A NEW FUTURE FOR FAMILY LAW: SIGNIFICANT CHANGES TO r 43 APPLICATIONS

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10 A new future for family law: Significant changes to r 43 applications

Legal practitioner, Maresa Kurz, discusses the case of E v E and related matters [2019] 3 All SA 519 (GI), which brought about significant changes in r 43 applications, and divorces in general. The judgment was made pursuant to an order by van Vuuren AJ on 20 September 2018, when three r 43 applications were referred to a Full Court of the Gauteng Local Division of the High Court in Johannesburg under s 14(1)(b) of the Superior Courts Act 10 of 2013, as the conflicting judgments of that division brought Uniform subsbs 43(2) and (3) into focus.

14 Adding fuel to the fire – what is the remedy to curb violent strikes?

Section 23(2)(c) of the Constitution guarantees the right of workers to strike. Chapter IV of the Labour Relations Act 66 of 1995 (LRA) facilitates the exercise of this fundamental right in practice. Where strike action complies with the LRA’s procedural and substantive requirements, s 187(1)(a) provides workers with protection against dismissal and s 67(2) and (6) with immunity from delictual and contractual claims arising from participation in a protected strike. In short, the LRA does not make it unduly difficult for workers to embark on protected strikes. However, it is equally well known that protected industrial action is frequently accompanied by violence. In this article, candidate legal practitioner, Geoffrey Allsop, examines whether the solution to curbing violent strikes by forfeiting protection is the answer.

17 Unlocking the issue: When to arrest without a warrant when a dangerous wound is inflicted

In practice, a police officer may arrest a suspect with or without a warrant but only when there are prescribed jurisdictional factors, prior to effecting an arrest. In this article, legal practitioner, Nicholas Mgedeza, examines the situation where a police officer effects an arrest without a warrant – on reasonable suspicion that a dangerous wound has been inflicted. This article also seeks to lay out the circumstances, which need to be considered to determine whether such an assault where a dangerous wound is inflicted, falls under s 1 of the Criminal Procedure Act 51 of 1977. The focus will primarily fall on s 40(1)(b), which provides that the offence of assault where a dangerous wound is inflicted, is an offence for which a police officer may arrest the suspect without a warrant if there is a reasonable suspicion for commission of the offence.

19 Jumping from one retirement fund to a rival: Can it be done during your period of employment?

In Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) and Others [2016] 4 All SA 761 (SCA), an intense competition for members between rival retirement funds was highlighted. This raised three legal questions that not only the Pension Funds Adjudicator but also courts have been called on to answer: First, can members while they are actively employed, choose the fund they wish to join? Secondly, can members during the period of their employment voluntarily withdraw from their funds with a view to joining a rival fund? Thirdly, can members voluntarily initiate a process that would lead to their fund credits being transferred to a rival fund, which is associated with their employer? In this article, legal practitioner, Clement Marumoagae, examines whether the Pension Funds Act 24 of 1956 provides a legal framework that can assist South African courts to answer these questions.

DE REBUS – NOVEMBER 2019
Calling all attorneys: Have you been part of the establishment of the provincial attorneys’ associations?

In the past few weeks the Law Society of South Africa (LSSA) has been holding meetings for the establishment of provincial attorneys’ associations in the nine provinces of South Africa. The purpose of the meetings is to discuss the establishment of provincial associations as set out in the preamble of the LSSA constitution, which states:

“We, the representatives of legal practitioners in South Africa, the Black Lawyers Association, the National Association of Democratic Lawyers, the Independent Lawyers Association of South Africa, the Law Societies of South Africa, in recognising the changes brought about by the Legal Practice Act:

• having noted that the impact of the Legal Practice Act and agreed to the restructuring of the legal profession and its governing bodies and having adopted the principles contained herein;
• having agreed in principle to the creation of a national voluntary structure with a national executive body to represent the profession;
• having agreed that the new national structure shall be neither unitary nor federal but could comprise elements of both;
• having co-operated formally since July 1996 via an agreement between the Black Lawyers Association, the National Association of Democratic Lawyers, the Law Societies of the Free State, KwaZulu-Natal, the Northern Provinces and the Cape Provinces;
• having decided to further transform the governance and representation of the legal profession in South Africa;
• having noted that the provincial law societies will cease to exist, the local associations or circles will form a provincial lawyers’ association in each province. These associations shall consist of the Black Lawyers Association, the National Association of Democratic Lawyers and the independent constituents. The independent attorneys of each of the provincial associations shall nominate a provincial representative to the House of Constituents;
• having noted that the Legal Practice Act places the regulatory functions with the Legal Practice Council;
• committing ourselves to building a transformed organised legal profession which is non-racial, non-sexist, democratic, representative, transparent and accountable to all whom it serves and the public at large; and to that end we shall strive to advance the interests of women, the youth and people living with disabilities;
• committing ourselves to protecting and advancing the rights and interests of our members in relation to the regulatory activities of the Legal Practice Council and other authorities; and
• committing ourselves to influence the transformation of the economic structure in South Africa in order to advance the interest of our members, particularly the previously disadvantaged (see www.LSSA.org.za).

At the inaugural LSSA attorneys’ association establishment meeting held in East London on 2 October, the President of the LSSA, Mvuzo Notyesi, said that the independence of the profession must be preserved. Mr Notyesi highlighted the fact that the 23-member Legal Practice Council (LPC) has diverse interests and that the LPC’s sole role is to regulate the profession. Mr Notyesi reiterated the importance of the role the LSSA plays in the day-to-day running of attorney practices. He said that it would be difficult to question organisations and law makers if there is no LSSA to speak on behalf of the profession. He asked who would escalate unfair legislation or unfair pricing/fees if there is no LSSA? At times, the LSSA stops matters affecting attorneys long before the attorneys are aware of such matters (see ‘inaugural LSSA attorneys’ association establishment meeting held’ www.derebus.org.za, accessed 23-10-2019).

As an attorney, it is in your best interest to be part of the formulation of the provincial attorneys’ associations. The LSSA will be sending out invitations, during the next few weeks, to the meetings that will be held across the nine provinces. If you have missed a meeting, there is likely to be a follow-up meeting that you can attend in your province. Please visit the establishment meetings page on the De Rebus website to see when a meeting will be held in your province www.derebus.org.za

Would you like to write for De Rebus?

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

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

• Please note that the word limit is 2000 words.
• Upcoming deadlines for article submissions: 18 November and 20 January 2019.

Mapula Sedutla – Editor
Adapting to and adopting technology: Future proofing your law firm

By Thomas Harban

In the article by Emmie de Kock ‘Are you building a law firm of the future?’ 2018 (May) DR 20, Ms de Kock highlighted some of the external factors and technological advancements of which legal practitioners should be aware of. The aim of this article is to highlight some of the practical examples of measures that firms can implement to exploit the opportunities created by the new technologically driven environment.

In the past decade there have been major advances in various technological sectors. The advances in technology have resulted in major changes to the manner in which we communicate, disseminate and consume information, conduct financial transactions and even how we relate to each other. As the world in which law firms exist has adapted to and adopted these new technological advances, law firms must similarly adapt and adopt the new world in which they exist if legal practice – as we know it to-date – is to continue to be relevant and commercially viable. The profile of legal practitioners has also changed with (often younger) more technologically savvy practitioners entering the profession.

There have been many articles written on the topic of law firms of the future and also around the question of whether major advances in various technological sectors are many firms who still operate on a paper-based diary system in the form of a physical book. Such a system relies on the practice of keeping paper-based records, which is inefficient and not cost-effective. Technology can be seen as a potential disruptor or a tool to be used to better provide legal services in a more efficient and cost-effective manner. Technology cannot be ignored. The emergence of the legaltech industry is a reality of which legal practitioners must take note.

The need to adapt to and adopt technology

It is often said that the legal profession is, in many ways, conservative and slow to adapt and adopt changes. While the truth or otherwise of this general statement can be argued ad infinitum, in order to remain relevant, the profession must avoid being ‘so last century’ (to use modern day parlance).

As the broader world in which legal practice exists and is conducted changes, so is the need for the legal profession to change in line therewith. In our line of work at the Legal Practitioners Indemnity Insurance Fund NPC (the LPIIF), we have the opportunity to interact with a broad range of legal practitioners. Broadly speaking, there are many firms, which have adopted technology and implemented a number of appropriate technological solutions, which help run various aspects of their operations. On the other hand, there are many (particularly smaller practices) which – for a variety of reasons – have not embraced and implemented technological solutions in their practices. Many firms still, unfortunately, operate using manual and paper-based systems. Admittedly, the extent to which a firm may need to embrace and implement technological solutions will be determined by a number of factors including the areas of practice, location, including the size and structure of the practice. However, every firm needs technology to some extent in order to operate in the modern era. As the consumers of legal services become more technologically advanced, their expectations of a corresponding advancement in the technological solutions utilised by the service providers they choose to engage will commensurately grow.

In analysing the underlying reasons for the prescription of claims for example, it is concerning to note that there are many firms who still operate on a paper-based diary system in the form of a physical book. Such a system relies...
on the accurate capturing of information and regular updates made as and when changes occur. Human error is always a factor in these circumstances. The single diary could also either be lost or destroyed, resulting in the firm losing valuable information and running the risk of making important dates in respect of the various matters it is dealing with – these could be prescription dates, court dates, dates for lodgement of important documents such as trade mark renewals, appeals or even dates for consultations and meetings. Suggestions to such practitioners that consideration be given to utilising one of the many electronic diary systems available have, at times, been met with surprise or even doubt. Despite the number of claims arising in such instances from a failure of the manual diary systems, the practitioners concerned (and their support staff) often go to extraordinary lengths in explaining the supposed reliability of the manual systems they have in place.

A few years ago, a legal practitioner reported that a fire in the office block in which he practised at the time had destroyed large parts of the building, including his practice with all the paper-based files. There had been no system of electronic storage (offsite or in some other web or cloud storage solution) and the process of reconstructing the files had been a long, expensive and tedious one. It is not known how many matters (and clients) that legal practitioner managed to salvage after his entire professional life literally went up in smoke, so to speak. Had an electronic solution been in place, the files could have been retrieved.

As part of the International Bar Association’s 2017 Annual Conference in Sydney, Australia, visits to law firms in that city showed the benefits of using technology to not only increase profitability in terms of turnaround times for the finalisation of instructions, the benefits of using technology to enable staff to work remotely and the savings in terms of the overhead costs of the firms using paperless filing systems. In one firm, a demonstration was given on the benefits of using a technology-based project system for all areas of its commercial work, which meant that learnings from each instruction were shared within the firm in real time and, in dealing with similar instructions, legal practitioners had the benefit of access to similar work carried out by their colleagues.

Another legal practitioner practising in one of the smaller towns has reported on how, in order to avoid having to use Internet banking (which he says he does not trust or understand), he carries all documents relating to his trust and business banking with him in his pilot case wherever he goes. This legal practitioner reports that all his payments are made when he physically visits at his local bank branch on a predetermined day during the week with the recipient of the funds accompanying him. Even salary payments to staff are done in this way. While this legal practitioner may be a low risk when it comes to cybercrime and falling victim to hacking scams, the risk (and inefficiencies) of this method of doing financial transactions is numerous. What would happen if, for example, this practitioner was unable or unavailable to get to his branch timeously when a payment was due or his diary and that of the intended recipient of the funds clashed? Internet banking, while it is not without risk, is a secure and efficient manner of making payments.

Operating without the proper use of technology also open up legal practitioners to the potential for regulatory action. We have seen that many legal practitioners use e-mail domains such as Gmail, Yahoo, Webmail and the like as their official e-mail addresses for their practices. Legal practice, by its nature, involves the receipt and exchange of information, which may be confidential. Many of the e-mail domains used by practitioners do not have the necessary security features to ensure that data is stored or transmitted in a manner that meets the required standards in terms of security. Such e-mail domains may also not have adequate firewalls and also be susceptible to hackers. A breach of the information on the part of the legal practitioner will open up liability in respect of claims and regulatory action by various authorities. Storing the research on legal topics or the databank of precedents built up over many years in practice on a memory stick or the hard drive of a computer also places the legal practitioner at risk.

The display of nicely bound law reports in the library or office of a legal practitioner may be a beautiful sight to behold and add to the ambiance of the office premises, but there are many electronic solutions and tools available, which allow legal practitioners to conduct research in respect of judgments, legislation and other research material.

