

PROGRESSIVE LEGAL EDUCATION FOR CANDIDATE LEGAL PRACTITIONERS: WHAT ROLE SHOULD UNIVERSITIES PLAY?

A cause for confusion: How the amendment of the Municipal Property Rates Act holds the potential for injustice

The legal profession is highly competitive and unforgiving to black females

An exploration of s 7(7) and 7(8) of the Divorce Act 70 of 1979: Towards a legislative reform

The court may grant leave to appeal and deal with a matter even though it is moot

Can South Africa arrest President Putin pursuant to ICC warrant of arrest?

On constructive dismissals – when is the employee wrong?

Employment law update: Dismissal for bullying

The decriminalising of sex work in South Africa: A brief trajectory overview of the Criminal Law (Sexual Offences and Related Matters) Amendment Bill of 2022

Consequences of misconduct



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FEATURES

12 Progressive legal education for candidate legal practitioners: What role should universities play?

The broadening of the consumption of law has diversified how law should be taught and practiced. This means that universities can no longer produce law graduates for the sole purpose of practicing law at law firms or associate Bars. Law graduates now need to prepare to occupy any space where legal advice is sought and provided because the legal profession cannot absorb all the graduates produced by universities. Graduates may need to find positions in government departments, chapter 9 institutes, municipal legal departments and legal departments in various commercial institutions. Associate Professor, **Clement Marumoagae**, writes that this means that universities cannot provide law students with the specific skills that they would need to succeed in these places. Instead, universities should place law students in a position to learn and acquire technical skills that should be taught through vocational training.



16 A cause for confusion: How the amendment of the Municipal Property Rates Act holds the potential for injustice

In July 2015, the legislature amended the manner in which supplementary valuations were carried out as per the Local Government: Municipal Property Rates Act 6 of 2004. This has led to considerable confusion. The difficulties presented by the interpretation of the amendments presents the potential for harm and injustice. Legal practitioner, **Peter Murray** and candidate legal practitioner, **Alexandra Botha**, write about the vague and unclear aspects of the amended section of the Municipal Property Rates Act. Furthermore, they explain how the difficulties of interpretation have led to municipal implementation measures, which are legally incorrect, as they have no foundation in the text of the amended section. Mr Murray and Ms Botha instead suggest a more textually accurate paradigm along with proposals for further change.

18 The legal profession is highly competitive and unforgiving to black females

In this month's Young Thought Leaders feature, *De Rebus* news reporter, Kgomotso Ramotsho, spoke to legal practitioner **Palesa Ledwaba**, who was recently appointed as the Managing Director at Maponya Inc. Ms Ledwaba was born in Soshanguve and comes from a working-class family. Despite being born with a condition that affected her mobility that nearly confined her to a wheelchair since childhood, she managed to earn an LLB degree from the University of Limpopo. Her legal expertise lies in administrative, company, and tax law, particularly customs law and regulations, as well as general commercial litigation. Ms Ledwaba is an active member of the Black Lawyers Association and holds the position of Deputy Chairperson in its Gauteng Branch. Her guiding principles include upholding integrity, demonstrating persistence, and embracing a positive work ethic.

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LSSA challenges RAF medical tariffs

Through its Professional Affairs and Members' Benefit department, the Law Society of South Africa (LSSA) participates in several professional interest and public interest cases. In the matter discussed below, the LSSA challenged the introduction of the Road Accident Fund's (RAF) medical tariffs, which will preclude injured road accident victims, who are without medical aid or financial means, from accessing private health care.

The LSSA was the second applicant in *National Council of and for Persons with Disabilities and Another v Minister of Transport and Others* (GJ) (unreported case no 039100/2022, 15-12-2022) (Tolmay J). The matter was a constitutional challenge to the medical tariffs promulgated by the Minister of Transport in GN R2395 GG46747/19-8-2022 (the tariffs). In terms of the tariffs, the RAF would not be required to pay the actual medical costs of road accident victims, but only the costs according to the tariffs, which are far lower than what most services needed by road accident victims actually cost in the private sector. The application was divided into two parts: Part A, which seeks an interim interdict restraining the implementation of the tariffs, pending the outcome of Part B, which is for review proceedings to set aside the tariffs. It was the applicants' case that the tariffs were unlawful and unconstitutional for the following reasons:

- They are so low that road accident victims without means, or medical aid will no longer be able to obtain the care they need in the private sector. Given that the public sector cannot provide this care – either at all or at a sufficient quality or urgency – the result of the implementation of the tariffs is that many thousands of road accident victims will die or be permanently disabled. This means that road accident victims have no option but to submit to treatment at public hospitals, which are already overburdened. This impacts not only on road accident victims but on all public health patients. These tariffs also do not cover certain critical services – such as air ambulances by helicopter – which places road accident victims at serious risk.
- This renders the tariffs irrational, unreasonable and an unjustified limitation of the rights of access to health-care and bodily integrity.
- Of note is that, in November 2010, the predecessor to the tariffs was struck

down on a similar basis in *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC), when the Constitutional Court held that the tariff was incapable of achieving the purpose the Minister was seeking to achieve, namely to enable innocent road accident victims to obtain the health services they require.

- They were promulgated without complying with various stipulated and compulsory procedures. They would also apply retrospectively, which in these circumstances is unlawful. Prior to publishing the tariffs, a draft tariff was published for comment. The LSSA submitted comments pointing out that any tariff that had the effect of denying poor road accident victims' access to private health care would be in contravention of the 2011 Constitutional Court judgment.

Part A of the application was heard on an urgent basis on 15 December 2022. Tolmay J delivered an *ex tempore* judgment granting the relief sought by the LSSA and its co-applicant for an interim interdict to prohibit the implementation of the tariffs pending the outcome of the review application. Tolmay J also awarded a punitive costs order against the RAF and ordered it to pay the applicants' cost of Part A of the application on an attorney-and-client scale on account of the contemptuous way the RAF conducted its opposition to the application by filing its answering affidavit only days before the urgent court hearing and much later than the date directed by the court.

The RAF applied to Tolmay J for leave to appeal her order which application was refused. The main review proceedings brought to set aside the tariffs were initially set down to be heard in May 2023. However, the RAF failed to produce documents, which throw light on the decision-making process and the factors that were at play in the mind of the Minister of Transport when approving the decision to promulgate the tariffs. The Minister claimed that these documents were not in his possession and had to be sought from the RAF, which in turn, refused their disclosure.

The LSSA and National Council of and for Persons with Disabilities (NCPD), therefore, had to pursue the production of these documents by way of an interlocutory application.

In the build-up to the hearing of this interlocutory application, Opperman J issued directives ordering the RAF to



Mapula Oliphant – Editor

file papers explaining their recalcitrance. The RAF persisted in its refusal.

After hearing argument in the interlocutory application on 11 May 2023, Opperman J granted an order on 18 May 2023 directing the RAF to produce the documents within five days, on the basis that the documents are relevant to explain the decision-making process by the Minister of Transport to approve the tariffs.

Opperman J expressed her displeasure with the RAF's conduct as 'not only discourteous and unprofessional, but also the very opposite of rule-abiding'. Opperman J also granted a punitive costs order against the RAF and, furthermore, encouraged the Chief Executive Officer and Board Chairperson of the RAF to file affidavits to explain why they should not each be held personally liable to pay the costs of the interlocutory application and/or be joined personally to these proceedings for this purpose.

It is important to note that the tariffs remain suspended in terms of the binding interdict obtained by the LSSA and NCPD until such time as the review proceedings have been concluded.

The RAF has since applied for leave to appeal to the Supreme Court of Appeal, which has dismissed the RAF's application for leave to appeal the interdict order, which was granted by Tolmay J in December 2022.

Would you like to write for De Rebus?

Upcoming deadlines for article submissions: 19 June; 17 July; and 21 August 2023.

LETTERS TO THE EDITOR

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

Justice

Lady Justice stands with her sword and scales ready to stand in judgment between parties, wearing her blindfold, so that there is no bias against whom she will swing her sword. This has been the depiction of Lady Justice for hundreds of years.

When I visualise Lady Justice today, her blindfold is half off. She is scarred from fighting for truth and justice in a morally declining society.

The legal profession is obligated to ensure that fairness flows through to society, which is provided through the justice system. The legal field is supposed to be a battlefield for justice and by shining a light on various issues, truth can be brought to light.

The problem in 2023 is that the members of society are fearful of legal practitioners and the power they wield. People would rather settle with a lawyer than go to court or receive an outrageously high account from a lawyer.

'Cloak and dagger' law appears to be the order of the day, where some lawyers withhold information or casually give incomplete information, which misrepresents the truth and/or play games with the administration of justice to wear down the other side. Some lawyers also

are not interested in negotiating with respondents.

The legal profession is the foundation of the country and how law is practised determines the outcomes for communities. When lawyers struggle to remember their ethical obligations then Lady Justice struggles to hold the scales.

I would like to challenge lawyers to self-reflect and determine whether they are standing with Lady Justice for justice and for their communities or are they fighting against justice itself?

Christine Thomaides. She writes in her personal capacity.

Erratum

We would like to note that in the article, 'Getting to the "soul" of trademark infringement' 2023 (May) *DR* 36, the byline for the author, Lusapho Yaso, reflected that he was employed by Kisch IP.

This was an error to which Kisch IP alerted *De Rebus*.

De Rebus would like to apologise for any inconvenience caused to Kisch IP.

Editor



Compiled by
Kevin O'Reilly

People and practices

Malan Scholes Attorneys in Johannesburg has appointed Hloni Mokoena as a Director in the Dispute Resolution Department. He specialises in administrative law, property law, municipal law, land use and commercial litigation.

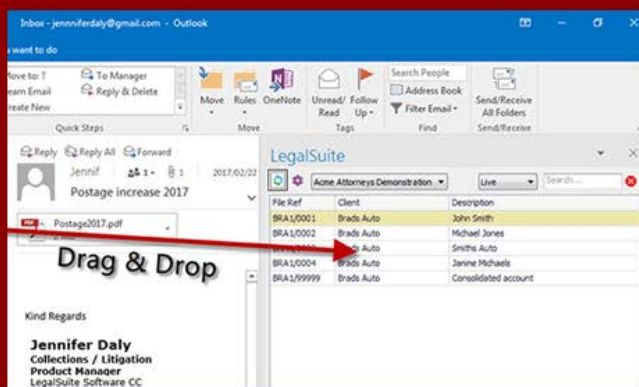


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By
Kevin
O'Reilly

Legal Aid, *Pro Bono* and Small Claims Court Committee meeting

The Law Society of South Africa's (LSSA) specialist Legal Aid, *Pro Bono* and Small Claims Court Committee (the Committee) met on 13 April 2023 to deliberate on several matters pertaining to its area of specialisation. The issues listed below were taken into consideration:

Provincial associations

The Committee considered reaching out to the various provinces, noting there are associations being formed in each province, with particular reference to small claims courts. It was noted that in the past an LSSA Small Claims Court Committee existed where members from various provinces were represented, which gave a feel for what was going on in the provinces. It is important for the Committee to not lose the provincial footprint. The Committee will approach the various provincial associations and task teams to identify the Small Claims Courts Commissioners in their province, who can then choose someone to represent them on the provincial structure for the Committee to liaise with.

Discussion Paper: Project 142 – Investigation into Legal Fees

The South African Law Reform Commission concluded its investigation and submitted its final Report on Discussion Paper: Project 142: Investigation into Legal Fees – Including Access to Justice and other Interventions (s 35 of the Legal Practice Act 28 of 2014 (LPA)) to the Minister of Justice and Correctional Service. The LSSA made extensive submissions on the initial Issue Paper, the Discussion Paper and the final Report to the Minister, and requested an opportunity to engage with the Minister on some aspects pertaining to the Report.

Practitioners are urged to read the Report, as it contains significant legislative proposals, which are likely to impact on the profession and access to justice. The Report and the LSSA's submissions can be accessed at the following link: www.lssa.org.za.

Pro bono legal assistance

Even though the regulation of *pro bono* services is the responsibility of the Legal

Practice Council, the LSSA has an interest in what is happening on the ground. The Committee is of the view that the provincial associations should be engaged to help formulate some form of incentive to encourage practitioners to take up more *pro bono* work, and to educate practitioners on how the regulations for community service under the LPA are going to be implemented, what is being affected, the hours required, etcetera. Practitioners should also be encouraged to serve a Small Claims Court Commissioners as part of their *pro bono* service.

Sheriffs

The Committee noted the importance of ongoing discussions between the LSSA and the South African Board for Sheriffs because the issue of sheriffs' fees has an impact on access to justice.

The Committee also noted with concern the lack of sheriffs in certain areas. It was noted that the Department of Justice deals with the appointment of Sheriffs.

A follow-up meeting will be held with the South African Board for Sheriffs to discuss these and other issues.

Juristic persons in small claims courts

The Committee discussed the possibility of lobbying for the extension of the jurisdiction of the small claims courts to include juristic persons. Small businesses often want to have this expedited process but are prevented from instituting action in these courts. The Committee earmarked this issue for follow up.

Meeting held with Legal Aid South Africa

A joint meeting of Legal Aid South Africa and the LSSA Committee was held on 30 August 2022 in which the following items were discussed: Wills Week, Legal Aid Manual, judicare, new mandate regarding land rights, candidate attorney programme, and women empowerment.

Community service

Section 94(1)(j) of the LPA provides for regulations regarding the rendering of community service and s 29(1)(a) and (b) provides that community service as a component of practical vocational training by candidate legal practitioners may

be required, or that a minimum period of recurring community service by practitioners may be required.

Draft regulations were published for comment and the LSSA invited the input of legal practitioners, which were included as part of the LSSA's submission. The LSSA's submission can be accessed at the following link: www.lssa.org.za.

It was noted that time spent providing supervision to candidate legal practitioners who are rendering community service is attributed to that legal practitioner's community service. Candidate legal practitioners will also be able to render *pro bono* legal services as opposed to community service.

The Committee also noted the importance of taking note of the definition of '*pro bono*' and 'community service', which has a wider definition and how this relates to services one can render.

Kevin O' Reilly MA (NMU) is a sub-editor at *De Rebus*. □



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By
Arniv
Badal

Consequences of misconduct

Being struck off the roll of legal practitioners is a serious consequence for a legal practitioner who has been found guilty of professional misconduct or has breached relevant rules or governing legislation of the profession. When a legal practitioner is struck off, they are no longer allowed to practice law in South Africa (SA). Before outlining several key factors, which legal practitioners should consider, it is worthwhile to highlight the roles of the relevant role players within the legal profession, namely, the Legal Practice Council (LPC) and the Legal Practitioners' Fidelity Fund (LPFF).

The LPC is a statutory body established in terms of the Legal Practice Act 28 of 2014 (LPA). Its primary role is to regulate the legal profession in the country and to promote an independent, effective, and efficient legal profession.

Some of the key functions of the LPC include –

- the registration of legal practitioners: The LPC is responsible for the registration of all legal practitioners in SA, which includes attorneys and advocates;
- the maintenance of the roll of legal practitioners;
- disciplinary proceedings: The LPC has the authority to investigate complaints against legal practitioners and to take disciplinary action against them if necessary. This can include suspension and striking off the roll of legal practitioners;
- promoting access to justice;
- setting standards for legal education; and
- monitoring compliance with the LPA: The LPC is responsible for monitoring compliance with the LPA. This includes ensuring that legal practitioners are complying with the rules and standards of the legal profession.

The LPC plays a critical role in regulating the legal profession. By ensuring that legal practitioners adhere to ethical and professional standards, the LPC helps to maintain the integrity of the legal profession and promote access to justice for all South Africans.

The LPFF is a statutory body established in terms of the LPA. Its primary role is to protect the interests of the public by providing compensation to clients who have suffered a financial loss because of misappropriation by a legal practitioner. The LPFF plays an integral part in protecting the interests of the public and maintaining the integrity of the profession. By providing compensation to clients who have suffered financial loss due to dishonesty of a legal practitioner, the LPFF helps to ensure that clients have access to justice and that legal practitioners are held accountable for their actions.

The process for striking a legal practitioner off the roll varies depending on the circumstances, but it generally involves an inquiry by the relevant professional body or disciplinary committee. If the legal practitioner is found guilty of misconduct or a breach of the rules, the disciplinary committee may recommend that they be struck off the roll. Once a legal practitioner is struck off the roll, they are no longer entitled to practice law or offer legal advice to clients. They are also required to surrender their Fidelity Fund Certificate and to remove their name from any signage or advertising that suggests they are still practicing law.

Being struck off the roll of legal practitioners is a serious consequence and can have significant consequences for a legal practitioner, such as:

- **The loss of right to practice law:** Once a legal practitioner is struck off, they are no longer entitled to practice law. This means they can no longer represent clients or provide legal advice.
- **The loss of professional reputation:** Being struck off the roll can have a significant impact on a legal practitioner's professional reputation. It may be difficult for a struck off legal practitioner to find employment or to be enrolled as a legal practitioner in the future.
- **Financial consequences:** Being struck off can have significant financial consequences for a legal practitioner, particularly if they solely rely on income from their legal practice to support themselves or their family.

- **Possible criminal charges:** Depending on the circumstances, being struck off may lead to criminal charges if the legal practitioner engaged in criminal behaviour.

Inversely, legal practitioners can avoid disciplinary action by, *inter alia*:

- **Adhering to professional standards:** Legal practitioners must adhere to the rules and standards of the legal profession. This includes ethical standards, rules of professional conduct, and relevant legislation.
- **Maintenance of accurate records:** Legal practitioners are required to maintain accurate records of their client accounts and finances.
- **Continuous professional development:** Legal practitioners should undertake continuous professional development activities to ensure that their knowledge and skills remain up to date. This helps to ensure that legal practitioners are providing competent and effective legal advice to their clients.
- **Avoidance of conflicts of interest:** Legal practitioners must avoid conflicts of interest and ensure that they are always acting in their client's best interests.
- **Responding to complaints:** If a legal practitioner receives a complaint from the regulator, it is imperative that they respond promptly and appropriately. This can involve providing a satisfactory response and resolution to the complaint, or a defence against any allegation made against them.

By adhering to the above non-exhaustive examples, legal practitioners can help to maintain the integrity of the legal profession and ensure that they are providing effective and ethical legal advice to their clients.

A further consequence of a practitioner being suspended or struck off is that an application will be made to the relevant High Court having jurisdiction to appoint a *curator bonis* to the practice. The effect of the application will be that the practitioner will be prohibited from handling or operating on the trust account subject to certain provisions of the sought order. The *curator bonis* respon-

sibilities will be detailed in the order, and practitioners should note that a *curator bonis* is not appointed to 'step into the shoes' of the suspended or struck-off practitioner.

The *curator bonis* may also be responsible for winding up the affairs of the legal practitioner's firm should it be determined that the practice can no longer

continue to operate without the legal practitioner who has been struck off. This may involve transferring clients and files to another legal practitioner or firm, closing bank accounts, and disposing of assets as necessary.

Overall, being struck off the roll of legal practitioners is a serious outcome for any legal practitioner and is a strong de-

terrent against professional misconduct or breach of professional standards.

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



The decriminalising of sex work in South Africa: A brief trajectory overview of the Criminal Law (Sexual Offences and Related Matters) Amendment Bill of 2022



By Wezi Masuku and Seraphine Kwanje

South Africa (SA) is moving in the right direction in becoming the first nation in Africa to decriminalise sex work. This change in the legal landscape, which occurs decades after the enactment of the Sexual Offences Act 23 of 1957, which replaced the Immorality Act 5 of 1927, is highly respected. The former Act completely declared sex work unlawful, as well as the construction and operation of brothels (see ss 10 and 20), while the latter prohibited 'illicit carnal intercourse' between races (see ss 1 through 6). Even so, it was striking to observe that sex workers continued to be denied access to their constitutional rights in a democracy devoted to gender equality and women's rights. This legislative jurisprudence informed the decision in the case of *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (2) SACR 499 (CC) in which the Constitutional Court supported the criminalisation of sex work based on its illegality. Sex work

'invites the public generally to come in and engage in unlawful conduct in private' (para 28), as the majority judgment succinctly stated.

Since *S v Jordan*, a novel trajectory has emerged that has garnered attention from the public and legal scholarship. A unique perspective on decriminalising sex work is furnished by the much-welcomed Criminal Law (Sexual Offences and Related Matters) Amendment Bill of 2022 (the Bill). According to the Minister of Justice and Correctional Services, Ronald Lamola, the Bill 'follows the view that the ongoing criminalisation of sex work contributes to [gender-based violence and femicide], as it leaves sex workers unprotected by the law, unable to exercise their rights as citizens and open to abuse generally, not least when they approach State facilities for assistance' (see BusinessTech 'New laws to decriminalise sex work in South Africa' (<https://businessstech.co.za>, accessed 29-4-2023)).

Thus, the Bill proposes to repeal the Sexual Offences Act with its primary pur-

pose to uphold the dignity of sex workers rather than to deter morally reprehensible criminal conduct. This novelty has been applauded because it heightens the minimisation of sex workers becoming victims of human rights violations, increases their access to healthcare and reproductive health services, and ensures that health and safety regulations and labour laws are being followed (see BusinessTech (*op cit*)). Further, working conditions, more protection for sex workers, and less stigma and discrimination would be ensured. Section 2 of the Constitution, which articulates on the respect and protection of all people, regardless of their sexual orientation, gender, race, etcetera, gives credence to this legal novelty, which supports the above decriminalisation.

Debates on decriminalisation of sex workers in SA

The call for decriminalisation of sex work in SA, however, is not void of legal debates. These debates show two distinct sides of the same coin. On the one hand, it has been argued that decriminalisation may result in an increase of HIV in SA, amidst the reality that it has the world's largest HIV epidemic, with 19% of all HIV-positive people worldwide, 15% of all new infections, and 11% of AIDS-related deaths (see Human Rights Watch 'Why sex work should be decriminalised in South Africa' (www.hrw.org, accessed 29-4-2023)). According to other estimates, female sex workers have HIV prevalence rates that are three to four times greater than those of women in the general population (see

Professor Cathi Albertyn ‘Debate around sex work in South Africa tilts towards decriminalisation’ (<https://theconversation.com>, accessed 29-4-2023)). On the other hand, it has been argued that having sex work unlawful only results in sex workers having less access to healthcare, becoming economically disadvantaged, and being abused by the police and other people who take advantage of their vulnerabilities (see Human Rights Watch (*op cit*)). Although both arguments have merit, sex workers would be able to access health care, education, and other essential services without fear of being detained or subjected to persecution if sex work were legalised. As a result, this will safeguard their rights to freedom of association, privacy, and human dignity, all of which are protected by the Constitution.

Nonetheless, if this Bill is to become law and implemented as intended, weighing the benefits and drawbacks eminent in its implementation remains crucial. Hence, while acknowledging the novelty that the Bill offers, it is also the intent of this article to highlight the potential challenges that may arise should this Bill become an Act in motion as subsequently mentioned.

