and inserts s 79C and sch 3C of the Financial Intelligence Centre Act 38 of 2001. Amends ss 1, 33, 50, 56, 69, 122, and the arrangement of sections of the Companies Act 71 of 2008. Amends s 159, long title and arrangement of sections of the Financial Sector Regulation Act 9 of 2017. Inserts ch 11A, ss 159A and 159C of the Financial Sector Regulation Act 9 of 2017. GN1535 *GG*47815/29-12-2022.
Commences ss 9, 10, 16, 18 to 55, 59 and 62 – 65 of the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act 22 of 2022. Sections 1, 2, 3, 4, 5, 6, 8, 11 – 15, 17, 56, 57, 58, 60 – 61 of the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act 22 of 2022 except ss 6(1H) and 11A(1)(c), 11A(2) and 11A(3) of the Trust Property Control Act 57 of 1998. Date of commencement: 1 April 2023. Proc 109 *GG*47805/31-12-2022.

Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Act 23 of 2022
Date of commencement to be proclaimed. Amends ss 1, 3 – 6, 7, 9, 10, 12, 13, 15 – 18, 24 and 27, the preamble and the arrangement of sections of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004. Inserts ss 4A and 24A of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004. Substitution of ss 11 and 23 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004. Repeals ss 25 and 26 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004. GN1533 *GG*47803/29-12-2022.
Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Act 23 of 2022: Proclamation. Date of commencement: 4 January 2023. Proc 110 *GG*47820/4-1-2023.

Rates and Monetary Amounts and Amendment of Revenue Laws Act 19 of 2022
Date of commencement to be proclaimed. Amends the fixing of rates of normal tax, ss 6, 6A and sch 7 para 9. Amends sch 1 of the Customs and Excise Act 91 of 1964. Amends s 7 of the Employment Tax Incentive Act 26 of 2013. Amends ss 5 and 6 of the Carbon Tax Act 15 of 2019. Amends ss 18 and 19 of the Taxation Laws Amendment Act 20 of 2021. GenN1540 *GG*47825/5-1-2023.

Sectional Titles Amendment Act 13 of 2022
Date of commencement: 5 January 2023. Amends ss 1, 4, 14, 15B, 17, 21 – 26, 27, 32, 54 and 55 of the Sectional Titles Act 95 of 1986. Substitutes s 18 of the Sectional Titles Act 95 of 1986. GenN1545 *GG*47830/5-1-2023.

Special Appropriation Act 18 of 2022
Date of commencement to be proclaimed. GenN1539 *GG*47824/5-1-2023.

Tax Administration Laws Amendment Act 16 of 2022
Date of commencement: 5 January 2023. Amends s 1 of the Transfer Duty Act 40 of 1949. Amends s 5 of the Estate Duty Act 45 of 1955. Amends ss 1, 64M, sch 4 para 5 and sch 24 para 5 of the Income Tax Act 58 of 1962. Amends ss 1, 4, 38, 39, 40, 41, 47, 49, 65, 71, 79, 84, 86, 107 and 120 of the Customs and Excise Act 91 of 1964. Inserts Chapter IXA of the Customs and Excise Act 91 of 1964. Amends ss 13, 23 and sch 1 of the Value-Added Tax Act 89 of 1991. Amends ss 221, 222, 240A and s 256 of the Tax Administration Act 28 of 2011. Amends s 10 of the Employment Tax Incentive Act 26 of 2013. Amends s 20 of the Tax Administration Laws Amendment Act 44 of 2014. Amends s 2 of the Tax Administration Laws Amendment Act 13 of 2017. Amends s 1 of the Tax Administration Laws Amendment Act 24 of 2020. GenN1542 *GG*47827/5-1-2023.

Taxation Laws Amendment Act 20 of 2022
Date of commencement to be proclaimed. Amends ss 1, 7B, 7C, 9D, 10, 10B, 10C, 11, 12L, 19, 23, 23M, 24, 28, 29A, 45, 64FA, 64K, sch 2 para 4, sch 4 para 11, sch 7 para 3, sch 8 para 5 and sch 11 of the Income Tax Act 58 of 1962. Amends s 48, sch 1 to sch 6 of the Customs and Excise Act 91 of 1964. Amends ss 1, 9, 16, 18D, 20, 23 and 52 of the Value-Added Tax Act 89 of 1991. Amends s 1 of the Taxation Laws Second Amendment Act 25 of 2011. Amends ss 13, 15 and 62 of the Taxation Laws Amendment Act 31 of 2013. Amends ss 5 and 6 of the Carbon Tax Act 15 of 2019. Amends s 50 of the Taxation Laws Amendment Act 34 of 2019. Amends ss 4, 18 of the Taxation Laws Amendment Act 20 of 2021. GenN1541 *GG*47826/5-1-2023.

Government, General and Board Notices

Disaster Management Act 57 of 2002
Classification of a Provincial Disaster in terms of s 23 of the Act: Impact of the Gauteng Province Flooding Incidents. GN2954 *GG*47911/25-1-2023.

Electronic Communications Act 36 of 2005
Notice to extend the closing date in respect of the invitation to pre-register for Digital Community Television Broadcasting Service and Radio Frequency Spectrum Licences on Multiplex 1 (Mux1) frequencies. GenN1547 *GG*47832/6-1-2023.

Financial Surveillance Department: Cancellation of an Authorised Dealer in Foreign Exchange
GenN1561 *GG*47917/26-1-2023.

Higher Education Act 101 of 1997
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plaints handling procedures. GN2939 *GG*47883/20-1-2023.
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Amendment of Money Laundering and Terrorist Financing Control Regulations. GN2943 *GG*47883/20-1-2023.

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Pension Funds Act 24 of 1956
Repeal of reg 33. GN2977 *GG*47926/27-1-2023.

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Maximum Retail Price for liquefied petroleum gas. GN R2919 *GG*47816/3-1-2023.
Amendment of the regulations in respect of petroleum products. GN R2920 *GG*47816/3-1-2023.

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Shanay Sewbalas and Johara Ally are Editors: National Legislation at LexisNexis South Africa. ❑

Employment law update

By Nadine Mather

Can abandoned disciplinary action amount to an unfair labour practice?

In *Department of International Relations and Cooperation v Laubscher and Others* [2023] 1 BLLR 1 (LAC), the employee was served with a notice to attend a disciplinary hearing for misconduct allegedly committed when he was stationed at the South African Permanent Mission of the United Nations in New York. Instead of holding a disciplinary hearing, the employee and the Department of International Relations and Cooperation (DIRCO) agreed to a pre-dismissal arbitration as envisaged in s 188A of the Labour Relations Act 66 of 1995 (LRA).

The employee's attorneys requested DIRCO to, among other things, furnish further documents to enable the employee to respond to the allegations. DIRCO, however, repeatedly failed to adhere to the request, which culminated in the employee launching an application in the General Public Service Sector Bargaining Council (GPSSBC), and thereafter the Labour Court (LC), to compel DIRCO to furnish the documents. The employee also sought an order interdicting DIRCO from proceeding with the pre-dismissal arbitration. Pursuant to these applications, DIRCO withdrew all the charges against the employee.

The withdrawal of the charges prompted the employee to refer an unfair labour practice dispute to the GPSSBC in terms of s 186(2)(*b*) of the LRA. An unfair labour practice for purposes of s 186(2)(*b*) of the LRA means 'any unfair act or omission that arises between an employer and an employee involving –

(*b*) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee'. At arbitration, the GPSSBC arbitrator held that as the disciplinary proceedings had been aborted and no disciplinary sanction had been imposed against the employee, the employee's dispute fell outside the ambit of s 186(2)(*b*) of the LRA and the GPSSBC thus lacked jurisdiction to hear the dispute.