What do law firms need to do?
I am not aware of any comprehensive survey conducted on technology and the South African legal profession. In its Law Firm’s Survey (www.pwc.co.uk, accessed 30-9-2019) of the top 100 firms in the United Kingdom (UK) in 2018, PWC reported that -

- 100% of top 10 and 40% of top 11 to 25 firms view technology as the key challenge facing the legal sector over the next two years;
- 82% of respondents indicated that cyber threats will have an impact on their future growth ambitions; and
- 63% reported on the concerns about
The PWC report poses the following questions for legal practitioners:

- Are the technology ‘basics’ in place that allow the firm to operate effectively on a day-to-day basis?
- Does the firm have a technology improvement plan?
- Is the firm aware of all available emerging technologies and does it know which ones have a ‘best fit’ for the organisation?
- Is the firm able to ensure all new technologies adopted are secure?

The main risks identified in the PWC survey are information security and data loss, business continuity and financial crime.

While the South African legal profession is conducted in a commercial, geographical and socio-political environment, which differs from that of the UK, many lessons can be drawn from the PWC report.

Conclusion

Law firms must embrace technology in order to meet the current and future needs of clients and the broader operating environment. In the words of William Gibson: ‘The future is already here – it’s just not very evenly distributed’ (Sabrina Weiss ‘Building the Law Firm of the Future – The Shape of Things to Come’ www.vista.blog, accessed 30-9-2019).

The Financial Services Tribunal is ready for action

The Financial Sector Regulation Act 9 of 2017 (the Act) establishes the independent Financial Services Tribunal (the Tribunal) in terms of s 219 thereof. The Tribunal replaced the Financial Services Board’s Appeal Board and came into effect on 1 April 2018.


Since 1 August, the Tribunal has been operating from its new premises at Kasteel Office Park Orange Building (2nd Floor), 546 Jochemus Street, Erasmuskloof, Pretoria. All Tribunal hearings will take place at the new premises. The current chairperson of the Tribunal is former Constitutional Court Judge, Yvonne Mokgoro.

The Tribunal

The purpose of the Tribunal is to reconsider decisions. According to s 219 of the Act, the Tribunal is established to reconsider decisions as defined in s 218 and to perform the other functions conferred on it by the Act and specific financial sector laws.

Section 218 of the FSR Act defines ‘decision’ as including, for example, ‘a decision by a financial sector regulator or the Ombud Council in terms of a financial sector law in relation to a specific person’ or ‘a decision of a statutory ombud in terms of a financial sector law in relation to a specific compliant by a person’.

Section 219(2) of the Act, states that the Tribunal is independent, impartial and exercises its powers without fear, favour or prejudice. It is a tribunal of record and must perform its function in accordance with the Act and the specific financial sector laws.

The members of the Tribunal are appointed by the Minister of Finance in terms of s 220 of the Act. The requirements of who can be members of the Tribunal are contained in s 220 of the Act and include a requirement that at least two of the members must be retired judges, or persons with suitable expertise and experience in law and at least two other persons with experience or expert knowledge of financial products, services, instruments, market infrastructures or the financial system.

The chairperson of the Tribunal has an obligation to constitute a panel of the Tribunal for each application for reconsideration of a decision. Section 224 of the Act provides that the decision of the panel in respect of the application for the reconsideration of a decision is the decision of the Tribunal.

The Tribunal has been accorded with the power to make its own rules. Section 227 of the Act states that the chairperson may make rules for procedure to be followed in proceedings on applications for reconsiderations of decisions, and the conduct of those proceedings and may at any time amend or revoke them.

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PRACTICE NOTE – BANKING AND FINANCE LAW
Applications before the Tribunal

An application for the reconsideration of a decision is basically an application to revise the decision as contemplated in s 218 of the Act. In terms of s 230 of the Act, the aggrieved party may apply to the Tribunal for a reconsideration of the decision.

It is critical to note that in terms of s 231 of the Act, an application for reconsideration of the proceedings regarding the application do not automatically suspend the decision of the decision maker. The decision can only be suspended if the Tribunal orders that such decision be suspended.

Section 229 of the Act deals with matters relating to the rights of persons to be provided with reasons for the decisions taken. For example, an applicant who has not been provided with the reasons for the decision taken, may within 30 days, request the decision maker for the reasons. In that event the decision maker must – within one month after receiving a request – provide the person with the reasons, which will include a statement of the material facts on which the decision was based.

There are two instances where an application can be made, it can either be in terms of s 230 of the Act, where the applicant has requested reasons, or where within 60 days after the applicant was notified of the decision, or such longer period as may on good cause be allowed.

Proceedings of the Tribunal

The aggrieved party or the decision maker may in terms of s 232(a) be represented before the Tribunal by a legal representative of their own choice. The Tribunal hearings are to be held in public. However, the person presiding over the panel may direct that a person be excluded from a hearing on any ground. The grounds on which the person may be excluded are expected to be more or less the same as those that exclude a person from civil proceedings before the High Court.

The proceedings for the reconsideration of decisions are to be conducted in terms of the procedure that are subject to the financial sector laws (for example, the Financial Markets Act) and the Tribunal rules.

Proceedings are to be conducted with as little formality and technicality, as expeditiously, as the requirements of the financial sector laws and a proper consideration of the matter permit. Furthermore, the person chairing the panel may provide directions in order to facilitate the proceedings.

The person presiding over the panel has certain powers conferred on them, which includes calling on a witness to appear before the panel to provide evidence or produce any document. When the witness appears before the panel to give evidence the presiding officer must administer an oath or accept an affirmation from the witness. It is the majority rule when it comes to the decisions of panels. However, in the event that the members of the panel are equally divided in opinion, the opinion of the presiding officer on the panel will prevail.

Tribunal orders

The Tribunal may in terms of s 234 of the Act impose certain orders, which may include the following –

• the setting aside of the decision and remitting the matter to the decision maker for further consideration;
• setting aside the decision and substituting the decision of the Tribunal (decisions in terms of ch 13, para (b) or (c) of the definition of ‘decision’ in s 218 and prescribed by Regulation for the purposes of s 231); or
• dismissing the application.

The Tribunal also has the authority, in exceptional circumstances, to order costs. It may impose an order that a party to the proceedings pay some or all the costs reasonably and properly incurred by the party in connection with the proceedings.

The above orders are, however, subject to any provision of a financial sector law that excludes, restricts or qualifies the orders that the Tribunal may impose in proceedings.

The orders of the Tribunal may be reviewed by the judicial authority. Section 235 of the Act provides any party to the proceedings who is dissatisfied with an order of the Tribunal to approach the judicial authority for review of the order of the Tribunal. This may be either in terms of the Promotion of Administrative Justice Act 3 of 2000 or any applicable law.

A party to the proceedings may in terms of s 234 of the Act file a certified copy of the order with the registrar of a competent court subject to s 236(1)(a) and (b) of the Act. Section 236(2) of the Act states that the order, on being filed, has the effect of a civil judgment, may be enforced as if lawfully given in that court.

Conclusion

The Tribunal has issued new rules, which came into effect on 1 August 2019. The Tribunal Rules and the Tribunal Hearing Schedule are obtainable from the Financial Sector Conduct Authority (FSCA) website at: www.fsca.co.za. Since the Tribunal’s inception in 2018, to date it has heard over 70 matters and all its orders have been published on the FSCA website at: www.fsca.co.za.

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DE REBUS - NOVEMBER 2019

- 7 -
Notes on modulated legal drafting

There are numerous distinct constituents to fine legal drafting, however, its singular nub is located squarely within utilitarianism’s ambit. Beneath the skilled craftsman’s calculated literary ornamentation and far divorced from any aesthetic aspirations he or she may harbour lies the core aims of ‘clarity, conciseness and comprehensive coverage’ (see SF Parham Jr ‘The Fundamentals of Legal Draftsmanship’ (1966) 52 American Bar Association Journal 831).

Parham assumes the first and last (clarity and comprehensive coverage) as essential utilitarian tools to legal writing and the second as not only a device for the furtherance of utilitarian purpose but one which affords the writer mild latitude to demonstrate their literary prowess and flair. An inherent leniency that often compromises clarity as a result of an author’s usage of unwarranted adornment or, alternatively, as a result of a total neglect to consider the relevant audience.

It is within such crevice that I write this article with the aim of providing a few convenient devices through which a drafter may effectively modulate writing to suit ‘simpler’ audiences. The devices contained below may prove effective in simplifying excessive complexity and aiding comprehension.

Discourse structure
The organisation and structural coherence of a sentence or paragraph may be referred to as ‘discourse structure’ (see RP Charrow and VR Charrow ‘Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions’ (1979) 79 Columbia Law Review Association Inc 1306). A purposeful approach to drafting may assist significantly in achieving coherence and eliminating ambiguity. Prior to drafting a particular clause, the drafter must be cognisant of –
• what the intent of the particular clause is; and
• what elements must be present in the clause to satisfy such intent.

A drafter should also consider the most appropriate medium and method of arrangement for the required elements (eg, contingency, chronological order, separation through numbering etcetera). Precise appreciation of the above often translates into more accurate and penetrative construction.

Embeddings, misplaced phrases and word choice
The usage of multiple subordinate clauses within a single sentence (embeddings) is ubiquitous in legal writing. There is consensus that additions, particularly indiscriminate additions, of such clauses tend toward complexity. In fact, many practitioners may improve their own comprehension of sentences by delineating the respective main and subordinate clauses and appreciating them in isolation before understanding them in relation to one another.

Interestingly, a perusal of numerous embeddings indicates the relatively common use of misplaced phrases. The Charrows (op cit), in an interesting study make, inter alia, the following findings on the ability of American jurors to comprehend the following phrase, ‘If in these instructions any rule, direction or idea is repeated…’. They found the following:

‘The placement of the italicized phrase directly after the word “if” confused the majority of the subjects. Since the word “if” is normally followed by the subject of the sentence, most listeners perceived the noun in the misplaced phrase – “instructions” – as the subject of the sentence and paraphrased it as “if these instructions are repeated…”.

Misplaced phrases together with heightened vocabulary and unwarranted jargon are deleterious to mass comprehension and should be used with caution and care.

Nominalisation
A nominalisation is essentially a noun that is constructed from a verb base. This is most commonly achieved through the addition of a present participle ending in ‘ing’ to the verb stem, or the insertion of ‘al’ or ‘tion’ to the verb.

It is trite in linguistic theory that nominalisations (which tend toward abstraction) are less easy to comprehend than their basic verb forms (see E Pavlickova ‘The Role of Nominalisation in English Legal Texts’ in Alena Kacmarova Phd (ed) English Matters III (a collection of papers by the Institute of English and American Studies Faculty) (University of Presov 2012)). Consider, for instance, the following clause: ‘No responsibility or liability shall be borne for any defects latent or patent or for any damage resulting therefrom’. Nominalisation in the sentence is responsible for the absence of the sentence’s true subject and adds unnecessary complexity and opaqueness. Now, contrast this with the sentence here below:

‘The seller shall not be responsible or liable for any defects latent or patent or for any damage caused as a result therefrom.’

It is evidently easier to comprehend as compared to the for-
mer. This is not to indiscriminately charge nominalisation as unnecessary or burdensome on the reader, on the contrary, the use of nominalisation is often convenient and necessary. Regardless, a drafter should be cognisant of their usage of nominalisation and modulate their mode of expression accordingly.

Negatives and passives
Two of the simplest ways of simplifying complexity is through the deletion of multiple negatives and the phrasing of clauses in the active voice (B Kaup and J Ludtke ‘Context Effects when Reading Negative and Affirmative Sentences’ in R Sun and N Miyake Proceedings of the 28th Annual Meeting of the Cognitive Science Society (Psychology Press 2006)).

Negatives, as evident, are words or prefixes that negate. These have been shown to impact adversely on comprehension and it is recommended that negatives be utilised sparingly. Multiple negatives may often be converted to effective positive substitutes (the phrase ‘not irrefutable’ to just ‘refutable’ for instance) and in these instances double negatives serve limited efficacy where such usage negates each other.

Much of legal drafting tends to the passive voice, which has traditionally been considered mildly more difficult to comprehend than clauses phrased in the active voice. This problem may be compounded exponentially as the sentences themselves increase in length and complexity. While the active voice should not be prescribed rigidly, I admit that such consideration could prove moderately useful in certain circumstances.

Conclusion
Language is inexhaustibly vast, and its expression only constrained by one’s own imagination to the extent that the creation of a systemic paradigm of expression is a fool’s errand. Drafters should not be stifled in this inherent freedom but should be mindful of the constraints of their audience and that of a potential arbiter (for even a judge is not immune from confusion and error). In Irving Dilliard The Spirit of Liberty: Papers and Addresses of Learned Hand (Vintage Books, 1959) American Judge, Learned Hand, once stated: ‘The language of the law must not be foreign to the ears of those who are to obey it’.
I concur wholeheartedly.