Potential challenges

There are several potential challenges that could arise from the decriminalisation of sex work in SA, including:

- **Societal stigma:** Although the decriminalisation of sex work may be legal, it may still face societal stigma and discrimination. This could lead to sex workers being marginalised and excluded from society, limiting their access to education, healthcare, and other basic services.
- **Regulation and enforcement:** There may be challenges in regulating and enforcing laws related to sex work, which could lead to exploitation, trafficking, and other forms of abuse. It may also be difficult to ensure that sex workers are protected from violence and exploitation without adequate regulations in place.
- **Public health:** The decriminalisation of sex work may raise public health concerns, as it could lead to the spread of sexually transmitted infections and other diseases. Ensuring that sex workers have access to healthcare and education on safe sex practices could mitigate these risks.
- **Increased demand:** Decriminalisation could lead to an increase in demand for sex work, which could further exacerbate the issues of exploitation and trafficking. This could also put a strain on law enforcement and social services.
- **Resistance from religious and conservative groups:** There may be resistance from religious and conservative groups who view sex work as immoral or unethical, which could lead to social unrest and political pressure against the decriminalisation of sex work.
- **Lack of political will:** There may be a lack of political will to fully implement the decriminalisation of sex work, which could limit the effectiveness of any legislation and regulations that are put in place.
- **Applicability and implementation of labour legislations:** It is important to note that the applicability and enforcement of labour laws would have a significant impact if sex work became lawful. This relates to standard wage rates for working hours, sick leave, and other benefits.

Overall, while decriminalisation of sex work may provide greater autonomy and protection for sex workers, it will also require careful consideration of potential challenges and implementation strategies to ensure that it is effective in protecting the rights and well-being of all involved.

Is there a way forward?

While the specifics may vary depending on the country and region, there are some common principles that can guide efforts towards decriminalisation in SA:

- **Acceptance of sex work as work:** Sex workers should be given the same rights and protections as other workers and should be accepted as an authentic form of employment. This includes the opportunity to create and join labour unions, access to healthcare, and legal protections against exploitation and abuse. The adherence of these of labour practices should further be implemented through policies, health, and safety laws (Michele R Decker, Anna-Louise Crago, Sandra KH Chu, Susan G Sherman, Meena S Seshu, Kholi Buthelezi, Mandeep Dhaliwal and Chris Beyrer ‘Human rights violations against sex workers: Burden and effect on HIV’ (2015) 385 *The Lancet* 186 at 191-192).
- **Focus on harm reduction:** Decriminalisation efforts should prioritise harm reduction, which involves reducing the negative consequences of sex work rather than criminalising sex workers themselves. This includes measures such as providing access to healthcare and education on safe sex practices, as well as efforts to address poverty and other structural factors that can contribute to exploitation. In this way, the police need to be actively involved and increased by police liaisons assigned

to work with sex workers on abuse issues (see the New Zealand Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003, 2008 cited in Decker, Crago and Chu *et al* (*op cit*) at 193).

- **Involvement of sex workers:** Sex workers should be involved in the development and implementation of policies related to sex work. This can include providing funding and support for sex worker-led organisations and ensuring that sex workers are included in policy discussions and decision-making processes. In this light, advocating to follow legal routes adopted by New Zealand and Australia in this regard should be fostered. For instance, most sex workers in New Zealand attribute decriminalisation to enhanced protection from violence as well as the capacity for negotiating safer sex (see Decker, Crago and Chu *et al* (*op cit*) at 192).

While there may be challenges in implementing decriminalisation, including stigma and opposition from conservative groups, there is growing recognition of the need to protect the human rights of sex workers and reduce the harms associated with criminalisation. By prioritising harm reduction, involving sex workers in policy development, and collaborating with other stakeholders, it is possible to move towards a more just and equitable approach to sex work.

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By
Donald
Msiza

On constructive dismissals – when is the employee wrong?

In *Shoprite Checkers (Pty) Ltd v Nkosi and Others* (2022) 43 ILJ 1386 (LC), the issue before the Labour Court (LC) was whether an employee who resigned because he found a workplace difficult to be in was dismissed, and whether such dismissal was procedurally and substantively fair, or whether same amounted to constructive dismissal.

Summary

This matter comes to the Labour Court (LC) as a review application of the finding of the Commission for Conciliation, Mediation and Arbitration (CCMA) against Shoprite Checkers, that the dismissal of the employee, Mr Nkosi, was constructive dismissal. The LC held for the applicant and held that the said dismissal was in fact procedurally and substantively fair.

Facts

The employee was in the employ of the applicant for approximately six and a half years from 1 February 2013 to 30 September 2019 when he tendered his resignation on a month's notice. During his employment the employee had written numerous letters of complaint, the first of which was written in 2016 in which letter he registered a complaint against his then regional manager but later retracted same after consultation with the human resources department, he was further transferred multiple times from one store to another for various reasons after consultation. In 2018, he was transferred to another branch store (Sontonga) of the applicant and within days of his arrival was charged and informed to appear before a disciplinary committee. He then registered a complaint with the CCMA against the applicant for victimisation, which complaint he later withdrew and accepted a transfer to a different branch (Ridgeway). Shortly after this in December 2018, he was transferred to yet another branch (Alberton North) to help in the manager's absence.

In January 2019, Mr Nkosi returned to the Ridgeway branch where he was allegedly victimised and intimidated by one Ms Dunn, his then regional manager, when he enquired about his promotion.

Ms Dunn allegedly further made racist comments against Mr Nkosi. He registered a complaint with Mr Sibiyi, a divisional manager, whereafter he began to receive warnings from his senior managers, of which he refused to sign the warnings, because he believed that he had done nothing wrong, and the warnings were retaliation for his complaints. In response to the warnings, he registered another complaint with the CCMA for unfair labour practice, which complaint he later withdrew to 'seek legal advice'.

Mr Nkosi agreed to another transfer after he was issued with a final written warning for 'storming out of a disciplinary enquiry and for not responding to the alarm'. He reported (under contestation, even though he was allowed to leave early for transport purposes) to the Heidelberg branch instead of the Chris Hani branch (as discussed) because the former had no fresh produce manager. When he was not allowed to leave early due to an impending store visit of the divisional team in August 2019, he protested and was issued with three warnings by the branch manager (Mr Nhlapo), which he challenged, and Mr Nhlapo also lodged a grievance of his own with the divisional manager against Mr Nkosi.

Following a meeting held by the then regional manager on 30 August 2019 between Messrs Nkosi and Nhlapo, a commitment was reached to peacefully work together. Notwithstanding, Mr Nkosi still had complaints about how Mr Nhlapo treated him and that he, Mr Nhlapo, demanded to be addressed as 'Meneer'.

Mr Nkosi resigned on 30 September 2019 and, thereafter, lodged a dispute with the CCMA claiming constructive dismissal.

Legal provisions considered by the Labour Court

In considering whether there was indeed a dismissal and as such whether the dismissal was constructive the court considered the decision in *Solid Doors (Pty) Ltd v Commissioner Theron and Others* (2004) 25 ILJ 2337 (LAC) where the court emphasised that 'the question whether the employee was constructively dis-

missed or not is a jurisdictional fact that – even on review – must be established objectively' because 'a tribunal such as the CCMA cannot give itself jurisdiction by wrongly finding that a state of affairs necessary to give it jurisdiction exists when such state of affairs does not exist. Accordingly, the enquiry is not really whether the commissioner's finding that the employee was constructively dismissed was unjustifiable', effectively holding that where it is found that an employee was not constructively dismissed the commissioner's findings become reviewable and thus can be set aside.

The court also considered the test for constructive dismissal, which the Labour Appeal Court (LAC) in *Solid Doors* set out to be that:

1. first, the employee must have terminated the contract of employment;
2. second, the reason for termination of the contract must be that continued employment has become intolerable for the employee; and
3. third, the employer must have made continued employment intolerable.'

It must be noted that where one of the requirements as set out above is not present, constructive dismissal cannot be established, the same can be said where an employer terminates their contract of employment merely because they cannot stand working in a particular environment or a certain company unless the resignation can be attributable to a conduct on the part of the employer. The court agreed with the decision of the LAC in *National Health Laboratory Service v Yona and Others* (2015) 36 ILJ 2259 (LAC), which held that the test for proving constructive dismissal is an objective one, that is, the conduct of the employer should be such that any reasonable person would have not coped with but resigned due to the intolerability caused by the conduct of the employer. This view confirms the decision of the court in *Pretoria Society for the Care of the Retarded v Loots* [1997] 6 BLLR 721 (LAC) where it was held that the first test was whether, when resigning, there was no other motive, namely, that had it not been for the continued unacceptable conduct of the employer the employee

would have not terminated the employment.

In *Gold One Ltd v Madalani and Others* (2020) 41 ILJ 2832 (LC); [2021] 2 BLLR 198 (LC) the LC held that intolerability is 'far more than just a difficult, unpleasant or stressful' workplace or conditions, or 'obnoxious, rude and uncompromising superior who may treat employees badly' maybe even an emotionally or mentally toxic environment, for intolerability is a high threshold. The Constitutional Court in *Booi v Amathole District Municipality and Others* (2022) 43 ILJ 91 (CC) has held that intolerability 'implies a level of unbearability, and must surely require more than the suggestion that the relationship is difficult, fraught or even sour.' In *Watt v Honeydew Dairies (Pty) Ltd* (2003) 24 ILJ 466 (CCMA) the CCMA emphasised that an employee who resigns and in turn 'is unable to show the requisite conditions that render continued employment intolerable then the resignation remains valid.' A resignation is not a dismissal.

Section 186(1)(e) of the Labour Relations Act 66 of 1995 defines the:

'Meaning of dismissal and unfair labour practice –

(1) "Dismissal" means that –

...

(e) an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee.'

Labour Court findings

The employee did not present any evidence to prove that there was a dismissal, much less a constructive dismissal. The commissioner erred when he found for the employee because he failed to consider the contexts of the transfers, the lodging and withdrawal of grievances and the agreements reached thereafter.

The employee resigned because he was dissatisfied with the trajectory of his career, particularly the lack of progression therein. He was ill-disciplined and had a longwinded history of breaking workplace rules.

Mr Nkosi failed thus, to reach the threshold of intolerability in that he could not prove that the underlying reason for his resignation was the conduct

of the employer, which conduct would have led any reasonable person to do the same.

Importance of the case

As in *Billion Group (Pty) Ltd v Ntshangase and Others* (2018) 39 ILJ 2516 (LC) the LC found that the employee had failed to establish that continued employment had become intolerable – his mere sense of foreboding about his continued employment prospects was not sufficient to justify his resignation.

It is pivotal that the employee proves and shows that the employer's conduct is objectively unbearable. The court found that the employee had to resign within a reasonable time of the trigger event. Employees need to know that just because an environment is hard to work in, that does not make it objectively unbearable.

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Progressive legal education for candidate legal practitioners: What role should universities play?



By
**Clement
Marumoagae**

This article discusses the role of both law teachers and legal practitioners in the provision of legal education in South Africa (SA). Legal education has narrowly been viewed through the lens of preparing law students for the practice of law without seriously and holistically engaging about what is required for the modern practice of law. This has led to an unfortunate and largely unhelpful debate regarding the perceived lack of quality in the current LLB, which is seen as producing students who are ill-equipped to practice law. While there is a need to debate and constantly seek to improve the content of the LLB, there appears to be a general dishonesty regarding the collective role of both law teachers and legal practitioners in the broader provision of legal education.

By simply assessing the pattern of candidates that they receive either within law firms or different Bars, legal practitioners have concluded, without a thorough assessment of the curriculum and the way law is taught, that the LLB fails to produce competent candidate legal practitioners. This raises a fundamental and unnecessary tension between vocational training and academic training. This tension leads to a question, '[s]hould the university law school train lawyers for practice or pursue a broader, academic legal education?' (Franny Rabkin 'Quality law graduates preferred to large numbers of ill-equipped graduates' (www.ru.ac.za, accessed 4-5-2023)).

While the LLB programme is not perfect and some of the criticisms levelled against it are totally warranted and necessitate progressive initiatives to be taken to constantly improve it, some of the criticisms are simply not helpful. At the LLB



Summit held in 2013, most of the legal practitioners raised serious concerns regarding ‘the perception that the quality of law graduates was generally poor, and that they were ill-equipped to practise law in a professional environment’ (The State of the Provision of the Bachelor of Laws (LLB) Qualification in South Africa Report, 2018 at 4). This implies that law teachers develop, teach and design law programmes that fail to train students to be equipped for the practice law. Further that they fail to provide students with the required skills for the practice of law. What is missing in the debate is the nature of the required skills with which law students should be provided and whether universities during the period of legal studies are better placed to carry that task as opposed to law firms and constituent Bars during the vocational training period.

Generally, the LLB can introduce law students to skills such as –

- reading with comprehension;
- ability to analyse factual and legal material;
- critical and nuanced thinking;
- ability to conduct relevant and contextual research;
- developing arguments and supporting them with authority;
- writing with precision and clarity;
- ability to adequately summarise facts and locate and apply the applicable law;
- capacity to use the law to advance an argument;
- computer and numerical literacy; and
- ethical behaviour.

It is important to note that these skills are introduced within the confines of the actual subject matter that revolves around legal theory as part of an equally important aca-

demic training. However, this does not mean that law students should be taught more than a blind acceptance of legal principles derived from existing authority without placing the constitutional vision at the heart of legal education (see Dennis Davis ‘Legal transformation and legal education: Congruence or conflict?’ (2015) *Acta Juridica* 172 at 182).

The constitutional vision has broadened the consumption of law and diversified how law should be taught and practiced. As such, modern universities are no longer producing graduates solely for law firms and associate Bars. Currently, graduates are prepared to occupy spaces where legal advice is sought and provided. This is because the traditional legal profession cannot consume all the graduates that are produced by universities. Some of the graduates find refuge in various governmental departments, legal departments of Chapter 9 institutions, municipal legal departments, and legal departments of various commercial institutions including specialised tribunals and commissions.

This means that universities are generally not equipped to provide specific skills that are tailor-made to guarantee success in any space of the legal fraternity. In other words, given the diversity of places that provide legal services generally and different law firms – in particular in SA – universities cannot provide law students with specific skills that they would need to succeed in these places. However, universities are better placed to provide important generic skills that would provide law students with the greatest opportunity of succeeding in all the spaces they will find themselves in. Most importantly, universities must impart relevant skills that law students would require to function effectively which ‘must be developed and modelled in teaching-learning activities’ (Geo Quinot and Lesley Greenbaum ‘The contours of a pedagogy of law in South Africa’ (2015) *Stell LR* 29 at 38).

Academic training provided by universities should place law students in a position to learn and acquire technical skills that should be taught by legal practitioners during their vocational training. Law graduates will find it relatively easy to receive vocational training from legal practitioners once they have received academic training from universities (see JBK Kaburise ‘The role of legal education in a changed South African society: an outsider’s reflections’ (1987) 20 *CILSA* 316 at 321).

There is a need for legal practitioners to improve the way in which they provide vocational training. Within their spaces, they need to have a programme that adequately introduces candidate legal practitioners to the practice of law from –

- writing e-mails and letters;
 - drafting of pleadings, notices and affidavits;
 - corresponding with opposing lawyers;
 - complying with court directives;
 - preparation for trial and building cases;
 - briefing advocates and responding to attorneys;
 - receiving and managing clients;
 - service and filing of documents;
 - treatment and development of relationships with court officials;
 - ethical conduct; and
 - billing clients and the business of law.
- Vocational training is usually compromised where –
- candidate legal practitioners are not even provided an opportunity to provide first drafts of relevant legal documents;
 - they are reduced to messengers and copy machines experts;
 - they are denied the opportunity to present cases at magistrates’ courts, even in unopposed matters or postponements;
 - they are not provided with work that requires constant review and progress assessment by their principals; and
 - they are not provided regular feedback on their work.

Legal education does not commence and end at university level. The Legal Practice Council (LPC) through various voluntary associations and other institutions continuously provide legal education to legal practitioners and candidate legal practitioners. However, apart from trial advocacy, the legal education provided mirrors what universities are already providing with one person instructing or lecturing a group of people in a classroom. Usually, an instructor would prepare slides, which are going to be narrated to the audience. With respect, there is a need to seriously assess the kind of post-university legal education with a view to determining whether it is fit for purpose. In relation to candidate legal practitioners, there is a need to evaluate whether legal education that appears to prepare them for entry examinations is fit for purpose. This assessment should place legal practitioners at the centre of post-university legal education. This will be an opportunity for legal practitioners to examine whether the post-university legal education contributes meaningfully towards the transfer of critical technical and practical skills that are required by the modern lawyer. If this is not the case, then to influence the development of practical and progressive legal education programmes aimed at addressing the criticisms that are often unfairly levelled against universities.

One of the unfortunate criticisms is that universities have lowered standards

Picture source: *Gallo Images/Getty*

and anyone who cannot be admitted to other programmes can easily be admitted into the LLB programme. This criticism fails to seriously consider the government's push for higher matric pass rates and the number of matriculants that come out of matric who genuinely qualify to study law. In some circles, the calibre of the modern law teachers has also been questioned by some. While these criticisms are levelled in seemingly objective terms, they are generally clouded by racial undertones. It is a fact that with the advent of democracy, universities are now open to the majority of the population and funding has been made available for those from poor backgrounds to study law. Ultimately when they graduate, it is inevitable that some of them would consider academia as their trade. The insinuation that lecturers in yesteryears were generally good as opposed to those who are lecturing today is baseless and bigoted. It cannot be denied that the legal education system was previously designed to serve and accommodate a small minority that made up the majority of participants in the legal profession (see Lutho Dzedze 'Time on their side? A review of the four-year LLB as a tool for the transformation of the legal profession' (2017) 31 *Speculum Juris* 107 at 113).

The Legal Practice Act 28 of 2014 was promulgated to 'provide a legislative framework for the transformation and restructuring of the legal profession into a profession which is broadly representative of the Republic's demographics under a single regulatory body' (preamble).

At the centre of the desired transformation and restructuring of the legal profession is progressive legal education that would equip candidate legal practitioners with necessary skills to not only enter the profession but to also thrive in their trade. This will not be achieved through traditional legal education that requires candidate legal practitioners to merely attend law classes where they will be taught the substance of law without any effort on inculcating forensic and technical skills. Legal practitioners are duty bound to offer progressive legal education within their spaces with a view to adequately train candidate legal practitioners for the practice of law for modern times. Given the fact that not all legal practitioners have progressively advanced legal education, I propose that the LPC should invite legal practitioners to voluntarily make themselves available to conduct practical seminars on forensic, technical, and practical aspects of law and the business of law. These seminars can be held virtually once a week for a period of 40 weeks a year. They should be opened to be attended by all candidate legal practitioners and interested legal practitioners. This means that one legal practitioner would present only one seminar in a year. The first ten weeks can focus on the legal framework, regulations and rules that regulate legal practitioners. The remaining weeks should be on the holistic practice of law, including management of law firms, establishing a practice as an advocate, marketing, acquiring legal work while avoiding touting, accounting practices,

ethical conduct, and collegiality.

Due to the current state of electricity in SA, these seminars should be recorded and made freely available on the LPC website. This initiative will capacitate candidate legal practitioners with the necessary skills that are required once they are admitted into the practice. Given the fact that most law firms do not retain their candidate attorneys and these candidates eventually resort to opening their own practices, to some extent, this initiative will mitigate the risks associated with candidates who are not adequately trained and not ready to manage their own practices. In conclusion, the training and development of future lawyers is not the sole prerogative of law teachers. Legal practitioners should also come to the party and do their part to advance continued and progressive legal education.

- This article was presented at the LSSA Annual Conference held at Emperors Palace on 24 March 2023.
- See Kgomoitso Ramotsho 'Former President of LSSA calls on youth to be active within the organisation' 2023 (May) *DR* 4.

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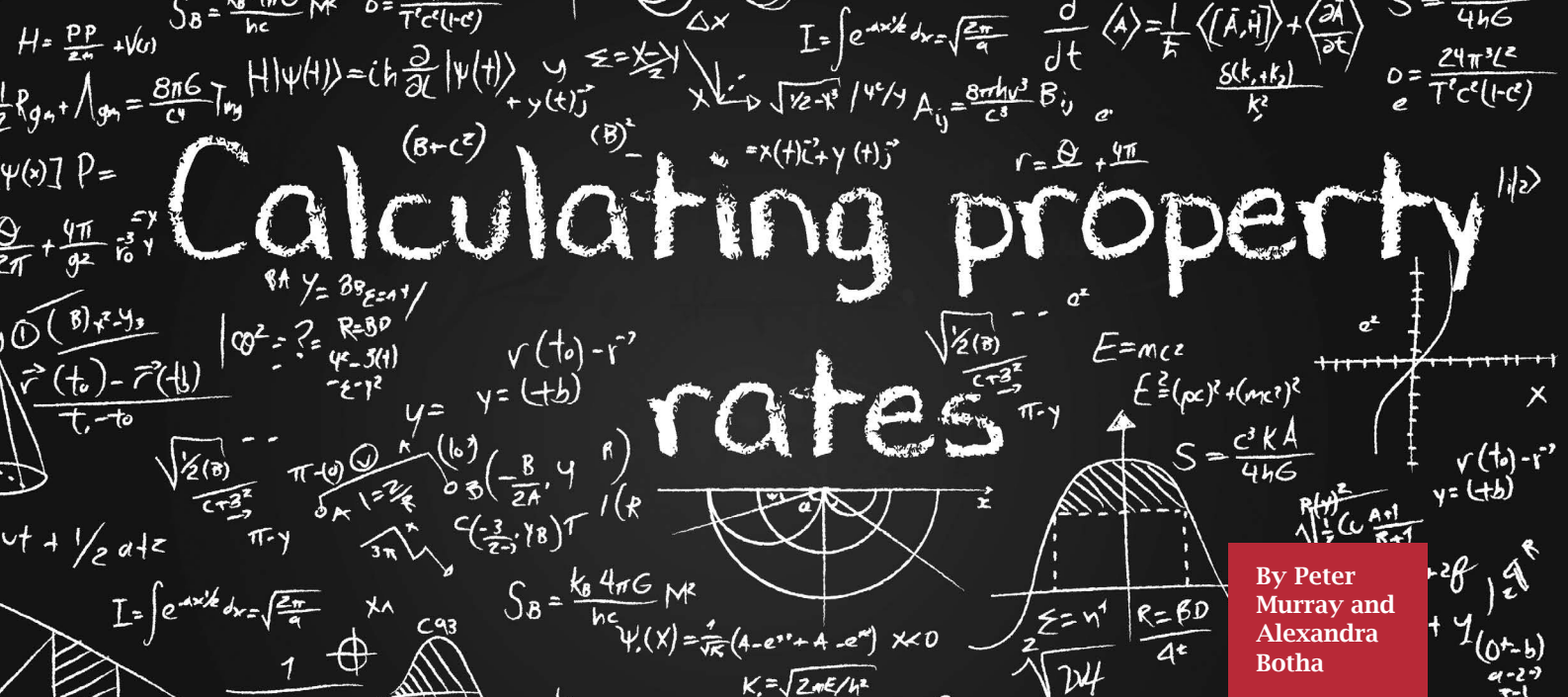
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A cause for confusion: How the amendment of the Municipal Property Rates Act holds the potential for injustice

Municipalities essentially have one source of income: Property taxes (also known as 'rates'). From the perspective of the payers of rates, the budget of a property owner can be made or broken by the monthly rates bill. This tension between municipal maximisation of income, and the finite ability of property owners to pay tax on their properties, should find fair and transparent resolution in the applicable legislation, namely the Local Government: Municipal Property Rates Act 6 of 2004 (the Act).