Dissatisfied with the outcome, the employee took the ruling on review to the LC. The LC found that notwithstanding that DIRCO later withdrew the charges against the employee, DIRCO had still instituted disciplinary action against the employee and this disciplinary step fell within the ambit of s 186(2)(*b*) of the LRA. It accordingly found that the GPSSBC was incorrect in ruling that it had no jurisdiction to hear the dispute and, on the basis that the employee had been humiliated and suffered reputational damage, it awarded the employee compensation equivalent to six months' salary and costs in respect of both the disciplinary proceedings and the review application.

DIRCO took the matter on appeal to the Labour Appeal Court (LAC). The question for determination before the LAC was whether an aborted disciplinary process constitutes 'disciplinary action short of dismissal' as contemplated in s 186(2)(*b*) of the LRA.

The LAC noted that neither the LRA, nor the explanatory memorandum provides an explanation of what would constitute a disciplinary action short of dismissal. Over the years, the LC's have understood the reference to 'any other unfair disciplinary action short of dismissal' to include disciplinary action in the form of warnings or any action intended to correct the employee's conduct which is short of as dismissal. In the present matter, the LC attempted to distinguish between what it termed disciplinary 'action' and a disciplinary 'sanction' to justify a construction that the aborted disciplinary process constituted disciplinary 'action' short of dismissal. The LAC found that this amounted to a strained interpretation of the statutory provision, particularly if one had regard to the Code of Good Practice: Dismissal set out in sch 8 of the LRA.

In this regard, the LAC noted that the phrase 'short of dismissal' is linked to 'disciplinary action'. On a plain reading of the phrase, together with the Code of Good Practice: Dismissal, the phrase refers to a sanction less severe than dismissal. Accordingly, a disciplinary inquiry, which had not yet commenced or had been abandoned without the imposition of a disciplinary penalty, cannot be equated to disciplinary action short of dismissal as contemplated in s 186(2)(*b*) of the LRA. On this basis, the LAC held that an unfair labour practice as envisaged in s 186(2)(*b*) does not embrace the present dispute, which the employee had referred to the GPSSBC.

The LAC held further that, in any event, a pre-dismissal arbitration process under s 188A of the LRA is conducted by agreement between the parties. It was, therefore, inconceivable that an employee would agree to that process and on its withdrawal, claim that he had been subjected to a disciplinary process short of dismissal.

Finally, the LAC confirmed that the LC did not have the jurisdiction to determine whether DIRCO had committed an unfair labour practice and to award the employee compensation. The fact that the LC is a court of equity does not in any sense supplement the jurisdiction of the court. The inquiry in the LC should have ended when it found, albeit incorrectly, that the GPSSBC had jurisdiction to entertain the dispute.

The appeal was upheld.

Unfair discrimination as a result of a protected disclosure

In *Tanda v MEC, Department of Health* [2023] 1 BLLR 95 (LC), the employee was employed by the Department of Health (the Department) as a data-capturer. When the Department embarked on an extensive recruitment process, the employee was requested to assist with the process in the Human Resources (HR) department.

While recruiting for the position of administrative clerk, the employee was instructed by a manager to include a fellow employee's niece in the batch of shortlisted applications on the basis that she had been overlooked. As the selection panel had not shortlisted the individual for the position, the employee refused the instruction and advised the manager that the Department's HR policies and procedures required her to reconvene the selection panel so that it could deal with the alleged oversight. The employee then reported the incident to the Deputy Director Human Resources Manager (the Director). While the Director expressed her unwillingness to intervene, she advised the employee to reconvene a meeting of the selection panel. The selection panel took a final decision to not shortlist the individual concerned.

Following the incident, the employee

she had been working on. The employee then addressed a letter to the Director complaining about the treatment she had received and, without receiving a response, found herself excluded from all HR meetings and removed from the HR department's WhatsApp group. The employee lodged a formal grievance and, in return, was unilaterally transferred back to her previous position of data-capturer, subject to a warning that her failure to report to work in this position would constitute serious misconduct.

Aggrieved by the Department's conduct, the employee referred an unfair discrimination claim to the Labour Court contending that her removal from the HR department constituted an occupational detriment as a result of her having made a protected disclosure in terms of the Protected Disclosures Act 26 of 2000 (PDA). She sought compensation and an order that she be entitled to resume her duties within the HR department.

The Department argued that –

- the employee had not made a protected disclosure but rather had become rebellious and failed to perform her duties properly; and
- the employee had failed to prove that she had suffered an occupational detriment as a result of reporting the manager's conduct.

With reference to the protected disclosure, the court held that the Department's denial that the employee had made a protected disclosure was not supported by the evidence. In this regard, the court noted that the PDA defines a 'disclosure' as 'any disclosure of information regarding any conduct of an employer, or of an employee … of that employer, made by an employee … who has reason to believe that the information concerned shows', amongst other things, 'that a person has failed, [or] is failing … to comply with any legal obligation'.

The court found that it was common cause that when the employee was instructed by the manager to add the niece's application to the shortlisted batch, the manager was failing to comply with her legal obligation to conduct the recruitment process in accordance with the Department's recruitment procedures and that this had in fact amounted to nepotism. The manager was intentionally acting in breach of the recruitment procedure and the disclosure of that conduct accordingly constituted a protected disclosure as envisaged in the PDA.

As regards the occupational detriment, the court noted that an 'occupational detriment' is defined in the PDA as 'being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities [and] work security'. The employee had contended that she had been removed from the HR department as punishment for making the disclosure. This was more probable than the Department's version that she had become rebellious and failed to perform her duties. If this was the case, the Director was aware of the procedures to be followed when dealing with misconduct. Instead, she abused her seniority by humiliating the employee and denying her the opportunity to develop her knowledge and skills as an HR practitioner. This denial constituted an occupational detriment in that it affected the employee adversely and retarded her development at work.

The court accordingly found that the Department had committed an occupational detriment against the employee in breach of the provisions of the PDA. Having regard to the humiliation and bullying that the employee had endured for making the protected disclosure, the court ordered the Department to pay the employee compensation equivalent to ten months remuneration, to restore the duties the employee performed in the HR department before making the protected disclosure, and for the Department to pay the costs of the application.

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By Moksha Naidoo

Amending a pleading v amending pre-trial minutes

AMCU obo Wayise and Others v Rand Uranium (Pty) Ltd (LC) (unreported case no JS658/17, 8-12-2022) (Sass AJ)

Does it necessarily follow in law, that once an application to amend a statement of claim is granted, the pre-trial minutes concluded between the parties are axiomatically likewise amended? This was one of the questions the court dealt with in this matter.

The applicant trade union, the Association of Mineworkers and Construction Union (AMCU), made an application to make 18 amendments to its statement of claim, which was duly opposed by the respondent employer. In its notice of motion, the union only sought leave to amend its statement of claim. However, in its replying affidavit and in argument, the union further sought to amend the pre-trail minutes in consequence of the amendments to its statement of claim.

Relying on the principle that an applicant must make out its case in the founding affidavit and not, for the first time, in its replying affidavit; the court rejected the union's attempt to argue that the application before the court, included an application to amend the pre-trial minutes.

The question before the court was whether an application to amend a statement of claim, if granted, would automatically amend the pre-trial minutes accordingly.

On the strength of the decision in *Putco Limited v Transport and Allied Workers Union of South Africa and Another* (LC) (unreported case no J2578/10, 18-2-2015) (Molahlehi, J), the court noted that if an application to amend a pleading is granted, it would not inevitably translate to the pre-trail minutes being likewise amended. A litigant needs to make out a separate case should it wish to amend the pre-trial minutes. On this point the court held:

'The applicants were, therefore, required to not only apply to amend the statement of claim but also apply to amend the pre-trial minute. They have not done so in their notice of motion and founding affidavit. The amending of the statement of claim would not automatically result in an amendment to the pre-trial minute – that relief must be sought specifically.'