Muhammed Ahmed Mayat LLB (Wits) LLM (UJ) is a candidate legal practitioner at Thokan Attorneys in Johannesburg.

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SEEN ON SOCIAL MEDIA

This month, social media users gave their view on the following:

The LSSA invites all attorneys in East London to meet with LSSA President, Mvuzo Notyesi, and discuss the establishment of a provincial attorneys association.

What are KPIs and why are they important for your legal practice? Non-practising legal practitioner, Carl Holliday, explains in this month’s issue.

The @CouncilPractice would like to warn legal practitioners about the increasing levels of e-mail fraud and the fact that cybercrime is not covered by the policy provided by the @LPIIFZA.

The real question is why is cybercrime not covered by the LPIIF. So if I steal clients’ money the public is protected but if I’m hacked then the public is not protected?

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This month, social media users gave their view on the following:

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A new future for family law: Significant changes to r 43 applications

On 12 June, the Gauteng Local Division of the High Court in Johannesburg (GJ) delivered a Full Bench judgment relating to r 43 applications. This judgment brings about significant changes in r 43 applications, and divorces in general.

The referral to the Full Bench
The judgment in E v E and related matters [2019] 3 All SA 519 (GJ) was made pursuant to an order by van Vuuren AJ on 20 September 2018, when three r 43 applications were referred to a Full Court of the GJ under s 14(1)(b) of the Superior Courts Act 10 of 2013, as the conflicting judgments of that division brought Uniform subsrs 43(2) and (3) into focus. Uniform subsrs 43(2) and (3) read, *inter alia*, as follows:

‘(2) The applicant shall deliver a sworn statement in the nature of a declaration, setting out the relief claimed and the grounds thereof … .

(3) The respondent shall within ten days after receiving the statement deliver a sworn reply in the nature of a plea … in default of which he shall be *ipso facto* barred.’

Makume J in delivering the Full Bench judgment, noted that the effect of r 43(5) would also have to be considered, which provides:
'5) The court may hear such evidence as it considers necessary and may dismiss the application or make such order as it thinks fit to ensure a just and expeditious decision.'

The directive to the Full Bench by Mlambo JP

Gauteng Division Judge President Mlambo JP directed the Full Bench to take into consideration the following issues at para 18:

i) While rule 43 applications generally require the submission of a succinct set of papers, does the Court have the discretion to permit the [filing] of applications that have departed from the strict provisions of rule 43(2) and (3)?

ii) If the Court does not have such a discretion, should the Practice Manual direct that all rule 43 application[s] conform to a specific form, particularly in terms of length? Would the imposition of a restriction on the length of rule 43 applications withstand constitutional muster?

iii) If the Court does have such a discretion, what are the factors to consider in order to reasonably exercise this discretion? Are these factors exhaustive?

Mlambo JP issued a further directive inviting interested parties to apply to be admitted as amicus curiae. Legal Aid South Africa and the Gauteng Family Law Forum (GFLF) both applied and were respectively admitted as amicus curiae. This article focusses on the submissions made by the GFLF, and the outcome of the case.

The GFLF

The GFLF is a voluntary association of Gauteng family legal practitioners. The GFLF seeks to improve the standard of practice of and level of cooperation between legal practitioners, and to improve the experience of the public exposed to the judicial system in family law matters. Members of the GFLF have committed to approaching family law matters in a constructive way, seeking to resolve and not to inflame. In order to be a member of the GFLF, a practitioner must subscribe to the GFLF Code of Conduct, as published on the GFLF's website at www.gflf.co.za.

The GFLF aims to identify, discuss and provide practical solutions to the problems that legal practitioners face in practice areas affecting family law. Once the solutions are identified, the GFLF works towards initiating and promoting reforms and improvements, working cooperatively with a number of role-players (eg, the judiciary, the magistracy, and the Office of the Family Advocate).

Mlambo found in his judgment that the subject matter raised in the directive falls squarely within the Forum's knowledge and expertise and subsequently admitted the GFLF as amicus curiae.

The salient points raised by the GFLF as amicus curiae

Uniform Rule 43 enables a spouse to apply to the High Court for maintenance pendente lite, a contribution towards costs, and interim care of and/or contact with a child born of the marriage in a pending matrimonial matter.

The GFLF argued, inter alia, that rule 43 implicates various constitutional rights, including the rights of a child, socio-economic rights to housing, healthcare and food, the right to dignity, the right of spouses to equal protection under the law, and the right to a fair hearing. The High Court is, therefore, under a constitutional obligation to interpret rule 43 in a manner that best promotes these constitutional rights. An overly narrow interpretation and strict application of rule 43 would threaten these constitutional rights. In addition, s 173 of the Constitution provides, inter alia, that a High Court has the inherent power to regulate its own processes in the interests of justice. This, the GFLF argued includes issuing a practice directive to ensure uniformity of treatment and the proper administration of justice in certain categories of cases.

The GFLF submitted that taking the above into consideration, the Full Bench should exercise its discretion in terms of s 173 of the Constitution by amending or issuing a practice directive, to include:

- the pre-emptory completion of a substantial and uniform financial disclosure form under oath (a proposed form, drafted by the GFLF, was annexed to the founding affidavit); and
- the right of an applicant in a r 43 application to file a replying affidavit, with the replying affidavit limited to addressing inaccuracies in the respondent's reply, as well as addressing untruths in the reply and dealing with new matters raised in the reply.

The GFLF demonstrated that its submissions were in line with international family law practices. The United Kingdom, Australia and Singapore, among others, require that litigants file uniform and detailed statements of their finances at inception of a divorce action, or in applications for maintenance pendente lite. The GFLF argued that the procedures of the High Courts must, therefore, also be developed to ensure full financial disclosure by both parties in a uniform manner under oath, thereby ensuring the proper administration of justice.

The findings of the Full Bench

Makume J (Kollapen J and Modiba J concurring) correctly noted in para 28 of the judgment that: ‘The nub of the question to be answered is what interpretation of rule 43 will ensure a speedy and efficient resolution of the application while at the same time protecting the rights of women and children who are prevalently vulnerable in rule 43 applications?'

When considering the directive of Mlambo JP concerning the court’s discretion to allow (or disallow) lengthy r 43 applications, Makume J at para 61 found that: ‘It is imperative, constitutional and practically necessary to amend the practice manual so as to permit rule 43 applications being filed without restrictions. This will allow optimisation of the best interest of minor children but will also be fair and promote transparency’.

At para 33, the court held that: ‘The length of an applicant’s affidavit should not disentitle her to relief. What is important is whether the contents of the affidavit and the annexures are relevant.' However, parties and practitioners ought to heed the caution set out in para 62 of the judgment, echoed in clause 3 of the court’s order: ‘The lifting that this judgment proposes should not become a license to parties to express and advance views and opinions that bear no relevance to the issues before the Court.’

The court suggested that parties who include irrelevant material could be met with costs orders or could find the irrelevant material struck out.

It is evident from the judgment that there is still a delicate balance to be struck between making full and relevant disclosures on the one hand and avoiding unnecessary prolixity on the other.

The completion of a uniform financial disclosure form by litigants in r 43 applications was found by the court to be not only relevant, but also convenient. The uniform financial disclosure form, as was suggested by the GFLF, is now annexed to the Full Bench judgment and is included in clause 2 of the Order. About this financial disclosure form, the court held at paras 56 – 57: ‘The benefit of making it mandatory to file a financial disclosure form is that firstly, the parties will not need to file lengthy affidavits to make or defend their case. Secondly, parties will be forced to be transparent with...’

It is evident from the judgment that there is still a delicate balance to be struck between making full and relevant disclosures on the one hand and avoiding unnecessary prolixity on the other.
each other and with the Court at the in-
ception of the divorce action. … Finan-
cial disclosure will place the Court hear-
ing the application in a better position to
decide the matter in a manner that does
justice to the parties and takes care of
the best interests of the minor children.’

With regard to the suggested filing
of a replying affidavit and how to deal
with a dispute of fact that arises from
the respondent’s answering affidavit,
the court took a measured approach and
found that this should be dealt with in
terms of subr 43(5) stating, inter alia,
at para 24 that: ‘In my view the answer
lies in the provisions of rule 43(5) which
gives the court a discretion to hear such
evidence as it considers necessary. The
applicant may seek leave to file a further
affidavit in terms of rule 43(5) …’.

The order
The following order was granted by the
Full Bench on 12 June:

1. On receipt of the rule 43(2) and
43(3) affidavits, the judge allocated to
hear the matter shall, if he or she deems
it appropriate, issue a directive to the
parties in terms of rule 43(5) calling on
the Applicant and/or the respondent to
file (a) supplementary affidavit(s) mak-
ing a full and frank disclosure of their fi-
nancial and other relevant circumstanc-
es to the Court and to the other party.

2. The affidavits referred to above
must be accompanied by a financial
disclosure form, annexed hereto, which
must be filed seven days before the date
of hearing.

3. Affidavits filed in terms of rule
43(2) and (3) shall only contain material
or averments relevant to the issues for
consideration. It shall not be competent
for a court to dismiss an application in
terms of rule 43, only on the basis of
proxility. If the Court finds that the pa-
pers filed by a party contain irrelevant
material, the Court only has the power to
strike off the irrelevant and inadmissible
material from the affidavit in question
and make an appropriate cost order.

4. It is proposed that the Judge Presi-
dent amends the Practice Directive to
give effect to this judgment and order.’

Conclusion
The outcome of a r 43 hearing carries
significant weight in a matrimonial mat-
ter and it drastically impacts the lives of
the parties and minor children involved.
As such, judges hearing r 43 applica-
tions ought to apply the highest level
of judicial scrutiny, and in my view it
is, therefore, correct that this judgment
restores the proper exercise of judicial
discretion, by removing outdated and ar-
bitrary restrictions relating to the length
of papers in r 43 applications.

The introduction of a mandatory uni-
form financial disclosure form in matri-
monial matters is long overdue. It will
assist not only the court, but litigants as
does well. This form should, inter alia, reduce
the time and costs associated with dis-
covery, and it will hopefully encourage
early settlement. Furthermore, this judg-
ment aligns South African family law
with international family law standards.

We await the amendments to GJ’s prac-
tice directive, which will have to fol-
low this judgment in order to deal with
its practical implementation. It is hoped
that the Rules Board will in due course
make this financial disclosure form
mandatory in all opposed divorces, and
not only r 43 applications.

Ultimately, this transformation of r 43
procedures will not only innovate family
law practice, but, crucially, it will ensure
the promotion of the administration of
justice in an expeditious manner and will
provide protection to the constitutional
rights relevant in family law matters.

• See law reports ‘family law’ 2019 (Oct)
DR 17 for the summary of the E v E and
related matters judgment.

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rum acted as amicus curiae in the E
v E case.

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Adding fuel to the fire – what is the remedy to curb violent strikes?

By Geoffrey Allsop

Section 23(2)(c) of the Constitution guarantees the right of workers to strike. Chapter IV of the Labour Relations Act 66 of 1995 (LRA) facilitates the exercise of this fundamental right in practice. Where strike action complies with the LRA’s procedural and substantive requirements, s 187(1)(a) provides workers with protection against dismissal and s 67(2) and (6) with immunity from delictual and contractual claims arising from participation in a protected strike. These requirements are not onerous and accord with international labour law principles as developed by the International Labour Organisation (ILO) (see A Steenkamp ‘Unprotected strikes, interdicts and other remedies’ in D Du Toit (ed) Strikes and the Law (Durban: LexisNexis 2017) at p 125). In short, the LRA does not make it unduly difficult for workers to embark on protected strikes.

However, it is equally well known that protected industrial action is frequently accompanied by violence (see E Manamela and M Budeli ‘Employees’ right to strike and violence in South Africa’ in D Du Toit (ed) Strikes and the Law (Durban: LexisNexis 2017) at p 125). In short, the LRA does not make it unduly difficult for workers to embark on protected strikes.