The preamble to the Act enjoins municipalities to exercise their power to impose rates within a framework that enhances certainty, uniformity, and simplicity.

Foundational to the Act is the fact that property taxes are calculated on property value, and it is the process of attributing value to property that provides fertile ground for legal and valuation disputes. Since the inception of the Act in 2004, these value disputes have been raised and resolved in terms of a process which, as the preamble requires, was generally clear and well understood.

In July 2015, however, the legislature amended the way supplementary valuations are carried out, and the amendment has in its implementation caused considerable confusion. The interpretative difficulties that the amendment presents hold the potential for harm and injustice, especially to property owners who may not have access to expert legal and valuation services, and who look to municipal officials for guidance and fair treatment.

This article highlights vague and unclear aspects of the amended section. It will also be explained how these difficul-

ties of interpretation have led to municipal implementation measures which are legally incorrect, as they have no foundation in the text of the amended section. A more textually accurate paradigm will be suggested, as will proposals for further change.

Pre-amendment position

A municipality intending to levy a rate on property must in terms of s 30(1)(a) cause a general valuation to be made by the municipal valuer of all properties in the municipality. The valuer then prepares a general valuation roll in terms of s 30(1)(b) reflecting all properties so valued. Colloquially speaking, the valued properties are taken up into the roll.

The municipal valuer certifies the valuation roll and submits it to the municipal manager. The municipal manager publishes the roll in the *Government Gazette*, in the media, and by service of notice on each person who is the owner of property reflected in the general valuation roll (the dreaded s 49 notice).

The publishing of the general valuation roll triggers the following legal rights in the hands of an owner –

- to inspect the roll (s 50(1)(a));
- to object to any roll entry (s 50(1)(c));
- to receive a decision on one's objection (s 51); and
- to appeal any decision so received.

Objections are decided by the municipal valuer and appeals against such decisions are decided by the valuation appeal board (s 54).

General valuation rolls have a lifespan of four or five years – the additional year requires the consent of the member of the Executive Council.

Section 78 of the Act and its amendment in 2015

Section 78 has – since the inception of the Act – provided a mechanism for property values to be increased or decreased during the currency of a general valuation roll. The procedure is a salutary one: Property owners should not be obliged to pay higher property taxes for five years where the value of their property has reduced due to legal or physical alteration since the general valuation; it would similarly be unfair if the municipality, faced with a property that has increased in value, has to wait for five years to re-value the property and receive its increased taxes.

Before the amendment of the section, supplementary valuations were carried out in terms of a procedure that did not differ materially from the one in terms of which general valuations were carried out.

Wide-ranging changes were brought about to s 78 in terms of the Local Government: Municipal Property Rates Amendment Act 29 of 2014 (effective date 1 July 2015). The amended s 78 obliges a municipality to cause a supplementary valuation to be carried out of any property that falls within the categories mentioned in s 78(1)(a) to (h), such as property incorrectly omitted from the general valuation roll; and property of which the market value has substantially increased or decreased for any reason.

Crucially, where s 30 provides that during the general valuation process property is simultaneously valued and entered in the general valuation roll, supplementary valuation rolls are now not created simultaneously with the supplementary valuation process, and there are various inter-

vening steps between the supplementary valuation of the property and the time when it is taken up into the supplementary roll:

- The first step is the supplemental valuation of the property if the municipality is of the view that any of the eight categories mentioned in s 78(1) have triggered the duty to carry out a supplementary valuation.
- In terms of s 78(5)(a) the municipal valuer must, on completion of the supplementary valuation (and not on the certification of the roll as in the case of the general valuation) give notice of the supplementary valuation to the property owner. Together with such notice, the municipal valuer must, in terms of s 78(5)(b), notify the property owner that they are entitled, within 30 days, to lodge a request for a review with the municipal manager. This is the innovative heart of the amendment: Section 78 in its unamended form did not provide for a review of a supplementary valuation.
- If a review is received, the municipal valuer, in terms of s 78(5)(c), 'may adjust the valuation on consideration of the request for review.' Note that the municipal valuer may only adjust the value: The municipal valuer has no power in law to amend categories, or any other roll particulars.
- The penultimate step is contained in s 78(6), in terms of which the municipality must, at least once a year, compile and publish a supplementary valuation roll of all the properties on which a supplementary valuation was made, and such roll must contain details of any decision taken by the municipal valuer after receipt of a request for a review.
- Any person who is dissatisfied with any supplementary roll entry may object and may ultimately also appeal a decision on the objection.

The introduction of a 'review' into the supplementary valuation process has led to much confusion.

Some incorrect post-amendment responses

The amendment to s 78 was greeted with some fanfare, and without much interrogation of its wording. Currently there is also no judicial interpretation of the amended section. Some municipalities have seized on the amended s 78 as an opportunity to dictate their own procedures once the rigours of the general valuation roll are behind them. Some examples follow.

- *'You're late, but I am sure we can squeeze you in.'*

In a more generous application of the post-amendment valuation paradigm, some municipalities view the amended section as giving them the right to accept and consider late objections to entries

in the general valuation roll. This is a marked departure from the application of the pre-amendment Act, where municipal responses to late objections to the general valuation roll were – almost universally, and correctly so – that their hands were tied, and late objections could not be considered.

- *'The pervasive enquiry.'*

A common practice that has sprung up since the amendment is 'the section 78 enquiry'. Although the meaning of the phrase seemingly differs from one municipality to another, the general purport appears to be that if property owners are dissatisfied with any aspect of their property as contained in a general valuation roll, then they are welcome to submit an s 78 enquiry. The municipal valuer will consider the 'enquiry' and advise the property owner whether the 'enquiry' has resulted in any changes to the valuation.

- *'Keep 'em in the dark.'*

Some commentators have gone so far as to suggest that municipalities may, in terms of the amended s 78, re-value property without giving notice of such an intention to the owner. This is clearly not the case.

- *'The last chance saloon.'*

On the more sinister end of the spectrum of municipal responses, some municipalities advise property owners that an s 78 decision is not subject to appeal, which is an insidious implication given the consequences of an inability to appeal poor or incorrect decisions. Unfortunately, this misconception has gained some traction, and even experienced valuers are prone to tell one that an s 78 decision cannot be appealed.

The correct approach

Municipalities, property owners, valuers, and legal practitioners should approach changes in property particulars strictly in accordance with the wording of the section, no matter how cumbersome the procedure might now appear to be.

Section 78, properly construed, does not authorise municipalities to 'accept' late objections, or to treat late objections as 'section 78 enquiries'. In fact, nowhere does s 78 use the word 'enquiry', and any resort to this language or procedure is unhelpful and probably *ultra vires*.

It is also incorrect to state that the outcome of a request for review cannot be appealed. In fact, it can be the subject of both an objection and an appeal: Section 78(6) provides that the municipal valuer must make the supplementary roll 'available for inspection in the manner provided for in section 49.' Section 49 provides that the notification must invite 'every person who wishes to lodge an objection ... to do so.'

It is also incorrect to state that a municipality can re-value property without notice to the owner and without following a procedure: In fact, correctly construed, the procedure for arriving at a supple-

mentary value is more cumbersome than that of the general valuation.

The intention behind the innovative review request procedure is laudable: The request could lead the municipal valuer to amend an obvious error, and this would obviate a cumbersome objection and appeal. This kind of innovation is sorely needed, as many appeal boards are overloaded.

It is difficult, however, to see why the consequence of wishing to unburden the appeal boards has been to add to the administrative burden of municipalities. Whereas the pre-amended s 78 required only one notice to the owner, the municipality must now give the owner two, and potentially three notices – when the valuation has been completed, when a decision is available on the review request, and when the supplementary roll has been created.

Valuation rolls have proven themselves to be inflexible in the amount of data that can be included in them. One need only think of the myriad disputes around hybrid land uses, and the response from some municipalities (generally during litigation) that the roll could not accommodate the extra information. If this is the case, it is not clear how the post-amendment rolls are coping with having to record whether a review request was received, and if so, what the outcome was.

The triple-pronged procedure also places an unfair burden on property owners: in the postlapsarian world of the South African Post Office, and media overload, property owners must be vigilant and ensure that they receive notice of the supplementary valuation, notice of the outcome of their review request, notice of the creation of the supplementary valuation roll, and notices of the decisions on their objection and appeal should they choose to lodge them.

In conclusion, this does not appear to be a sustainable model and the confusion and inability to comply with the amended s 78 procedure is hardly surprising. It is critical that the legislature re-visits s 78. The previous section was workable and clearly understood because it followed a procedure that did not differ significantly or at all from the general valuation procedure. But until such time as s 78 is amended, the procedure set out in the section must be followed: A supplementary valuation, then an invitation to review, followed by the publication of the roll, objections, and appeals, even though the 'simplicity' required by the preamble to the Act has not been achieved.

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The legal profession is highly competitive and unforgiving to black females



By
Kgomotso
Ramotsho

In this month's Young Thought Leaders feature, *De Rebus* news reporter, Kgomotso Ramotsho, spoke to legal practitioner Palesa Ledwaba, who was recently appointed as the Managing Director at Maponya Inc. Ms Ledwaba was born in Soshanguve, a township in the north of Pretoria. Her parents are working class citizens, who like many black parents, relied on their extended relatives, such as grandparents or aunts to help with the upbringing of their children.

Ms Ledwaba said not much was expected from her by the community she grew up in, not only because of her background, but also because she was born with a condition that affected her mobility and almost left her wheelchair bound from infancy. This was a condition, which has only recently been diagnosed as hereditary spastic paraplegia.

Ms Ledwaba added that her family on the other hand had known of her potential and attaining a university qualification was non-negotiable. 'I did fairly well throughout High School, which I completed at Hillview High School, being a regular feature on the top ten list academic students. I chose law from a very early age and my legal journey started in 2009 when I enrolled for an LLB at the University of Limpopo (this was after a year of doing BCom Law because my application to my preferred university had been rejected). The University of Limpopo may have not been my preferred university, but in hindsight, it was the best thing to have happened to me at the time. I obtained my LLB in 2012, by graduating at the top of my class and with a wealth of teachings from my participation in the student chapter of the Black Lawyers Association (BLA),' Ms Ledwaba said.



Legal practitioner, Palesa Ledwaba, is our June Young Thought Leader.

After obtaining an LLB, Ms Ledwaba opted to immediately enrol for the six-month Law School Programme prior to seeking employment and by mid-2013 she had completed law school, wrote, and passed all four of her board examinations by August of the same year and started serving her articles with Maponya Inc soon after completing the law school programme (Law Society of South Africa, School for Legal Practice).

Kgomotso Ramotsho (KR): Which field of practice are you in and why did you choose that field?

Palesa Ledwaba (PL): Much of my practice is in administrative, company and tax law especially customs, as well as general commercial litigation. I am well versed in tax legislation, namely, the Customs and Excise Act 91 of 1964, Tax

Administration Act 28 of 2011, and Income Tax Act 58 of 1962.

I believe the practice of tax and administrative law chose me instead. I was fortunate enough to have done my articles under a principal who was not only willing to teach and transfer skills, but who exposed me to his networks and clients. When my principle left the firm, I had been well equipped to take over his clients in these fields and diversify the nature of tax instructions received by the firm despite having only been in practice for a year.

KR: Since completing your studies and being in practice, have you experienced challenges as a black female legal practitioner and what are those challenges?

PL: The legal profession is highly competitive and unforgiving to a black fe-

male. One of the biggest challenges that I had to face was establishing myself in a field that is still jealously guarded by the few who were privileged enough to be exposed to the practice long before black female practitioners were even allowed to practice law. It is also an ongoing challenge where I find myself constantly having to prove worthiness to clients and opponents simply for being black and for being female.

Furthermore, my progression in the profession has been relatively faster than most and being recently appointed as the Managing Director at one of the biggest black-and-female-owned firms, Maponya Inc, has come with its own challenges. While I have never doubted my capabilities as a legal practitioner, the shift from being an employee (attorney) to being an employer (director and shareholder) was not an easy one, being part of the 'table' means constantly showing exactly what it is that you bring to the 'table'. Client retention and excellent service are no longer enough, I must now go out and secure more clients, generate enough fees to ensure that the company makes profits and become part of the administration of ensuring that the company is compliant as a legal entity. This is where skills training becomes important, aside from the mandatory practice management training, one needs to constantly engage in skills development in addition to having a business acumen.

KR: This year South Africa is celebrating the centenary of the Women Legal Practitioners Act 7 of 1923. Do you have any thoughts on this?

PL: Prior to the promulgation of the Women Legal Practitioners Act 7 of 1923 (the Act), the court in the infamous judgment of *Incorporated Law Society v Wookey* 1912 AD 623, while refusing to come to the respondent's aid to compel the Law Society to register her articles of clerkship, rendered (among others) the following unfortunate quote from Roman-Dutch law authorities in its reasons: 'Likewise, owing to the same natural peculiarity, it happens that, in as much as nearly the whole of womankind by reason of an inborn weakness is less suited for matters requiring knowledge and judgment.'

It is worth mentioning that this judgment was handed down in 1912, a mere generation, at most two generations ago. So, while the legal impediment to women being admitted to practice as attorneys was taken away by the Act, I do not believe that it is so with regard to the beliefs held by those who hold a view as expressed by the court in the *Wookey* matter, namely, that women are in their nature not 'built' to practise law.

KR: In these 100 years of women being

allowed to practice as legal practitioners in South Africa, do you think women in 2023 can say that there is equality in the legal profession and that the contribution of female legal practitioners is being noticed?

PL: The contributions are certainly being noticed, what is unfortunate is that we still fight for equality despite these contributions. It is perhaps necessary to highlight a few of these contributors:

- Deputy Chief Justice Mandisa Maya, the first female South African Deputy Chief Justice and first female jurist who has served as President of the Supreme Court of Appeal.
- Justice Zukisa Tshiqi, a Justice of the Constitutional Court who is also an activist for constitutional transformation, which is evident from the work she does with the African Regional Judges' Forum.
- Justice Yvonne Mokgoro who served as justice of the Constitutional Court from 1994 to 2009 and was awarded the presidential Order of the Baobab in Bronze for 'her excellent contribution in the field of law and administration of justice in a democratic South Africa.'
- Kathleen Matolo-Dlepu, a staunch activist for women empowerment in the legal profession and long-serving member of the BLA. She was elected as the first chairperson of the Legal Practice Council, which saw the formulation of the Legal Sector Code, a document, which aims to ensure the fair distribution of legal work from the State and private sector.

KR: You are a member of the BLA and the Deputy Chairperson of the Gauteng Branch. Tell us why you became a member?

PL: As mentioned above, I joined the BLA while I was still a student. A year into my studies I realised that my qualifications alone would not suffice for this profession, I needed to network and most importantly be exposed to potential employees. I worked my way up in the organisation from an event organiser to the first female chairperson since the student chapter had been re-launched at my university and now Deputy Chairperson of the Gauteng Branch. It was through my involvement in the organisation that I (and many others) got exposure to the working environment through placement in different law firms during school holidays and got to network with different legal practitioners and member of the judiciary through seminars we held.

After my university days, I continue to be an active member of the BLA as the need for commercially beneficial networking continues, the BLA has further given me a platform to advocate for the exposure of young black female excel-

lence within the profession and to participate in the attainment of change of the *status quo*.

KR: What is one of the crucial challenges that black legal practitioners still face in this country, which has not been addressed?

PL: The advancement of racial equality in the profession has received much attention through legislature and other interventions such as the formation of organisations whose core existence is to tackle this issue, the BLA being one of them. It would seem, however, that those who hold the power to enforce change are comfortable with the *status quo* and have no motivation or will to enforce change.

Some of the challenges, which have been highlighted by the BLA over the years include:

- The prevailing red tape that has been put in place in the access to lucrative work. A high number of black practitioners especially black female practitioners are concentrated in the field of family law and third-party litigation. Economic networking needs to be vigorously pursued including the briefing of black practitioners in high profile matters and 'specialised' fields.
- The struggle of getting one's worth in as far as fees are concerned. The rate/fee/statement or account of a black practitioner is more likely to be questioned/rejected by client than that of a white practitioner and this is not always based on merit.
- Skills transfer, the few that have been fortunate to break through these barriers need to dedicate more time in skills transfer for young black practitioners.

KR: When the Legal Practice Act 28 of 2014 (LPA) was promulgated, it was hoped that it would address transformation issues. Can you see that transformation or does the profession still have some issues to resolve before we can say we truly have one inclusive legal profession?

PL: As correctly stated above, the idea behind the LPA was to ensure uniformity within the legal profession by creating a single statutory body and a step towards transformation within the legal fraternity. Furthermore, one of the objectives of the LPA is quoted as being to 'remove any unnecessary or artificial barriers for entry into the legal profession.'

Wayne Dyer, an American author, and motivational speaker defines 'transformation' as 'literally mean[ing] going beyond your form.' The legal profession like the law itself is constantly changing its form to suit the generation it finds itself in, while the wheel of unifying the profession has been notably slow, we

have seen some steps being taken in the objective of removing ‘unnecessary or artificial barriers’. An example of the latter being the new requirements for enrolment as a legal practitioner in terms of s 26 of the LPA, which does away with the unnecessary age requirement, which was required by its predecessor the Attorneys Act 53 of 1979.

We still have a long way to go but it is certainly headed in the right direction.

KR: As a young and black female legal practitioner, what are some of the ethics you live by? Give us one of your everyday ethics.

PL: I live by quite a few in both my personal and professional life:

- Always maintain one’s integrity – it enhances all other values and beliefs. This goes way beyond one’s ethical duties prescribed by our regulators.
- Being persistent – perseverance and determination will help one to forge through the most difficult cases and obtain a positive result for client.
- Having a good and positive work ethic – although challenging, having a positive attitude in difficult situations is necessary and understanding as well as delivering on deadlines builds clients’ confidence.

KR: What are some of the hopes for

women in the legal profession for the next 100 years?

PL: It is both saddening and concerning (to say the least) that ten decades later the modern-day woman continues to face the same high levels of oppression and exploitation in our working environments.

It is even more concerning that this situation rears its ugly head in a profession, which proclaims itself as noble and learned. In addition, perhaps the less talked about evil is where the perpetrators are women themselves.

My hope is that as females who are privileged to find themselves in leadership positions, we will ensure that discussions such as these remain top of the agenda, further that we align ourselves with the promotion of those who have broken through the barriers and holding one another accountable in order to accelerate the wheels of change. We need to ensure that some of the following measures are put in place –

- the creation and maintenance of economically beneficial networking among female practitioners, this includes the preference of female candidate legal practitioners, appointment of female executives, briefing of female practitioners in lucrative work and lobbying of female candidates for judge appointments;

- skills transfer and training for young female legal practitioners; and
- promotion of healthy working environments.

It is important that female legal practitioners of a century from now do not suffer the same consequences or face the same challenges that we and those who came into practice a century ago face.

KR: Where do you see yourself in the next five years, namely, what are your plans in the legal space?

PL: My recent appointment as Managing Director of Maponya Inc has given me a platform to realise some of my preachings. When my term ends I want to leave a legacy of having implemented policies that seek to empower other young female practitioners and also channel my focus for the next five years into building on the strong foundations that have been left by the founders of the firm and my predecessors so as to maintain the firm’s reputation of being a competitive black-owned firm but also bringing in fresh ideas of how to remain top of our game in this difficult economic climate.

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By
Merilyn
Rowena
Kader

THE LAW REPORTS

April [2023] 2 All South African Law Reports (pp 1 – 296);
March – April 2023 Judgments Online

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:

GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
KZP: KwaZulu-Natal Division, Pietermaritzburg
MM: Mpumalanga Division, (Main Seat) Mbombela
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Civil procedure

Failure to promote effective disposal of litigation – special costs order: The question addressed by the court in *Hlatshwayo v Road Accident Fund and a related matter* [2023] JOL 57405 (MM) was whether it is appropriate to make a special order as to costs against a party or its attorney, for failure to attend a pre-trial conference or failing to a material degree to promote the effective disposal of the litigation.

The two cases before the court involved claims for compensation against the Road Accident Fund (RAF) and were settled on the date of trial or partly settled close to the date of trial contrary to Forms A and A3 of the Practice Directive of the Division. Form A3 is used as a trial readiness certification form. It provides that 'should the matter be settled on the date of trial, the parties run the risk of punitive costs order, or forfeiture of a day fee, against any person responsible for the late settlement of the matter and any such costs order may include payment out of own pocket by whoever is responsible for the late settlement including claim handlers and/or attorneys for the parties.'

The management judge may at a case management conference, make any order as to costs, including an order *de bonis propriis* against the parties' legal representatives or any other person whose conduct has unreasonably frustrated the objective of the judicial case management process. Any failure by a party to adhere to the principles of r 37A may be penalised by way of an adverse costs order.

The purpose of r 37A is to ensure efficient case management.

Section 24(5) of the Road Accident Fund Act 56 of 1996 entitles the RAF to object to the validity of the claim within 60 days on receipt of the lodgement of such a claim. In terms of s 24(6)(a), no claim shall be enforceable by legal proceedings commenced by a summons served on the RAF or an agent before the expiry of 120 days from the date on which the claim was delivered to the RAF. The power of the RAF to commence, conduct, or to defend legal proceedings in connection with claims lodged against it must be resorted to sparingly.

The drafters of r 37 and r 37A saw meaningful pre-trial conferences and judicial case management conferences as important tools to alleviate congested trial rolls. Examining the measures currently in place to avoid the problem of cases against the RAF being finalised in court in the absence of the RAF, the court found the RAF's policy in the handling of litigation not to further the interests of justice by alleviating congested trial rolls and addressing the problems, which cause delays in the finalisation of cases as contemplated in r 37A(2)(a). The unsatisfactory handling of the two cases led to adverse costs orders being made against the Chief Executive Officer and the Board of the RAF.

Effect of appointment of *curator ad litem* on prescription of claim of a person suffering from mental incapacity:

The *Shoprite Checkers (Pty) Ltd v Mafate* [2023] JOL 57792 (SCA) case raised two issues:

- Does the appointment of a *curator ad litem* to person with mental incapacity have the effect that the relevant impediment referred to in s 13(1) of the Prescription Act 68 of 1969 ceases to exist?
- Whether a curator appointed for a person with a mental or intellectual disability, disorder or incapacity is, apart from relying on s 13(1)(a), precluded

from invoking s 12 of the Prescription Act in circumstances where he or she and the person under curatorship did not have knowledge of the identity of the debtor and the facts from which the debt arose because the person under curatorship was severely injured and suffered mental incapacity as a result of the alleged negligence of an employee, whose employer is sought to be held vicariously liable for the ensuing damages.

In February 2017, the respondent (Mr Mafate) was appointed as *curator ad litem* of Ms Mkhwanazi who sustained injury in the course of her employment with the appellant (Shoprite Holdings), leaving her permanently mentally incapacitated. Mr Mafate instituted action for damages in his representative capacity, against the entity which he believed bore liability as owner of the store. When two special pleas to the claim were raised, he withdrew the action, and instituted fresh proceedings, in October 2018, against the appellant (Shoprite Checkers). Shoprite Checkers filed a special plea of prescription, asserting that the claim had prescribed. In replication, Mr Mafate claimed that prescription began to run only from when he became aware of the true identity of the debtor in July 2017. The High Court's dismissal of the special plea of prescription led to an appeal.