In further support of this position, the court considered the fact that the test for whether an amendment to a pleading should be granted, materially differs from the test regarding whether an amendment to a pre-trial minute, ought to be granted.

In summary, the test for an amendment to pleadings is:

- 'Is the amendment necessary for the

proper ventilation of the dispute between the parties?
- If leave to amend is granted, will the respondent be prejudiced?
- If the respondent is prejudiced, can the respondent's prejudice be cured and/or corrected?'

Whereas the test to determine whether a party would be granted leave to amend a pre-trail minute, differs. Referring to the decision in *Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union and Others v CTP Ltd and Another* [2013] 4 BLLR 378 (LC), wherein the Labour Court, having regard to the status of a pre-trial minute and the importance thereof within the scheme of litigation, held:

'A pre-trial minute is a consensual document and, in effect, constitutes a contract between the parties.

It is precisely because of the critical importance played by pre-trial conferences/minutes in the litigation process that the SCA has twice held that, in the absence of special circumstances, a party cannot resile from the agreement.

…

…[W]here a party in a pre-trial minute abandons a point, or agrees (expressly or by necessary implication) not to pursue/rely on the point, or otherwise informs the opposing party that the point will not be relied upon, then he will not be allowed to do so at a later stage, unless he is able to resile from the agreement on a basis upon which he would in law be able to resile from a contract.

…

…[S]pecial circumstances in the present context should, in my view, be understood as meaning that, in order to resile from the agreement (or part thereof), the applicant must establish a basis for doing so in the law of contract.'

In conclusion the court *in casu* stated:

'The applicant is required to … follow the ordinary procedures that are applicable to an application to amend a pre-trial minute or resile wholly or in part from a pre-trial minute (ie, a contract) and not "*piggy-back*" on the amendment to the Statement of Claim.

It is trite that a pre-trial minute constitutes a binding agreement between the parties and that a party may only resile from that agreement if -
- the other party consents;
- if there are special circumstances which entitle that party to do so; or
- a basis has been established for doing so in the law of contract.'

Returning to the application before it and applying the appropriate test, the court granted the applicant leave to amend its pleading but made no order as to the pre-trail minutes the parties entered into. The court directed the applicant to make out a substantive application to amend the pre-trail, should it wish to do so.

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Recent articles and research

By Kathleen Kriel

Abbreviation	Title	Publisher	Volume/issue
ADRY	African Disability Rights Yearbook	Pretoria University Law Press (PULP)	2022 (10)
DJ	De Jure	University of Pretoria	(2022) 55
EL	Employment Law Journal	LexisNexis	(2022) 38.4 (2022) 38.5 (2022) 38.6
Fundamina	Fundamina	Juta	(2022) 28.1
ITJ	Insurance and Tax Journal	LexisNexis	(2022) 37.3 (2022) 37.4
JCCLP	Journal of Corporate and Commercial Law and Practice	Juta	(2021) 7.1 (2021) 7.2 (2022) 8.1
JJS	Journal for Juridical Science	University of the Free State, Faculty of Law	(2022) 47.1 (2022) 47.2

Administrative law

Chata, T and Pazvakawambwa, L 'Evaluation of the cause-and-effect relationship of internal controls on financial reporting in the Ministry of Health and Social Services, Namibia' (2021) 7.2 *JCCLP* 134.

African Continental Free Trade Area Agreement

Zaire, D and Warikandwa, TV 'The African Continental Free Trade Area Agreement: Aiding intra-African trade towards deeper continental integration' (2021) 7.2 *JCCLP* 16.

African unification

Kufuor, KO 'Pathways to African unification: The four riders of the storm' (2022) 28.1 *Fundamina* 66.

Arbitration

Kimela, H and Cosmas, J 'Unveiling the contemporary arbitration regime in Tanzania: Anecdotes worth sharing, prospects and challenges' (2021) 7.2 *JCCLP* 101.

Birth registrations

Kruger, H 'The invisible children – protecting the right to birth registration in South Africa' (2022) 47.2 *JJS* 55.

Children's rights

Mthembu, T and Holness, W 'Criteria for law reform on comprehensive sexuality education for children with disabilities in South Africa' 2022 (10) *ADRY* 78.

Commissioner of oaths

De la Harpe, L 'Commissioner of Oaths: Can you depose an affidavit virtually?' (2022) 37.3 *ITJ*.

Company law

Beja, X 'Business judgment rule to directors against personal liability for breaches of some of their duties' (2021) 7.1 *JCCLP* 1.

Danha, MD 'Personal liability of non-executive directors in South Africa: A global comparative analysis' (2022) 8.1 *JCCLP* 21.

Hayath, B 'Co-existence of statutory provisions and common-law rules make the smooth application of the Companies Act of 2008 to be untenable in certain respects' (2022) 8.1 *JCCLP* 35.

Hayath, I 'A case for excluding foreign companies from the application of the Companies Act of 2008 is unconvincing' (2022) 8.1 *JCCLP* 67.

Heyerdahl, J 'Review: Legal standing rules under the Companies Act, 2008: A critical review' (2021) 7.1 *JCCLP* 104.

Horney, J 'Is directors' liability under the Companies Act of 2008 a potentially dangerous trap in comparison to other jurisdictions?' (2022) 8.1 *JCCLP* 50.

Competition law

Ndlovu, PN 'Case Notes: Complaint initiations and prescription provisions in the Competition Act – The Constitutional Court provides clarity in *Competition Commission v Pickfords Removals*' (2021) 7.2 *JCCLP* 217.

Consumer protection

Enakireru, EO and Ekakitie, OW 'The challenges of anti-competitive practices and consumer protection in Nigeria' (2021) 7.2 *JCCLP* 152.

Corporate governance

Zikhali, NL 'The myth of a central role by institutional shareholders in corporate governance' (2022) 8.1 *JCCLP* 1.

Country reports regarding disabled citizens

Kmaga, GEK 'Country report: Republique of the Seychelles' 2022 (10) *ADRY* 187.

Peyou, SAN 'Country report: Republique du Burkina Faso' 2022 (10) *ADRY* 141.

Severin, M 'Country report: The Federal Republic of Somalia' 2022 (10) *ADRY* 202.

Tengho, SM 'Country report: Republique du Cap-Vert' 2022 (10) *ADRY* 168.

COVID-19 pandemic

Mokofe, WM 'COVID-19 at the workplace: What lessons are to be gained from early case law?' (2022) 55 *DJ* 155.

Debt collection

Van der Merwe, S 'The development of the South African emolument attachment order mechanism: A historical overview' (2022) 28.1 *Fundamina* 140.

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Swanepoel, M 'Buy-and-sell agreements – the importance on valuing the business entity correctly' (2022) 37.3 *ITJ*.

Dispute resolution

Biresaw, SM 'An assessment of the success of the Convention on Choice of Court Agreements 2005 as an instrument of transnational commercial dispute resolution' (2021) 7.2 *JCCLP* 168.

Domestic violence

Maphosa, R 'Tackling the "shadow pandemic": The development of a positive duty on adults to report domestic violence' (2022) 55 *DJ* 87.

Drafting contracts

Van Eck, M 'Duties of the contract drafter' (2022) 47.1 *JJS* 1.

Employment equity

Tenza, ME 'A retrospective evaluation of affirmative action – taking stock after twenty years' (2022) 28.1 *Fundamina* 104.