To counter strike violence, a growing body of Labour Court (LC) jurisprudence has already begun developing. On at least two occasions, the court has begun to examine whether protected strikes marred by violence should forfeit protection (see Tsogo Sun Casinos (Pty) Ltd v/a Montecasino v Future of SA Workers Union and Others (2012) 33 ILJ 998 (LC) at para 13 and National Union of Food Beverage Wine Spirits and Allied Workers and Others v Universal Product Network (Pty) Ltd: In re Universal Product Network (Pty) Ltd v National Union of Food Beverage Wine Spirits and Allied Workers and Others (2016) 37 ILJ 476 (LC) at paras 30 - 32). In late 2018, the LC took this one step further, declaring a protected picket under s 69(1) of the LRA as unprotected following various incidents of violence and a breach of picketing rules (see Dis-Chem Pharmacies Ltd v Malema and Others (2019) 40 ILJ 855 (LC) paras 28 – 31). Several judgments, adding to this trend, have begun to impose increasingly stringent duties on unions to ensure their members behave peacefully when engaged in protected industrial action (see Xstrata South Africa (Pty) Ltd v Association of Mineworkers and Construction Union and Others (LC) (unreported case no J1239/13, 25-2-2014) (Tholthelahameje AJ) at paras 31 - 40; SA Transport and Allied Workers Union and Another v Garvas and Others (2012) 33 ILJ 1593 (CC) at paras 39 - 41; and KPMM Road and Earth Works (Pty) (Ltd) v Association of Mineworkers and Construction Union and Others (2018) 39 ILJ 609 (LC) at paras 49 – 56). Other decisions, have also begun to explore the possibility of holding unions vicariously liable for contempt of court, where they fail to take all reasonable steps to ensure that their members comply with interdicts restraining violent acts during the course of a protected strike (see Food and Allied Workers Union v In2Food (Pty) Ltd (2014) 35 ILJ 2767 (LC) at paras 18 – 19 and GRI Wind Steel SA v Association of Mineworkers and Construction Union and Others (2018) 39 ILJ 1045 (LC) at paras 7 - 10). Parliament has also intervened. The Labour Relations Amendment Act 8 of 2018 came into effect in January 2019, which among other things, amended s 150 of the LRA to provide for a process whereby ‘dysfunctional strikes’ - in narrowly circumscribed situations - can forfeit protection (see S Godfrey, D du Toit and M Jacobs ‘The New Labour Bills: An Overview and Analysis’ (2018) 39 ILJ 2161 at 2172).

What is interesting about these developments, insofar as strike violence is concerned, is that the LRA provides the LC with no express power to declare a protected strike unprotected because of violence (see A Myburgh SC ‘Interdicting Protected Strikes on Account of Violence’ (2018) 39 ILJ 703). It is undeniable that violent industrial action cannot be condoned in a society committed to the rule of law and the orderly resolution of labour disputes and the protection of fundamental human rights. However, the more pressing issue is this: Will giving the LC authority to declare a protected strike unprotected because of violence, curb South Africa’s (SA’s) strike violence epidemic or will it have the unintended consequence of further entrenching the inherent inequality of bargaining power
between employer and employee? Before examining this question, it is necessary to consider what remedies the LRA already provides.

**Remedies for violent strikes**

The LRA provides employers, and members of the public, with several remedies for any harm protected strikes marred by violence may cause.

Firstly, s 67(8) of the LRA expressly states the protections against dismissal and immunity from delictual or contractual claims do not apply to any conduct constituting an offence. Section 67(8) thus already strips violent strikers of the protections ch IV of the LRA provides, by recognising 'the right to engage in a protected strike is not a license to engage in misconduct' (see CEPPWAWU and Others v Metrofile (Pty) Ltd [2004] 2 BLR 103 (LAC) at para 53).

Employers, therefore, can fairly dismiss employees for violent acts committed during a protected strike, provided they comply with ch VIII of the LRA, sch 8 Code of Good Practice: Dismissal and if strike violence is the proximate cause of the dismissal, not simply a guise to dismiss workers because of their participation in a protected strike (see SACWU and Others v Afrox Ltd [1999] 10 BLR 1005 (LAC) at paras 31 – 32).

Where multiple violent strikers are involved, it is not even necessary to establish every employee directly participated in violence, as it is sufficient if the employer can establish employees associated themselves with violence committed by others according to the active association strand of the common purpose doctrine (see T Cohen 'Dismissal' in D du Toit (ed) (op cit) at 200 and SA Municipal Workers Union on behalf of Abrahams and Others v City of Cape Town and Others (2011) 32 ILJ 3018 (LC) at paras 40 – 42).

Following the recent Constitutional Court (CC) decision in National Union of Metaworkers of South Africa obo Ngonezi v Dunlop Mixing and Technical Services (Pty) Ltd and Others (Casual Workers Advice Office as amicus curiae) [2019] 9 BLR 865 (CC) at paras 73 – 76) the court unanimously rejected the notion that employees have a strict duty to inform their employer about the violence committed by others or risk been found guilty of breaching the implied contractual duty of good faith under the doctrine of derivative misconduct (on derivative misconduct generally, see Western Platinum Refinery Ltd v Ilhlela and Others (2015) 36 ILJ 2280 (LAC) at paras 5 – 20 and Dunlop (op cit) at paras 37 – 64). However, the CC appeared to leave the possibility open that where the employer can guarantee an employee's safety, that employee could be under a duty to identify who was involved in violence or risk facing dismissal based on derivative misconduct (Dunlop (op cit) at para 76). Finally, both the LC and Labour Appeal Court (LAC) have accepted it is possible, in principle, for an employer to fairly dismiss violent strikers based on its operational requirements under s 189 of the LRA (see Tiger Food Brands Ltd t/a Albany Bakeries v Levy NO and Others (2007) 28 ILJ 1827 (LC) at paras 30 – 40 and Food and Allied Workers Union and Others v Premier Foods Ltd t/a Blue Ribbon Salt River [2012] 12 BLR 1222 (LAC) at para 26).

Secondly, employers, and potentially members of the public, can interdict strike violence in the LC under s 158(1)(a) of the LRA (see A Myburgh SC 'The failure to obey interdicts prohibiting strikes and violence' 2013 23 Contemporary Labour Law 1 at 1 – 2). Such applications can be brought urgently on an ex parte basis (Myburgh (op cit)). Violent strikers can also be held personally liable for any costs incurred in pursuing interdict applications of this nature (see Tsogo Sun (op cit) at para 11). Furthermore, failure to comply with interdicts restraining violent strike action constitutes civil contempt of court and can result in imprisonment and hefty fines (see Steenkamp (op cit) at 113 – 118 and Ram Transport SA (Pty) Ltd v SA Transport and Allied Workers Union and Others (2011) 32 ILJ 1722 (LC) at para 9).

Thirdly, strikers who violently picket or demonstrate in any public space can be held jointly and severally liable for riot damage under s 11(1) of the Regulation of Gatherings Act 205 of 1993 by their employer and members of the public (see M Wallis ‘Now you foresee it, now you don’t’ SATAWU v Garvas and Others’ 2012) 33 ILJ 2257 at 2258 – 2260).

Section 11(1) of the Regulation of Gatherings Act creates a form of strict statu-
Will removing protection curb strike violence?
The above discussion illustrates strike violence already attracts consequences. However, there are two problems:

- First, these remedies are, by their nature, reactive as they are only available once harm has already arisen.
- Second, and more importantly, experience shows that interdicts restraining strike violence are frequently disobeyed (see Betalence South Africa (Pty) Ltd v National Union of Metalworkers of South Africa and Others (LC) (unreported case no C194/2016, 15-9-2016) (Tlhothlaleme J) at paras 54 – 55).

To curb strike violence - and given the relative ineffectiveness of interdicts restraining strike violence appear to have - some commentators propose the LC should have the authority to declare protected strikes unprotected if they turn violent (Myburgh (op cit) at 706 and Rycroft (op cit) at 206 – 208). This argument is underpinned by good intentions and seeks to achieve a legitimate objective: To prevent the harm violent strikes cause non-strikers, employers, members of the public and the economy. However, as the saying goes, ‘the road to hell is paved with good intentions’.

The argument that violent protected strikes should be declared unprotected appears to rest on the following premise: If strikers know protected strike action can be declared unprotected because of violence, they would be more reluctant to utilise violence during a protected strike. At face value, this appears to hold weight. However, examining it further, it is doubtful this would achieve its intended objective. This is for three interconnected reasons:

- First, it begs the question why an order declaring a violent protected strike unprotected would prevent strike violence? Employees already know the LC can interdict violence during a protected strike and such interdicts are, as noted, frequently disobeyed. This equally applies to interdicts restraining unprotected strikes. Therefore, why would an order declaring a protected strike unprotected because of violence suddenly achieve a different result? For this reason, it is doubtful that simply because the LC declared a violent protected strike unprotected that workers would not utilise violence, or would comply with an order prohibiting strike action, simply because it was declared unprotected.
- Second, it would require the judiciary to make difficult subjective value judgments about the degree of violence required for a protected strike to forfeit protection. How would a court weigh destruction of property against violence to persons (see E Fergus ‘Reflections on the (Dys)functionality of strikes to collective bargaining: Recent developments’ (2016) 37 ILJ 1537 at 1546)? Conservative judges may be more inclined towards finding this threshold reached than others (Fergus (op cit)). The fundamental problem with this proposed solution is giving the LC this power could provide employers with an undue tactical advantage, similar to the tactical advantage the interim interdict procedure already provides (see Rycroft (op cit) at 204 – 205). In short, it could provide employers with a weapon to undermine the legitimate exercise of the constitutional right to strike, adding further scepticism towards what some sectors of organised labour already have for the courts (see Steenkamp (op cit) at 113 – 118).
- Third, the CC has held that those who exercise their constitutional right to demonstrate and assemble peacefully and unarmed do not forfeit constitutional protection simply because other protestors are violent (Garvas (op cit) at para 53). I submit that this same principle should apply equally to violence during a protected strike. Simply because some strikers act violently, it does not necessarily follow that peaceful strikers should lose protection. This is fortified by the fact that criminal elements sometimes use strike action as cover to engage in criminal acts, and that a certain political party has begun to frequently involve itself in industrial disputes, sometimes encouraging workers to breach orders of court against their best interests (see National Union of Food Beverage Wine Spirits and Allied Workers and Others (op cit) at para 18-23 and Calgan Lounge (Pty) Ltd v National Union of Furniture and Allied Workers SA and Others (2019) 40 ILJ 342 (LC) at paras 14 – 30 and 39 – 46).

Conclusion
It is undeniable that there are too many violent strikes in SA. However, proposing that protected violent strikes entirely forfeit protection is problematic for various reasons. Among other things, it fails to take proper account of the remedies the law already provides and the constitutional rights of workers who peacefully strike. The root causes of violent strikes partly arise from our historically highly adversarial industrial relations climate but also, and more fundamentally, high levels of socio-economic inequality in South African society generally (see T Ngcukaitobi ‘Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana’ (2013) 34 ILJ 836). A lasting solution towards eradicating strike violence lies in properly addressing socio-economic inequality, not undermining the constitutional right of workers to strike.

See also Kelsey Allen ‘The death of derivative misconduct’ 2019 (Sept) DR 23 for a discussion on the Dunlop judgment.

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Unlocking the issue: When to arrest without a warrant when a dangerous wound is inflicted

In practice, a police officer may arrest a suspect with or without a warrant. In the latter instance only when there are prescribed jurisdictional factors, prior to effecting an arrest.

In this article, the analysis predominantly focuses against the backdrop where a police officer effects an arrest – without a warrant – on reasonable suspicion that a dangerous wound has been inflicted. This analysis seeks to lay out the dynamics and circumstances, which needs to be considered to determine whether such an offence, namely assault where a dangerous wound is inflicted, falls under sch 1 of the Criminal Procedure Act 51 of 1977 (the CPA).

Arrest without a warrant

Section 40(1)(a) and (b) of the CPA provides that: ‘A peace officer may without warrant arrest any person –
(a) who commits or attempts to commit any offence in his presence;
(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.’

The focus of this article will fall on s 40(1)(b). The latter provides that the offence of assault where a dangerous wound is inflicted, is an offence for which a police officer may arrest the suspect without a warrant if there is a reasonable suspicion for commission of the said offence.

Reasonable suspicion

According to www.lexico.com (accessed 7-10-2019), ‘suspicion’ is defined as ‘a feeling or belief that someone is guilty of an illegal, dishonest, or unpleasant action’.

In the matter Minister of Safety and Security v Sekhoto and Another 2011 (5) SA 367 (SCA) it is stated at para 6 that the following facts needs to be present for a s 40(1)(b) defence, to apply:
- the arrester must be a peace officer;
- the arrester must entertain a suspicion;
- the suspicion must be that the suspect committed an offence referred to in sch 1; and
- the suspicion must rest on reasonable grounds.