The relevant sections of the Prescription Act were set out per Petse AP as the outcome of the appeal turned on the proper interpretation of those sections and restates principles of statutory interpretation.

Rejecting Shoprite Checkers' argument that the impediment standing in the path of Ms Mkhwanazi instituting action ceased to exist on appointment of Mr Mafate, the court concluded that as Ms Mkhwanazi still suffered from mental incapacity, the impediment persisted. The completion of the relevant period of prescription would not occur for as long as the impediment persisted.

The appeal was dismissed with costs.

Exceptions to claims – sufficiency of particularity with which plaintiffs’ allegations should be pleaded: The plaintiffs’ claims in *Tongaat Hulett Ltd and Others v Staude and Others* [2023] JOL 57406 (KZP) arose from events during the second defendant’s employment as chief financial officer of the first plaintiff (Tongaat Hulett). It was alleged that second defendant authorised inaccurate financial statements of Tongaat Hulett. The plaintiffs’ causes of action included alleged breach of fiduciary duties, unjust enrichment, breach of (employment) contract, fraudulent or negligent misrepresentation, and as regards delinquency, a contravention of provisions of the Companies Act 71 of 2008.

The second defendant raised various exceptions to the claims – mainly in relation to the particularity with which the categories of alleged misconduct and collective irregularities were pleaded. The court listed *facta probanda*, or facts required to be proved, to find a valid claim against the defendants in respect of each of the aforesaid causes of action. While considering each exception, the court discussed standards of directors’ conduct as set out in s 76(2)(a) of the Companies Act.

The debate centred around the sufficiency of the particularity with which the allegations should be pleaded by the plaintiffs. The plaintiffs contended that the second defendant had, in many instances, characterised statements in the particulars of claim as conclusions, when they were allegations pleaded as fact, which had to be accepted as true for the purposes of determining the exceptions. As a general principle, that contention was correct, if what is alleged is truly a statement of fact rather than a conclusion or inference drawn in respect of facts, which will need to be established to justify the conclusion asserted.

Leave to file supplementary affidavit: The applicant in *Ecolab (Pty) Ltd v Mabra Construction (Pty) Ltd in re Mabra Construction (Pty) Ltd v Ecolab (Pty) Ltd (Leave to Supplement)* [2023] JOL 57941 (GP) sought leave of the court to file a supplementary affidavit. The relevant legal principles referred to by Nel AJ was r 6(5)(e) of the Uniform Rules of Court, which states that a court may, in its discretion, permit the filing of further affidavits. A further affidavit should only be allowed in exceptional circumstances taking into regard all the facts that are relevant to the issues in dispute. The exceptional circumstances would exist if new or unexpected evidence was recorded in a replying affidavit, or relevant factual evidence occurred or only came to the knowledge of the party seeking leave to file a further affidavit, after it had already filed its answering affidavit. The court must weigh up fairness to parties if a further affidavit

is allowed, and potential prejudice to any of the parties if the further affidavit is allowed or not allowed. A party seeking leave to file a further affidavit must provide a satisfactory explanation as to why the facts sought to be put before the court in the further affidavit had not been included in the earlier affidavits.

The court was satisfied that leave should be granted for filing a supplementary affidavit, to ensure that all facts that might be relevant, were placed before the court tasked with determining the main application.

The court granted leave to file the supplementary affidavit to the applicant and reserved costs until the main application was heard.

Constitutional and administrative law

Tenders – whether decision by institution of higher learning to cancel tender relating to provision of student accommodation constituted administrative action: In *Ma-Afrika Hotels (Pty) Ltd v Cape Peninsula University of Technology* [2023] 1 All SA 731 (WCC) after selling its property to the respondent (the Cape Peninsula University of Technology (CPUT)), the applicant (Ma-Afrika) rented the premises from the CPUT, and the CPUT compensated it for providing and administering the accommodation for its students on the property. When the time approached for Ma-Afrika’s lease to expire through effluxion of time, the CPUT advertised a request for proposals in respect of the future administration of the property. Ma-Afrika was one of two entities who submitted a tender. The CPUT decided to award the contract to the other entity (Baobab) but it was subsequently discovered that it had not met the qualifying criteria for the tender contract. The CPUT cancelled the tender and put out a fresh tender invitation. Ma-Afrika had by then applied to court for an interdict against implementation of the tender award. It nonetheless submitted a new bid but reserved its alleged rights in the cancelled tender process. It then brought another application seeking to review the CPUT’s decisions to cancel that process, and not to award the tender to it. The review application was brought in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

An application for judicial review in terms of PAJA is tenable only if the impugned decision (or failure to make a decision) constituted administrative action. The CPUT disputed that its decisions in relation to the procurement of a new service provider constituted administrative action within the meaning of the term in the Act. It also denied that it was an ‘Organ of State’ as defined in the Act. Examining the nature of the impugned decision, the court held that the provision

of student accommodation and matters closely related thereto fell within the public sphere. The CPUT was an institution that performed the public function of providing higher education. It was created for that purpose by the national government and its operation was substantially subsidised from the National Revenue Fund. It was thus an Organ of State as defined in s 239 of the Constitution. Its contracting for the provision of student accommodation similarly fell within its public functioning. Furthermore, its decision to cancel the tender was also administrative action within the meaning of PAJA and was susceptible to being challenged in terms of s 6 of the Act.

The specific grounds of review were –

- that the CPUT had failed to make a decision to award the tender to Ma-Afrika after rescinding the award to Baobab;
- that the CPUT had failed to comply with reg 13 of the Preferential Procurement Regulations, 2017; and
- that the decision not to award the tender to Ma-Afrika after it rescinded the award to Baobab was not rationally related to the information before it as Ma-Afrika’s tender satisfied all the mandatory requirements in the tender invitation.

None of those submissions was sustainable. The court emphasised that Ma-Afrika did not have a right to be awarded the contract when the award to the successful candidate was rescinded. Provided that it acted reasonably in the circumstances, the CPUT was entitled to opt to cancel the tender and proceed with the intended procurement in terms of a fresh procedure. The application was dismissed.

Contract

Credit agreement – National Credit Act 34 of 2005 (NCA) – compromise arising from earlier unlawful agreements not sustainable: In *CSB v DJ* [2023] JOL 57843 (WCC), the appellant signed an acknowledgment of debt in favour of the respondent, in an amount of R 2,5 million, based on amounts advanced to him by the respondent. When the respondent instituted action for payment, appellant queried whether the respondent had been registered as a credit provider in terms of the NCA at the time of the conclusion of the relevant agreements, and whether respondent had conducted a credit assessment of him, prior thereto.

Section 89(2)(d) of the NCA provides that a credit agreement is unlawful if, at the time when the agreement was ‘made’ the credit provider was unregistered, in circumstances where the NCA requires that they be registered, and if a credit provider concludes a credit agreement with a consumer without a credit assessment having been performed this may constitute the provision of reckless

credit, which is liable to be set aside by a court.

At common law a contract which is unlawful is generally considered to be void *ab initio* and of no effect, as it is a nullity, and cannot be enforced. The court discussed novation and compromise, stating that the proposition that a compromise is not affected by the invalidity of an earlier *causa* because it is a self-standing agreement, does not reflect the current state of our law. The appeal was upheld.

Criminal law and proceedings

Discovery of material which might incriminate in parallel criminal proceedings: The applicant in *MTN (Pty) Ltd v Madzonga and Others* [2023] JOL 58026 (GJ) sought to compel discovery of a range of documents relating to its action in a case of fraud against the respondents. Second respondent, Ms Nxusani, resisted the application on the ground that the documents sought were not relevant to the issues in the main action, and that the documents might, if disclosed, tend to incriminate her and her firm in parallel criminal proceedings arising from the same facts underlying MTN's cause of action in this case.

Wilson J summarily dismissed the first

objection. Regarding the second objection, the question was how far, if at all, the privilege against self-incrimination extends beyond precluding compulsion of testimony, into the terrain of forcing an accused person to disclose, or help generate, documentary evidence that might incriminate him. The question had to be answered on an interpretation of s 35(3)(j) of the Constitution. The court held: 'In the absence of an express statutory limitation on the right against self-incrimination in this context, I do not think that I can allow MTN in this case to secure by means of civil discovery proceedings evidence that may clearly tend to incriminate the second and third respondents if it is produced in the criminal proceedings currently pending against them. That would be at odds with the fundamentals of section 35.'

The application was dismissed.

Delict

Development of common law in medical negligence case involving the 'once and for all' rule: In a medical negligence claim, the defendant (Member of the Executive Council (MEC)) in *TN obo BN v Member of the Executive Council for Health, Eastern Cape* [2023] JOL 57735 (ECB) pleaded a novel combination of remedies (referred to as the 'DZ

defences' (see *Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ (Member of the Executive Council for Health, Eastern Cape and Another as Amici Curiae)* 2017 (12) BCLR 1528 (CC))) not falling within the common law rules, which required an assessment of such damages in monetary terms on a once and for all basis. It was contended that instead of draining the public healthcare system of a massive lump-sum award for potential future medical care that plaintiff's child may or may not ultimately use, the defendant wished to provide such care to him as and when he needed it, if not by the department directly, then paid for in the private sector as the need therefor arose.

Griffiths J considered whether the common law should be developed to accommodate the defendant's remedies.

In claims for compensation, which arise out of delict, the plaintiff must claim in a single action all damages already sustained, or expected to arise in the future, insofar as they are based on a single cause of action (the 'once and for all' rule).

The court concluded that a case had been made out for the development of the common law as set out in the proposed draft order. It was further found that the defendant had established that the hospitals concerned were able to pro-

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vide the relevant services and supplies at the required standard.

Liability for loss caused in business e-mail compromise case: The first and second respondents had given the appellant in *Hartog v Daly and Others* [2023] 2 All SA 156 (GJ) an oral mandate to act as conveyancer to transfer their immovable property should it be sold. After the sale of the property, the appellant was to pay some of the proceeds into the third respondent's bank account. The money was never received into the third respondent's account but was paid into a Standard Bank account opened in the name of a fraudster and was stolen. The dispute between the parties concerned who should be held liable for the loss, which was caused through 'business e-mail compromise' (BEC). The appellant contended that the respondents were liable as the mandate had a tacit term requiring the respondents to exercise the utmost caution when instructing the appellant to make payment, and to do all that was reasonably possible to ensure the integrity of the e-mails addressed to the appellant and keep and maintain their data security. Strydom J embarked on a discussion of tacit terms and considered when a tacit term will be imputed in a contract and whether a factual dispute arose on the question concerning the imputation of a tacit term. The court stated that mere allegation of the existence of a tacit term on the papers of the appellant and the denial thereof by the respondents does not create a factual dispute in itself. The alleged tacit term never became part of the mandate agreement, and the appellant breached the mandate agreement by not making payment of the proceeds of the sale into the third respondent's account, therefore, remaining responsible for such payment. The case against the bank was also not established. The appeal was dismissed.

Family law

Enforceability of variation of divorce order regarding payment of pension interest to non-member spouse: The question before the court in *CNN v NN* [2023] JOL 58028 (GJ) was whether the court could vary a divorce settlement agreement by replacing the statutorily recognised and defined phrase 'pension interest' with the phrase 'accrued pension benefit' which is not defined in the Divorce Act 70 of 1979. It had to be determined whether such an order could be enforced.

Marumoagae AJ confirmed that variation of divorce orders is permitted in terms of s 7(1) of the Divorce Act and a settlement agreement signed by divorcing parties that prescribes that the pension fund in which one of the spouses is

an active member should pay to the non-member spouse a portion of the member's pension interest will be enforceable should the agreement be made an order of court. In this case, neither the court nor the applicant was aware at the time the divorce order was granted that the respondent had already exited his fund. The amendment sought would thus be unenforceable considering the current legal framework. The non-member spouses' access to their member spouse's benefits is dependent, first on divorce, and secondly, on whether member spouses are active in their funds, even though these benefits are still held by such funds.

The application was dismissed.

Right of non-biological parental figure to have contact with child: In Part A of his application, the appellant in *RC v HSC* [2023] JOL 58109 (GJ) had sought to have a clinical psychologist appointed to conduct an assessment and provide a recommendation as to whether it would be in the best interests of the minor child (B) for the appellant to be awarded rights of contact and care in terms of s 23 of the Children's Act 38 of 2005. The appellant was not B's biological father but had formed a close bond with the child during his relationship with the respondent, who was B's mother. Pending the finalisation of Part B, appellant sought contact with B.

Opperman J emphasised that the best interests of the child must be paramount, as provided in s 9 of the Children's Act. The respondent's summary termination of appellant's contact with B was not in the child's best interests. Departing from the opinion of the court below, the court stated that the High Court can, as upper guardian of all children and in the best interests of a child, grant joint guardianship without finding that the existing guardian is unsuitable. Absence of a biological link with a child is not a bar to an application in terms of s 23 of the Act, subject to the best interests of the child standard. Section 7 of the Act deals with the best interests of a child standard. The court restated the principle that where the welfare of a minor is at stake, a court should be slow to determine the facts by way of the usual opposed motion approach.

The appeal was upheld.

Validity of marriage certificate in customary marriage: In *Mgence v Mokoena and Another* [2023] JOL 58107 (GJ) the applicant sought an order cancelling the marriage certificate recording that her son (the deceased) and the first respondent had entered into a customary marriage. The first respondent and the deceased were in a relationship for several years prior to his death, they were parents of a minor child and cohabited

in their home. The first respondent procured a marriage certificate a few weeks after the death of the deceased. The applicant stated that as mother of the deceased, she had not consented to his marriage, and was unaware of the existence thereof. She sought an order to cancel the marriage based on the allegations that the intended negotiations between the first respondent and the deceased were never concluded and that the certificate incorrectly records that the deceased and first respondent were married in accordance with customary law.

This matter concerns a challenge to the validity of a marriage certificate that was registered under the provisions of the Recognition of Customary Marriages Act 120 of 1998.

Rome AJ confirmed that the requirements for the conclusion of a valid customary marriage are contained in s 3 of the Recognition of Customary Marriages Act and set out such requirements.

A marriage certificate stands as *prima facie* proof of the marriage and a judicial officer must accept the contents of the certificate unless they are convinced that they are not to be relied on. The applicant's contentions did not suffice to cast any doubt on the validity of the marriage certificate.

The application was dismissed.

Other cases

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

- application to expand genetic link requirement in s 294 of the Children's Act 38 of 2005;
- court orders in irregular proceedings;
- enforceability of variation of divorce order regarding payment of pension interest to non-member spouse;
- entitlement of accused to present new facts to reapply for bail;
- eviction application based on breach of lease;
- lawfulness of financing of 'on the road' fee in vehicle finance credit agreements;
- lawfulness of removal of trustee in family trust;
- renewal of visas pending processing of application for asylum;
- repudiation of claim for compensation arising from fire damage; and
- requirements for granting of summary judgment.

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By
Kgomo
Ramotso

The court may grant leave to appeal and deal with a matter even though it is moot

Minister of Tourism and Others v Afriforum NPC and Another (CC) (unreported case no CCT 318/21, 8-2-2023)
(Zondo CJ (Maya DCJ, Baqwa AJ, Madlanga J, Majiedt J, Mathopo J, Mbatha AJ, Rogers J, and Tshiqi J concurring))

In the case of *Minister of Tourism v Afriforum NPC*, the Minister of Tourism (the Minister), together with the Department of Tourism and the Director-General (DG) of the Department of Tourism, applied to the Constitutional Court (CC) to appeal a judgment by the Supreme Court of Appeal (SCA), which judgment and order related to whether the Minister was obliged or entitled to include Broad-Based Black Economic Empowerment (B-BBEE) status level criteria among the criteria that the Department of Tourism used to select small, micro and medium sized businesses (SMMs) that would be given grants out of the Tourism Relief Fund for SMMs.

In 2020, after South Africa (SA) discovered that the COVID-19 had made its way to the country and was spreading fast, the Minister of Cooperative Governance and Traditional Affairs (COGTA) declared a state of disaster in SA. The government placed several regulations in place, which also instituted a lockdown throughout the country, the lockdown had different levels, namely, from level five up to level one. Only essential workers, such as doctors, nurses, police, media, and other essential workers were allowed to travel to continue giving the country essential services.

Many businesses suffered and some people lost their livelihood due to the lockdown, which was implemented to curb the spread of the virus. The government in response to the lockdown gave financial aid to businesses to assist with the financial crisis. In separate applications, Afriforum and Solidarity sought to have the Minister's decision to include the race-based criteria (B-BBEE status level) as some of the criteria to be used to select SMMs to receive grants from the COVID-19 Tourism Relief Fund (the Fund) removed and set aside. This was on various bases including that the Minister had no power to include such criteria

in the Fund related to providing relief to businesses that had suffered because of the COVID-19 pandemic.

In response to the national lockdown and in the attempt to alleviate or prevent or contain the adverse economic and financial impact of the national lockdown on SMMs within the tourism sector, the Minister established the Fund in terms of reg 10(8) of the Disaster Management Act 57 of 2002: Regulations issued in terms of s 27(2) of the Act promulgated by the Minister of COGTA, to the total amount R 200 million. The Minister decided that SMMs selected for the grants under the Fund would be paid R 50 000 each to assist them.

In order to select businesses which were to be given grants out of the Fund, the Minister decided that the Department would be guided by the Tourism B-BBEE Code of Good Practice, which were approved by the Minister of Trade and Industries in 2015. The codes were made in terms of the Broad-Based Black Economic Empowerment Act. The selection of SMMs, which would benefit from the Fund, was based on scores that would be given to the SMMs that applied for grants out of the Fund.

The Minister, DG and Department opposed the application in the High Court, on among others, the basis that she was obliged by law to include the criteria taken from the Tourism B-BBEE Codes of Good Practice (ie, the criteria that Afriforum and Solidarity called race-based criteria). The Minister also stated that she was entitled to include such criteria because one of the goals of the Department was the transformation of the tourism industry. She said that there was no reason why, in seeking to alleviate, prevent, or contain the economic effects of the COVID-19 pandemic on SMMs, the Department could not have due regard to the transformation agenda of the Department for the tourism industry.

The matter came before Kollapen J. He

concluded that:

'(a) given the other criteria that the represent 80 points, it could hardly be suggested that the other consideration of race created an insurmountable advantage for black businesses over white business, on the contrary; Kollapen J said that the point of difference between two and eight points was capable of being bridged by the scoring in other categories and it was possible that a white applicant could score more points than a black applicant.

(b) the criteria were flexible and did not perpetuate an unfair advantage for some candidates over others based on race; in summary, Kollapen J pointed out that the criteria did not have the effect of excluding white applicants nor did it "seal in an advantage" for black candidates but rather it had the effect of providing those candidates with a head start which other candidates could overcome within the general scoring system which was both diverse and flexible.

(c) the Minister's decision was not irrational.'

After the High Court refused leave to appeal, Afriforum and Solidarity petitioned the SCA for leave to appeal against the decision taken in the High Court.

The SCA granted Afriforum and Solidarity leave to appeal. It then concluded that:

'(a) in making the direction that included the B-BBEE criteria for eligibility, the Minister was acting administratively;

(b) given (a) above, her conduct was subject to the Promotion of Administrative Justice Act [3 of 2000] (PAJA) and could, therefore, be challenged on review under PAJA; and

(c) the Minister had erred in believing that she was obliged by section 10(1)(e) of the [Broad-based Black Economic Empowerment Act 53 of 2003 (B-BBEE Act)] to apply the B-BBEE status levels as part of the criteria for eligibility for grants

from the Tourism Relief Fund which, therefore, means that in her decision she was materially influenced by an error of law as contemplated by PAJA.’

The SCA upheld the appeal with cost of two counsel. It set aside the decision of the High Court and replaced it with an order declaring that when the Minister made the direction of 6 April 2020 in terms of reg 10(8) of the regulations under the Disaster Management Act, she was not legally obliged by s 10(1) (e) of the B-BBEE Act to make eligibility for assistance from the Fund subject to the Tourism B-BBEE Sector Code made in terms of B-BBEE Act. The SCA declared the Minister’s decision unlawful. It also made an order to effect that the declaratory order did not authorise the Minister to recover funds already disbursed from the Fund.

In the CC the Minister, DG and the Department applied for leave to appeal against the judgment and order of the SCA. Afriforum and Solidarity opposed the application on basis that the matter is moot, and, in any event, there are no reasonable prospects of success. Furthermore, the Minister submitted that the CC has jurisdiction because part of the dispute is whether she was obliged to include the B-BBEE level status among the criteria to be used to select SMMs to benefit from the Fund. Since the decision that is challenged is a decision, which the Minister says she took to advance transformation in the tourism industry,

it is a decision that raises constitutional issues, which such issues relate to s 9 of the Constitution.

The CC said that it grants leave to appeal if it is in the interests of justice to do so. In its answering affidavit filed to the CC, Solidarity contended, among others, that the application for leave to appeal should be dismissed because the matter has become moot. The Minister in her written submission referred to the fact that the High Court and the SCA had given conflicting judgments. The SCA said that the Minister submitted that it was in the interests of justice that the CC should decide on the matter even if it is moot.

The CC added that Afriforum also took the point that the matter was now moot and that, for that reason alone, it was not in the interests of justice to grant leave. The CC said that a case is moot when there is no longer a live dispute or controversy between the parties, which would be practically affected in one way or another by a court’s decision or which would be resolved by a court’s decision. The CC added that counsel for the Minister conceded that the matter was moot but submitted that nevertheless, it was in the interests of justice for the CC to grant leave to appeal. The CC pointed out that in support of this, counsel pointed out that a judgment of the CC could give guidance on whether the Minister is entitled to use the B-BBEE level status in respect of relief under the

Disaster Management Act. The CC said that there was no merit in this point and that the Minister’s defence to attack Afriforum and Solidarity was very specific.

The CC added that the Minister’s defence to the attack by Afriforum and Solidarity were very specific and related to the state of disaster, the Disaster Management Act and the regulations that were promulgated to regulate certain matters during the state disaster. The CC pointed out that the state of disaster has been terminated and it may take a long time before SA is faced with another state of disaster. The CC said that there are no sound reasons for it to entertain this matter despite it being moot. The CC added that the High Court and SCA in this matter gave conflicting decisions does not on its own carry much weight. The CC added that it may have been different if the issue that it was dealing with was about conflicting decisions of different courts in different matters raising the same issue. The CC said it does not mean that it will never entertain a matter that is moot if there are proper grounds justifying that it should entertain a moot matter.

Leave to appeal was refused with costs including the cost of two counsel.

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By
Mukwevho
Donald

An exploration of s 7(7) and 7(8) of the Divorce Act 70 of 1979: Towards a legislative reform

CNN v NN [2023] JOL 58028 (GJ)

Section 7(8) of the Divorce Act 70 of 1979 provides that the court, when making an order pertaining to a decree of divorce, may order that the pension interests of one member be paid to the other member who is part of the divorce and is so entitled in terms of s 7(7) of the Act, on such interests having accrued to the member of the fund. In light of the facts that came to light in the case of *CNN v NN*, this article seeks to provide a constructive opinion on s 7(8) of the Divorce Act and its relevance in the protection of the interests of one or all the divorcing parties.