Employment law

Genga, S and Du Plessis, M 'A critical analysis of the duty to provide reasonable accommodation for employees with psychosocial conditions as an employment anti-discrimination obligation: A case study of Kenya's legal framework' 2022 (10) *ADRY* 17.

Enforcing legal rules

Jooste, Y 'The drive towards certainty: A short reflection on "law is/as code", complexity, and "the uncontract"' (2022) 55 *DJ* 143.

Environmental law

Lemine, BJ; Albertus, CJ and Kanyerere, T 'Wading into the debate on section 2(4)(*r*) of the National Environmental Management Act 107/1998 and its impact on policy formulation for the protection of South African wetlands' (2022) 47.1 *JJS* 77.

Financial services sector

De la Harpe, L 'FSCA discussion paper: Unclaimed assets in South Africa's financial sector' (2022) 37.4 *ITJ*.

Emmett, R 'Changing of the guard: Debarment: Protecting financial customers and the integrity of the Financial Services Sector' (2022) 37.3 *ITJ*.

Emmett, R 'Understanding FAIS: Are you authorised for too many product categories' (2022) 37.4 *ITJ*.

Gender inequality

Vengesai, P and Mnkandhla, SZ 'The dilemma of gender inequality in the delict of seduction: A Zimbabwean perspective and some lessons from South Africa' (2022) 55 *DJ* 107.

Human rights

De Man, A 'Reconsidering corruption as a violation of the rights to equality and non-discrimination based on poverty in South Africa' (2022) 47.1 *JJS* 52.

Makore, STM; Oscode, PC and Lubisi, N 'Re-theorising international agricultural trade regulation to realise the human right to food in developing countries' (2022) 47.2 *JJS* 88.

Intellectual property

Iitembu, JA and Usebiu, L 'A comparative analysis of the approaches to trade secrets protection between Namibia and the USA' (2021) 7.2 *JCCLP* 83.

Juma, PO 'The Marrakesh Treaty and African copyright laws: Lessons for the African Region from *Blind SA v Minister of Trade, Industry and Competition*' 2022 (10) *ADRY* 231.

Zewale, YT 'The need to go beyond ratifying the Marrakesh VIP Treaty: The case of Ethiopia' 2022 (10) *ADRY* 3.

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

The opportunities to secure employment dwindle post-admission as a legal practitioner

By Boitumelo Moshugi

LLB degree graduates who are fortunate enough to secure practical vocational training (PVT) contracts for themselves, undergo rigorous training to ensure they can protect the legal interests of their clients, and to ensure that they have the capacity to apply the law correctly and appropriately.

All candidate legal practitioners are required to undergo two years of PVT in order to be admitted as a legal practitioner. This experience allows candidate legal practitioners the opportunity to walk in the shoes of a qualified legal practitioner.

By law, these graduates must undergo this experience through the supervision and guidance of their principals, as well with the staff associated with the law firm. This is a special type of employment relationship as it functions as a mentor/mentee partnership.

The purpose of this mentorship programme is to ensure that candidate legal practitioners are fit and proper to practice.

Through the journey of becoming a qualified legal practitioner the experience gained by a candidate legal practitioner forms a significant, extensive, and resourceful foundation towards building their legal career.

On completion of their PVT contract and becoming admitted as a legal practitioner, many legal practitioners are encountering a conundrum when securing employment post-admission.

Although employers have their own criteria for employing their preferred candidates who meet all their requirements, newly admitted legal practitioners are placed at a disadvantage because most employers turn a blind eye to them because they lack the number of years of experience post-admission.

In light of the above, the job experience requirement appears to outweigh the current and potential capabilities of newly admitted legal practitioners.

Potential candidates for a vacancy are disregarded based solely on the requirement of a minimum of three to five years post-admission experience, although the said candidate has undergone such a rigorous process of PVT. This is a disservice to newly qualified legal practitioners.

Consequently, we are living in a world that is forever changing and adapting as the COVID-19 pandemic has explicitly shown us.

However, the COVID-19 pandemic worsened the dilemma because the chances of newly admitted legal practitioners being retained is gradually becoming less and securing job opportunities is becoming scarce, which is contributing to youth unemployment.

Through the experience of job hunting online, this task has become so tedious, financially taxing and time consuming because the advertised vacancies require a specific number of years of experience post PVT, which one cannot acquire immediately post-admission, if not retained at a firm.

In considering the above dilemma, what possible solutions do we have to overcome this youth unemployment among newly qualified legal practitioners?

In light of the above, these are the possible solutions:

- Firstly, the potential candidate's curriculum vitae and credentials are the first points of reference. It is noteworthy that every individual possesses unique attributes and value to offer a firm and/or organisation, especially when working with clients to provide a valuable service.
  For example, to name a few, it is important to highlight whether an individual can build rapport with people, the manner in which they carry themselves is vital, the manner in which they speak and interact with their colleagues and counterparts, their ability to be innovative, and their assertiveness to take a lead role in certain circumstances.
- Secondly, the interview stage is the

second point of reference, which allows the employer to observe whether the potential candidate's skills, knowledge, personality, and character are all suitable for the advertised vacancy.

- Thirdly, the probation period and work integrated training is the third point of reference. This occurs following the interview stage being completed, and the employer having made the job offer and the suitable candidate having accepted the offer.

During this period, the chosen candidate is orientated and inducted in the workplace systems and on the other hand, it is a significant yardstick for the employer to measure and determine the capabilities, work ethic, and suitability for the position as a newly qualified legal practitioner.

Therefore, considering the above, the experience requirement cannot be the only factor for judgment that disregards potential candidates from securing job employment.

Contrary to popular belief most established legal practitioners who own their own law firms were given job opportunities by their seniors in the legal profession to prove themselves worthy of building their careers. Consequently, established legal practitioners should give more thought to providing similar help to upcoming legal professionals who have a youthful perspective to contribute to the legal profession.

It is important that employers and employees adopt the stance of open-mindedness and utilise the principal of ongoing learning and growth. Despite the number of years of experience obtained post-admission by newly qualified legal practitioners, generally people are teachable.

Moreover, the question arises, how are newly qualified legal practitioners supposed to acquire the required experience if employers are not affording them the opportunity to prove themselves. Is the PVT requirement as a candidate attorney insufficient to render one experienced enough to secure a job opportunity in legal practice?