Let me hasten to say to rely on the suspicion of someone else would render the arrest unlawful (see Ralekwa v Minister of Safety and Security 2004 (2) SA 342 (T) at para 11 – 14). In Mabona and Another v Minister of Law and Order and Others 1988 (2) SA 654 (SE) at 658 E – J, Jones J held: ‘The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) is objective … . Would a reasonable man in the second defendant’s position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen’ … This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. This

By Nicholas Mgedeza
section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it [would] be flighty or arbitrary, and not a reasonable suspicion.’ Accordingly, an officer does not have to be convinced that there is in fact evidence proving the guilt of the suspect beyond reasonable doubt. The quality of the information on which the arrestor acts must be analysed and assessed. Acting on information, where the quality of which has not been subject to scrutiny, will render an arrest unlawful (see Mawu and Another v Minister of Police 2015 (2) SACR 14 (WCC) at para 31).

Assault where a dangerous wound is inflicted

In our legal system, the offence of assault emanates from common law. Furthermore, assault comprises of –

- common assault; and
- assault with intent to cause grievous bodily harm (assault GBH).

In addition, to assault GBH, there is assault where a dangerous wound is inflicted, both of which are distinct concepts. In South African jurisprudence, there is no specific crime known as assault where a dangerous wound is inflicted. In the matter of Rex v Jones 1952 (1) SA 327 (E) the court held that assault GBH is not a sch 1 offence unless a dangerous wound is inflicted. At para 332 D – F Jennett J in the Jones case had the following to say about a ‘dangerous wound’ as referred to in the ‘first schedule’ to the Act 31 of 1917: “The expression “dangerous wound” is not easy to define. One may well ask, “Is a serious wound always a dangerous wound?” A minor wound may be dangerous because of the extra possibility it creates for septic infection. Then, however is it not the wound which causes the danger but the sepsis. It seems to me that by a dangerous wound is meant one which itself is likely to endanger life or the use of limb or organ. The officer effecting the arrest has only to have reasonable grounds for suspecting that such a wound has been inflicted’.

The authority in the Jones case has been followed and endorsed in a number of other leading cases on the subject, such as in the Goliath v Minister of Police (ECG) (unreported case no CA107/2017, 14-11-2017) (Bloom J) decision and in the case of De Klerk v Minister of Police [2018] 2 All SA 397 (SCA) at para 10. Likewise, a person who commits assault GBH does not necessarily attempt to commit an assault in which a dangerous wound is inflicted and such arrest stands to be unlawful (see SE van der Merwe (ed) Commentary on the Criminal Procedure Act (Cape Town: Juta 1987) at 5 – 14B. In Minister of Police v Lwies [2015] JOL 32807 (ECG) an appeal against the judgment of the lower court, which awarded damages to the plaintiff for wrongful arrest and detention. In addition to the denial of unlawful arrest and detention by the appellant, the latter relied on s 40(1)(b) of the CPA by adducing evidence to the effect that the arresting officer reasonably suspected that the respondent had committed an offence referred to in sch 1 of the CPA, namely, the assault where a dangerous wound was inflicted. Furthermore, the arresting officer received the docket on 14 August 2012 relating to the commission of offence of assault GBH, which was allegedly committed on 11 August 2012. The interview with the complainant was conducted on 15 August 2012 (four days after the incident) and the arresting officer was given a J88 form with the following clinical finding ‘Wound on the scalp – no fracture seen – Wound on the left chest at the back. No lung injury seen on x-ray. Patient was observed overnight and discharged the following day’. The court held at para 15 as follows: ‘Although loss of consciousness was mentioned in [the complainant’s] affidavit, by the time [the arresting officer] interviewed him nearly four days had passed since he was injured and he had been discharged from hospital the morning after the injuries were inflicted. The scalp wound which [the arresting officer] observed and [the complainant’s] com

plain of pain would not in themselves appear to be symptoms of life-threatening injuries. Most importantly, even if [the arresting officer] thought that head injuries are inherently dangerous, she was aware of the conclusion in the J88 form that the wounds were superficial. It was not for her to go beyond the doctor’s expert conclusion and speculate that something more serious might develop in the future’. The appeal court dismissed that appeal and concluded that the court a quo correctly inferred that the arresting officer reasonably suspected that the respondent had inflicted the complainant’s injuries and that the arresting officer did not have grounds to believe that the wounds were dangerous.

Conclusion

It is prudent for the arresting officers to be vigilant where the arrest without a warrant encapsulates assault. Although in terms of our common law, assault that is legally recognised comprises of common assault and assaults GBH; the assault that is covered by the statute (sch 1 of the CPA) is assault where a dangerous wound is inflicted. The arresting officer – when effecting an arrest under the circumstances – must formulate reasonable suspicion that an assault where a dangerous wound was inflicted was committed by the suspect. The court must look at the circumstances of each case beyond the J88 form, which will state the nature and degree of injuries, the period of arrest and the date of infliction of the injury and the expert evidence to determine if the arresting officer’s suspicion was justified. A dangerous wound is one, which itself, is likely to endanger a life or the loss of a limb or organ.
The Supreme Court of Appeal (SCA) in Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) and Others [2016] 4 All SA 761 (SCA) at para 1, highlighted an intense competition for members between rival retirement funds. This rivalry raises three fundamental legal questions that not only the Pension Funds Adjudicator (the Adjudicator) but also courts have been called on to answer:

• First, can members exercise their right to freedom of association, while they are actively employed, to choose the fund they wish to join?

• Jumping from one retirement fund to a rival: Can it be done during your period of employment?

• Secondly, can members during the period of their employment voluntarily withdraw from their funds with a view to joining a rival fund?

• Thirdly, can members voluntarily initiate a process that would lead to their fund credits being transferred to a rival fund, which is associated with their employer?

This article examines whether the Pension Funds Act 24 of 1956 (the Act) provides a legal framework that can assist South African courts to answer these questions. I will also reflect on how the Adjudicator and the courts have sought to answer these practical legal questions.

Adjudicator’s approach

There are various reasons that can induce retirement fund members (members) to decide to leave their current funds while in their employer’s service and join other funds. These include:

• low investments (Van den Heever v Cape Joint Retirement Fund and Another [2002] 4 BPLR 3372 (PFA) at para 12);

• maladministration of their funds (Brown v National Oil Pension Fund and Others [2001] 5 BPLR 1992 (PFA)); and

• benefits not accumulating desired interests and other funds perform better (Mthapho and Others v South African Municipal Workers’ Union National Provident Fund [2013] 2 BPLR 203 (PFA) at para 3.3).

In Mthapho, members requested the fund to transfer their fund credits to another fund associated with the employer. The fund refused to comply with the members’ request on the basis that it was precluded from doing so by a collective agreement concluded in the industry bargaining council, which placed a moratorium on employees’ ability to transfer from one fund to another while still actively employed (para 2.1). The Adjudicator was required to determine whether members were entitled to transfer their fund credits to another fund in which their employer participated (para 5.4). In order to deal with this issue, the Adjudicator had to consider the rules of the fund and the provisions of the Act.

The Adjudicator evaluated rs 3.2 and 11.11 of the South African Municipal Workers’ Union National Provident Fund Rules. Rule 3.2.1 specifically provides that ‘a member may not withdraw from the fund while he remains in service’. The Adjudicator determined that members are not entitled to withdraw from their current fund and further that while this rule infringes members right to freedom of association, it is nonetheless not unreasonable or unconstitutional (para 5.7 to 5.8). The Adjudicator reasoned that this rule merely prevents members who are still employed from cashing in their fund credits while they are still em-
ployed. The Adjudicator also evaluated r 11.11.1(a), which basically empowers the Board when a portion of the business of the fund is transferred to another fund or the fund amalgamates with another fund to ‘determine the amount to be transferred … in respect of each member who is to be transferred from the Fund, which amount shall consist of the Member’s share’. While the Adjudicator correctly held that the collective agreement did not bind the fund because the fund was an independent entity governed by its rules, the Adjudicator nonetheless, incorrectly interpreted r 11.11 as not prohibiting the transfer of members to other funds. In particular, the Adjudicator determined that members ‘are entitled to transfer their fund values to a local authority fund of their choice in which their employer is the participating employer in terms of the provisions of the approved rules of the local authority fund concerned’ (at para 5.12). The Adjudicator reached the same conclusion in Mthapha v South African Municipal Workers’ Union National Provident Fund [2013] 2 BPLR 197 (PFA) and TP Moss v South African Municipal Workers’ Union National Provident Fund (unreported case no PFA/EC/11061/2012/PGM, 25-7-2012).

The fund appealed all of the Adjudicator’s determinations against it to the Gauteng Local Division of the High Court in Johannesburg. Without a written judgment, the court upheld the appeal and the essence of its judgment was that members were not entitled to voluntarily initiate the process of transferring their fund credits to other funds while they are in their employers’ service (Mthapha v South African Municipal Workers’ Union National Provident Fund 2015 (11) BCLR 1393 (CC) at para 4). Soon thereafter, the Adjudicator received a complaint from a member of the same fund who was refused permission to transfer his fund credits to another fund. In line with the Gauteng Local Division order and contrary to her earlier determinations, the Adjudicator dismissed the complaint (Andreas v South African Municipal Workers’ Union National Provident Fund [2014] 3 BPLR 337 (PFA) at para 5.12).

Judicial approach
Balton J in SAMWU National Provident Fund v Ntabankulu Local Municipality and Others [2019] JOL 44272 (SCA) (unreported case no 297/2018, 29-3-2019) (Swain AJ (Lewis ADP, Tshiqi and van der Merwe JJ and Dlodlo AJA concurring) at para 36) correctly endorsed Hartle J’s approach, which he referred to as ‘artificial’ in that it ignores the real meaning of Rule 3.2.1 which … prohibits the Fund from doing what the municipality, the employees and the competing Fund seek to achieve, which is a cessation of membership whilst the employees remain in service of the employer’ (at para 102). The essence of his reasoning was correct that r 11.11 did not provide a self-standing basis for members to voluntarily initiate the transfer of their fund credits to other funds. The SCA in South African Municipal Workers’ Union National Provident Fund v Umzimkhulu Local Municipality and Others (SCA) (unreported case no 297/2018, 29-3-2019) (Swain AJ (Lewis ADP, Tshiqi and van der Merwe JJ and Dlodlo AJA concurring) at para 36 correctly endorsed Hartle J’s approach.

Legislative framework
Our courts are often confronted with a conundrum of establishing the most suitable provision within the Act that should be applied when fund members voluntarily seek to relocate from one fund to the other, much to the objection of the remaining Fund. Members often attempt to rely either on ss 13A(5) or 14 of the Act when making out their claims that they are entitled to transfer their fund credits to other funds while still in their employer’s service. Section
13A(5) of the Act regulates persons who have ceased to be fund members for reasons not related to the transfer of assets or amalgamation of funds in terms of s 14, voluntary dissolutions of funds in terms of s 28 or liquidation of funds in terms of s 29 of the Act. This section deals with termination of membership in terms of the rules of the fund (Umzimkhulu (SCA) at para 26). In other words, it is applicable when one of the contingent events prescribed in the rules takes place. Once that event occurs, a member can request the fund – in writing – to transfer their benefit to another fund, which the fund is obliged to effect within 60 days from the date of the written request. Section 13A(5) of the Act neither regulates voluntary withdrawal of membership, nor voluntary transfer of fund credits from one fund to the other while members are still in their employers service. It provides a legislative procedure that enables members – once they have met the conditions prescribed in their funds’ rules – to make written requests for the transfer of their fund credits to other funds. This can only be done once they have ceased to be members by virtue of termination of their employment through resignation, dismissal, retrenchment or retirement. Members who are actively employed cannot rely on this section to effect transfer of their fund credits. The SCA in Umzimkhulu held that ‘cessation of the employees’ membership of the Fund in terms of its rules is a necessary condition to be satisfied in terms of s 13A(5) of the [Act], before the employees may demand in writing that any benefit, or right to any benefit to which they are entitled must be transferred to the MEPF, in terms of s 13A(5) of the [Act]. Equally, the Fund would only be obliged to transfer these benefits to the MEPF within 60 days of a written request, if the employees’ membership of the Fund has been validly terminated in accordance with the rules of the Fund’ (para 21).