Background

On 23 February 2023, the Gauteng Local Division of the High Court in Johannesburg handed down a judgment in the case of *CNN v NN* in which the court found that in terms of the current legal position, a non-member to a pension fund cannot claim directly from the fund, and especially considering the interests, which accrued to the member before the finalisation of a divorce. In this case, the applicant approached the court to vary a deed of settlement, which was entered into by the applicant and the respondent, entitling the applicant to claim the pen-

sion interests held by the pension fund the respondent was a member to. The respondent having been served with the divorce summons on 18 March 2021, the respondent subsequently resigned from his work and exited his pension fund.

On the court granting an order incorporating the deed of settlement, the applicant was informed by the fund that the pension benefit had accrued to the respondent and that he is no longer a member to the fund, and as such the deed of settlement that speaks about pension interests can no longer be enforced under the current legal framework (s 7(1) and 7(8) of the Act).

The legislative provisions on the concept of pension interest

Section 1 of the Act provides that pension interests is a benefit that a party would have been entitled to in terms of the fund rules if his membership to the fund would have been terminated on divorce on account of resignation from his office. This means that pension interest includes the contributions and the interests earned on investments as calculated after divorce. Section 7(7) provides that pension interests shall be deemed as property of member in determination of the benefits any party is entitled to receive.

The court in *Eskom Pension and Provident Fund v Krugel and Another* [2011] 4 All SA 1 (SCA) held that once the pension benefit accrues to the member beyond the divorce, then the provisions of s 7(7) and 7(8) can no longer apply. This is to mean that the other member who would otherwise have a claim in the funds, can no longer claim as the benefits change from pension interests into pension benefits, which are not covered by the two provisions in question.

In this case, the applicant was claiming a pension interest on the benefit, which

has changed to pension benefit, by virtue of the respondent resigning, terminating the contract with the fund and the funds accruing to him, hence the court held that her application cannot succeed.

The implications of the current legal framework on divorce matters

Section 37D(4)(a) of the Pension Funds Act 24 of 1956 read with s 7(7) and 7(8) of the Divorce Act have the effect that the pension interests can only be claimed on divorce, and the non-member does not have access to claim their share in any case. The problem with that is the rising trend as seen in this case, where the member to a fund served with summons decides to resign from their office and terminate their membership with the fund, having their benefits accrue to them before the divorce finalised, and thus depriving the non-member from receiving the share they would receive as entitled.

Conclusion

Although the court, in this case, did not attend to the issue as it was not the applicant's argument, paved the way for the need to challenge the constitutionality of s 7(7) and 7(8) read with s 37D(4)

(a) of the Pension Funds Act, in that they prejudice the non-members who are divorcing, through enabling the members to terminate their membership to the fund, leaving no interests to be paid to their non-member (ex) spouses. As a result, this article suggest that a future approach should be towards the reform of the above three provisions, in a manner that would prevent members to a fund acting unethically, thus prejudicing their non-member (ex) spouses. The legislature should look at amending the definition of 'pension interest' to make no distinction between the benefits received before and after divorce has been granted. The legislature may also consider incorporating pension benefits into the joint estate to avoid these kinds of disputes. Alternatively, the legislature may consider disallowing claiming of the pension interests once the divorce summons has been issued, and before finalisation of such divorce.

- See also Law Reports - 'Family law' at p25.

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By
Monique
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Retirement age

In *Bester v SITA (SOC) Ltd* [2023] 4 BLLR 303 (LC) an employee alleged that he was forced to retire and, therefore, that the termination of his employment was automatically unfair. The employer, the State Information Technology Agency (SITA), alleged that he had reached the normal retirement age and, therefore, the termination was fair.

The employee had previously worked for SITA as an independent contractor and, therefore, did not belong to any re-

tirement fund. He was also not part of a retirement fund when he became permanently employed in 1999 and took out an annuity with a separate insurer. Thus, he was never a member of a retirement fund. His letter of appointment provided that his appointment was subject to the conditions of service applicable to SITA and that such conditions may be amended from time to time after consultation. It was not clear whether such terms referred to a retirement age in 1999 but in 2011 SITA adopted employment conditions stating that the retirement age would be as per the rules of the relevant pension or retirement funds. It went further to state that those not on an approved pension fund would be treated as members of one of the existing funds, which provided a retirement age of 60. In 2012, the employee signed

an updated contract, which provided that the contract would be in force until the employee reached the retirement age as prescribed by the rules of the relevant pension or retirement fund. The employee had deleted this wording and replaced it with 'the age of 65 years'. However, not all the amendments were counter-signed and the employee who signed on behalf of SITA was not available to give evidence. The employee's version was that with effect from his amendments to the employment contract in 2012 his retirement age became 65.

A few years later in 2018, the SITA board passed a resolution that all employees would be subject to a retirement age of 60 if they joined the employer after 1999. In February 2019, the employee became aware that he would be asked to retire at age 60 and he raised a grievance.

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ance, which was not resolved to his satisfaction. SITA then gave him notice that his services would terminate on 31 January 2020. The employee then referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). This was withdrawn and he then referred a matter to the Labour Court (LC) claiming that he had been dismissed and that this was automatically unfair.

The LC considered s 187(1)(f) of the Labour Relations Act 66 of 1995 (LRA) and found that if that is read in isolation it would mean that all an employee would need to prove to show that the dismissal was automatically unfair is that they had reached the retirement age and that that was the reason for the dismissal. Therefore, s 187(2)(b) of the LRA also has to be considered, which states that 'a dismissal based on age is fair if the employee has reached the normal or agreed retirement age.'

The LC held that an agreed retirement age means one that has been discussed or negotiated, and is binding, regardless of what that agreed age is. SITA argued that the employee had reached the retirement age of 60, which is applicable for all employees and, therefore, the dismissal was fair. The LC remarked that a retirement age becomes normal when employees have habitually retired at that age for many years or even for a shorter period in the case of a newly formed employer, which may adopt the norm used in the industry generally. There was evidence led that since 2018 all employees of SITA retired at age 60 and there would need to be a motivation for an employee to work beyond the age of 60. The LC held that SITA had successfully raised the defence in s 187(2)(b) of the LRA and, therefore, the dismissal was not automatically unfair. The LC also considered whether there was any ground for the employee to allege that the dismissal was substantively or procedurally unfair and found that there was no such ground given the fact that SITA raised the defence in s 187(2)(b) of the LRA.

The employee's case was premised on the fact that there had been a breach of his employment contract. The LC, however, found that it did not have jurisdiction to determine this as the employee should have filed a claim under s 77(3) of the Basic Conditions of Employment Act 75 of 1997 if he wanted to allege a breach of contract.

Dismissal for bullying

In *Makuleni v Standard Bank of South Africa Ltd and Others* [2023] 4 BLLR 283 (LAC) an employee was found guilty of creating a hostile work environment by using vulgar language and mistreating staff. She was consequently dismissed. The Commission for Conciliation, Mediation and Arbitration (CCMA) found that

the dismissal was substantively unfair and ordered reinstatement. The arbitration award was, however, set aside by the Labour Court (LC). The matter was then taken on appeal to the Labour Appeal Court (LAC).

The LAC found that the LC had erroneously treated the review as an appeal. It remarked that the LC was required to assess whether the outcome was reasonable but had instead taken a different approach and had committed five misdirections. In this regard, the LC accepted that the employer's witnesses who were the employee's subordinates, had no motive to lie whereas the employees who had been corrected and criticised by her would have obviously wanted to see the employee leave as on her own admission she was a demanding and authoritarian manager who tended to micro-manage people. She had needed to adopt a strict authoritarian approach because she had been employed to drive performance of that particular branch, which she had done. Another misdirection was finding that the correspondence of the witnesses was a self-supporting corroboration because there was no proof of conspiracy among them. The commissioner was of the view that the corroboration could have been explained by a common dislike of the manager and it was found by the LAC that this was not an unreasonable finding by the commissioner. The LC also found that the commissioner considered the evidence in a piecemeal fashion and did not consider it holistically whereas the LAC did not agree. The LAC also remarked on how the commissioner and LC handled the fact that the witnesses had not complained at the time that the incidents took place. The witnesses argued that they were too scared to come forward and the commissioner was not convinced by this, as there were instances where employees had raised complaints but had decided at the time not to take the issue further as it had been resolved. This was particularly unconvincing because there was a grievance process that employees could have used. It was found that this finding by the commissioner was accordingly not unreasonable. It was further argued in the appeal that the commissioner exhibited a bias by interfering in the presentation of the case. The LAC did not agree and remarked that commissioners are expected to assist an unrepresented litigant and the commissioner did no more than that.


As regards the substantive fairness of the dismissal, the LAC found that there was insufficient concrete evidence to support the charges against the employee, particularly the charges about her not motivating the staff. It was found that there was no evidence about the employee's managerial ethos and what was expected of her and where she was

falling short of the required standards. The employee had also called two senior managers who were not aware of the employee's alleged bad behaviour and, therefore, the LAC was of the view that the bad behaviour could not have been overtly obvious. Most of the evidence lead was about the how the employee managed her subordinates' performance. In this regard, employees were upset because she was allegedly rude and shouted at them and feedback was sometimes given in the presence of others. It was stated that the charges were vague with very few details as to the time and context of the incidents. It was remarked that this lack of detail does not mean that nothing has happened, but it does make it more difficult to overcome the denial of an accused. Furthermore, the offensive behaviour in the presence of customers was not corroborated by any complaints in a complaints book and it was found that it was not unreasonable for the commissioner to draw an adverse inference from this.


The LAC also remarked obiter that even if the employer had proved that the employee had behaved inappropriately summary dismissal would not have been an appropriate sanction given the employee's long service and the fact that she had been appointed to turn around the branch, which she did. If there was a problem with her management style, she should have been sent for advance management training. The employer could have also explored transferring her to another position, which did not involve managing staff.

The appeal was accordingly upheld.

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New legislation

*Legislation published from
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Acts

Compensation for Occupational Injuries and Diseases Amendment Act 10 of 2022

Date of commencement: 17 April 2023. Amendment of ss 1, 4, 11, 12, 16 – 18, 20, 22, 23, 25, 26, 30, 32, 36, 39 – 43, 45 – 49, 54, 56, 57, 59, 65, 69, 70, 72 – 76, 78, 80, 83, 85, 87, 88, 90, 91 and 97. Insertion of ss 13A, 13B, 13C, 49A, Ch VIIA and Ch XA. Repeal of s 14. Substitution of ss 13, 44, heading of Ch VI, ss 64, 67, 79, 81, 86, 89, 99 and certain expressions in the Compensation for Occupational Injuries and Diseases Amendment Act. GN3294 GG48431/17-4-2023.

Customs and Excise Act 91 of 1964

Amendment to part 1 of sch 1 and part 1 of sch 2. GN R3292 and GN R3293 GG48428/14-4-2023.

Amendment to part 1 of sch 2. GN R3314 GG48439/19-4-2023.

Domestic Violence Amendment Act 14 of 2021

Date of commencement: 14 April 2023, except s 6A. Proc NR117 GG48419/14-4-2023.

Electoral Amendment Act 1 of 2023

Date of commencement: 17 April 2023. Amendment of ss 1, 20, 27, 28, 30, 39, 57A, 59, 62, 64, 66, 96, 99, 100, 106, 110, sch 1 and sch 2. Insertion of part 3A and substitution of ss 58, 94 and sch 1A. GN3295 GG48432/17-4-2023.

Employment Equity Amendment Act 4 of 2022

Date of commencement: 14 April 2023. Amendment of ss 1, 8, 16, 20, 21, 27, 36, 37, 42 and 53.

Repeal of s 14, 64A and sch 4, insertion of s 15A and deletion of footnotes 4 and 7. GN3280 GG48418/14-4-2023.

National Energy Act 34 of 2008

Commencement of s 6. Proc118 GG48480/28-4-2023.

Bills and White Papers

Electricity Regulation Act 4 of 2006

Publication of explanatory summary of the Electricity Regulation Act Amendment Bill, 2022. GN3315 GG48441/19-4-2023.

Non-Profit Organisations Act 71 of 1997

Notice of withdrawal of Non-Profit Organisation Amendment Bill. GN3339 GG48468/25-4-2023.

Public Administration Management Act 11 of 2014

Memorandum on the objects of the Public Administration Management Amend-

ment Bill and the Public Service Amendment Bill. GenN1753 and GenN1754 GG48449/21-4-2023.

Government, General and Board Notices

Broadcasting Act 4 of 1999

Section 13(7) of the Act: Appointment of the non-executive members of the Board of the South African Broadcasting Corporation. GenN1748 GG48438/18-4-2023.

Competition Act 89 of 1998

Notice of designation in terms of s 10(3) (b)(iv) of the Act. GenN1762 GG48466/25-4-2023.

Notice in terms of s 43B(4)(b) of the Act (as amended): Notice of extension granted: Online Intermediation Platforms Market Inquiry. GN3313 GG48436/18-4-2023.

Construction Industry Development Board Act 38 of 2000

Standard for developing skills through infrastructure contracts: 31 March 2023. GenN1769 GG48483/28-4-2023.

Electoral Act 73 of 1998

Publication of reviewed lists of candidates. GenN1767 GG48481/28-4-2023.

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

Explanatory memorandum for annual remuneration recommendations for 2022/2023. GenN1757 GG48458/21-4-2023.

Labour Relations Act 6 of 1995

Extension of the period of operation of the Main Collective Agreement extended to Non-Parties: Bargaining Council for the Restaurant, Catering and Allied Trades. GN R3344 GG48476/28-4-2023.

Legal Aid South Africa Act 39 of 2014

Notice of tabling in Parliament of amendments to the Legal Aid Manual. GenN1741 GG48429/14-4-2023.

Local Government Municipal Property Rates Act 6 of 2004

Public notice calling for the inspection of the fourth supplementary valuation roll for the year 2019 – 2024 and lodging of objections. GN3278 GG48416/13-4-2023.

National Environmental Management Act 107 of 1998 and National Environmental Management: Biodiversity Act 10 of 2004

General notice calling for registration of participants who would consider voluntary exit from the captive lion industry. GN3284 GG48423/14-4-2023.

Publication of the notice for the commencement of the 2020-2024 Consolidated Environmental Implementation and Management Plan. GN3338 GG48462/21-4-2023.

National Qualifications Framework Act 67 of 2008

Filling of vacancy on the South African Qualifications Authority Board. GN3346 GG48479/28-4-2023.

Non-profit Organisations Act 71 of 1997

Notice of withdrawal of Non-Profit Organisation Amendment Bill. GN3339 GG48468/25-4-2023.

Nuclear Energy Act 46 of 1999

Amendment of notice declaring certain substances, materials and equipment as restricted material, source material, special nuclear material and nuclear related equipment and material. GN R3291 GG48428/14-4-2023.

Public Finance Management Act 1 of 1999

Correction of GN3270 GG48406/6-4-2023. GN3272 GG48408/11-4-2023.

South African Post Office SOC Ltd Act 22 of 2011

Reappointment of members of the Board of the South African Post Office SOC Ltd. GenN1749 GG48440/19-4-2023.

The South African National Roads Agency Limited and the National Roads Act 7 of 1998

Declaration amendment of National Road N2 Section 2: Amendment of Declaration 812 of 2021. GN3329 GG48450/21-4-2023.

Declaration amendment of National Road N7 Section 8 – De-declaration of a section as National Road: Amendment of Declaration 289 of 2018. GN3330 GG48451/21-4-2023.

Declaration Amendment of National Road N11 Section 3: Amendment of Declaration 1048 of 2021. GN3331 GG48452/21-4-2023.

Declaration amendment of National Road R24 Section 1: Amendment of Declaration 979 of 2021. GN3332 GG48453/21-4-2023.

Declaration amendment of National Road R63 Section 9: Amendment of Declaration 305 of 2012. GN3333 GG48454/21-4-2023.

Declaration amendment of National Road R63 Section 15: Amendment of Declaration 305 of 2012. GN3334 GG4845/21-4-2023.

Tourism Act 3 of 2014

Members of the South African Tourism Board. GenN1759 GG48461/21-4-2023.

Rules, regulations, fees, and amounts

Civil Aviation Act 13 of 2009

Twenty-Seventh Amendment of the Civil Aviation Regulations, 2023. GN3276 GG48414/13-4-2023.

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Amendment of Gazettes. GenN1766 GG48477/28-4-2023.

Domestic Violence Act 116 of 1998

Tariff for Electronic Communication Service Providers. GN R3281 GG48419/14-4-2023.

Directives in terms of s 18A of the Act. GN R3282 GG48419/14-4-2023.

Determination of value of weapon in terms of s 9(3). GN R3283 GG48419/14-4-2023.

Domestic Violence Regulations, 2022. GN R3289 GG48428/14-4-2023.

Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947

Regulations relating to the tariffs for the registration of fertilizers, farm feeds, agricultural remedies, stock remedies, sterilising plants and pest control operators, appeals and imports: Amendment. GN3296 GG48429/14-4-2023.

Regulations relating to the tariffs for the registration of fertilizers, farm feeds, agricultural remedies, stock remedies,

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Labour Relations Act 66 of 1995

Amended Commission for Conciliation, Mediation and Arbitration (CCMA) Referral LRA Forms. GN R3317 GG48445/21-4-2023.

Rules for the Conduct of Proceedings before the CCMA. GN R3318 GG48445/21-4-2023.

Local Government Municipal Property Rates Act 6 of 2004

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Local Government Property Rates Act 6 of 2004

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Medicines and Related Substances Act 101 of 1965

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National Environmental Management Act 107 of 1998

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Occupational Diseases in Mines and Works Act 78 of 1973

Adjustment of levies paid by controlled mines and works. GN3341 GG48472/26-4-2023.

Amendment of amounts to increase benefits. GN3342 GG48472/26-4-2023.

Political Party Funding Act 6 of 2018

Regulations on Political Party Funding, 2018: Represented Political Party Fund. GenN1739 GG48422/14-4-2023.

Prevention of and Treatment for Substance Abuse Act 70 of 2008

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Promotion of National Unity and Reconciliation Act 34 of 1995

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Public Finance Management Act 1 of 1999

Rate of interest on government loans. GenN1768 GG48483/28-4-2023.

Statement of the National Government Revenue and Expenditure as at 31 March 2023 issued by the Director-General of the National Treasury. GenN1775 GG48485/28-4-2023.

Statement of the National Revenue, Expenditure and Borrowings as at 31

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March 2023 issued by the Director-General of the National Treasury. GenN1776 GG48485/28-4-2023.

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Adjustment of statutory limit in respect of claims for loss of income and loss of support. BN430 GG48483/28-4-2023.

Social Service Professions Act 110 of 1978

Allowances payable to members of council. GN R3321 GG48445/21-4-2023.

South African Council for the Property Valuers Profession Act 47 of 2000

Publication of fees and charges: Effective 1 April 2023 until 31 March 2024. GenN1755 GG48449/21-4-2023.

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Veterinary and Para-Veterinary Professions Act 19 of 1982

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Legislation for comment

Electoral Commission Amendment Bill, 2023

Notice of a change related to the person in charge of a Private Member's Bill and notice of intention to introduce a Private Member's Bill. GenN1744 GG48429/14-4-2023.

Electricity Regulation Act 4 of 2006

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Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972

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Health Professions Act 56 of 1974

Regulations relating to the qualifications for the registration of graduate clinical technologists: Amendment 2023. GN3349 GG48483/28-4-2023.

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Local Government: Municipal Structures Amendment Bill, 2023

Notice of intention to introduce a Private Member's Bill into Parliament and invitation for comment. GenN1750 GG48442/14-4-2023 and GenN1745 GG48429/14-4-2023.

Marketing of Agricultural Products Act 47 of 1996

Deciduous fruit industry: Application for the continuation of statutory measures on pome and stone fruit. GenN1751 GG48449/21-4-2023.

Military Veterans Act of 2011

Proposed Regulations regarding the Military Veterans Pension Benefit, 2023. GN3340 GG48469/25-4-2023.

National Environmental Management Act 107 of 1998

Consultation on the intention to exclude the development and expansion of solar photovoltaic facilities from the requirement to obtain an environmental authorisation based on the solar exclusion norm. GN3286 GG48425/14-4-2023.

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Consultation on the intention to amend the regulations laying down the procedure to be followed for the adoption of spatial tools or environmental management instruments. GN3336 GG48457/21-4-2023.

Consultation on the intention to exclude identified activities associated with the development and expansion of battery storage facilities from the requirement to obtain an environmental authorisation based on the battery storage exclusion norm. GN3308 GG48429/14-4-2023.

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Notification regarding opportunity to participate in the environmental application processes for the proposed Harmony Nooitgedacht Tailings Storage Facility Project in the Mathjabeng Local Municipality, Free State. GenN1742 GG48429/14-4-2023.

Notification regarding opportunity to participate in the environmental application processes for the proposed Harmony Valley Storage Facility Project in the Mathjabeng Local Municipality, Free State. GenN1743 GG48429/14-4-2023.

National Environmental Management Act: Air Quality Act 39 of 2004

Proposed amendments to the notice declaring temporary asphalt plants as controlled emitters and establishing their emission standards, as published in GN201 GG37461/28-3-2014. GN R3319 GG48445/21-4-2023.

National Environmental Management: Waste Act 59 of 2008

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Invitation to submit written comments on the proposed list of particular trees and particular groups of trees (Champion Trees) under s 12(1)(a) and (b) of the Act. GN3273 GG48409/12-4-2023 and GN3274 GG48410/12-4-2023.

National Identification and Registration Bill, 2022

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National Land Transport Act 5 of 2009

Draft Second Amendment to the National Land Transport Regulations, 2009. GenN1772 GG48483/28-4-2023.

National Land Transport Act 5 of 2009

Draft Second Amendment to the National Land Transport Regulations, 2009. GenN1758 GG48459/21-4-2023.

National Small Enterprise Amendment Act 29 of 2004

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National Water Act 36 of 1998

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One Stop Border Post Bill, 2022

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South African Weather Service Act 8 of 2001

Invitation for the nomination of suitable persons to be appointed as a member of the Regulating Committee for Meteorological Services. GN3285 GG48424/14-4-2023.

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



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<i>BTCLQ</i>	Business Tax and Company Law Quarterly	Juta	(2023) 14.1
<i>Fundamina</i>	Fundamina	Juta	(2022) 28.2
<i>ILJ</i>	Industrial Law Journal	Juta	(2023) 44
<i>JCLA</i>	Journal of Comparative Law in Africa	Juta	(2022) 9.2
<i>JSAC - IAWJ</i>	Journal of the South African Chapter of the International Association of Women Judges	Juta	(2022)
<i>SA Merc LJ</i>	South African Mercantile Law Journal	Juta	(2022) 34.1 (2022) 34.2
<i>SAIPLJ</i>	Southern African Intellectual Property Law Journal	Juta	(2022)
<i>SAJCJ</i>	South African Journal of Criminal Justice	Juta	(2022) 35.1 (2022) 35.2
<i>SALJ</i>	South African Law Journal	Juta	(2023) 140.1 (2023) 140.2
<i>SLR</i>	Stellenbosch Law Review	Juta	(2022) 33.2 (2022) 33.3
<i>TSAR</i>	Tydskrif vir die Suid-Afrikaanse Reg	Juta	(2022) 3 (2022) 4 (2023) 1 (2023) 2
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Company law

Bidie, SS 'Re-acquisition by a company of own issued shares under sections 48 and 114(1) of the Companies Act 71 of 2008: A critical assessment through *Capprec*' (2022) 34.1 SA Merc LJ 52.

