

Institutional responses to combat corruption in South Africa

By Melissa Engelbrecht, Legal Intern – Cape Town

In an address to the nation on 23 July 2020, President Cyril Ramaphosa stated that millions of rands of COVID-19 relief funds had been lost to corruption; his first official admission of corrupt practices in this regard. This admission by the President drew the attention of the public, who questioned his ability to steer the country into a corruption-free dispensation. However, the public's reaction seems justified, as this shocking news was contained in a report by the Special Investigating Unit in October 2019, which revealed that the public health sector loses USD 3,2 billion annually to corruption. The frustration directed at the President is therefore due to his failure to deal harshly with corruption, while the issue that has never been holistically addressed is whether the President has personally failed in the fight against corruption.

Anti-Corruption Institutions and their respective roles

Under the South African Constitution, there are four key institutions involved in the fight against corruption, namely; the Public Protector (PP), the National Prosecuting Authority (NPA), the South African Police Service (SAPS), and the Judiciary. This is not an exhaustive list, but these are the key institutions and will be briefly dealt with in turn.

The office of the PP is established under Section 182 of the Constitution to investigate conduct in public administration that is suspected to be improper or result in an impropriety or prejudice. The PP is to report on such investigation and where applicable to take appropriate remedial action. It should be noted that the operations of the PP are not subject to the Executive and the PP is accountable only to Parliament. It would appear that the scope of the PP's mandate includes corruption. Needless to say, it was the PP who realised that former President Jacob Zuma had corruptly benefitted from non-security upgrades performed at his Nkandla homestead, for which he paid back the money.

Section 179 of the Constitution gives rise to the powers of the NPA, described as being responsible for

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instituting criminal proceedings on behalf of the State, and to perform other functions incidental to this core mandate. But for the NPA to carry out its mandate optimally there must be efficient investigation and gathering of evidence. This task is left to the SAPS, responsible for preventing, combating and investigating crime throughout the Republic in terms of Section 205 (2) of the Constitution. The functions of the police and the NPA are interlinked; effective investigation by SAPS leads to a successful prosecution by the NPA. It should be noted that in terms of Section 209 of the Constitution, the President has the authority to appoint other specialised intelligence services to deal with specific tasks.

The last institution directly involved in combating corruption, and arguably the most significant, is the Judiciary. The court system is provided for under Chapter 8 of the Constitution. When the police complete their investigation they

hand over the case to the NPA, although more often than not the investigations are done jointly so that only the relevant issues are focused on. The NPA then institutes the corruption charges in the relevant courts, where the presiding officer is the final arbiter, who pronounces the guilt or otherwise of an accused, and the appropriate sentence.

As seen from the above, the fight against corruption involves various institutions which ought to work efficiently. If one institution is infiltrated, then the whole system fails and all the efforts against corruption become compromised.

Why blame the President?

Of all the institutions discussed above, none is headed by or directly under the control of the President. Yet the President is under attack for failing to combat corruption. Why?

The President is the head of the Executive and the face of the nation.

It is not surprising that the nation is holding him accountable as he is the ultimate authority. As explained previously, corruption investigations are conducted by the SAPS, who are under the authority of a Minister of Police who is appointed by the President. Failure of SAPS to carry out investigations means failure of the respective Minister and, ultimately, failure of the President. In as much as the President does not have control over the NPA and the Judiciary, he influences policy, and we can see some correlation as to why he would be held accountable in this regard as well.

However, this again raises the issue of society regularly putting faith and trust in individuals rather than existing institutions that are in place. A country must have strong institutions which are less likely to become compromised. Importantly, no individual should bear the sole responsibility to fight corruption as we are human, and humans are imperfect. ●

What happens to your assets when you die?