Equally so, members cannot rely on s 14 of the Act to voluntarily initiate the process of transferring their fund credits to other funds while they are actively employed. This section ‘governs the amalgamation of any business carried on by a registered fund with any business carried on by any other person; and the transfer of any business from a registered fund to any person, or from any person to a registered fund’ (Pepkor Retirement Fund and Another v Financial Services Board and Another [2003] 3 All SA 21 (SCA) at para 13). The phrase ‘transfer of business’ is not defined in the Act. While it is not entirely clear which transactions generally amount to ‘transfer of business’, it appears nonetheless, that it does not cover members’ voluntary initiated efforts to have their fund credits to be transferred to other funds while still in their employers’ services. This provision appears to cover only circumstances where the fund itself initiates either the amalgamation or transfer of its assets. This is because in terms of s 5 of the Act, the assets held by the fund are owned by the fund. I submit that in order to maintain sound administration of retirement funds, it is not ideal to legislatively enable members of retirement funds to voluntarily initiate the transfer of their funds’ assets to which they have an interest. This might encourage forum shopping, which might destabilise the management and administration of retirement funds. In Finan-
cial Services Board and Another v De Wet (in his capacity as liquidator of the Pepkor Pension Fund) and Others [2002] 4 BPLR 3259 (C) at para 284, it was held that “[w]hen a bulk transfer of assets is made from one pension fund to another, the transfer constitutes “the transfer of any business” within the meaning of section 14(1)’. In Younghusband and Others v Decca Contractors (SA) Pension Fund and its Trustees [2000] 1 BPLR 88 (PFA) at p 111, the Adjudicator was of the correct view that “[g]enerally, one may safely assume, [that] voluntary individual withdrawals fall outside the ambit of … [s 14 of the Act]”. The SCA in Umzimkhulu also confirmed that the wording used in s 14 of the Act does not describe ‘individual voluntary withdrawals from the Fund and the transfer of individual benefits to another fund’ (at para 27).

Conclusion
It is important for all legal practitioners dealing with members that seek to voluntarily withdraw their funds while they are still in their employer’s service to note that the Act does not provide a legal avenue for such members to do so. The rules on individual funds should be considered to determine whether they allow for such transfers and the circumstances under which such transfers could be affected. It is also important for all legal practitioners that draft funds rules to ensure that such rules are clear in relation to whether the fund allows transfer when members are still in their employer’s service.

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Did you know?
The 2019 Old Mutual Savings Monitor shows that many South Africans continue to earn some kind of income after they retire. It found that for every R 100 these retirees receive, more than half (R 56) is derived from post-retirement earnings.
If it was not, the court had no discretion to overlook that failure and admit the applicant. While Edeling, therefore, only had to show that he was a fit and proper person to be admitted, he had to do so against the background of his past misconduct, which had exposed a serious lack of integrity. The SCA pointed out that where applicants were struck from the roll for serious dishonesty, they had to prove genuine, complete and permanent reformation. The SCA found that Edeling had failed to discharge the onus resting on him and upheld the appeal.

Companies

Jurisdiction of Gauteng Division in winding-up applications clarified: In Wild & Marr (Pty) Ltd v Intratek Properties (Pty) Ltd 2019 (5) SA 310 (GJ) the court had to decide whether an application for the winding-up of Intratek was correctly served at its principal place of business in Johannesburg. Intratek argued that since its registered office was in the jurisdictional area of another court (MN), only that court had jurisdiction. The SCA contended that this was so because s 23(3) of the Companies Act 71 of 2008 (the Act) abolished the dual-jurisdiction regime instituted by s 121(1) of the Companies Act of 61 of 1973 (the 1973 Act).

Intratek’s proposition was that, because the Act requires the main place of business to be the same as the registered address, applications for liquidation must be launched exclusively in the court exercising territorial jurisdiction over the registered address. In other words, the Act extinguished the right to serve on one of two addresses that existed under the 1973 Act.
where the original underlying agreement did not fall under that Act.

The background was the following: Phapho Nkone Transport (PNT), as lessee, entered into various truck rental agreements with the respondent financing company MAN Financial Services (MAN). Mr Ratlou (a director of PNT) agreed to stand surety. When PNT later defaulted on its payments, MAN repossessed and sold the trucks to third parties. Ratlou, PNT and MAN subsequently entered into a settlement agreement in respect of the outstanding amount owing. However, Ratlou and PNT fell into default of the settlement agreement’s terms, and consequently MAN instituted application proceedings in the GJ, demanding payment. The GJ dismissed the claim, finding that the settlement agreement was a credit transaction subject to the NCA, and that MAN had failed to comply with notice requirements prescribed by s 129.

In its reasoning the court acknowledged that the original rental agreements fell outside the ambit of the NCA, as they were large agreements concluded with a juristic person and, therefore, so too did the suretyship. However, the settlement agreement, it held, was a compromise or transactio amounting to a new and independent agreement, which extinguished any rights and obligations emanating from the underlying contracts. As it stood, the court concluded, this agreement required compliance with the NCA (providing as it did for deferred instalment payments and interest thereon).

The SCA per Dambuza JA (Lewis ADP, Swain JA, Carelse AJA and Matojane AJA concurring), however, disagreed with the approach of the GJ. It acknowledged that on a literal interpretation of s 8(4)(f) of the NCA, the settlement agreement under question met the definition of a credit transaction. It held, however, that it was clear that the NCA, purposively interpreted, was not intended to apply to settlement agreements where the underlying agreements, such as the present ones, fell outside the ambit of the Act. The SCA stressed the absurd consequences of holding otherwise. It would mean, for example, that a settlement agreement concluded in relation to a delictual claim would immediately fall within the ambit of the NCA. Ultimately, people would be discouraged from seeking to curtail litigation and settle their disputes by entering into settlement agreements.

The SCA accordingly concluded that the settlement agreement in question did not fall within the ambit of the NCA, and that MAN had no obligation to comply with the Act’s provisions prior to enforcing the agreement’s terms. The appeal was dismissed with costs.

**Criminal law**

The constitutionality of s 18(2)(b) of Riotous Assemblies Act: In Economic Freedom Fighters and Another v Minister of Justice 2019 (2) SACR 297 (GP)

The applicants approached the court seeking orders, inter alia, declaring that s 18(2)(b) of the Riotous Assemblies Act 17 of 1956 was unconstitutional, and that s 1(1) of the Trespass Act 6 of 1959 was not applicable to occupiers of land protected under legislation such as the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).

The matter arose out of three related charges that were laid against the second applicant, the leader of the first applicant, for inciting his followers to illegally occupy vacant land in contravention of s 1(1) of the Trespass Act.

The applicants raised various arguments, including that s 18(2)(b) criminalised the exercise of free expression protected by s 16 of the Constitution, the definition of incitement was overbroad, and the limitless scope thereof provided an unjustifiable limitation of the right.

The court expressed some frustration with the abstract nature of the constitutional challenge to the section and noted that the applicants’ arguments appeared to misunderstand the crime of incite-
ment, particularly the fault element. The court, per Ledwaba DJP, Pretorius J and Molege J, nevertheless went on to consider the nature of the offence in some detail, concluding that the mere voicing of an opinion was not enough for the offence and a clear intention to influence the mind of another to commit a crime had to be present, which was a high bar for the state to prove beyond reasonable doubt.

The court also considered the relationship between the section in issue and s 16, finding that it did not attack the core of the right to freedom of expression. The section did criminalise conduct otherwise protected by s 16(1)(b) and, therefore, infringed the right, but only to the extent that a person was prohibited from imparting ideas and information to commit crime not otherwise excluded by s 16(2). It was not a wholesale restriction on speech, but merely prohibited the influencing of the minds of others to commit acts, which the law already considered to be unlawful.

After doing a limitations analysis, the court found that the infringement bore a rational connection to the purpose of timely law enforcement and the prevention of the commission of crimes en masse and was justifiable. The provision in s 18(2), however, that an inciter was liable to punishment as if they had committed the crime, could not be said to be rationally connected to the purpose of crime prevention, and to this limited extent the section was unconstitutional.

As to the Trespass Act, there was no immediate conflict between it and PIE and the application in that regard had to fail.

In the result, the applications were dismissed except for the declaration of constitutional invalidity of the penalty provision in s 18(2)(b), which was referred to the CC for confirmation.

Defence Force

Termination of service on sentence of imprisonment by civilian court: Maswanganyi, the respondent in Minister of Defence and Military Veterans and Others v Maswanganyi 2019 (5) SA 94 (SCA), was a member of the South African National Defence Force and was convicted of rape and sentenced to life imprisonment. This had the effect that his service was terminated under s 59(1)(d) of the Defence Act 42 of 2002, which provides that '[t]he service of a member of the Regular Force is terminated ... if he ... is sentenced to a term of imprisonment by a competent civilian court without the option of appeal'.

Maswanganyi appealed the conviction and sentence, and they were set aside. He then asked the Defence Force for his reinstatement. When this was declined, he approached, and obtained an order from the High Court, for the setting aside of the purported ‘decision’ of the Chief of the Defence Force to terminate his service under s 59(1)(d), and an order that he be reinstated.

The Minister of Defence, the Chief of the Defence Force, and the Secretary for Defence, appealed to the SCA. The SCA, per Majiedt IA (Navsda ADP, Van der Merwe JA, Molemela JA and Davis AJA concurring), considered the operation of the section and found that where the requirements of s 59(1)(d) were met, the member’s service was terminated by operation of law, so that no decision was required to be made. And if it was later found that a requirement for the operation of the section was not met, this did not have the result that the individual’s service was reinstated.

Environmental law

Prohibition on mining and prospecting activities in protected areas without ministerial consent: The manner in which the relevant ministers should exercise their discretion to allow mining and prospecting activities in protected areas, was the focus of the decision in Mining and Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others 2019 (5) 231 (GP). In terms of s 48(1)(b) of the National Environmental Management: Protected Areas Act 57 of 2003 (NEMPA), a party proposing to conduct mining activities in a protected environment must obtain the written permission of the Minister of Environmental Affairs and the Minister of Mineral Resources; and s 48(4) of NEMPA provides that ‘when applying this section, the Minister must take into account the interests of local communities and the environmental principles referred to in section 2 of the National Environmental Management Act [107 of 1998 (NEMA)]’.

The applicants contended that such permission should only be given in ‘exceptional circumstances’, and that these words had to be read into s 48 in order to render it functional. The court held that it was unnecessary to read such a qualification of ‘exceptional circumstances’ into s 48, and that doing so might set the bar higher than the legislative intention. Instead, it held, that to purposively give effect to the envisaged environment within and manner in which the ministers were obliged to exercise their discretions, s 48(1)(b) and 48(4) of NEMPA should be interpreted to mean the following: Despite the fact that a person may have obtained all the necessary authorisations required in terms of all other applicable statutory provisions in order to lawfully conduct mining activities on a certain portion of land, should that land fall within a protected environment as contemplated in NEMPA, then such a person would, in addition, need to obtain the written permission of both the ministers of environmental affairs and mineral resources to do so. In considering a request for such permission, the ministers shall act as custodians of such protected environment and with a strict measure of scrutiny take into account the interests of local communities and the environmental principles referred to in s 2 of NEMA.

Enforcement of environmental legislation by way of private prosecution: Section 33 of National Environmental Management Act 107 of 1998 (NEMA) provides that ‘[a]ny person may ... in the public interest; or ... in the interest of the protection of the environment, institute and conduct a [private criminal] prosecution in respect of any breach of any duty ... concerned with the protection of the environment’. In Uzani Environmental Advocacy CC v BP South Africa (Pty) Ltd 2019 (5) SA 275 (GP), an environmental advocacy group (Uzani) had obtained the High Court’s leave to institute a private prosecution as contemplated in s 33 of NEMA against BP Southern Africa (BPSA). Uzani charged the BPSA with commencing or continuing the construction of 21 filling stations without environmental authorisation, as required by s 22 of the Environmental Conservation Act 73 of 1989 (the ECA).

BPSA pleaded not guilty, and also denied Uzani’s entitlement to prosecute. In the latter regard, one of the grounds BPSA advanced was that private prosecution was precluded by BPSA’s application under s 24G of NEMA for rectification of the unlawful commencement or continuation of a listed activity.

The court dismissed this contention, holding that s 24G did not impact on a right to prosecute. As to whether Uzani had proven the offences, it was held that Uzani only had to rely on the lack of authorisation by the minister or the competent authority (aside from proving the construction or upgrading of the filling stations referred to in the indictment and the date of its commencement); and that in making an application under s 24G of NEMA, BPSA admitted that it had commenced with a listed or specified activity without an environmental authorisation in contravention of s 24F(1).

BPSA was accordingly convicted on all counts, except those in respect of which the records created sufficient doubt.