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Nanyemba, T and Maphiri, M 'The social and ethics committee and the protection of non-shareholder constituencies: Teething problems or no teeth at all?' (2022) 33.3 SLR 376.

Schoeman, W 'South African Governance Legal Framework for Corporate disclosures and reporting: Part 1 – Voluntary sustainability reporting' (2022) 34.2 SA Merc LJ 268.

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Brickhill, J and Bishop, M 'Constitutional law' (2021) 2 YSAL 153.

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tory of articles 29(1)(A), 43 and 41 of the Constitution' (2022) 28.2 *Fundamina* 1.

Consumer Protection Act

Du Plessis, MA 'Redress for consumers in terms of the Consumer Protection Act 68 of 2008: The watchdog's failure to support an accredited industry ombud – alternative suggestions' (2022) 33.2 SLR 70.

Contract law

Kuschke, B 'Contract law' (2021) 2 YSAL 223.

Kuschke, B 'Contract law' (2022) 3 YSAL 322.

Van Eck, M 'Good faith is not dead: It still lives after *Beadica 231 CC v Trustees, Oregon Trust*' (2022) 34.1 SA Merc LJ 29.

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Koekemoer, M 'Credit law' (2022) 3 *YSAL* 364.

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Van der Linde, D 'Note: Previous consistent statements – the sexual offence anomaly' (2022) 35.1 *SAJCJ* 58.

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Van der Merwe, A 'Recent cases: Sentencing' (2022) 35.2 *SAJCJ* 268.

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Jegede, AO and Stoffels, MC 'Climate change protests and a liberal rights approach in South Africa: Pitfalls and potentials' (2022) 33.2 *SLR* 125.

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Le Roux-Kemp, A 'Family law' (2022) 3 *YSAL* 565.

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Theron, L 'Gender-based violence and the judiciary: Reflections on the role of the courts in safeguarding the dignity, safety and freedom of women' (2022) *JSAC-IAWJ* 1.

Homeowners' associations

Pienaar, GJ and Horn, JG 'Homeowners' associations as urban property management entities' (2022) 33.3 *SLR* 438.

Human rights in Africa

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Cramer, R 'Abandoning the spouse, abandoning the house? Abandonment of co-ownership shares in immovable property [Discussion of *M v M* (10751/2000) [2020] ZAGPPHC 155 (20 March 2020)]' (2022) 33.3 *SLR* 548.

Income Tax Act

Horak, W and Mckinnell, J 'Outsourcing and the foreign business establishment rule for CFC purposes: Why the SCA got it wrong in *CSARS v Coronation Investment Management SA (Pty) Ltd*' (2023) 14.1 *BTCLQ* 13.

Liptak, ED 'The misuse and abuse of section 80J of the Income Tax Act: Time to get back to the basics' (2023) 14.1 *BTCLQ* 1.

Rudnicki, M 'The modified section 23M: Interest deduction limitations' (2023) 14.1 *BTCLQ* 24.

Legwaila, T and Fritz, C 'Case notes: The income tax position of a creditor on the insolvency and/or business rescue of a debtor' (2022) 34.2 *SA Merc LJ* 293.

Independent guarantees

Lupton, C 'Regspraak: "On demand payment" character of independent guarantees' (2022) 3 *TSAR* 569.

Indigenous criminal law

Mosaka, TB 'The Black Flame (part three): Snyman's Criminal Law' (2022) 35.1 *SAJCJ* 1.

Insolvency law

Evans, R 'Insolvency' (2021) 2 *YSAL* 631.

Mabe, Z 'Insolvency' (2022) 3 *YSAL* 617.

Insurance law

Millard, D 'Insurance law' (2021) 2 *YSAL* 646.

Millard, D 'Insurance law' (2022) 3 *YSAL* 693.

Intellectual property law – Nigeria

Oluwasemilore, IA 'Nigerian intellectual property protection for small and medium-sized enterprise (SME) fashion designers in the digital economy' (2022) *SAIPLJ* 38.

International child abduction

Saldulker, HK 'The implications of *Office of the Children's Lawyer v Balev* 2018 SCC 16 for the interpretation of "habitual residence" in the Hague Convention on

the Civil Aspects of International Child Abduction (1980)' (2022) *JSAC-IAWJ* 118.

International law

Vinti, C 'The conduct of "price undertakings" and "interim reviews" in the anti-dumping regime of South Africa [Discussion of *Casar Drahtseilwerk Saar GmbH v International Trade Administration Commission* (66248/2014) 2020 ZAGPPHC 141 (14 February 2020)]' (2022) 33.3 *SLR* 560.

International trade transactions

Hugo, C and Lupton, C 'An analysis of the preclusion rule in documentary credit practice with specific reference to the position of nominated and confirming banks' (2023) 2 *TSAR* 235.

Labour law

Grogan, J 'Labour and employment law' (2021) 2 *YSAL* 765.

Grogan, J 'Labour and employment law' (2022) 3 *YSAL* 748.

Maloka, TC 'Case notes: Jurisdictional quandaries triggered by a new variant for dismissal' (2022) 34.1 *SA Merc LJ* 135.

Newaj, K 'Dismissals for Cannabis use: Determining substantive fairness' (2023) 44 *ILJ* 683.

Okpaluba, C and Budeli-Nemakonde, M 'Reinstatement in the context of "deemed dismissal": A critical analysis of recent case law' (2022) 34.1 *SA Merc LJ* 1.

Scott, J 'Regspraak: Moving on thin ice – recent judgment in a deviation case a caveat to employers to exercise utmost caution when contemplating new appointments' (2022) 4 *TSAR* 781.

Van Staden, MJ 'Aantekeninge: An update of recent labour law developments from South African courts 2022' (2022) 4 *TSAR* 717.

Land reform

Pienaar, JM 'Land reform' (2021) 2 *YSAL* 854.

Pienaar, JM 'Land reform' (2022) 3 *YSAL* 852.

Law of contract

Cornelius, S 'Die matigende rol van die waardes onderliggend aan die grondwet in die Suid-Afrikaanse kontraktereg' (2022) 4 *TSAR* 660.

Law of defamation

Fagan, A 'Wrongfulness in the South African law of defamation' (2023) 140.2 *SALJ* 285.

Law of evidence

Schwikkard, PJ 'Law of evidence' (2021) 2 *YSAL* 921.

Schwikkard, PJ 'Law of evidence' (2022) 3 *YSAL* 917.

Law of inheritance

Barbaix, R and Leire, D 'Belgium's inheritance law reform of 2017 and 2018' (2022) 3 *TSAR* 421.

Law of succession

Chetty, N 'Law of succession' (2021) 2 *YSAL* 946.

Chetty, N 'Law of succession' (2022) 3 *YSAL* 953.

Legal costs

Bekker, T 'The apportionment of legal costs in South Africa: a comparative analysis' (2022) 3 *TSAR* 457.

Legal education

Nyathi, M 'Re-asserting the doctrinal legal research methodology in the South African academy: Navigating the maze' (2023) 140.2 *SALJ* 365.

Legal profession

Van Eck, M 'Regspraak: A cautionary tale of litigation, liability and ethical responsibilities in the legal profession' (2022) 4 *TSAR* 798.

Legislative response to gangsterism

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Local government

Adderley, M and Toefy, A 'Local government law' (2021) 2 *YSAL* 980.

Adderley, M and Toefy, A 'Local government law' (2022) 3 *YSAL* 983.

Bronstein, V and Glaser, D 'Intervention in South African municipalities: Dangers and remedies' (2023) 140.1 *SALJ* 95.

Fuo, O 'Local government and the conundrum of constitutional competencies in South Africa: The tussle between City of Tshwane Municipality and the Gauteng Health Department over ambulance services' (2022) 33.3 *SLR* 484.

Williams, M 'Notes: Municipal crisis: A justifiable limitation of political rights' (2023) 140.1 *SALJ* 38.

Maintenance of surviving spouses

Abduloaf, M and Moosa, N 'Aantekeninge: An analysis of the right of a Muslim widow to claim maintenance in terms of section 1 of the Maintenance of Surviving Spouses Act 27 of 1990' (2023) 2 *TSAR* 302.

Mandament van spolie

Sonnekus, JC 'Aantekeninge: Die Internet of things en afstandbeheerde afskakel van toestelle – kontrakteervryheid en ander geëkte regsbeginsele by spolie, vergeet en/of verwar?' (2023) 1 *TSAR* 96.

Maritime claims

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Matrimonial law

Osman-Hyder, M 'Termination of Muslim marriages in the South African legal context: Understanding the challenges' (2022) 33.2 *SLR* 91.

Matrimonial property regime

Sonnekus, JC 'Regspraak: Huweliks-goedereregterlike bedeling lukraak terugwerkend gewysig en die betrokkenes se handelingsbevoegdheid só verminder?' (2023) 1 *TSAR* 140.

Sonnekus, JC 'Regspraak: Regsontdanning kragtens 'n akte van dading, soos 'n huweliksvoorwaardekontrak, beliggzaam 'n ooreenkoms gebaseer op wilsooreenstemming en dit word beheers deur die beginsel *pacta sunt servanda* – mits die afstanddoener dan handelingsbevoeg is' (2022) 4 *TSAR* 809.

Medical law

Grobbelaar-du Plessis, I; Carstens, P; Swart, M and Thomas, C 'Health law' (2021) 2 *YSAL* 545.

Le Roux-Kemp, A 'Medical and health law' (2022) 3 *YSAL* 1025.

Money laundering

Moosa, F 'Combating money-laundering through currency control: Do Exchange Control Regulations 3(3) and 19(1) limit a traveller's right to privacy?' (2022) 4 *TSAR* 672.

Negligence

Scott, J 'Regspraak: 'n Tydige waarskuwing dat waaksaamheid van sowel deelnemers as omstanders by padwedlope – 'n oënskynlik nie-riskante sportsoort – verag kan word' (2023) 2 *TSAR* 332.

Ownership of wild animals

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Parental responsibilities and rights

Shozi, B; Hazarilall, R and Thaldar, D 'Blood is thicker than water, but is it

thicker than ink? An analysis of parenthood and sperm donor agreements in the wake of *QG v CS* (32200/2020) 2021 ZAGPPHC 366 (17 June 2021)' (2022) 33.3 *SLR* 529.

Patent opposition in the SADC region

Ndlovu, L 'Improving access to medicines in the SADC region through patent opposition: Law reform inspirations from an unlikely jurisdiction' (2022) *SAIPLJ* 105.

Pension law

Marumoagae, MC 'Notes: Do retirement funds have a right to transfer accrued retirement benefits without non-member spouses' consent? An analysis of the *Col-latz* matter' (2023) 140.1 *SALJ* 17.

Marumoagae, MC 'Pension law' (2021) 2 *YSAL* 1015.

Marumoagae, MC 'Pension law' (2022) 3 *YSAL* 1084.

Persons and family law

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Piracy in Nigeria

Anele, KK 'Reimagining regional cooperation as a springboard for curbing piracy off the coast of Nigeria' (2022) 9.2 *JCLA* 33.

Populist understanding

Pretorius, JL 'Populist conceptions of the "people" and multi-party democracy' (2022) 33.2 *SLR* 3.

Private and public law

Van der Merwe, D 'Law as datum and law as purpose: Otto von Gierke's conception of the social purpose of law and its continued relevance' (2023) 2 *TSAR* 209.

Property law

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Van der Sijde, E 'Property law' (2021) 2 *YSAL* 1052.

Van der Sijde, E 'Property law' (2022) 3 *YSAL* 1119.

Protection of personal information

Ismail, N 'Private closed-circuit television surveillance under the Protection of Personal Information Act 4 of 2013' (2023) 1 *TSAR* 20.

Jooste, Y 'The right to deletion: Identity, memory, and surveillance capitalism' (2022) 33.3 *SLR* 460.

Malahleka, M 'The right to data portability: a ghost in the protection of personal information' (2023) 1 *TSAR* 1.

Public procurement

Quinot, G 'Public procurement law' (2022) 3 *YSAL* 1161.

Quantum of damages arising from shootings

Okpaluba, C 'Damages for injuries arising from unlawful shooting by police and other security agents: South Africa, Lesotho, Malawi, Namibia and Swaziland/Eswatini (1)' (2022) 35.1 *SAJCJ* 34.

Okpaluba, C 'Damages for injuries arising from unlawful shooting by police and other security agents: South Africa, Lesotho, Malawi, Namibia and Swaziland/Eswatini (2)' (2022) 35.2 *SAJCJ* 175.

Religious freedom

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Reparation orders

Keter, DK 'Reparation orders at the International Criminal Court: The quest of the victims in the *Bosco Ntaganda* case' (2022) *AJCJ* 184.

Restraint of trade agreements

Weiner, SE 'Contracts in restraint of trade: *Pacta sunt servanda* and constitutional values: From *Magna Alloys* to *Beadica*' (2022) *JSAC-IAWJ* 19.

Right to basic education

Adams, G and Slade, BV 'Providing greater clarity on the meaning of basic education [Discussion of *Moko v Acting Principal, Malusi Secondary School* 2021 (3) SA 323 (CC)]' (2022) 33.3 *SLR* 579.

SADC – post-COVID-19

Letete, P 'Tax policy gap in southern African countries: Reflections on indirect tax coordination and tax diversity in SADC post COVID-19' (2022) 9.2 *JCLA* 1.

Sectional titles

Van der Merwe, CG 'Aantekeninge: Lessons from the landmark New South Wales appeal tribunal decision and three community schemes ombud service adjudications on smoking in sectional (strata) title schemes' (2023) 2 *TSAR* 283.

Van der Merwe, CG 'Lessons from New South Wales, Queensland, and British Columbia to assist South Africa in adequately regulating the keeping of assistance

animals by disabled persons in sectional title schemes' (2022) 33.3 *SLR* 419.

Van der Merwe, CG 'Regspraak: Can the body corporate or trustees agree to an accommodation of outstanding levies and other charges to a unit owner who is unable to pay the full outstanding levy and other charges on account of dire financial straits caused by the COVID-19 pandemic?' (2022) 4 *TSAR* 754.

Van Der Merwe, CG 'Regspraak: Can the body corporate insist that the purchaser of a sectional title unit at a sale in execution pay or secure not only outstanding levies but also other amounts the body corporate claims are due by the unit owner such as interest on arrears, legal costs and interest on non-paid legal costs before the body corporate will issue the levy clearance certificate for transfer required in terms of section 15B(3)(a)(i)(aa) of the Sectional Titles Act?' (2023) 1 *TSAR* 125.

Sentencing

Le Roux-Kemp, A 'Sentencing' (2022) 3 *YSAL* 1175.

Sentencing of robbery

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Separation of powers

Moleya, NI 'Reflecting on the tension between the development of the common law and the doctrine of separation of powers in *Paulsen v Slip Knot Investments 777 (Pty) Ltd*' (2023) 140.1 *SALJ* 170.

Sequestration of estate

Sonnekus, JC 'Regspraak: Oordrag van onroerende eiendom kragtens 'n eggskeidingsbevel tóg 'n besmette vervreemding volgens die Insolvensiewet?' (2022) 3 *TSAR* 591.

Seychelles Employment Tribunal

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Special economic zones

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Surety agreements

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Tax law

De Lange, S 'Making and disputing jeopardy assessments: An administrative law perspective' (2022) 33.2 *SLR* 46.

Maleka, M 'The influence of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* in shaping South African Tax Administration' (2022) 34.2 *SA Merc LJ* 212.

Williams, R 'Taxation' (2021) 2 *YSAL* 1096.

Williams, R 'Taxation' (2022) 3 *YSAL* 1208.

Technology and the court

Mbatha, YT 'To video link or not to video link? Safeguarding vulnerable persons' right of access to courts in civil matters' (2022) *JSAC-LAWJ* 69.

Test for passing off

Karim, SA 'Deficiencies in the tests for distinctiveness and reputation: A discussion of passing off in light of *Koni Multi-national Brands (Pty) Ltd v Beiersdorf AG*' (2022) *SAIPLJ* 1.

The South African CRISPR patent landscape

Kamwendo, T 'The quest to use CRISPR technology in tackling the South African tuberculosis epidemic: Examining how the CRISPR patent and licensing regime may impact access to CRISPR-related tuberculosis therapies' (2022) *SAIPLJ* 14.

Trademark law

Karjiker, S 'Two horses do not need to be from the same stable: A critical evaluation of the *Polo* case' (2022) 4 *TSAR* 640.

Trafficking in persons - Uganda

Salzman, C and Dunman, T 'The one-two punch: Utilising community prosecution

and victim-centred strategies to successfully prosecute trafficking in persons in Uganda' (2022) *AJCJ* 78.

Tribute

Hector, S and Wildenboer, L 'Tribute to Reinhard Zimmermann on the occasion of his seventieth birthday' (2022) 28.2 *Fundamina* 117.

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Viljoen, G 'The transformed water regulatory regime of South Africa [Discussion of *South African Association for Water User Associations v Minister of Water and Sanitation* [2020] ZAGPPHC 252 (19 June 2020)]' (2022) 33.2 *SLR* 148.

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By
Dr Milton
Owuor

Can South Africa arrest President Putin pursuant to ICC warrant of arrest?

On the authorisation of President Vladimir Putin, the Russian Federation invaded Ukraine on 24 February 2022. Both Russia and Ukraine have levelled accusations of alleged heinous international crimes under the Rome Statute of the International Criminal Court (the Rome Statute), against each other. This has attracted the attention of the International Criminal Court (ICC).

The ICC has issued a warrant of arrest for Putin (see ICC ‘Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova’ (www.icc-cpi.int/news, accessed 2-5-2023)). This decision has engendered considerable interest globally. There is ongoing unabating debate on the possible arrest of President Putin if and when he arrives in South Africa (SA) to attend the BRICS Summit from 22 – 24 August 2023.

In an overarching approach, this legal discourse considers implications of the legal framework regarding the arrest and surrender of a head of state, under both the ICC cooperation regime, and under the jurisdiction of SA. Against this backdrop, the discourse determines whether the ICC warrant of arrest against President Putin would be enforceable when he is present in the territory of SA.

ICC warrant of arrest against President Putin

On 22 February 2023, the Prosecutor made necessary applications to the Pre-Trial Chamber II of the ICC, which culminated in the issuance of warrants of arrest, on 17 March 2023, for President Putin. The court determined that there are reasonable grounds to believe that President Putin bears individual criminal ‘responsibility for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation, in prejudice of Ukraine children’ (see ICC ‘Ukraine: Situation in Ukraine’ (www.icc-cpi.int/situations, accessed 2-5-2023) and articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute).

President Putin’s alleged individual criminal responsibility arises from two grounds, namely –

‘(i) for having committed the acts directly, jointly with others and/or through others (article 25(3)(a) of the Rome Statute); and

(ii) for his failure to exercise control properly over civilian and military subordinates who committed the acts, or allowed for their commission, and who were under his effective authority and control, pursuant to superior responsibility (article 28(b) of the Rome Statute)’ (ICC (*op cit*)).

Accordingly, a warrant of arrest was issued for President Putin. The crimes were allegedly committed in the occupied territory of Ukraine at least from 24 February 2022. President Putin and the Russian government have vehemently denied these allegations.

The ICC does not have its own police force to enforce its warrants of arrest, so it relies entirely on the national authorities of state parties, like SA, to effect an arrest. President Putin has been invited to visit SA for BRICS Summit on 22 – 24 August 2023. Can SA execute the ICC warrant of arrest against President Putin on his presence in its territory?

South Africa a state party to the Rome Statute

South Africa ratified the Rome Statute on 27 November 2000. It thereby became a state party to the Rome Statute. It is a member of the ICC. However, in 2016 South Africa deposited, with the UN Secretary General, its Instrument of Withdrawal from the Rome Statute pursuant to article 127(1) of the Rome Statute. Withdrawal only becomes effective one year from the date of deposit. Arguably, the withdrawal was inspired by its failure in 2015 to enforce the ICC warrant of arrest against former Sudanese President Omar al-Bashir.

Domestically, SA introduced the International Crimes Bill B37 of 2017 in 2017, which sought to withdraw South Africa from the Rome Statute, and thereby repeal its ICC membership. However, the attempted withdrawal from ICC by the South African government was aborted,

as it was successfully challenged before the Gauteng High Court in *Democratic Alliance v Minister of International Relations and Cooperation and Others* 2017 (3) SA 212 (GP). On 22 February 2017, the High Court ruled that the attempted withdrawal from the ICC was unconstitutional because the mandatory requirement of prior approval of Parliament was not complied with. Consequently, the South African government withdrew the International Crimes Bill, and it revoked the Instrument of Withdrawal from the Rome Statute.

The resultant legal effect is that SA remains a member of the ICC, and therefore, as a state party of the Rome Statute it continues to be under certain obligations. South Africa is under certain obligations in respect of the ICC cooperation regime. There is a general obligation to cooperate fully with the court (article 86 of the Rome Statute). This entails a requirement for SA to enforce, within its own territory, a warrant of arrest issued by the court (article 89(1) of the Rome Statute). The Rome Statute further requires that SA, as a state party, must ensure that ‘procedures available under their national law for all of the forms of cooperation’ are implemented to enhance the cooperation regime under the Statute (article 88 of the Rome Statute).

In order to give effect to the provisions of the Rome Statute within the municipal jurisdiction of SA, the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the ICC Act) was promulgated. This Act was designed to establish comprehensive ICC cooperation regime in SA.

The interesting question, is whether this Act empowers the South African courts to exercise criminal jurisdiction over the President of Russia? Does the question of the immunity of heads of state become relevant? Can the universality principle independently provide a basis for this jurisdiction?

Arguably, the ICC Act seems to contemplate the universal jurisdiction principle, when it provides, *inter alia*, that any person who commits an ICC crime outside the territory of the Republic, is deemed to have committed that crime in

the Republic if that person is present in the territory of the Republic (s 4(3)(c) of the ICC Act). To this extent, it could be argued that President Putin would not be availed the possible cushion from arrest.

Ukraine and the ICC

It is critical to note that Ukraine is not a state party to the Rome Statute, but it accepted the jurisdiction of the court 'over alleged crimes under the Rome Statute occurring on its territory, pursuant to article 12(3) of the [Rome] Statute' (ICC (*op cit*)). By virtue of its first declaration under article 12(3) of the Rome Statute, 'Ukraine accepted the ICC jurisdiction with respect to alleged crimes committed on Ukraine territory from 21 November 2013 to 22 February 2014' (ICC (*op cit*)). In the subsequent declaration, Ukraine extended the period in the first declaration beyond 20 February 2014 without a definite end, in order to take into account ongoing alleged international crimes committed throughout the territory of Ukraine. Arguably, these declarations empower the ICC to exercise its jurisdiction over Rome Statute crimes committed on the territory of Ukraine by any person, including President Putin.

The Russian Federation as a non-state party to the Rome Statute

Russia signed the Rome Statute in 2000 and voted for the establishment of the ICC. However, it did not ratify the treaty establishing the ICC. Russia, therefore, never became a member of the ICC, and has remained outside the jurisdiction of the court. Indeed, in 2016, Russia proceeded to withdraw its signature from the ICC founding statute. It is not a state party to the Rome Statute. It follows, therefore, that Russia has no obligations under the Rome Statute.