By Mukethwa Chauke – Johannesburg

The concept of succession is not a foreign concept in our African legal system. In customary law the heirs of the deceased were determined through the male line, referred to as the male primogeniture rule, which is well known to discriminate against women. Only the eldest legitimate son of the deceased could inherit, to the exclusion of the other siblings. The customary rule of male primogeniture was declared invalid and unconstitutional by the Constitutional Court in a landmark case of *Bhe v Magistrate Khayelitsha 2005 (1) SA 580 (CC)*, as the rule infringed the rights of equality and human dignity.

When a person dies and leaves assets, a deceased estate comes into existence and it must be distributed through the application of application of the laws of testate or intestate succession.

Testate succession is where the deceased died having left a valid Will. The wishes of the deceased person will be carried out according to what the Will says.

Intestate succession is where the deceased died without a Will or with a Will which was later rejected by the Master of the High Court (hereinafter referred to as the Master) and/or declared invalid by the High Court for certain reasons. In this regard the deceased estate will be distributed through the application of the Intestate Succession Act 81 of 1987.



What happens to your assets when you die?

The deceased estate must be reported to the Master in whose area of jurisdiction the deceased was living prior to his or her death. The estate must be reported within 14 days from the date of death, and any person who is in possession of the deceased person's Will and/or has control over any of the deceased assets can report the death.

The Master will appoint an executor to the deceased estate. The appointment differs depending on the value of the deceased estate and is regulated by section 18(3) of the Administration of Estates Act 66 of 1965 (hereinafter referred to as the Act).

If the value of the estate is more than R250,000 the heirs of the deceased must nominate an attorney who will wind up the estate and prepare and lodge the liquidation and distribution account (hereinafter referred to as the L&D account) with the Master. The L&D account is governed by the provision of section 35 of the Act, and once the Master has approved the L&D account, Letters of Executorship will be issued. Where the value of the estate is less than R250,000 the Master may issue Letters of Authority.

When the Master issues Letters of Authority it is free of charge and legal assistance is not necessary. However, property values are regularly increased by municipalities and this affects the destitute in a negative manner when they want to wind up their loved one's deceased estate through the process of obtaining Letters of Executorship without the use of a private attorney which is beyond the destitute's financial means. If the legal costs are unaffordable to the heirs, it results in many deceased estates not being wound up.

Through my experience as a legal intern at ProBono.Org, I have come across various kinds of deceased estate disputes among siblings. One of the most common is when an heir fraudulently transfers the deceased's immovable property into his/her name to the exclusion and detriment of the other siblings who are the rightful heirs of the deceased. The unscrupulous sibling may go as far as selling the immovable property, even when the deceased's family is occupying the property, to the extent that they end up being illegally evicted from their home.

All the rightful heirs are entitled to the deceased estate, whether in testate or intestate succession. One heir cannot legally act on their own, but must obtain consent from the other heirs. A property that has been fraudulently transferred or sold to a third party without the knowledge or consent of the rightful heirs of the deceased can be challenged, and the ownership or sale of the property declared null and void.

The moment a person dies his or her assets are frozen. If the deceased owns immovable property and has left money and/or any policies, his or her beneficiaries will not be able to claim if the Master has not appointed an executor of the deceased estate.

In conclusion, drafting a valid will is advisable as it can minimise the difficulties that might transpire when administering the deceased estate, the testator has the freedom to indicate what should happen to their assets, who are the heirs and also to nominate the executor of their choice. Any person older than 16 years can draft a valid will. ProBono.Org offers this service free of charge.●



Temporary Employment Services (Labour Brokers) and their future in the South African labour spectrum

By Siyabonga Zondi, Durban Intern

The use of temporary employment services (TES), better known as labour brokers, in the South African labour market has always been a topic that has polarised opinion, in both the political and the legal environment. The Labour Relations Act 66 of 1995 makes provision for a Temporary Employment Service to exist, creating a threefold relationship between the labour broker, the client and the worker.

