



# LIVINGSTON LEANDY

## NEWSLETTER

No. 62

August 2017

## IN THE WORKPLACE

### IS YOUR RIGHT TO PRIVACY PROTECTED?

In our December 2016 newsletter we highlighted the pitfalls of ill-considered posts on social media platforms. Many people have increased their privacy settings in the hope of keeping social media posts within the confines of a certain network of contacts. But did you know that your constitutional right to privacy is not absolute when it comes to social media and the workplace?

In the 2015 judgment *Harvey v Niland and Others*, the Eastern Cape Division of the High Court ruled that communication taken from Facebook was admissible, despite the fact that the owner of the account had not given permission.

Gregory Harvey and Bruce Niland were members of a close corporation, *Huntersville Safaris CC*, a business providing hunting services. Bruce Niland was also an employee of *Huntersville Safaris*. Following a dispute, the parties decided to part ways. Despite remaining a member of *Huntersville Safaris CC*, Niland became an employee of a direct competitor, *Thaba Thala Safaris*.

Shortly after Niland left

*Huntersville Safaris*, Harvey became suspicious that Niland might be contravening his fiduciary duty to *Huntersville Safaris* by actively approaching existing clients and diverting them to *Thaba Thala*

*Safaris*. The parties' attorneys exchanged correspondence in which Harvey alleged that Niland had breached his fiduciary duties.

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*Funda Nkonzombi*



*Hlengiwe Skosana*

## TWO NEW APPOINTMENTS

### **Funda Nkonzombi**

Funda graduated in 2015 with an LLB degree from Walter Sisulu University. In 2017, she successfully completed a Compliance Management Course through the University of Cape Town and is currently pursuing a Master's Degree in Business Law (LLM) at the University of KwaZulu-Natal. Funda served her articles of clerkship at a law firm in Umhlanga and was admitted as an attorney in 2017. She has experience in third party litigation and personal injury claims. Away from the office, Funda enjoys dining out, adventurous activities and being physically active.

### **Hlengiwe Skosana**

Hlengiwe studied at NMMU in Port Elizabeth, where she obtained her LLB degree. After graduating, she served her articles of clerkship in Port Elizabeth and was admitted as an attorney in 2013. She worked as an Associate, gaining experience in civil litigation and labour law. In June 2017, Hlengiwe relocated to Durban and joined LLI, where she continues to specialize in labour law and civil litigation. In her spare time, Hlengiwe enjoys going to gym, running and spending time with family and friends.

# IN THE WORKPLACE, CTD

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In response, Niland denied that he had breached his fiduciary duties to Huntersville Safaris but undertook to refrain from approaching Huntersville Safaris' clientele.

At this stage, an employee at Huntersville Safaris informed Harvey that she knew the password to Niland's Facebook account. Various posts and private communications were copied and used as evidence in High Court litigation, showing that Niland had in fact been directly contacting Huntersville Safaris' clients. In Niland's replying papers, he argued that he had never given out his password and that he had essentially been hacked in accordance with section 86(1) of the Electronic Communications and Transactions Act of 2002, which states that 'a person who intentionally accesses or intercepts any data without authority or permission to do so, is guilty of an offence.'



In his judgment, Judge Plasket accepted that Harvey had acted unlawfully in accessing Niland's Facebook communications without his permission. However, he stated that the information accessed from Facebook was relevant to the business of Huntersville Safaris and to Niland's fiduciary duties to it. Judge Plasket recognised that Harvey did have access to other legal options in order to compel Niland to provide the information found on Facebook but, from a practical perspective, Harvey had merely had a suspicion of Niland's wrongdoing. Without the unlawfully obtained Facebook communications, Harvey would not have been able to institute action against Niland.

Judge Plasket ultimately ruled that Niland's right to privacy was not absolute and that in the circumstances - particularly in the light of his denial of acting contrary to his fiduciary duties and having undertaken not to do so - he should not be allowed to hide behind his expectation of privacy. The Facebook communications thus constituted admissible evidence in court, despite having been unlawfully obtained.

This case serves as an important reminder that one's right to privacy is not absolute, especially when a personal social media account adversely affects one's former or current employer's business.

*Contributed by Ishara McKenna,  
candidate attorney*

## WHO IS THE EMPLOYER? THE LABOUR BROKER OR THE CLIENT?

**A**t the onset of an employment dispute, it is essential to ascertain who the employer and who the employee are. If an employment relationship is not established, the legal proceedings will be dismissed on that ground alone.

The 2014 amendments to the Labour Relations Act 66 of 1995 (the LRA) changed the law pertaining to the relationship between labour brokers (referred to in the LRA as Temporary Employment Service or TES), the placed worker, and the client.

Section 198 A(1) of the LRA defines a 'temporary service' as a period not exceeding three months; a substitute for an employee of the client who is temporarily absent; or for any period of time determined in a collective agreement, or a sectoral determination or notice published by the Minister of Labour.