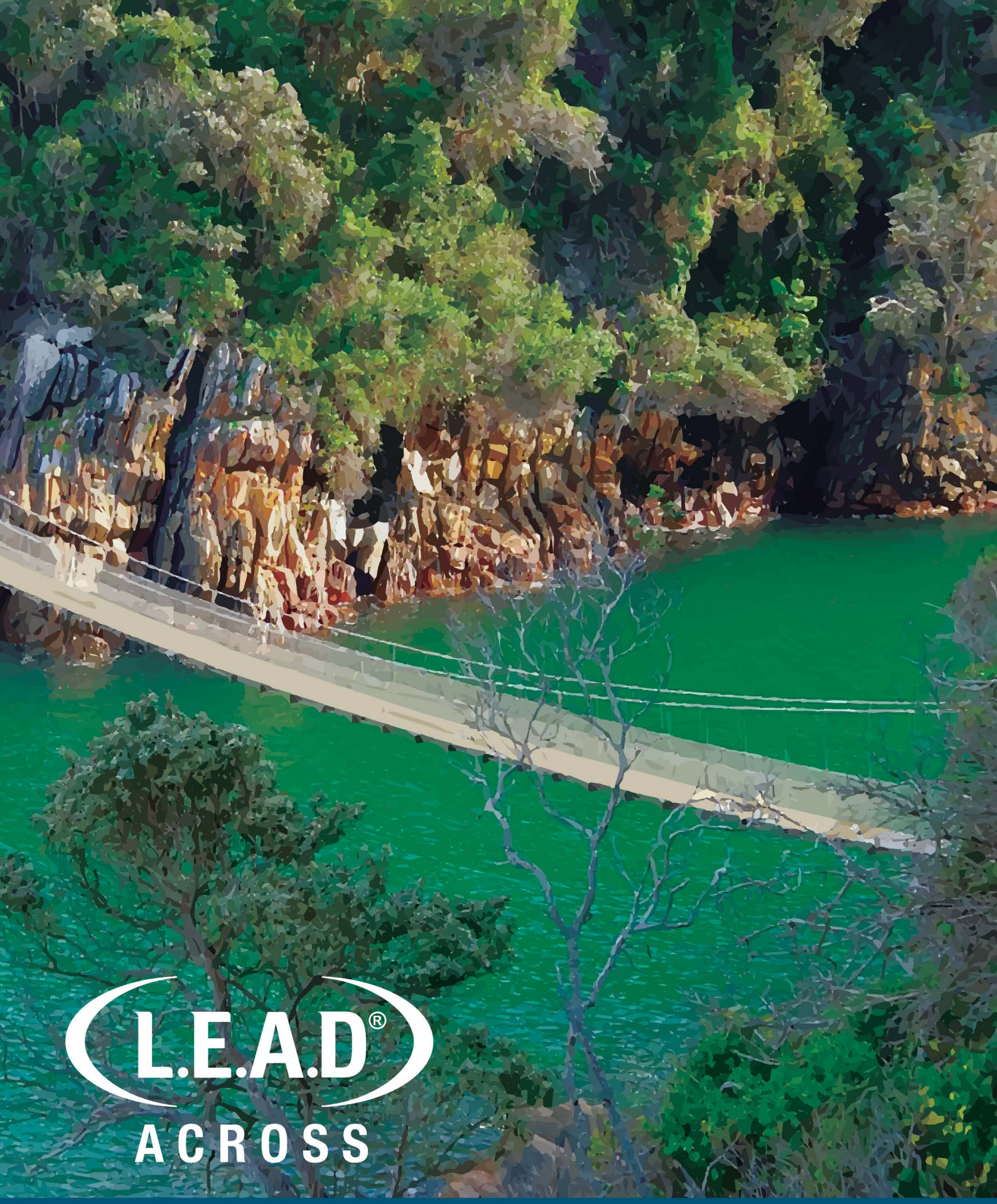
As a result of this requirement, many professionals in the legal industry have been forced to seek other avenues to secure permanent job positions by exploring opportunities overseas. This demand is gradually resulting in South Africa losing highly skilled professionals to other countries who have better opportunities to offer. Furthermore, young highly skilled legal professionals are leaving the legal profession to explore other avenues with better opportunities.

Fortunately, I have had to explore the option of creating a job for myself by starting my own legal consulting company due to the scarcity of job employment and not meeting the number of years of experience requirement. Due to this dilemma and the high unemployment rate, some newly admitted attorneys are brave enough to take the risk of open their own law firms to begin their post-admission journey. However, many newly qualified legal professionals are not as fortunate enough to become entrepreneurs and create job opportunities for themselves.

Considering the above, providing young legal professionals the opportunity to build their careers contributes to their professional development, which will empower them with skills and knowledge needed to lead a team within a firm and/organisation. Furthermore, it will enhance their professional reputation, thus attracting newly admitted attorneys in a firm and/or organisation is vital.

As stated, the number of years of job experience requirement is not a valid justification to disregard potentially brilliant legal practitioners.

Boitumelo Moshugi *LLB (UFS)* is a legal practitioner in Johannesburg. ❑



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RISKALERT

MARCH 2023 NO 1/2022

IN THIS EDITION

RISK MANAGEMENT COLUMN

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SOUTH AFRICA

RISK MANAGEMENT COLUMN

Risk statistics paint a concerning picture

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The Legal Practitioners Indemnity Insurance Fund NPC (LPIIF) had an outstanding reserve of R753, 343,300 as at 31 December 2022, a decrease of 2,2% from the corresponding figure as at the end of 2021. This figure represents the estimated value of outstanding claims notified to the company as at that date. As mentioned in previous publications, this is a significant number considering the nature and size of the LPIIF. Claims development patterns have remained stable over the last five years.

I will try to unpack some of the statistics in order to give an overview of the risks facing insured legal practitioners.

Claim trends

In the last five years, 59% of the claims paid by the LPIIF have arisen from prescription related risks, with the prescription of Road Accident Fund (RAF) related claims making up 48% of the payments and general prescription (non-RAF) making up 11%. Other high-risk areas of practice are conveyancing (11%), under-settled RAF matters (10%), litigation (8%) and commercial matters (5%). The

RISK MANAGEMENT COLUMN continued...

six main areas from which claims arise are consistent with previous years. Practitioners engaging in these high-risk areas of practice must put a significant amount of effort into their risk management measures.

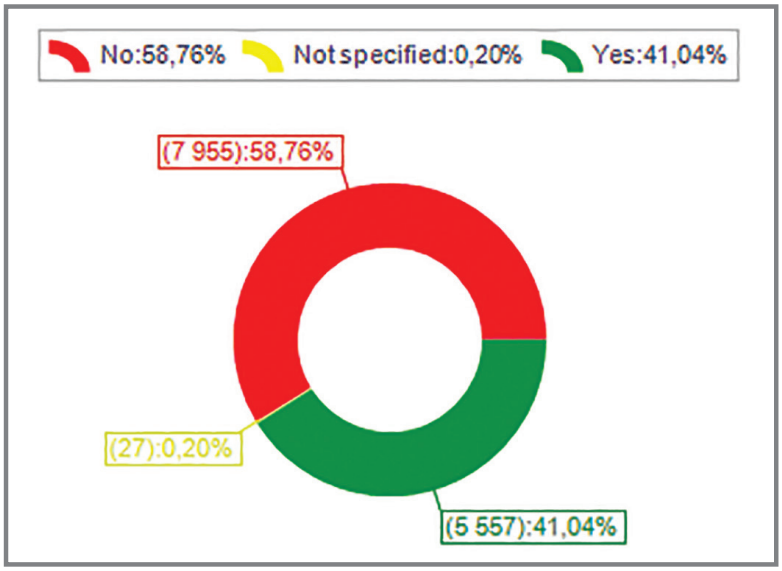
Prescription

Prescription remains a major risk area despite the significant focus on this risk in our risk management education and publications. Unfortunately, some practitioners still do not recognise this as one of the main risks facing their practices.

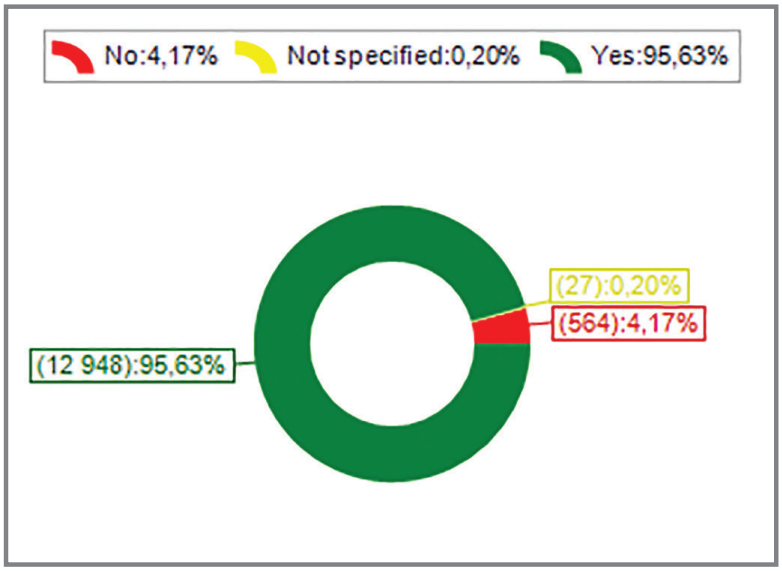
Some of the questions in the risk self-assessment questionnaire completed annually by practitioners are specifically focused on prescription. The graphs below give an overview of the responses provided in respect of each prescription related question.