There has been widespread discourse on the enforceability of the ICC warrant of arrest issued against President Putin, who is a national of Russia, a non-state party to the Rome Statute. Does the ICC have jurisdiction over Rome Statute crimes allegedly committed by a President of Russia?

Immunity of head of state

On the question of head of state immunity, s 4(2) of the ICC Act provides that being a head of state or government is neither –

(i) a defence to a crime, nor
(ii) a ground for any possible reduction of sentence once a person has been convicted of a crime' (see also s 232 of the Constitution). This provision appears to strip off President Putin's immunity as head of state of Russia, in the context of the jurisdiction of SA. However, this

could be contested on some grounds, namely, President Putin could argue that he does not recognise the flawed process of the issuance of the ICC warrant of arrest and could even initiate an action or an appeal before the ICC itself to contest the order. Some would argue that pending such action, if any, it is debatable that President Putin would be arrested in SA.

I submit that s 4(3)(a) of the ICC Act is SA's reflection of article 27(2) of the Rome Statute, on the removal of the immunity of a head of state before the jurisdiction of the ICC. The said article provides that the statute 'shall apply equally to all persons without any distinction based on official capacity' (article 27(1)). It provides further that 'in particular, official capacity as a head of state or government ... shall in no case exempt a person from criminal responsibility under this Statute' (article 27(1)). On this account, it would be argued that President Putin might not be entitled to invoke immunity of heads of state to forestall an arrest in SA.

It would appear that lessons can be drawn from the case of former Sudanese President Omar al-Bashir in SA, on the question of immunity of heads of state, and the experiences on how the government of South Africa and the ICC dealt with the related questions at the time (see ICC-02/05-01/09-302 'Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the court for the arrest and surrender of Omar Al-Bashir' (www.icc-cpi.int/court-record, accessed 3-5-2023)).

Arguably, the official status of an individual as a head of state does not provide immunity against prosecution by the ICC and even by SA. However, powerful political considerations cannot be entirely divorced from this question.

On 25 April 2023, it was reported that President Cyril Ramaphosa announced that: 'The governing party, the African National Congress, has taken [the] decision that it is prudent that South Africa should pull out of the ICC, largely because of the manner in which the ICC has been seen to be dealing with (these) [types] of problems' (Carlen du Plessis 'South Africa to try to withdraw from ICC again – Ramaphosa' (www.reuters.com, accessed 3-5-2023)). This statement was, however, immediately retracted by the Presidency, clarifying that indeed, on the contrary, the ANC National Executive body had resolved that SA would remain in the ICC, and advocate for equal treatment by the ICC (Siyabonga Mkhwanazi 'ANC, Ramaphosa back-track on ICC withdrawal' (www.iol.co.za, accessed 3-5-2023)). This leaves the ANC with options, which may include spearheading the amendment of the relevant

provisions of the ICC Act to remove the immunity clause. It could also attempt the removal of the clause requiring one year waiting period for withdrawal from the ICC. Given the majority that the ANC commands in Parliament, it is not in doubt that such amendments may be realised. The question now is whether that process would be realised before August 2023 when President Putin is expected to be visiting SA.

Conclusion

The long-standing cordial relations between the ANC and Russia cannot be gainsaid, and it is extremely unlikely that the executive would easily facilitate the arrest of President Putin. However, the legal position deriving from the Rome Statute, the applicable legislation in SA, and the jurisprudence of both the ICC and the South African courts, appear to be more inclined to fortify the position that immunity of heads of state is not available. Such a conclusion, however, cannot be absolutely guaranteed, because it is not prudent to predict the outcome of any court challenge that may be mounted by President Putin or any action that the government of SA may take to oust the immunity provision in the ICC Act.

It may be suggested that the ICC itself has demonstrated impartiality or fear in speedily dealing with investigations involving US and Israel, and thus has no moral authority to expect reciprocity in the enforcement of the Putin warrant. The SA executive is endowed with immense authority that could be invoked to ensure President Putin is protected when he attends the summit in SA.

Immunity of heads of state remain a very contentious issue in the realm of the international criminal law.

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011 705 3512**



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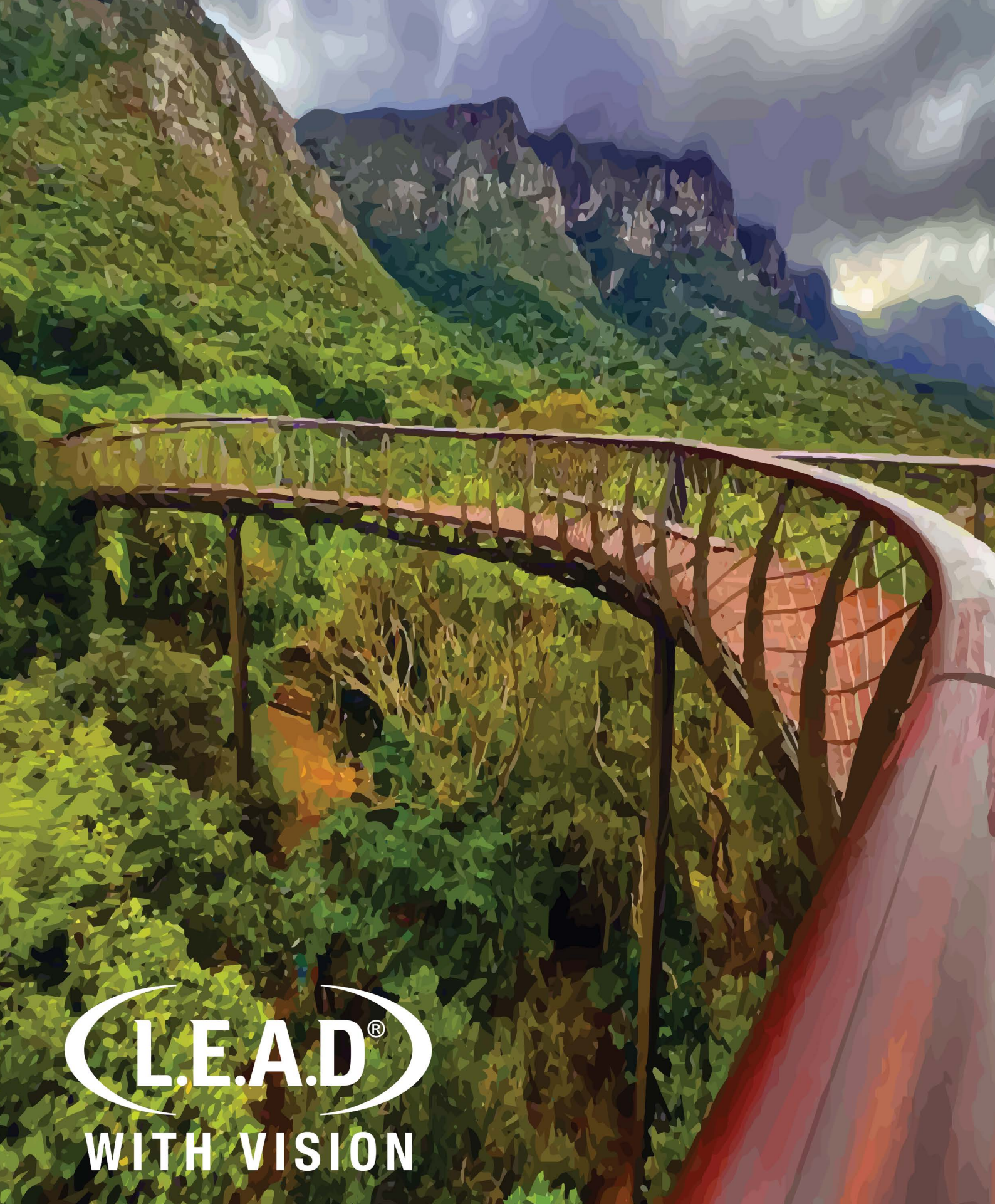
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Classified advertisements and professional notices

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• Visit the *De Rebus* website to view the legal careers CV portal.

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E-mail: Odasilva@pagelinc.co.za

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South African attorney and member of the Italian Bar, who is in regular contact with colleagues and clients in South Africa.

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Tel: 0039 06 3973 2421

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Galleria del Corso 1
20122 Milan, Italy
Tel: 0039 02 7642 1200

Mobile/WhatsApp: 0039 348 5142 937

Skype: Anthony V. Elisio

E-mail: avelisio@tin.it | anthonyvictor.elisio@gmail.com

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Kelly van der Berg:
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De Rebus has launched a CV portal for prospective candidate legal practitioners who are seeking or ceding articles.

How it works? As a free service to candidate legal practitioners, De Rebus will place your CV on its website.

Prospective employers will then be able to contact you directly. The service will be free of charge and be based on a first-come, first-served basis for a period of two months, or until you have been appointed to start your articles.

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Advertisements and CVs may be e-mailed to:
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RISKALERT

JUNE 2023 NO 3/2023

IN THIS EDITION

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RISK MANAGEMENT COLUMN

CHANGES TO THE LPIIF POLICIES FROM 1 JULY 2023

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

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

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

DISCLAIMER

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



Legal Practitioners' Indemnity Insurance Fund NPC

Est. 1993 by the Legal Practitioners' Fidelity Fund



LEGAL PRACTITIONERS' FIDELITY FUND

SOUTH AFRICA

Ahead of the start of the new insurance year on 1 July 2023 (remember that the insurance policy year runs from 1 July to 30 June), the Legal Practitioners Indemnity Insurance Fund NPC (LPIIF) gives notice to the legal profession that the changes set out below will be made to its policies in the new year.

The Professional Indemnity insurance policy

The following amendments will be made to the professional indemnity insurance policy:

1. An amendment of the Preamble by omitting sub-paragraphs (a) and (b) to avoid confusion with regards to the nature and extent of the professional indemnity cover provided.
2. An amendment of Definition V relating to bridging finance by adding "or any party to litigation for purposes related to that litigation".
3. The definition of "dishon-



Joseph Kunene,
Claims Executive LPIIF,
Centurion

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Telephone: (012) 622 3917

est" in clause XI will be amended to state that the word will bear its ordinary meaning.

4 The definition of "Claim" (clause VI) will be amended to include an "oral" demand made to an insured by a client or third party.

5 Currently, the words "compensation" and "damages" are used interchangeably

RISK MANAGEMENT COLUMN continued...

in the policy. The word “damages” will now be used throughout the policy. There will be a new definition of the word “Compensation” to cater for situations and areas in the policy where the word is used.

- 6 Clause 22 will be reworded to read as follows:

“The **Insured** must:

- a) notify the **Insurer** in writing as soon as practicable of any circumstance, act, error or omission that may give rise to a **Claim**; and
- b) notify the **Insurer** in writing as soon as practicable of any **Claim**, but by no later than one (1) week after receipt thereof, in such notification enclosing a copy of the written communication or legal document or, in the event of an oral **Claim**, conveying the detail of the oral demand.

In the event of non-compliance, the **Insurer** reserves the right to deduct from the indemnification amount or amounts to which the **Insured** would otherwise have been entitled, such amount or amounts as represent the **Insurer’s** assessment of the damage suffered by the **Insurer** as a result of the non-compliance, which amount or amounts might be comprised of increased costs (whether in the form of **Approved Costs** or **Defence Costs** or both), interest that would not otherwise have been payable, or increased liability, or any combination thereof.”

- 7 A slight amendment to the definition of “Cybercrime” in clause X to include reference to the Cybercrime Act 19 of 2020.

- 8 By adding a new Definition XX which seeks to define the insurer’s costs.

- 9 By removing in Definition XXII (Legal Services) the part that refers to work done or advice given on foreign law and made it an exclusion on its own.

- 10 By changing Definition XXVIII relating to Senior Practitioner in the dispute resolution clause 40 from being an attorney or trust account advocate to a traditional advocate in order to enhance objectivity and impartiality in the process of dispute resolution;

- 11 By removing, in Clause XXIX (Trading Debt), reference to “damages” in sub-clause (b), and adding “incurred by the insured”.

- 12 By adding in Clause 1 the words “...and subject to the provisions and exclusions thereof” to make the clause read better.

- 13 By removing 6(e) in Clause which relates to the liquidators and trustees in insolvent estates.

- 14 By combining old Clauses 13 and 15 together into the new 13.1 and 13.2 respectively.

- 15 By adding reference to Section 56(6)(a) of the Legal Practice Act to Clause 16(f), and also adding at the end of the clause “...provided that the insured’s doing so constituted the provision of legal services” to improve the clause.

- 16 By amending Clause 16(g) relat-

ing to punitive costs by adding at the end of the clause “...or where a costs order against the insured is unrelated to the insured’s being held liable for the payment of Compensation”.

- 17 By slightly amending Clause 16(i) relating to the Investment exclusion by omitting “...in respect of a conveyancing transaction” to avoid creating an incorrect impression that the exclusion applies only to conveyancing transactions.

- 18 By adding a new Clause 16(m) dealing with Liquidators and trustees in line with the amendment of Clause 6(e).

- 19 By slightly amending the new Clause 16(n) (which was Clause 16(m) in the previous year Master policy) to read as follows:

“arising out of or in connection with the receipt or payment of funds, whether into or from the **Legal Practice’s** trust account or otherwise, where:

- (i) that receipt or payment of funds is unrelated to the successful completion of a direct instruction to the **Insured** to provide specific **Legal Services** other than the receipt or payment itself; or
- (ii) the insured acts merely as a conduit for the transfer of funds from the **Legal Practice’s** trust or other account to the payee, and provides no **Legal Services** beyond acting as such conduit”.

- 20 By slightly amending new Clause 16(u), which was Clause 16(t) in the previous year), by

RISK MANAGEMENT COLUMN continued...

excluding or omitting reference to the rules.

- 21 By adding a new exclusion Clause 16(v) relating to work done outside of RSA, which is effectively a formalisation of what was already excluded in old definition XX in relation to the definition of legal services.
- 22 A slightly amendment to Clause 19 dealing with “dishonesty” by changing the writing style from “..takes all...” to “...has taken all...”.
- 23 Clause 30 has changed positions to make the policy read better, and a new heading has been added before Clause 30 reading “The consequence of the insured breaching any terms of the policy”.
- 24 In Clause 31 – Insurer’s rights and duties, by omitting the sentence referring to the “exercise of the insurer’s discretion in terms of (a) will not be unreasonable”.
- 25 In Clause 32 – Agreement not to settle without insured’s prior consultation, by adding “...or Insurer’s Costs” in subparagraph (a).
- 26 By amending Clause 34 to add reference to “Approved Costs” and “Insurer’s Costs” to the clause.
- 27 By amending Clause 40 relating to the dispute resolution mechanism by including a new reference to a dispute arising from “the amount of indemnity”, and also added a new reference to the interruption of prescription during the period of having submitted written submission at the end of the clause.

The limits of indemnity (amount of cover) and excesses will remain un-



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Executor Bonds Executive
LPIIF, Centurion
Email: zodwa.mbatha@lpiif.co.za
Telephone: (010) 501 0728

changed. For information purposes, the limits of indemnity and excesses, respectively, are set out and below.

The annual aggregate limits of indemnity per firm:

Clause 20 reads as follows:

“20. Where the **Dishonest** conduct includes:

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

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

The new policies will become effective from 1 July 2023 and uploaded onto the website www.lpiif.co.za.

The Executor Bond policy

One change will be made to the executor bond policy. The words “a legal practitioner” in clauses 1.1, 3.3.5, 3.11.2, 3.11.3, and 4.2 will be deleted and replaced with “an attorney”. This amendment is made to further clarify that bonds of security are only granted to practising attorneys seeking appointment as executors of deceased estates. Section 77(3) of the Legal Practice Act 28 of 2014(the Act) provides that the Board of the Legal Practitioners’ Fidelity Fund (Fidelity Fund) “may enter into deeds of suretyship to the satisfaction of the Master of the High Court having jurisdiction in order to provide security on behalf of an attorney in respect of work done by an attorney as-

- (a) executor in the estate of a deceased person” (emphasis added).

The change will thus further ensure that the wording of the executor bond policy is aligned with section 77 (3) of the Act. Since the introduction of this service in 1998, the LPIIF has always only granted bonds of security to practising attorneys who meet the requirements prescribed by the company.

The maximum value of bonds issued (R5 million per estate) and total exposure for a firm at any time (R20 million) will remain unchanged.

For your ease of reference, the executor bond policy, application form and resolution are attached as annexures to this document.



THE 2023/2024 LPIIF MASTER POLICY

PREAMBLE

The **Legal Practitioners' Fidelity Fund**, as permitted by the **Act**, has contracted with the **Insurer** to provide professional indemnity insurance to the **Insured** against liability which may arise out of the **Insured's** professional conduct as **Practitioner**.

DEFINITIONS:

- | | |
|--|---|
| <p>I Act: The Legal Practice Act 28 of 2014.</p> <p>II Annual Amount of Cover: The total available amount of cover for the Insurance Year for the aggregate of payments made for all Claims, Approved Costs and Claimants' Costs in respect of any Legal Practice as set out in Schedule A.</p> <p>III Approved Costs: Legal and other costs incurred by the Insured with the Insurer's prior written consent (which will be in the Insurer's sole discretion) in attempting to prevent a Claim or limit the amount of a potential Claim.</p> <p>IV Legal Practitioners' Fidelity Fund: As referred to in Section 53 of the Act.</p> <p>V Bridging Finance: The provision of short-term finance to a party to a Conveyancing Transaction before it has been registered in the Deeds Registry, or to a party to litigation for purposes related to that litigation.</p> <p>VI Claim: A written or oral demand for payment of Compensation from the Insured, which arises out of the Insured's provision of Legal Services. For the purposes of this policy, a demand is any written or oral communication or any legal document that either makes a demand for, or intimates or implies an intention to demand, payment of Compensation from an Insured.</p> <p>VII Claimant's Costs: The legal costs the Insured is obliged to pay to a claimant by order of a court, arbitrator, or by an agreement approved by the Insurer.</p> <p>VIII Compensation: Loss for which the Insured is liable arising out of the Insured's provision of Legal Services. Compensation includes a liability for capital, interest and Claimant's Costs.</p> <p>IX Conveyancing Transaction: A transaction which:</p> <ul style="list-style-type: none"> a) involves the transfer of legal title to, or the registration of a real right in immovable property from, one or more legal entities or natural persons to another; and/or b) involves the registration or cancellation of any mortgage bond or real right over immovable property; and/or c) is required to be registered in any Deeds Registry | <p>X Cybercrime: Any offence that is facilitated by or involves the use, interception or interference with electronic communications, information systems, computer data storage mediums or computer systems, including but not limited to interception of or interference with data as described in the Cybercrimes Act 19 of 2020 or any successor thereto.</p> <p>XI Defence Costs: The reasonable costs incurred by the Insured, with the Insurer's prior written consent, in investigating and/or defending a Claim against the Insured in question.</p> <p>XII Dishonest: Shall bear its ordinary meaning.</p> <p>XIII Employee: A person who is or was employed or engaged by the Legal Practice to assist in providing Legal Services. (This includes in-house legal consultants, associates, professional assistants, candidate legal practitioners, paralegals and clerical staff but does not include an independent contractor who is not a Practitioner).</p> <p>XIV Excess: The first amount (or deductible) payable by the Insured in respect of each and every Claim (including Claimant's Costs) as set out in schedule B.</p> <p>XV Fidelity Fund Certificate: A certificate provided for in terms of section 84 of the Act, read with Rules 3, 47, 48 and 49 of the South African Legal Practice Council Rules made under the authority of section 95(1) of the Act.</p> <p>XVI Innocent Principal: Each current or former Principal who:</p> <ul style="list-style-type: none"> a) may be liable for the debts and liabilities of the Legal Practice; and b) did not personally commit or participate in committing the Dishonest, fraudulent or other criminal act, and had no knowledge or awareness of such act. <p>XVII Insured: The persons or entities referred to in clauses 5 and 6 of this policy.</p> <p>XVIII Insurer: The Legal Practitioners Indemnity Insurance Fund NPC, Reg. No. 93/03588/08.</p> <p>XIX Insurance Year: The period covered by the policy, which runs from 1 July of the first year to 30 June of the following year.</p> <p>XX Insurer's Costs: Costs incurred by the Insurer in exercising its rights in accordance with clause 31 in dealing with or contesting a Claim or in attempting to prevent or limit the amount of a potential Claim.</p> |
|--|---|

- XXI Legal Practice:** The person or entity listed in clause 5 of this policy.
- XXII Legal Services:** Subject to the provisions and exclusions of this policy, work done or advice given in the ordinary course of carrying on the business of a **Legal Practice** in the Republic of South Africa in accordance with the provisions of section 33 of the Act.
- XXIII Practitioner:** Any attorney, advocate referred to in section 34(2)(b) of the Act, notary or conveyancer as defined in the Act who is the **Insured**.
- XXIV Prescription Alert:** The computerised back-up diary system that the **Insurer** makes available to the legal profession.
- XXV Principal:** An advocate referred in section 34(2)(b) of the Act, sole **Practitioner**, partner or director of a **Legal Practice**, or any person who is publicly held out to be a partner or director of a **Legal Practice**.
- XXVI Risk Management Questionnaire:** A self-assessment questionnaire which can be downloaded from or completed on the **Insurer's** website (www.lpiif.co.za) and which must be completed annually by the advocate referred to in section 34(2)(b) of the Act, sole practitioner, senior partner, director or designated risk manager of the **Insured** as referred to in clause 5. The annual completion of the **Risk Management Questionnaire** is prescribed by this policy (see clause 23) and the South African Legal Practice Council Rules made under the Act.
- XXVII Road Accident Fund claim:** A claim for compensation for losses in respect of bodily injury or death caused by, arising from or in any way connected with the driving of a motor vehicle (as defined in the Road Accident Fund Act 56 of 1996 or any predecessor or successor of that Act) in the Republic of South Africa.
- XXVIII Senior Practitioner:** A senior counsel practising as an advocate in accordance with section 34(2)(a)(i) of the Act, with experience in professional indemnity insurance law.
- XXIX Trading Debt:** A debt incurred as a result of the undertaking of the **Insured's** business or trade (trading debts are not compensatory in nature, and this policy deals only with claims for **Compensation**). This exclusion includes (but is not limited to) the following:
- a refund of any fee or disbursement charged by the **Insured** to a client;
 - Compensation** or other forms of damages which are calculated by reference to any fee or disbursement charged by the **Insured** to a client or incurred by the **Insured**;
 - payment of costs relating to a dispute about fees or disbursements charged by the **Insured** to a client; and/or
 - any labour dispute or act of an administrative nature in the **Insured's** practice.

WHAT COVER IS PROVIDED BY THIS POLICY?

- On the basis set out in this policy and subject to

the provisions and exclusions thereof, the **Insurer** agrees to indemnify the **Insured** against professional legal liability to pay **compensation** to any third party:

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

WHO IS INSURED?