Section 198 A(3)(b)(i) of the LRA provides that a person placed by a labour broker to work for a client who is not performing a temporary service as defined by the LRA is deemed to be an employee of the client and the client is deemed to be the employer. The controversial issue surrounding this section is that it appears to conflict with section 198 (2) of the LRA, which provides that a person placed by a labour broker is an employee of the labour broker.

What creates more confusion is that sections 198 (4) and 198 (4A) of the LRA state that a labour broker, a client, or a client who is deemed to be an employer, are jointly and severally liable for the labour broker contravening a collective agreement, sectoral determination, arbitration award or the Basic Conditions of Employment Act 75 of 1997.

Which raises the question: who is the employer?

In NUMSA v Assign Services & Others (Labour Appeal Court (LAC) the labour appeal court was tasked with clarifying whether the labour broker remains the employer of the placed worker or whether both the labour broker and the client are the placed worker's employer, when section 198 (3)(b)(i) of the LRA is triggered.

The effect of the LAC judgment is that a placed worker, whilst performing a temporary service, is an employee of the labour broker. However, where the placed worker is not, or is no longer, performing a temporary service, the worker is the employee of the client.

*Contributed by Hlengiwe Skosana,  
an associate in the labour department*

# NEW BITE ON INTEREST-FREE LOANS TO TRUSTS

Trusts are often used as a tool in estate or succession planning and commonly acquire assets from natural persons by way of low-interest or interest-free loans, which are recorded as credit loan accounts in the trust. Over time, the natural person donates his tax-free R100 000 per annum to the trust in reduction of the loan account, with the object of extinguishing the loan by the time of his death.

Section 7C of the Income Tax Act came into effect on 1 March 2017, with the intention of curtailing the ability of persons to transfer their wealth to their trusts without being subject to tax, and to widen the tax base. This provision applies where a loan is made available to a trust and no interest is payable on the loan, or interest is payable at a rate lower than the official rate of interest, which is currently 8%. The loan is made available to the trust by a natural person or a company that is a connected person to that natural person, and that person is also a connected person in relation to the trust. Section 7C applies to any amount owed by a trust in terms of a loan, advance or credit, whether that amount was provided to the trust before, on or after 1 March 2017. As a consequence, existing loans prior to this date will also be subject to these provisions.

What does it mean? In essence, where the trust incurs no obligation to pay interest or pays interest at a rate lower than the official rate, the difference between the interest obligation incurred by the trust and the amount that it would have incurred if the interest was levied at the official rate will be treated

as a donation for donations tax purposes.

An example is when a founder lends his trust R2.5m interest free. There will be a deemed donation of R200 000 (R2.5m x 8%) per annum, resulting in the founder's tax liability being increased by R40 000 (R200 000 x 20% being the rate at which donations are taxed) on the assumption that the donations exemption of R100 000 per annum was used elsewhere.

What are the exclusions? The following are excluded from the application of this new provision:

- loans to special trusts established solely for the benefit of persons with disabilities
- loans to trusts registered with SARS as Public Benefit Organisations
- loans to vesting trusts where the rights of beneficiaries are clearly established
- loans to the extent that the loan is used by the trust for funding the acquisition of the primary residence of the lender
- international loans where non-arm's length loans are subject to adjustment in terms of special tax rules in section 31 of the Income Tax Act
- loans in terms of Sharia-compliant financing arrangements
- loans which are deemed to be dividends

What are the solutions? These will depend on the circumstances of each trust but could include:

- the trust repaying the loan

- the trust repaying the loan account by ceding a right to the income of the trust
- making use of the R100 000 annual donation tax exemption which will, where no other donations are made, have the effect that loans under R1 250 000 will not attract tax under section 7C
- making use of donations between spouses which are currently tax free with the result that one spouse may, therefore, donate a portion of his/her loan account to his/her spouse, thereby reducing his/her tax liability under section 7C
- setting off of credit and debit loan accounts or repaying a loan owed by the trust to a beneficiary by vesting of a loan owed to the trust in one of the beneficiaries
- making use of corporate rollover rules to transfer the assets of the trust to a company owned by the trust and, as part of the transaction, transferring the loan to the company as well.

Any existing low-interest or interest-free loans to trusts will need to be dealt with prior to 28 February 2018 in order to avoid the possibility of such loans being subject to donations tax.

Should you have any concerns in this regard, contact either Lance Coubrough or Mike Nolan for assistance.

*Contributed by Mike Nolan, a director in the deceased estates and estate planning department*

## NEW CANDIDATE ATTORNEYS



*New Candidate Attorneys, from left, Mohamed Mota, Thando Ndabeni and Hussain Khan.*

# WOMEN'S DAY TALK INSPIRED US

Livingston Leandy invited our female clients to celebrate Women's Day at the Oyster Box Hotel on 11 August 2017. The guest speaker was Mandy Ramsden, the first South African woman and the first woman to climb the highest peaks on each of the world's seven continents. Mandy's inspirational talk motivated everyone to dig deep and continue reaching for their goals.