One of the questions is: "Do you assess whether or not you have the appetite, resources and the expertise to carry out the mandate within the required time?" 98,53% of respondents replied in the affirmative to this question, with 1,26% replying in the negative and the remaining 0,21% not specifying whether or not they conduct the assessment.

Has your firm registered all time-barred matters with the LPIIF's Prescription Alert unit?

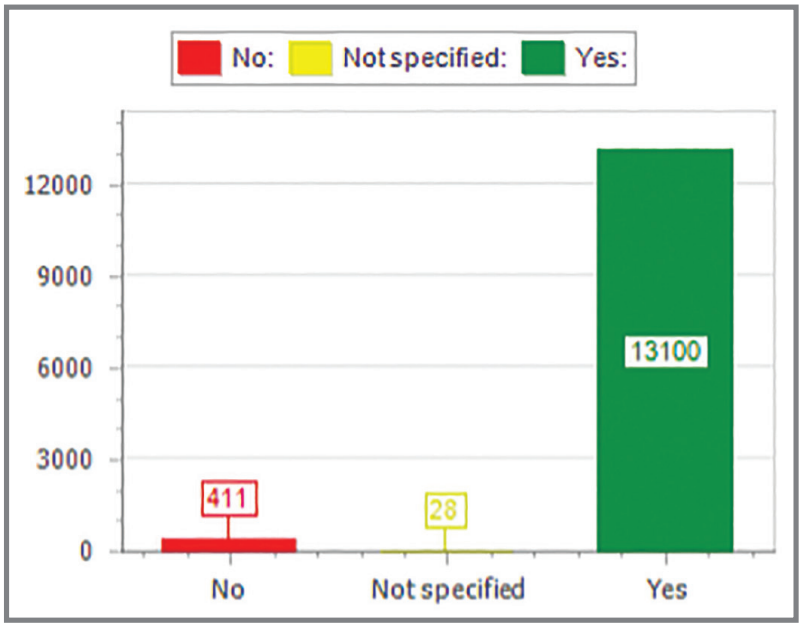


Are regular file audits conducted?

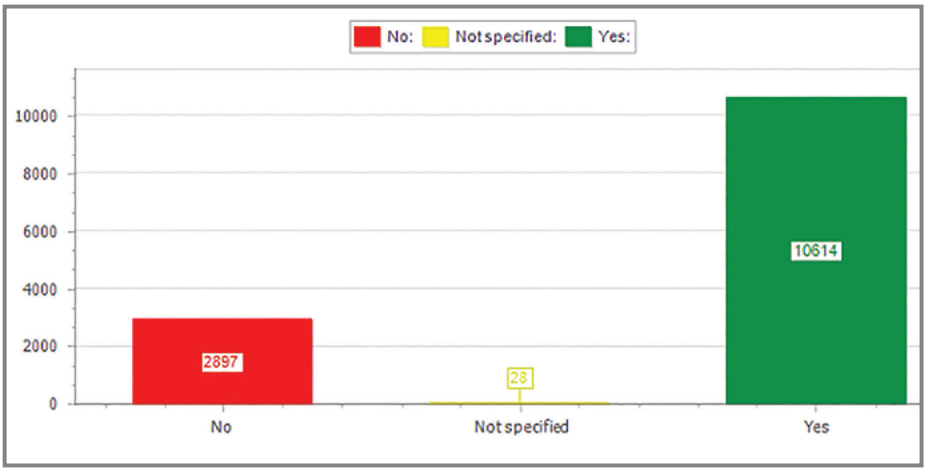


RISK MANAGEMENT COLUMN continued...

Is the proximity of the prescription date taken into account when accepting new instructions and explained to clients?



Do you have a formal handover process when a file is transferred from one person to another within the firm?



The fact that less than 50% of practitioners have registered their time barred matters with the LPIIF's Prescription Alert unit is cause for concern. The Prescription Alert system is a back-up diary system made available by the LPIIF to insured legal practitioners at no cost. Our experience has shown that less than 10% of matters registered on the Prescription Alert system ultimately result in claims against the legal practitioners concerned. It is important that the correct information is uploaded onto the system when matters are registered so that the system can calculate the prescription date accurately. Reminders sent by the Prescription Alert unit of the looming prescription date must be adhered to.

Almost 97% of respondents completing the risk management self-assessment questionnaires indicate that the proximity of the prescription date is taken into account when accepting new instructions and is explained to clients, with almost 95% reporting that regular file audits are conducted in their practices. If this was indeed the case, the number and value of prescription related claims would have been much lower.

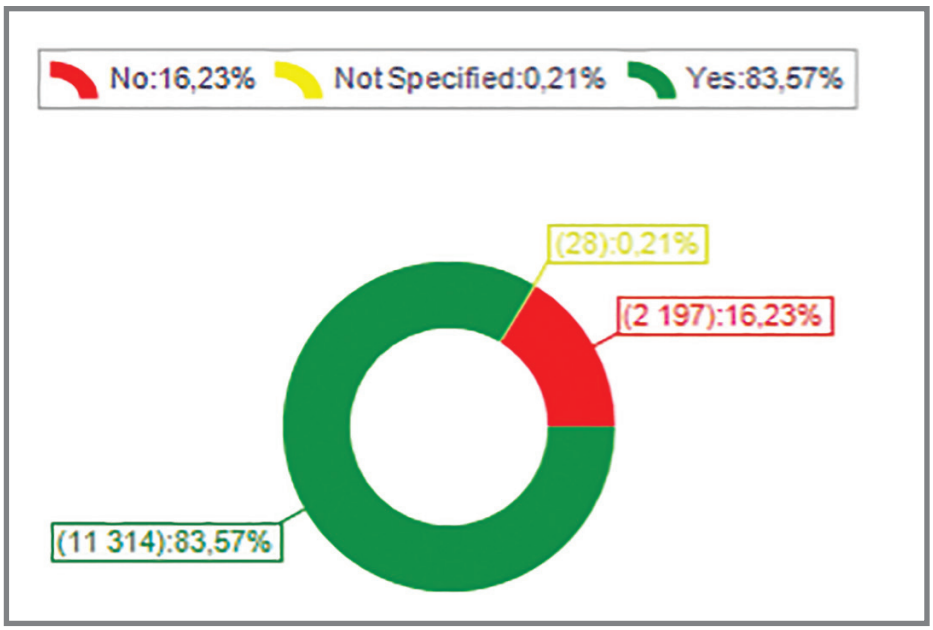
When faced with a special plea of prescription, do not concede if

RISK MANAGEMENT COLUMN continued...

there are facts and legal grounds on which to replicate and challenge the prescription defence. It is thus important that you and your staff know the law regarding when the running of prescription commences, is suspended or interrupted. It is also concerning that more than 18 months after the judgement was handed down in the LPIIF's favour in *Legal Practitioners Indemnity Insurance Fund NPC v The Minister of Transport and The Road Accident Fund* (GP) (unreported case no 26286/2020, 21-6-2021) (Janse van Nieuwenhuizen J), some legal practitioners are still not challenging the RAF where the latter raises a special plea of prescription in respect of claims arising from accidents where the identity of the driver or the owner of the vehicle is not known (commonly referred to as 'hit and run' claims). The LPIIF successfully challenged the constitutionality of the RAF regulations setting the two-year prescription period for those claims. A copy of the judgment can be obtained from the LPIIF website or by sending your request to risk.queries@lpiif.co.za

The recent Supreme Court of Appeal judgment in *Shoprite Checkers (Pty) Ltd v Mafate* (903/2021) [2023] ZASCA 14 (17 February 2023) gives some significant insight into the legal principles relating to prescription.