Land restitution

Land Claims Court states state’s failure to return land to District Six claimants, labels it violation of their constitutional rights: In District Six Committee and Others v Minister of Rural Development and

LAW REPORTS
Land Reform and Others 2019 (5) SA 164 (LCC) former residents of District Six attempted to resolve their 20-year-old claims for restitution of property confiscated from them during Apartheid era forced removals.

In the aftermath of the promulgation of the Restitution of Land Rights Act 22 of 1994, over 2 700 District Six claimants had lodged restitution claims. Of them, approximately 1 200 opted for restoration (that is, a house), while 969 claimants were still waiting at the time of the judgment.

The applicants contended that the respondents’ inaction was a breach of their constitutional and legal obligations. They sought a declaratory order to this effect, highlighting the injunction in s 237 of the Constitution that constitutional obligations had to be performed diligently and without delay. The respondents consented to a structural interdict but stressed that the concession did not imply an acknowledgment that they were in breach of their legal and constitutional obligations to the applicants.

The LCC pointed out that s 237 obliged the court to ensure that the imperatives of diligence and non-delay were complied with. The consolidation of South Africa’s young and fragile democracy required that the letter and spirit of the Constitution be absorbed by the state and the rest of society. Such internalisation was absent from the respondents’ approach in the present matter. The mere fact that nearly 80% of the claimants who had opted for a house were still without one, meant that there was merit in the granting of a declaratory order to clarify the legal and constitutional obligations owed by the respondents to the applicants. The state’s failure to deliver was magnified when viewed against the history of the applicants’ dispossession and the imperative to make good on the constitutional promise of redress.

The LCC declared that the respondents’ failure to provide restitution to the District Six claimants was a violation of their rights and a breach of the respondents’ obligations under s 7(2), s 25(7) and s 237 of the Constitution, as well as of the Restitution of Land Rights Act.

Pension funds

Time for determination of ‘dependants’ for purposes of distribution of death benefits – s 37C(1)(a) of the Pension Funds Act 24 of 1956: In Fundsatwork Umbrella Pension Fund v Guarneri and Others 2019 (5) SA 68 (SCA) the facts were as follows: A member of a pension fund had died and was survived by his wife and children and his mother. Some months later the member’s mother also died. Very shortly thereafter, and apparently in ignorance of this, the fund made its decision as to how the member’s death benefit should be distributed to his dependants. It allocated portions of the benefit, respectively, to the member’s now-deceased mother, his wife, and each child.

The wife challenged the distribution before the adjudicator, who set the challenge aside, only for the fund to make the same distribution. This fund’s distribution was subsequently set aside by the High Court, which ordered that the part of the benefit that the fund had awarded to the mother be allocated to the wife and children.

The fund appealed the GJ’s finding to the SCA. The issue before it was when, for the purposes of a s 37C(1)(a) distribution of a death benefit to dependants, a person would be a dependant.

The SCA found that it was when the fund had completed its inquiry into who the dependants were and what their allocations should be. Here, the member’s mother was not a dependant when the fund had made its decision, with the result that its award to her was contrary to s 37C(1)(a) and invalid. Hence the GJ had correctly set it aside.

Sectional titles

Use of sections for purposes other than those designated in sectional plans: The case of Mineur v Baylunes Body Corporate 2019 (5) SA 260 (WCC) concerned...
owners in a sectional title scheme who had converted parts of their sections designated on the sectional plan for garaging, to living quarters.

The body corporate sought to regularise the situation and to this end adopted, with an 84% majority vote, two resolutions and a conduct rule. The first resolution purported to approve the garage conversions and the second to adopt a conduct rule creating exclusive use areas from the common property for parking.

The applicant, an owner, opposed this course and sought relief from the Community Schemes Ombud Service. The adjudicator dismissed her application and she appealed to the WCC.

The WCC found that, given the simple nature of the matters in dispute, it had been inappropriate for the body corporate to bring the matter in the High Court rather than to the Community Schemes Ombud Service or employ legal representatives. The WCC accordingly granted the relief asked for but declined to make an award as to costs.

Other cases
Apart from the cases and material dealt with above, the material under review also contained cases dealing with -
- applicable accounting standards in company accounts;
- consumer credit agreements debt enforcement;
- consumer credit records;
- consumer protection unregistered builders;
- court powers to make settlement agreements orders of courts;
- defamation on social media and damages assessment;
- government procurement;
- income tax;
- insolvency – compulsory sequestration;
- judgments and orders;
- LCC not having jurisdiction to grant leave to appeal;
- medical practitioner disciplinary proceedings;
- refusal of leave to appeal by the SCA; and
- rights to property entitling transfer to an estate.

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What is the ‘law of the land’ when dealing with hearsay evidence during arbitration proceedings

Exxaro Coal (Pty) Ltd v Chipana and Others (LAC) (unreported case no JA161/17, 27-6-2019) (Coppin JA (Murphy and Savage AJJA concurring))

In the recent judgment of Exxaro Coal (Pty) Ltd the Labour Appeal Court (LAC) dealt with a paramount issue around the interplay between the powers granted to commissioners at the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of s 138 of the Labour Relations Act 66 of 1995 (LRA) and s 3 of the Law of Evidence Amendment Act 45 of 1988. To be specific, the court addressed the issue concerning the admissibility of hearsay evidence during arbitration proceedings at the CCMA.

Factual background

Mr Chipana, a National Union of Mine-workers of South Africa (NUMSA) shop steward was employed by Exxaro in its human resources department. He was charged with dishonesty for selling jobs to members of the public and was in breach of the disciplinary code. At the disciplinary hearing, the employer called three witnesses, namely, two members of the forensic auditing team who conducted the investigation and one of the complainants. The evidence of the two members of the forensic auditing team relayed what they had been told and heard from others during the investigation process and also relied on affidavits allegedly made by the complaints to give their testimony. Their evidence was essentially hearsay in that they had no first-hand knowledge of the alleged wrongdoing.

Mr Chipana was dismissed, however, he challenged his dismissal at the CCMA. During the arbitration proceedings, Exxaro relied on a bundle of documents, including the affidavits allegedly made by the complainants and called the two members of the forensic auditing team to prove that the dismissal was fair. It was common cause that the evidence sought to be relied on by Exxaro was hearsay evidence. The commissioner found at para 9 that: ‘6.6 Hearsay evidence cannot be admitted against a person without his consent, especially where it is not corroborated by independent evidence. This is the law of the land, and disciplinary enquiries are not exempted from the application of the law of evidence. The standard of proof in disciplinary proceedings is the same as that in civil matters, and not something lower than that. The standard must also be observed in arbitration proceedings in the CCMA.

6.7 Once the hearsay evidence against the applicant is excluded, which I hereby do, there remains no shred of evidence in support of the respondent’s allegations against him,’ (my italics).

Exxaro was ordered to reinstate Mr Chipana retrospectively, with back pay. On review, the Labour Court held that Exxaro had ‘failed to genuinely establish a compelling case for the admission of such evidence’, and that the contents of the affidavits of the complainants was undisputed and that the evidence given by the forensic audit team members was ‘based on untested allegations received from the complainants’. The court dismissed Exxaro’s review application.

The decision of the LAC

On appeal, Exxaro argued that the arbitrator failed to have proper regard to s 3 of the Law of Evidence Amendment Act, he had ignored the totality of the evidence and had merely excluded the hearsay evidence on the ground that Mr Chipana had not consented to its admission. Mr Chipana argued that there was not a ‘shred of evidence’ on which Exxaro could rely to prove the fairness of the dismissal, that the commissioner’s failure to take into account certain corroborating evidence for the content of the alleged affidavits of the complainants was not an error of law that amounted to a gross irregularity since it did not cause the commissioner to misconceive the nature of the inquiry, or his duties in relation thereto.

Section 3 of the Law of Evidence Amendment Act provides as follows:

‘3 Hearsay evidence – (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless – (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings; (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or (c) the court, having regard to – (i) the nature of the proceedings; (ii) the nature of the evidence; (iii) the purpose for which the evidence is tendered; (iv) the probative value of the evidence; (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; (vi) any prejudice to a party which the admission of such evidence might entail; and (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

(4) For purposes of this section –
"hearsay evidence" means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence; "party" means the accused or party against whom hearsay evidence is to be adduced, including the prosecution;" Section 138 of the LRA gives commissioners a discretion to conduct an arbitration in a manner that they consider appropriate to determine a dispute fairly and quickly and requires that they deal with the substantial merits of disputes with minimum legal formalities. The LAC recognised that s 3 of the Law of Evidence Amendment Act means that if there is no agreement to receive hearsay evidence it is to be excluded unless the interests of justice requires its admission, that hearsay evidence that is admissible is not in accordance with the provisions of this section is not evidence at all. This section has changed the rules regarding when hearsay evidence is to be received and when it is not to be received. It was held that s 138 does not imply that the commissioner may allow the admission or exclude hearsay evidence. Even though s 3 of the Law of Evidence Amendment Act assumes some legal formality, such formality is inapplicable. Notionally, a commissioner is not obliged to apply it during arbitration proceedings because of s 138 of the LRA (which requires minimal formality), however, a prudent commissioner does not err by applying it when dealing with hearsay evidence but follows an alternative norm, which ensures fairness in both the process and outcome of the arbitration (para 21).

It was held that applying the common law rules for the reception or exclusion of hearsay evidence in arbitration proceedings is contrary to the principles of fairness and reasonableness as they often lead to ‘rigidity, inflexibility – and occasional absurdity’. The provisions of s 3 of the Law of Evidence Amendment Act assumes some legal formality and the factors to be considered are not a closed list. With reference to the SCA judgment of S v Nhllovu and Others 2002 (6) SA 305 (SCA) where criminal courts were cautioned to be scrupulous when applying s 3 of the Law of Evidence Amendment Act, the LAC held that those safeguards and precautions, duly adapted, also apply to the application of s 3 of the Law of Evidence Amendment Act in civil proceedings. Because of the similarities between civil proceedings and arbitration proceedings, those safeguards equally apply to arbitration proceedings to ensure fairness and serve as a guide for arbitrators when faced with hearsay evidence, particularly in applying s 3. In adapting them to the labour law context, the LAC held that the principles are as follows –

- s 31(1)(c) of the Law of Evidence Amendment Act is not a license for the wholesale admission of hearsay evidence in the arbitration proceedings;
- the commissioner must be careful to ensure that fairness is not compromised in applying the section;
- a commissioner is to be alert to the introduction of hearsay evidence and ought not to remain passive in that regard;
- a party must as early as possible in the arbitration make known its intention to rely on hearsay evidence so that the other party is able to reasonably appreciate the evidentiary ambit or challenge that they are facing;
- the commissioner must explain the significance of the provisions of s 3 of the Law of Evidence Amendment Act; and
- the commissioner must timeously rule on the admission of the hearsay evidence and such ruling should not be made for the first time at the end of the arbitration, essentially the closing argument, or in the award.

The court emphasised that the point at which a ruling on the admissibility of evidence is made is crucial to ensure fairness in arbitration proceedings. The fact that the commissioner only made his finding on admissibility of hearsay evidence in the arbitration award was heavily criticised as being undoubtedly unfair to both parties. Exxaro’s legal representative had conceded in both her opening and closing statements that Exxaro had relied on hearsay evidence at the disciplinary inquiry, proceeded to adduce such hearsay evidence at the arbitration and Mr Chipana’s legal representative led evidence, which essentially tried to answer to the evidence without raising an objection on the basis that it is hearsay evidence.

The commissioner appeared passive at all times during the arbitration and did not deal with the admissibility of the hearsay evidence at that point. The court held at para 29 that:

‘The timing of the ruling and the Commissioner’s relative passivity during the arbitration when the hearsay evidence was being adduced is not consonant with a commissioner’s duty to determine a dispute between the parties fairly, or quickly’. If the issue of admissibility of the evidence had been addressed promptly when it was adduced, a ruling in that regard would have assisted both sides to know the ambit of the cases that they had to meet and could have possibly led to a quicker and cheaper resolution of the dispute. Both parties were prejudiced and deprived of the opportunity to make out a case and by the time the ruling on admissibility was made, it was too late for them to do anything to save their cases. Ultimately, it was held that a reasonable commissioner in the position of the arbitrator would have known the law on the admissibility of hearsay evidence, would have been alert to its introduction and would have addressed its admissibility promptly so as to ensure fairness and expediency.

Finally, the LAC acknowledged that while this approach seeks to introduce some measure of formality in arbitration proceedings, s 138 of the LRA does not ban all formality but merely requires ‘minimal formality’. An equitable balance must be struck between the requirement of minimal formality and the principles of fairness and speed. The award was set aside, and the matter remitted back to the CCMA for a hearing de novo before a different commissioner.