LLI Staff (L-R) Claudia Harris, Ishara McKenna, Subashnee Moodley, Hlengiwe Skosana and Leanne Ross.



Clients attending the Women's Day function.



L-R: Mandy Ramsden (Guest Speaker), Naomi Williams (LLI Director), Sonya Stewart (LLI Director) and Subashnee Moodley (LLI Managing Director).

# ACCESS TO INFORMATION – PRIVATE BODIES

The Constitution provides that everyone has the right of access to information held by the State and by a private body, and requires that national legislation be enacted to give effect to this right. In keeping with this Constitutional duty, Parliament passed the Promotion of Access to Information Act (PAIA).

Whilst it is commonly understood that this right exists with regard to information held by public bodies (any department of state or administration in the National, Provincial or local sphere of government), what is not as readily understood is that this right also extends to private bodies in certain circumstances. Private bodies under PAIA include any natural person who carries on any trade or business or profession, but only in that capacity, companies and trusts, and any trading or business partnership.

When seeking information from an organ of State (a public body), the requester is entitled to such information provided the procedural requirements set out in PAIA are met and no specified grounds for refusal exist. Grounds for refusal include protection of the privacy of a third party who is a natural person, protection of certain records of SARS, protection of trade secrets of a third party, protection of the safety of individuals and protection of property, as well as protection of police dockets in bail applications and information which could cause prejudice to the defence or security of the Republic.

Information held by private bodies is, however, treated differently in that, before looking at the issue of whether or not the procedural requirements of PAIA

have been met and determining whether there are any grounds for refusal, the requester first has to show that the record is required for the exercise or protection of any rights.

The interpretation of the provision that “the record is required for the exercise or protection of any rights” was recently dealt with by the Supreme Court of Appeal in a judgment delivered on 7 June 2017.

In this case, which was based on similar facts to the famous silicosis (a lung disease caused by the inhalation of dust) class action, information was sought by two individuals from Anglo Gold Ashanti, a mining company. In the silicosis class action, 56 miners proceeded against the mining house, however the two individuals seeking information in this application were not part of this class action suit. The two requesters required access to 10 documents held by the mining house as they intended to bring an action for damages and the documents requested would assist them and their lawyers in determining whether they had a good claim against the mining company for harm and loss suffered as a result of having contracted silicosis while at work on the mines.

The documents requested would show whether the mining house had complied with its general duty to provide and maintain a safe and healthy working environment for its employees in terms of the Mine Health and Safety Act.

The Supreme Court of Appeal held that, in determining whether the information is required for the exercise or protection of any right, the term “required” must be read as “reasonably required” and the requester must establish “substantial advantage” or an “element of need”, with the facts of each case determining whether this test has been met. When requesting information, the requester must state what right he wishes to exercise or protect and precisely what information is required and how that information will assist him in exercising or protecting that right.

The court found that in this case, the right which the requesters wished to exercise was the right to claim damages and that the information requested would assist in determining whether the mining house had complied with various provisions of the Mining Act. None of the information requested would, however, assist the requesters in asserting a right to claim damages or to formulate their claim. They already had enough information to bring the damages claim and the court held that the information requested did not relate to the exercise of a right to claim damages, but rather

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## ANNUAL GOLF DAY HOSTED



*Seen at the LLI Annual Golf Day, held at MECC on Friday 2 June 2017 were, from left, Patrice Rey, Rodger Shillaw, Mike Nolan and Craig Lithgow.*

## WE SERVED 67 MINUTES ...



Many LLI staff members served their 67 Minutes for Mandela Day at the Domino Foundation on 18 July 2017.

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to an evaluation of the merits of the proposed case.

The court held that it is necessary to avoid PAIA applications being brought under the Act purely to obtain premature discovery when pretrial court discovery procedures will adequately address the exchange of information and documents. The fact that the silicosis class action was based on the same facts as the proposed action by the applicants did not help their cause as in the class action,

no additional documents were necessary to enable the litigants to formulate their damages claim.

The court accordingly denied the request as it was not reasonably required to exercise the right to claim damages since the documents were sought more to acquire evidence to prove their claim when it ultimately went to trial.

It is important for those seeking information from private bodies to properly formulate their request for documents so as to comply with PAIA and also to properly

motivate their reasons for such a request. Private bodies being exposed to such requests should also interrogate the reasons for the request and test such reasons against the provisions of Section 50 of PAIA, so as to determine whether the information is required for the exercise or protection of any rights or whether it is merely a fishing expedition to secure evidence in advance.

*Contributed by  
Kay Naidoo,  
director in the  
litigation department*



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## SCAM ALERT

*We wish to remind our clients that, once banking details have been provided, we will NEVER change those details during the course of the transaction. Any notification purporting to be sent by us and advising of any change in our banking details should not be acted upon and reported to us immediately as it will, in all probability, be a scam.*