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



Reasons for the questionnaire

One of the reasons for the introduction of the risk management self-assessment questionnaire was to focus the minds of legal practitioners on risk management and the internal controls that must be implemented in their practices. Providing inaccurate information when completing the questionnaires benefits neither the legal practitioners concerned nor the LPIIF. Legal practitioners should take time to go through the questionnaire and to provide considered and accurate answers. You will also get more value out of the exercise if you consider the aims with which it was introduced which are to:

- assist the LPIIF when setting and structuring excesses and amounts of cover for the profession as a whole, deciding on policy exclusions, conditions and possible premium setting;
- raise awareness regarding risk management and to get practitioners to think about risk management tools/procedures for their practices;

RISK MANAGEMENT COLUMN continued...

- obtain relevant and usable general information and statistics about workloads, staff numbers, types of matters dealt with, stress levels, risk management/practice management and claims history;
- gain insight into which risk management/practice management procedures are in place/need to be put in place in practices;
- assist in the selection and formulation of the most effective risk management interventions; and
- assist in formulating a strategy to improve risk management/practice management at all levels.

Unfortunately, some practitioners only complete the questionnaires in order to comply with the LPIIF's Master Policy provisions and to meet the requirements of applying for a Fidelity Fund certificate. We are also aware that in some firms the completion of the questionnaire is delegated to administrative or support staff who may not have an appreciation of the importance of the risk management assessment. Those firms will not get the benefit of the risk management self-assessment process. Compare what information is provided in your risk assessment questionnaire to that provided by you in other areas, such as the proposal form that you have completed when applying for or renewing your top-up insurance. Any incorrect information provided in respect of any question will not only be unethical but will also jeopardise your insurance cover. In the event that you are involved in litigation or some other dispute, it may be necessary to produce the documents. You should also compare your responses provided in the current year to those in prior years in order to assess how your risk management measures have progressed. If you handed each person in your firm a copy of the questionnaire to complete, how would the responses compare to that which you have submitted?

The RAF

The implementation by the RAF of Board Notice 271 of 2022 on 4 July 2022 raised the bar significantly in respect of substantial compliance with the minimum requirements for the acceptance of claims. We have received numerous correspondence from members of the profession who are facing challenges with the RAF in this regard. The implementation of the Board Notice does not appear to be consistent across all RAF offices from what we can gather from the information received from the profession. We have also been made aware of the fact that RAF offices are turning some claimants away at the door and not providing any written reasons for refusing to accept claims. These developments have a significant impact on the rights of RAF claimants and also increase the risk of prescription of RAF matters in the hands of attorneys.

The LPIIF has launched an application to review and set aside Board Notice 271 of 2022. At the time of writing, we are awaiting a complete record from the RAF. If you require a copy of the LPIIF's papers, please send a request to risk.queries@lpiif.co.za. Parties with an interest in the matter are urged to consider their positions and, if necessary, file applications to participate in review application. We anticipate that the review application will be heard in the latter part of 2023, at the earliest. In the interim, legal practitioners must do their best to comply with the Board Notice. The related matter (*Mautla and Others v RAF and Others*) will be argued on 9 May 2023. The review application in the *Mautla* matter concerns Board Notice 58 of 2021, the predecessor of Board Notice 271 of 2022.

Cybercrime

The recent judgments in *Hawarden v Edward Nathan Sonnenbergs*

RISK MANAGEMENT COLUMN continued...

Inc (13849/2020) [2023] ZAGPJHC 14 (16 January 2023) and *Hartog v Daly and Others* (A5012/2022) [2023] ZAGPJHC 40 (24 January 2023) have received a lot of media attention and generated much discussion regarding cybercrime. It is hoped that there will also be an increased awareness of cyber risks by law firms, their clients and other stakeholders in the wake of these judgments and the conversations that they have generated.

It will be remembered that cybercrime related claims are excluded from the LPIIF policy. Cybercrime is defined in the LPIIF policy as follows:

"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 loss to fall within this definition;"

The full wording of the exclusion clauses relevant to the cybercrime exclusion read as follows:

"WHAT IS EXCLUDED FROM COVER?

16. This policy does not cover any liability for compensation:

…

(c) which is insured or could more appropriately have been insured under any other valid and enforceable 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;

…

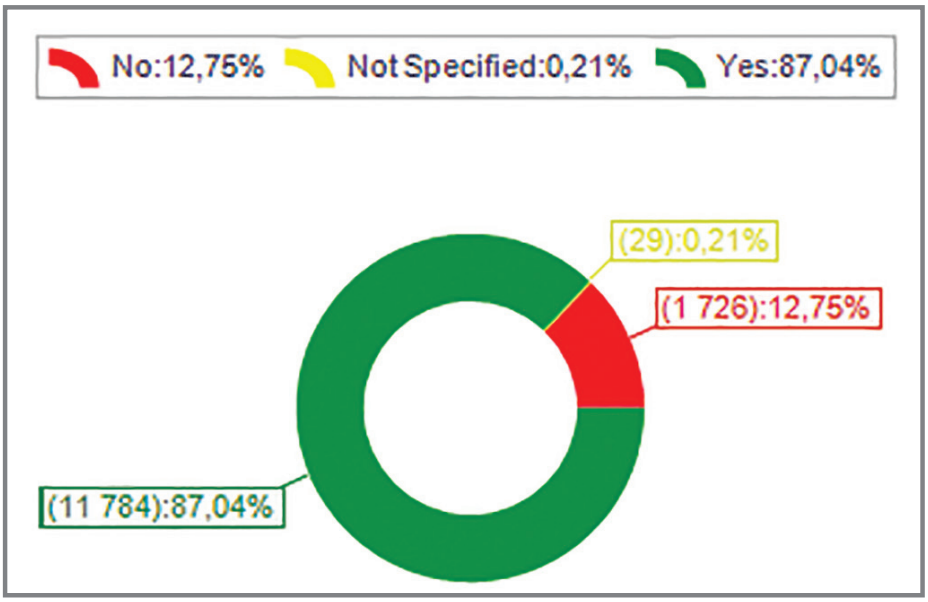
(o) arising out of **Cybercrime**. Losses arising out of **Cybercrime** include, payments made into an incorrect and/fraudulent bank account where either the Insured or the other party has been induced to make the payment into the incorrect bank account and has failed to verify the authenticity of such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

For purposes of this clause, "verify" means that the Insured must have a face-to-face meeting with the client and/or intended recipient of the funds. The client (or other intended recipient of the 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 attach an original stamped document from the bank confirming ownership of the account."