The call for the removal of labour brokers is one that has been echoed amongst a number of organised trade unions, most notably by South Africa's largest trade union federation, the Congress of South African Trade Unions (COSATU). One of the reasons for this is that in many ways, labour brokers have been supplying what are, in effect, permanent employees to their clients. This means that the worker may essentially perform the same roles and functions as those of a permanent employee of the client but not be afforded the same protections as a permanent employee. This has historically left the temporary employee vulnerable to unfair labour practices, abuse, inhumane and degrading treatment in the workplace and the concomitant fear of termination at the will of the employer, without any concrete legal recourse. Prior to the 2014 amendment, the LRA stipulated that the labour broker (the deemed employer) and the client are jointly and severally liable in respect of contraventions of conditions of service, the minimum and maximum standards as set out in the Basic Conditions of Employment Act 1997 (BCEA), and arbitration awards that regulate the terms and conditions of service. The pre-amendment LRA failed to articulate provisions that expressly protect temporary workers from unfair labour practices, such as unfair dismissals.



It would not be unfair to say that until recently government has not heeded the call to regulate or ban labour brokers with any sense of enthusiasm or urgency. The situation is however more complicated than meets the eye. To simply ban labour brokers to satisfy the calls made by the trade unions represents a conundrum for the government. This is because a large section of the South African workforce is employed by labour brokers and labour brokers are widely considered as a platform for first-time job seekers as well as labourers to secure employment.

In light of all these concerns and the resultant widespread protests against labour brokering, the LRA was amended in 2014 to introduce protections for employees in precarious employment. The amendments did not ban labour brokering, they instead strengthened the regulations to provide greater protection for workers placed in temporary employment services. For the most part, this purpose has had the effect of increased protection for marginal workers and the introduction of a legislative framework to ensure temporary services are indeed temporary. The addition of Sections 198A and D allowed for the parameters of

temporary services to be identified and detailed the protection offered to workers. In *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others CCT 194/1*, the interpretation of the section was tested, and the question was raised whether the deeming provision in the section resulted in a "sole employment" relationship between a worker and a client or a "dual employment" relationship between a labour broker, a worker and a client. The Constitutional Court held that the interpretation of the section must be one that is cognisant of the purpose of section 23 of the Constitution and of the LRA as a whole. The Court interpreted Section 198 to mean that for the first three months the labour broker is the employer and after that period the client becomes the sole employer.

The recent developments in the labour law spectrum have given a strong indication that labour brokers may not be banned for the foreseeable future and that a regulatory approach that monitors and enforces compliance with labour legislation may be the preferred approach going forward. ●

Can an administrator's decision to refuse asylum be substituted by an order of the High Court?

By Obakeng Phatshwane (Candidate Attorney, Fasken)

Given the impact of COVID 19 and the plight of asylum seekers, this decision remains crucial for those seeking asylum. The substitution by a court of an administrator's decision in granting asylum is a remedy that is only available in exceptional cases.

In the case of *Kalisa v Chairperson, Refugee Appeal Board and others* ("the Kalisa case") the court had to decide whether it could substitute an administrator's decision and whether such substitution would be just and equitable.

The Kalisa case involved a Burundian national who had applied to the Refugee Status Determination Officer (RSDO) for asylum. The application had been rejected, and the applicant's appeal to the Refugee Appeal Board (RAB) dismissed. The applicant applied to the High Court to review the RAB's decision, and to substitute it with a grant of asylum.

The court held that substitution was unjustified in that the relevant authority was better equipped to investigate and determine certain aspects of the application and that the court was neither in as good a position as the functionary to make a decision, nor was the decision foregone. Therefore the court ordered that the matter be referred back to the administrator, and that the applicant be allowed to make a new application for asylum.

The primary factors taken into consideration by the court when substituting an administrator's decision were:

- whether the court is in as good a position as the administrator to make the decision; and
- whether the decision of the administrator was a foregone conclusion.

In respect of the former enquiry, the court must be satisfied, on the

basis of the evidence presented to it, or by virtue of its institutional competency, that granting such substitution order would comply with the constitutional requirements of lawfulness, reasonableness and procedural fairness.