- Provided that each **Principal** had a **Fidelity Fund Certificate** at the time of the circumstance, act, error or omission giving rise to the **Claim**, the **Insurer** insures all **Legal Practices** providing **Legal Services** in the form of either:
 - a sole **Practitioner**;
 - a partnership of **Practitioners**;
 - an incorporated **Legal Practice** as referred to in section 34(7) of the Act; or
 - an advocate referred to in section 34 (2)(b) of the Act. For purposes of this policy, an advocate referred to in section 34(2)(b) of the Act will be regarded as a sole practitioner.
- The following are included in the cover provided to the **Legal Practice**, subject to the **Annual Amount of Cover** applicable to the **Legal Practice**:
 - a **Principal** of a **Legal Practice** providing **Legal Services**, provided that the **Principal** had a **Fidelity Fund Certificate** at the time of the circumstance, act, error or omission giving rise to the **Claim**;
 - a previous **Principal** of a **Legal Practice** providing **Legal Services**, provided that that **Principal** had a **Fidelity Fund Certificate** at the time of the circumstance, act, error or omission giving rise to the **Claim**;
 - an **Employee** of a **Legal Practice** providing **Legal Services** at the time of the circumstance, act, error or omission giving rise to the **Claim**;
 - the estates of the people referred to in clauses 6(a), 6(b) and 6(c).

AMOUNT OF COVER

- The **Annual Amount of Cover**, as set out in Schedule A, is calculated by reference to the number of **Principals** that made up the **Legal Practice** on the date of the circumstance, act, error or omission giving rise to the **Claim**.

RISKALERT

A change during the course of an insurance year in the composition of a **Legal Practice** which is a partnership will not constitute a new **Legal Practice** for purposes of this policy and would not entitle that **Legal Practice** to more than one limit of indemnity in respect of that **Insurance Year**.

8. Schedule A sets out the maximum **Annual Amount of Cover** that the **Insurer** provides per **Legal Practice**. This amount includes payment of **Compensation, Approved Costs** and **Claimants' Costs**.
9. Cover for **Approved Costs** is limited to 25% of the **Annual Amount of Cover** or such other amount that the **Insurer** may allow in its sole discretion.
Insured's excess payment
10. The **Insured** must pay the **Excess** in respect of each **Claim**, directly to the claimant or the claimant's legal representatives, immediately it becomes due and payable. Where two or more **Claims** are made simultaneously, each **Claim** will attract its own **Excess** and, to the extent that one or more **Claims** arise from the same circumstance, act, error or omission, the **Insured** must pay the **Excess** in respect of each such **Claim**;
11. The **Excess** is calculated by reference to the number of **Principals** that made up the **Legal Practice** on the date of the circumstance, act, error or omission giving rise to the **Claim**, and the type of matter giving rise to the **Claim**, as set out in Schedule B.
12. The **Excess** set out in column A of Schedule B applies:
 - a) in the case of a **Claim** arising out of the prescription of a **Road Accident Fund claim**. This **Excess** increases by an additional 20% if **Prescription Alert** has not been used and complied with by the **Insured**, by timeous lodgement and service of summons in accordance with the reminders sent by **Prescription Alert**;
 - b) in the case of a **Claim** arising from a **Conveyancing Transaction**.
13.
 - 13.1 In the case of a **Claim** where clause 20 applies, the **excess** increases by an additional 20%.
 - 13.2 The **Excess** set out in column B of Schedule B applies to all other types of **Claims**.
14. No **Excess** applies to **Approved Costs** or **Defence Costs**.

THE MAXIMUM ANNUAL AMOUNT OF COVER

15. Schedule A sets out the maximum **Annual Amount of Cover** that the **Insurer** provides per **Legal Practice**. This amount includes payment of **Compensation, Approved Costs** and **Claimants' Costs**.

WHAT IS EXCLUDED FROM COVER?

16. This policy does not cover any liability for **Compensation**:
 - a) arising out of or in connection with the **Insured's Trading Debts** or those of any **Legal Practice** or

business managed by or carried on by the **Insured**;

- b) arising from or in connection with misappropriation or unauthorised borrowing by the **Insured** or **Employee** or agent of the **Insured** or of the **Insured's** predecessors in practice, of any money or other property belonging to a client or third party and/or as referred to in section 55 of the **Act**;
- c) which is insured or could more appropriately have been insured under any other valid and collectible insurance policy available to the **Insured**, covering a loss arising out of the normal course and conduct of the business, or where the risk has been guaranteed by a person or entity, either in general or in respect of a particular transaction, to the extent to which it is covered by the guarantee. This includes but is not limited to Misappropriation of Trust Funds, Personal Injury, Commercial and Cybercrime insurance policies;
- d) arising from or in terms of any judgment or order(s) obtained in the first instance other than in a court of competent jurisdiction within the Republic of South Africa;
- e) arising from or in connection with the provision of **Investment Advice** or the administration of any funds or taking of any deposits as contemplated in:
 - (i) the Banks Act 94 of 1990;
 - (ii) the Financial Advisory and Intermediary Services Act 37 of 2002;
 - (iii) the Agricultural Credit Act 28 of 1996;
 - (iv) any law administered by the Financial Sector Conduct Authority and/or the South African Reserve Bank and any regulations issued thereunder; or
 - (v) the Medical Schemes Act 131 of 1998 as amended or replaced.For purposes of this clause, **Investment Advice** means any recommendation, guidance or proposal of a financial nature furnished to any client or group of clients:
 - (a) in respect of the purchase of any financial product; or
 - (b) in respect of the investment in any financial product; or
 - (c) to engage any financial service provider;
- f) arising where the **Insured** is instructed to invest money on behalf of any person, except for an instruction to invest the funds in an interest-bearing account in terms of sections 56(6)(a) or 86(4) of the **Act**, provided such investment is done pending the conclusion or implementation of a particular matter or transaction which is already in existence or about to come into existence at the time the investment is made.
This exclusion does not apply (subject to the other provisions of this policy) to funds which the **Insured** is authorised to invest in his or her

capacity as executor, trustee, curator or in any similar representative capacity, provided that the **Insured's** doing so constituted the provision of **Legal Services**;

- (g) arising from or in connection with any fine or penalty, or punitive or exemplary damages awarded against the **Insured**, or from an order against the **Insured** to pay costs *de bonis propriis*, or where a costs order against the **Insured** is unrelated to the **Insured's** being held liable for the payment of **Compensation**;
- (h) arising out of or in connection with any work done on behalf of an entity defined in the Housing Act 107 of 1997 or its representative, with respect to the National Housing Programme provided for in the Housing Act;
- (i) directly or indirectly arising from, or in connection with, or as a consequence of, the provision of **Bridging Finance**. This exclusion does not apply where the **Bridging Finance** has been provided in connection with a **Conveyancing Transaction** for the payment of:
 - (i) transfer duty and costs or either thereof;
 - (ii) municipal or other rates and taxes relating to the immovable property which is to be transferred; or
 - (iii) levies payable to a body corporate or homeowners' association relating to the immovable property which is to be transferred;
- (j) arising out of or in connection with the **Insured** having given an unqualified undertaking legally binding his or her practice, in matters where the fulfilment of that undertaking is dependent on the act or omission of a third party;
- (k) arising out of or in connection with a breach of contract unless such breach is a breach of professional duty by the **Insured**;
- (l) arising out of or in connection with the **Insured** acting or having acted as a business rescue practitioner as defined in section 128(1)(d) of the Companies Act 71 of 2008;
- (m) arising out of or in connection with the **Insured** acting as a provisional liquidator or liquidator or a trustee of an insolvent estate, or as a curator *bonis*;
- (n) arising out of or in connection with the receipt or payment of funds, whether into or from the **Legal Practice's** trust account or otherwise, where:
 - (i) that receipt or payment of funds is unrelated to the successful completion of a direct instruction to the **Insured** to provide specific **Legal Services** other than the receipt or payment itself; or
 - (ii) the insured acts merely as a conduit for the transfer of funds from the **Legal Practice's** trust or other account to the payee, and provides no **Legal Services** beyond acting as such conduit;

(o) arising out of a defamation **Claim** that is brought against the **Insured**;

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

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

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

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

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

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

(r) arising out of or in connection with a **Claim** resulting from:

(i) War, invasion, act of foreign enemy, hostilities or warlike operations (whether war is declared or not) civil war, mutiny, insurrection, rebellion, revolution, military or usurped power;

(ii) Any action taken in controlling, preventing, suppressing or in any way relating to the excluded situations in (i) above including, but not limited to, confiscation, nationalisation, damage to or destruction of property by or under the control of any Government or Public or Local Authority;

(iii) Any act of terrorism regardless of any other cause contributing concurrently or in any other sequence to the loss.

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

(s) arising out of or in connection with any **Claim** resulting from:

(i) ionising radiations or contamination by radio-activity from any nuclear fuel or from any nuclear waste from the combustion or use of nuclear fuel;

- (ii) nuclear material, nuclear fission or fusion, nuclear radiation;
 - (iii) nuclear explosives or any nuclear weapon;
 - (iv) nuclear waste in whatever form;
- regardless of any other cause or event contributing concurrently or in any other sequence to the loss. For the purpose of this exclusion only, combustion includes any self-sustaining process of nuclear fission or fusion;
- (t) arising out of or resulting from the hazardous nature of asbestos in whatever form or quantity;
 - (u) arising out of or resulting from **Legal Services** carried out in violation of the **Act**; and/or
 - (v) arising out of or resulting from work done or advice given on the law applicable in jurisdictions other than the Republic of South Africa, unless provided by a person admitted to practice in the applicable jurisdiction.

FRAUDULENT APPLICATIONS FOR INDEMNITY

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

CLAIMS ARISING OUT OF DISHONESTY OR FRAUD

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

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

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

THE INSURED'S RIGHTS AND DUTIES

22. The **Insured** must:
- a) notify the **Insurer** in writing as soon as practicable of any circumstance, act, error or omission that may give rise to a **Claim**; and
 - b) notify the **Insurer** in writing as soon as practicable of any **Claim**, but by no later than one (1) week after receipt thereof, in such notification enclosing a copy of the written communication or legal document or, in the event of an oral **Claim**, conveying the detail of the oral demand.
23. Once the **Insured** has notified the **Insurer** in accordance with clause 22 above, the **Insurer** will require the **Insured** to provide a completed **Risk Management Questionnaire** and to complete a claim form providing all information reasonably required by the **Insurer** in respect of the **Claim**.
- The **Insured** will not be entitled to indemnity unless the claim form and **Risk Management Questionnaire** have been completed by the **Insured** to the **Insurer's** reasonable satisfaction and have been returned to the **Insurer**.
24. The **Insured**:
- 24.1 shall not cede or assign any rights in terms of this policy;
 - 24.2 agrees not to, without the **Insurer's** prior written consent:
 - a) admit or deny liability for a **Claim**;
 - b) settle a **Claim**;
 - c) incur any costs or expenses in connection with a **Claim** unless the sum of the **Claim** and **Claimant's Costs** falls within the **Insured's Excess**;
- failing which, the **Insurer** will be entitled to reject the **Claim**, but will have sole discretion to agree to provide indemnity, wholly or partly.
25. The **Insured** agrees to give the **Insurer** and any of its appointed agents:
- 25.1 all information and documents that may be reasonably required, at the **Insured's** own expense.
 - 25.2 assistance and cooperation, which includes, but not limited to, preparing, service and filing of notices and pleadings by the **Insured** as specifically instructed by the **Insurer** at the **Insurer's** expense, which expenses must be agreed to in writing.
26. The **Insured** also gives the **Insurer** or its appoint-

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

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

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

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

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

29. Written notification of any new **Claim** must be given to:

**Legal Practitioners Indemnity Insurance Fund
NPC**

1256 Heuwel Avenue

Centurion

0127

PO Box 12189

Die Hoewes

0163

Docex 24

Centurion

Email: claims@lpiif.co.za Tel:+27(0)12 622 3900

THE CONSEQUENCE OF THE INSURED BREACHING ANY TERMS OF THIS POLICY

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

THE INSURER'S RIGHTS AND DUTIES

31. The **Insured** agrees that:

- a) The **Insurer** has full discretion in the conduct of the **Claim** against the **Insured** including, but not limited to, its investigation, defence, settlement or appeal in the name of the **Insured**; and

- b) the **Insurer** has the right to appoint its own legal representative(s) or service providers to act in the conduct and the investigation of the **Claim**.

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

- a) the **Insurer** will not be obliged to cover further **Claimant's Costs**, **Defence Costs** or **Insurer's Costs** beyond the date of the **Insurer's** recommendation to the **Insured**; and

- b) the **Insurer's** obligation to indemnify the **Insured** will be limited to the amount of its recommendation for settlement or the **Insured's** available **Annual Amount of Cover** (whichever is the lesser amount).

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

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

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

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

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

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

- b) the **Insurer** will then be reimbursed for the amount of its liability under this policy in respect of such **Claim**;

- c) any remaining amount will be applied toward

RISKALERT

the **Excess** paid by the **Insured** in respect of such **Claim**.

38. If the **Insured** gives notice during an **Insurance Year** of any circumstance, act, error or omission (or a related series of acts, errors or omissions) which may give rise to a **Claim** or **Claims**, then any **Claim** or **Claims** in respect of that/those circumstance/s, act/s, error/s or omission/s subsequently made against the **Insured**, will for the purposes of this policy be considered to fall within one **Insurance Year**, being the **Insurance Year** of the first notice.
39. This policy does not give third parties any rights against the **Insurer**.

HOW THE PARTIES WILL RESOLVE DISPUTES

40. Subject to the provisions of this policy, any dispute or disagreement between the **Insured** and the **Insurer** as to any right to indemnity in terms of this policy, or as to the amount thereof or any other matter arising out of or in connection with this policy, must be dealt with in the following manner:
- written submissions by the **Insured** must be referred to the **Insurer's** internal complaints/dispute team at disputes@lpif.co.za or to the address set out in clause 29 of this policy within thirty (30) days of receipt of the written communication from the **Insurer** which has given rise to the dispute;
 - should the dispute not have been resolved within thirty (30) days from the date of receipt by the **Insurer** of the submission referred to in clause 40(a) above, then the parties must agree on an independent **Senior Practitioner** to whom the dispute can be referred for a determination. Failing such an agreement between the parties, the choice of the **Senior Practitioner** must be referred to the Chairperson of the Legal Practice Council, whose decision will be binding on the parties.
 - the parties must make written submissions to the **Senior Practitioner** referred to in clause 40(b) above.
 - the costs incurred in so referring the matter and making submissions, and the costs of the **Senior Practitioner**, will be borne by the unsuccessful party.
 - the determination of the **Senior Practitioner** will be binding upon the parties unless the unsuccessful party notifies the successful party in writing within thirty (30) days of the date of the delivery of the determination by the **Senior Practitioner** that such unsuccessful party does not accept the determination.

The procedures outlined in sub-clauses (a) to (c) must be completed, the **Senior Practitioner** must have made a determination communicated to the parties, and the unsuccessful party must have furnished timeous notification of non-acceptance of the determination, before any formal legal action may be taken by either of the parties other than an action for enforcement of the determination by the successful party in the absence of timeous notification in terms of clause 40(e) above.

The running of prescription in terms of the Prescription Act 69 of 1969 will be interrupted during the period between the date of the written submission as per clause 40(a) above and the expiry of thirty (30) days from the date of the communication of the **Senior Practitioner's** award to the parties, both dates included, and the **Insurer** undertakes accordingly.

SCHEDULE A

Period of Insurance: 1 July 2023 to 30 June 2024 (both days inclusive)

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

SCHEDULE B

Period of Insurance: 1 July 2023 to 30 June 2024 (both days inclusive)

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

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

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



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

EXECUTOR BOND POLICY

1. GENERAL PROVISIONS

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

2. EXCLUSIONS

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

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

- in respect of previous bonds, or complied with the Terms and Conditions;
- 2.7 the applicant has a direct or indirect interest in the estate for which the bond is requested other than executor fees;
- 2.8 the applicant is an unrehabilitated insolvent, suspended or interdicted from practice, or where proceedings have commenced to remove him or her from the roll of practicing attorneys;
- 2.9 the applicant has either been found guilty by a court or a professional regulatory body of an offence or an act involving an element of dishonesty, or by reason of a dishonest act or breach of a duty, been removed from a position of trust;
- 2.10 the applicant has breached the terms of the policy in respect of any matter where a bond has been issued by the LPIIF.

3. TERMS AND CONDITIONS

- 3.1 An applicant must complete the prescribed application form and provide the LPIIF with all the relevant supporting documents. A copy of the application form is attached as annexure "A".
- 1.2 In the case of an application for co-executorship, each applicant must sign and submit a separate application form and also sign the Undertaking (Form J262E). Each applicant will be jointly and severally responsible for adhering to all the terms and conditions contained in this application.
- 3.3 The applicant undertakes:
 - 3.3.1 to finalise the administration of the estate for which the bond is requested, within twelve (12) months from date of issue. In the event that the administration takes longer than twelve (12) months, the executor shall provide written reasons for the delay and evidence thereof, not later than thirty (30) days before the expiry of the twelve (12) month period;
 - 3.3.2 to provide the LPIIF with information and access to records and correspondence relating to each estate for which the LPIIF has issued a bond, as if the LPIIF were in a similar position to the Master of the High Court (hereinafter referred to as the Master) or any beneficiary. In this regard:
 - 3.3.2.1 a copy of the letters of executorship must be provided to the LPIIF within thirty (30) days of being granted by the Master. Should the applicant fail to provide the letters of executorship to the LPIIF and remain in breach for a period of six (6) months after the initial thirty (30) days pe-

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

resolution is attached as annexure “B”.

3.11 If there is any dispute between the LPIIF and the executor as to the validity of a claim by the Master, then such dispute will be dealt with in the following order:

3.11.1 written submissions by the executor should be referred to the LPIIF's internal dispute team at dispute@lpiif.co.za or to the address set out in clause 6 of this document, within thirty (30) days of receipt of the written communication from the LPIIF, which has given rise to the dispute;

3.11.2 should the dispute not have been resolved within thirty (30) days from the date of receipt by the LPIIF of the submission referred to in 3.11.1, then the parties must agree on an independent senior estates attorney with no less than 15 years standing in the legal profession, to which the dispute can be referred for a determination. Failing an agreement, the choice of such senior estates attorney will be referred to the chairperson of the Legal Practice Council (or his/her successor in title) having jurisdiction over the executor;

3.11.3 the parties must make written submissions which will be referred for a determination to the senior estates attorney referred to in 3.11.2. The costs incurred in so referring the matter will be borne by the unsuccessful party;

3.12 A copy of the executor's current Fidelity Fund Certificate must be submitted annually within (thirty) 30 days of issue, but no later than the end of February each year.

4. LIMITS

4.1 The value of any bond is limited to **R5 million** per estate. The cumulative total of all bonds issued to any one firm will not exceed **R20 million** at any given time.

4.2 If an attorney is part of or holds himself or herself out to be part of more than one (1) firm simultaneously, such attorney shall be permitted to obtain bonds as an attorney only under one (1) firm at any given time.

4.3 In the case of co-executorship, each executor needs to meet the criteria as specified in this document. The limits will apply as mentioned in 4.1 and 4.2 above as if there were no co-executorship.

4.4 No new bonds will be issued where the applicant or the firm has failed to adhere to any of the provisions of this policy.

5. SOLE RECORD OF THE AGREEMENT

5.1 This document constitutes the sole record of the agreement between the LPIIF, the firm and the applicant in relation to the bond to which this document applies.

5.2 This document supersedes and replaces all prior commitments, undertakings or representations, (whether oral or written) between the parties in respect of this application.

5.3 No addition to, variation, novation or agreed

cancellation of any provision of this document shall be binding upon the LPIIF unless reduced to writing and signed by or on behalf of both parties, by authorised persons.

5.4 If there are any material changes to the information contained in this application, the applicant undertakes to inform the LPIIF in writing within fifteen (15) days of such change.

6. DOMICILIUM

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

6.1 LPIIF: 1256 Heuwel Avenue

Centurion

0157

Email: courtbonds@lpiif.co.za

6.2 The Applicant: The address provided in the application form.

6.3 Notices or legal processes may be delivered by hand or sent by electronic mail to the above addresses. The date of receipt by the addressee will be the date of hand delivery or transmission.

6.4 Either party may change its *domicilium* by giving the other party written notice of such change.

7. DECLARATION

If the bond is granted, I agree:

7.1 to fully comply with the terms and conditions contained in clause 3;

7.2 that all estate funds will be invested strictly in terms of the Administration of Estates Act 66 of 1965, the Legal Practice Act 28 of 2014 and the rules and regulations as promulgated in respect thereof;

7.3 to furnish the LPIIF with the annual audit certificates completed by my or our external auditors, verifying the continued existence of the property or funds under my control as executor within thirty (30) days of such certificate being issued.

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

DATED AT ON THIS

DAY OF 20.....

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

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

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

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



APPLICATION FORM FOR EXECUTOR BOND

1. APPLICANT

1.1 Surname :

1.2 Full names :

1.3 Identity number :

1.4 Practitioner number :

1.5 Fidelity fund certificate number :

1.6 Residential address :

Code :

1.7 Cell number :

1.8 Work telephone number :

1.9 Work email address :

1.10 Are you a practising attorney?

YES ☐ NO ☐

1.11 When were you admitted as an attorney?

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

YES ☐ NO ☐

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

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

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

(a) If YES, please provide details :

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

YES ☐ NO ☐

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

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

YES ☐ NO ☐

(a) If YES, please provide details :

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

YES ☐ NO ☐

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

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

2. FIRM

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

2.4 Physical address :

Code :

2.5 Postal address :

Code :

2.6 Telephone number :

2.7 Fax number :

2.8 Does your firm have misappropriation of trust monies insurance?

YES ☐ NO ☐

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

3. DECEASED

3.1 Surname :

3.2 Full names :

3.3 Identity number :

3.4 Date of birth :

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

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

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

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

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

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

Alternatively, you may contact:

- Ms Patricia Motsepe on 010 501 0711 - email patricia.motsepe@lpiif.co.za
- Mr Sifiso Khuboni on 010 501 0717 - email Sifiso.khuboni@lpiif.co.za

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

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

.....

WITNESS (Full names & signature)

.....

APPLICANT (Full names & signature)

.....

WITNESS (Full names & signature)



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

RESOLUTION IN TERMS OF CLAUSE 3.10

In the matter of: Estate Late

-----[the firm of attorneys]

herein represented by:

1. -----
2. -----
3. -----
4. -----
5. -----

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

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

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

1. The firm and its directors or partners will provide full co-operation to the LPIIF in the event of any claim being made against the LPIIF in respect of any fraudulent act, misappropriation or maladministration committed by the firm, or its present or former director or partner or present or former employee, arising out of the administration of an estate in respect of which the LPIIF has issued an executor bond.
2. The firm and its directors or partners will provide full assistance to the LPIIF:
 - 1.1 to institute and prosecute to completion any criminal or civil proceedings brought against any person referred to in 1 above or any individual or entity connected to any fraudulent act, misappropriation or maladministration resulting in a claim for which the LPIIF may have to pay compensation;

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- 1.2 to report any attorney or candidate attorney to the relevant law society or regulator on the request of the LPIIF within thirty (30) days.
3. The directors or partners renounce the legal benefits of “order”, “excussion”, “division”, “cession of action”, “*non numeratae pecuniae*”, “*non causa debiti*”, “*errore calculi*”, “revision of accounts” and all or any exceptions which could or might be pleaded to any claim.

Director / Partner 1 Signature

Director / Partner 2 Signature

Director / Partner 3 Signature

Director / Partner 4 Signature

Director / Partner 5 Signature