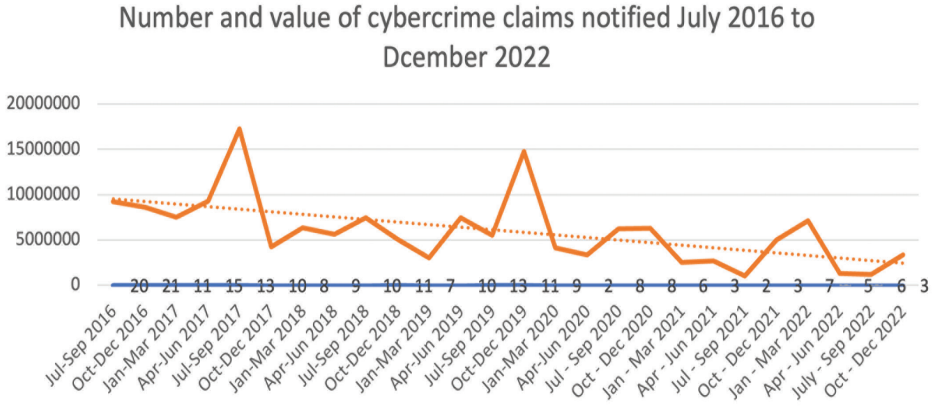
Between 1 July 2016 and 31 December 2022, the LPIIF was notified of 231 cybercrime related matters with a total value of R155,688,572.24. The average value of the cybercrime related claims is R5,988,022.01. All of these claims were not indemnified by the LPIIF as they fell within the exclusion clauses referred to above.

Cybercrime related claims are one of the most common type of claim notified to the LPIIF but excluded as they are not indemnified by the Master Policy. It is surprising that many practitioners still notify the LPIIF of cybercrime related matters when such claims have been excluded from the LPIIF policy since 1 July 2016 and there has been a lot of information directed to the profession regarding this exclusion. Moreover, almost 88% of practices have indicated that they have read the LPIIF Master policy and are aware of the exclusions. The question posed in the risk management self-assessment form asks: "Have you read the Master Policy and are you aware of the exclusions?" The statistics for the responses are as follows on page 7:

RISK MANAGEMENT COLUMN continued...



The pattern in respect of the cybercrime notifications will be gleaned from the graph below:



The most common type of cybercrime notifications relate to firms that have fallen victim to what is now commonly referred to as business email compromise scams. This scam involves the receipt of an email from an imposter, purporting to be from the intended recipient of funds, fraudulently instructing a party to make payment into a bank account held by or controlled by the imposter. The verification of bank accounts and instructions to make payment into such bank accounts is one measure that can be implemented by parties to mitigate the risk of falling prey to business email compromise scams. Practitioners must also have regard to the steps suggested in the judgments handed down in *Hawarden v Edward Nathan Sonnenbergs Inc, Jurgens and Another v Volschenk* (4067/18) [2019] ZAECPEHC 41 (27 June 2019) and *Fourie v Van der Spuy and De Jongh Inc and Others* 2020 (1) SA 560 (GP)). These cases can also provide useful training material for staff on business email compromise scams. Other cases that you can include in your training material are *Galactic Auto (Pty) Ltd v Venter* (4052/2017) [2019] ZALMPPHC 27 (14 June 2019) and *Lochner v Schaefer Incorporated and Others* (3518/16) [2017] ZAECPEHC 4 (24 January 2017). The *Hawarden v Edward Nathan Sonnenbergs Inc* and *Galactic Auto (Pty) Ltd v Venter* judgments differ from the other cases in a number of respects, including that in these two cases it was the party to whom payment was due to be made who

RISK MANAGEMENT COLUMN continued...

was found liable whereas in the other cases it was the party making the payment who was found to be liable for making payment into an incorrect account.

Rule 54.13 of the rules issued in terms of the Legal Practice Act 28 of 2014 reads as follows:

"Payment to clients

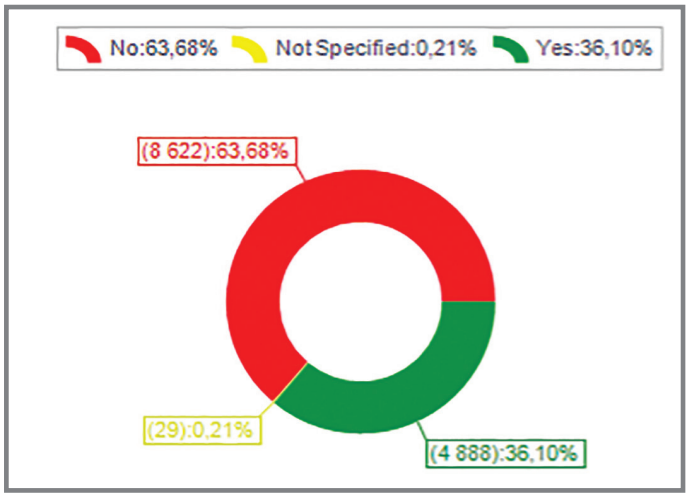
54.13 A firm shall, unless otherwise instructed, pay any amount due to a client within a reasonable time. Prior to making any such payment the firm shall take adequate steps to verify the bank account details provided to it by the client for the payment of amounts due. Any subsequent changes to the bank account details must similarly be verified."

Though rule 54.13 refers to payments to clients, the verification of the banking details and any subsequent or purported change must be applied to all payments.

The responses provided to the cybercrime related questions of the risk management self- assessment form make for interesting reading. The responses are as set out below.

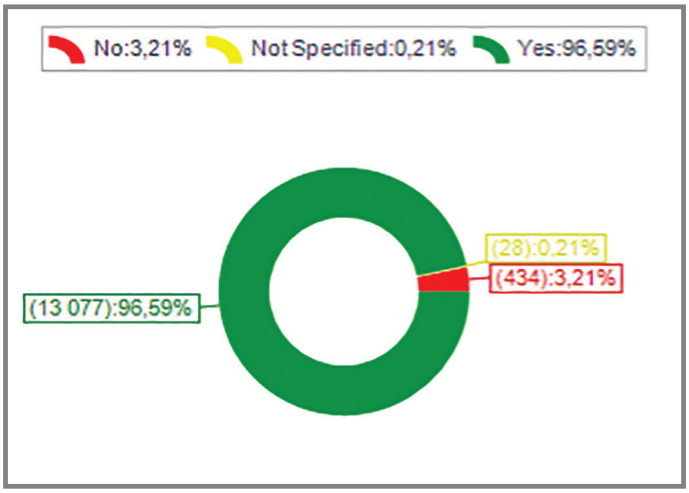
97,78% of respondents indicated that they are aware of the risks associated with cybercrime. It is concerning that even with this claim of widespread awareness of this risk, the prevalence of firms falling victim to cybercrime is so widespread.

Does your practice have appropriate insurance cover in place to cover cyber related claims?



The fact that just more than a third of legal practices indicate that they have appropriate cyber insurance in place is concerning as this risk is constantly increasing. Almost 97% of the respondents have stated that they conduct a verification of banking details as required by rule 54.13, but the number of cyber related claims reported to the LPIIF and insurers in the commercial market paint a picture of a much lower percentage of firms with a verification system in place.

In respect of the financial functions, has an adequate system been implemented which addresses the verification of the payee banking details, and any purported changes as required by rule 54.13?



In the wake of the recent judgments of law firms for cyber liability, legal practitioners must pay even more attention to this risk. There are a number of important lessons to be learnt from the judgments including raising awareness with all parties of the prevalence of cybercrime and business email compromise risks, including this risk in the training and orientation of staff, the implementation of secure portals and applications for communication (especially of banking details) and implementing a multi-factor authentication process.

Conclusion

The claim statistics and some of the underlying information received when assessing and investigating claims contradicts the picture painted by the responses to the risk questionnaire. This is a serious concern in that the development and profile of risks cannot be accurately assessed if inaccurate information is provided.

LPIIF team is available to conduct risk management training for all legal practitioners and their staff. Please send an email to risk.queries@lpiif.co.za should you require such training. The training is provided at no cost to legal practitioners and can either be done virtually or physically, depending on the needs of the firm.