Where a court is not in as good a position than the administrator but the administrator's bias or incompetence renders it unjust to refer the matter back to such administrator for consideration, a court might be required to devise a remedy not identified in terms of section 8 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

Other secondary factors to be considered include delay, bias or incompetence on the administrator's part. In asylum matters the prejudicial consequences of a delay would justify the granting of asylum

only where it is sufficiently clear that the applicant qualifies for refugee status. The onus is on the applicant to furnish sufficient evidence to the court that he/she qualifies for refugee status.

Legal Position

The judgement is an indication that the court would be unlikely to step into the shoes of the administrator or elect to substitute a decision of an administrator unless exceptional circumstances exist requiring the court to do so. An applicant looking to succeed with an application for a substitution order must in this instance furnish sufficient evidence indicative of the existence of exceptional circumstances, failure of which the court will refer the matter back to the administrator for consideration. ●



Guest Slot



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City of Johannesburg's Expanded Social Packages

Introduction

The City of Johannesburg ("The City") has a number of financial assistance measures in place for its consumers. Each of these measures has their own specific requirements that a consumer would have to meet in order to qualify. Examples include the Pensioners' Rebate and the Expanded Social Package.

What is the ESP?

The City rolled out its Expanded Social Package ("ESP") several years ago. The ESP is a social welfare programme facilitated by the Social Development Department of the municipality, with a view to provide much needed financial assistance to owners/occupants of residential properties who have a limited income and are not pensioners. The ESP is designed to provide a "basket of benefits" to owners/occupants who qualify as "indigent".

Who is the ESP intended to benefit?

The ESP is intended to target the vulnerable residents within the jurisdiction of the City such as the unemployed, women and children, youth, senior residents, persons with disabilities and displaced persons. Since July 2019, the ESP has provided its benefits to approximately 30,000 residents.

What benefits does the ESP offer?

The ESP provides rebates on water, electricity, sewer and refuse, and property rates on a tiered system, dependent on the level of poverty of the consumer concerned.

For the unemployed and working age residents (aged 18-59), a rates rebate will apply if the property in question is under R500,000.00 and, for pensioners, rebates for rates, sewer and refuse are available for properties valued under R2,500,000.00.

How do I qualify?

In order to qualify for the ESP, an individual or household must:

- i. be a South African citizen;
- ii. reside within the City's boundaries;
- iii. have a monthly income of less than the

prescribed amount, currently R6,086.37; and

iv. re-apply every six months. For bedridden or chronically ill patients, the Social Development Department offers social worker services by way of home visitations, affording these people the same opportunity to access the programme. However, during the current COVID-19 outbreak and the required social distancing measures, it would be irresponsible and impractical for the City to require beneficiaries of the ESP to have to attend Council to renew their ESP. As such, the City has extended the ESP, and, as such, current beneficiaries whose registration would expire between March and June 2020 will have an additional six months prior to having to re-apply for the ESP.

Other Benefits

The ESP programme is also linked to the City's food bank and beneficiaries of the ESP also qualify for referral to other services offered by the City, such as Skills Development and Intervention Programmes.

ESP during COVID

It would seem that, despite the difficulties posed by the current lockdown, the City has continued to provide such an essential service and package to its residents. Arguably, now more than ever, such a programme is essential due to the struggle to acquire an income. The City may see more of its residents applying for access to the ESP.

The Future of the ESP

The City is reviewing the current rebates offered under the ESP. While this is a positive move by the City in better providing for its residents, it has yet to provide further specifics on what the plan for extending access to the ESP will be.

While the City decides on what expansions will be made in the form of relief for its residents, the City is still accepting applications for its already existing relief schemes, such as the pensioners' rebate and the ESP.

Should you require any assistance in dealing with any City of Johannesburg issue, please do not hesitate to contact us. ●

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