Conclusion

This case is not only important because it sets the ‘law of the land’ regarding the admissibility of hearsay evidence in arbitration proceedings but also because it is a reminder to CCMA commissioners to know their law. In the words of the LAC at para 18: ‘[I]f a commissioner purports to apply the law then it is incumbent upon the commissioner to at least make an effort to ascertain what the law is. In this matter the commissioner avowed in his award that it was the law of the land that uncorroborated hearsay evidence could not be admitted without Mr Chipana’s consent. Perhaps the commissioner had in mind an oversimplified view of the law as it stood before the enactment of section 3 of the [Law of Evidence Amendment Act], because the position described by the commissioner is and was at the time of the award certainly not the law of the land’.

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Fact corner

- The Law of Evidence Amendment Act 45 of 1988 defines ‘hearsay evidence’ as ‘evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence’.
- Hearsay evidence cannot be admitted as evidence at a criminal or civil proceeding – ‘unless each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings’.
The Constitutional Court (CC) was tasked with deciding whether the chastisement of children was unconstitutional, in the matter of Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others (CC) (unreported case no CCT320/17, 18-9-2019) (Mogoeng CJ) (unanimous). The applicant, Freedom of Religion South Africa, applied for leave to challenge the declaration of constitutional invalidity of a parent’s right to administer reasonable and moderate chastisement or reasonable and moderate application of force on their children.

The matter began as a trial of assault with intent to do grievous bodily harm in the Johannesburg Magistrate’s Court, where a father abused his 13-year-old son for watching pornographic material. The violence meted out to the son took the form of vicious kicking and punching. The father could not, therefore, have justifiably raised the defence of reasonable and moderate chastisement or relied on any religious or cultural ground to justify the unmistakably inadequate and unreasonable application of force. He was previously convicted of common assault on his wife.

Aggrieved by the outcome, the father lodged an appeal to the Gauteng Local Division of the High Court in Johannesburg. Although the state did not challenge the constitutional validity of the common law right of parents to chastise their children moderately and reasonably, the court of its own accord decided on the issue. It declared the defence to be constitutionally invalid and, therefore, prospectively unavailable to parents charged with the offence of assault (common or with the intent to do grievous bodily harm) on their children.

The CC said the history and nature of parents’ legal authority to inflict reasonable and moderate corporal punishment on their children deserved attention. Chief Justice Mogoeng borrowed a quote from Burchell and Milton Principles of Criminal Law (Juta & Co Ltd, Cape Town 1991), whom he said did a brilliant job in capturing the essence of this subject. The use of physical force upon a child as a means of corrective educational discipline is a long-established part of civilisation. In line with the social importance attributed to the family unit in all societies, the law has traditionally conceded to parents a uniquely independent authority in raising their children. For this reason, the state did not interfere in the exercise of the rights, duties and responsibilities of parents in the upbringing of their children’ (Burchell and Milton (op cit) at p 159 to 161).

The CC said Burchell and Milton correctly observed that ‘disciplinary chastisement has been considered excusable provided it serves a corrective and admonitory purpose’ (Burchell and Milton (op cit) at p 163). The legal entitlement of parents to discipline their own children exists only within the confines of moderation and reasonableness. Ill-treatment or abuse of children exceeds those bounds and is, in law, punishable by reason of its unlawfulness. The CC added that 11 years before South Africa (SA) became a constitutional democracy, it already saw the need to pass legislation that limited parental authority and provided that parental ill-treatment of a child constituted a punishable offence. The CC stated that much progress has been made in that the Children’s Act 38 of 2005 provides for a wide range of protective measures for children.

Returning to the declaration of constitutional invalidity, the CC said none of those who were parties before the High Court wanted or were able to challenge that decision. However, Freedom of Religion South Africa, which was amicus curiae (friend of the court) in the court of first instance, sought to assume that responsibility. The CC added that there was uncertainty about the standing. The court held that the difficulty was whether a friend of the court had standing to bring an application for leave to appeal in circumstances where parties in the lower court were not willing or able to do so.

The CC said the only way for the court to challenge that declaration was to grant the applicant standing. The CC pointed out that almost all parents and children in SA would be affected by its decision on the matter. The CC added that a parents’ constitutional right to freedom of religion was implicated as it was a matter that involved the best interests of children, who are a vulnerable group. This, coupled with a child’s right to be protected from all forms of violence, supports Freedom of Religion’s contention that it had standing and was allowed to intervene as a party.

A jump or translation from being a friend of the court in a lower court to becoming a party at an appeal stage was, at times, permissible on considerations of justice. It was in this case that Freedom of Religion found itself in that exact situation. Not only did the applicant seek to become a party in the public interest, but the issues raised also bore the need for intervention as a party on behalf of the general body of parents and children in SA. The CC held at para 18 that what made a noteworthy difference was that Freedom of Religion was not seeking to be involved in the matter for the first time. It took part in the proceedings in the High Court, albeit in a different capacity.

The CC questioned whether it was in the interest of justice to grant leave to
appeal or whether the application raised an arguable point of law of general public importance, which the court had to consider. The CC added that at the heart of the application were issues that related to what was in the best interests of children. The issues or points of law raised were of great interest and importance to almost all parents and children, most of whom were not able to champion the cause of ventilating these rights themselves.

The CC said the application was for direct appeal in terms of s 167(6)(b) of the Constitution and it was necessary to explain why the CC did not insist that the Supreme Court of Appeal (SCA) be approached before the CC was approached. Ordinarily, litigants must not be allowed to bypass the SCA in matters involving the application or interpretation of the common law. The CC held that this was a matter concerning the validity of a common law defence, and it was inescapable that an explanation for the deviation be furnished.

The CC said the administration of reasonable and moderate punishment by parents on their children was declared unconstitutional by the High Court. The CC added that the declaration not relating to legislation, was too close and similar in character to declarations of unconstitutionality relating to legislation, to render the bypassing of the SCA excusable. The CC pointed out that all forms of the administration of punishment by the application of common law principles would justify a departure from normal appeal practice, the nature or importance of the constitutional issues raised, the seriousness and far-reaching implications of the unconstitutionality in the matter justify a departure from normal appeal route, which the SCA was intended to address.

The CC said that certainty and finality were needed urgently and the delay that would have been caused by that appeal process trajectory would not have been in the public interest or in the interests of justice. This is so because parents discipline their children daily and the sooner parents knew what was legally permissible, the better. It was for these reasons that the constitutionality of moderate and reasonable chastisement would primarily be resolved on the provision of s 12(1)(c) of the Constitution. The CC was seeking to distinguish reasonable and moderate parental chastisement from the kind of assault and abuse of children that every campaign or challenge to end this common law defence was intended to curb.

But the difficulty the applicants had was to attempt to locate chastisement outside the boundaries of assault. The CC said that the applicant had made an interesting point that not every parent - who out of religious or cultural considerations chastises their children as a way of instilling or enforcing discipline or consequence management - intended to harm or does harm and abuse their children. Freedom of Religion displayed an implicit appreciation of the reality that just as a verbal reprimand could have an even more traumatising or brutalising effect and enduring negative impact on the well-being of a child, so can chastisement that is unreasonable and immoderate, often triggered by anger or an unbridled attitude or disposition of a tough disciplinarian.

The CC said the approach of the applicant was not purely biblical. However, there was an allusion to the appropriateness of scriptural injunctions on the use of a rod and to parents' entitlement to administer reasonable and moderate chastisement on their children as an integral part of the exercise of the right to freedom of religion. But, the applicant, was fundamentally seeking to protect the pre-existing common law defence of chastisement available to all parents irrespective of their religious persuasions, cultural practice or non-belief in a deity.

The CC said the reason bears repetition that one of Freedom of Religion's major concerns was that apparent connotation of reasonable and moderate chastisement with blantly abusive and brutal assault by holding them out as being inherently or fundamentally the same. The CC pointed out that the application for force to the body of another may, subject to the de minimis non curatur lex principle, form the slightest touch or bumping against a person.

The CC said that there were several constitutional rights that could be relied on to determine the validity of reasonable and moderate chastisement. The issues would be adequately resolved on the basis of, among others, s 12(1)(c) of the Constitution, which provides: 'Everyone has the right to freedom and security of the person, which includes the right -

(1) to be free from all forms of violence from either public or private sources.'

The CC said a proper determination of the constitutionality of chastisement requires that it be located within a criminal law setting, which is its natural habitat. The CC turned to the language of s 12, which the operative words are 'free from all forms of violence'. The first question was whether people ascribe a highly technical meaning to the word 'violence' or give it its ordinary grammatical meaning, which connotes any application of force, however, minimal.

The court said chastisement by its nature entails the use of force or a measure of violence. The CC said the objective of chastisement is always to cause displeasure, discomfort, fear or hurt. The action's difference all along lies in the extent to which that outcome is intended to be or is actually achieved.

The CC said since punishment by the application of force to the body of a child by a parent is always intended to hurt to some degree, moderate and reasonable chastisement indubitably amounts to legally excusable assault. The court pointed out that there cannot be assault, as defined, without meeting the requirements of 'all forms of violence' envisaged in s 12(1)(c) of the Constitution. The CC said the mischief sought to be addressed through s 12(1)(c) is not only certain or some form of violence, but 'all forms'.

The CC said it was necessary to emphasise that in terms of the South African law, the application of force, including a touch depending on its location and deductive meaning, or a threat, therefore, constitutes assault, and parental authority or entitlement to chastise children moderately and reasonably has an escape route from prosecution or conviction. That means the violence proscribed by s 12(1)(c) could still be committed with justification if that parental right is retained. The court said if it is accepted that what would ordinarily be criminally punishable, but for the common law defence of moderate and reasonable chastisement, is indeed what s 12(1)(c) seeks to prevent, then children would be protected by that section like everyone else.

The CC said it was adequate to say that any form of violence, including reasonable and moderate chastisement, has always constituted a criminal act known as assault. The effect of relying on this common law defence was to exempt parents from prosecution or conviction. Identical conduct by a person other than a parent on the same child would otherwise constitute indictable assault. The CC said the High Court was correct in its conclusion that the common law defence of reasonable and moderate chastisement is constitutionally invalid, and that this declaration be prospective in its operation.

The CC made the following order:

- That the application for direct access was granted.
- That the Freedom of Religion South Africa was granted leave to intervene.
- The application for leave to appeal was dismissed.
- It was declared that the common law defence of reasonable and moderate parental chastisement is inconsistent with the provisions of ss 10 and 12(1)(c) of the Constitution.
- There was no order as to costs.

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New legislation
Legislation published from 2 – 30 September 2019

NEW LEGISLATION

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Bills

Commencement of Acts

Selected list of delegated legislation
Banks Act 94 of 1990

Convention on the International Recognition of Rights in Aircraft Act 59 of 1993

Council for the Built Environment Act 48 of 2000
Designation of health establishments to administer the project and construction management professions. GN1181 GG42671/19-9-2019.

Electronic Communications Act 36 of 2005

Health Professions Act 56 of 1974
Discontinuation of the proposed regulations defining scope of profession of psychology. GN1169 GG42702/13-9-2019.

Mental Health Care Act 17 of 2002
Designation of health establishments to provide acute care, rehabilitation and palliative care for cerebral palsy. GN1146 GG42687/5-9-2019.

National Environmental Management Act 107 of 1998

Pharmacy Act 53 of 1974

Project and Construction Management Professions Act 48 of 2000


Promotion of Administrative Justice Act 3 of 2000
Designation of magistrates’ courts (appointed in terms of s 2(1)(h) or 2(1)(k) of the Magistrates’ Courts Act 32 of 1944) and regional divisions (established in terms of s 2(1)(g)(ii) of the Magistrates’ Courts Act and appointed in terms of s 2(1)(a)) as a place for holding a court for the adjudication of disputes on administrative actions. GN1216 GG42717/19-9-2019.

Designation of magistrates’ courts (appointed in terms of s 2(1)(h) or 2(1)(k) of the Magistrates’ Courts Act 32 of 1944) as equality courts. GN1218 GG42717/19-9-2019.

Public Finance Management Act 1 of 1999

Rules Board for Courts of Law Act 107 of 1985

Social Service Professions Act 110 of 1978
Amended Regulations for Child and Youth Care Workers, Auxiliary Child and Youth Care Workers and Student Child and Youth Care Workers. GN1164 GG42697/13-9-2019.

Draft delegated legislation
• Proposed amendments to the Code of Professional Conduct for Registered Auditors relating to Registered Candidate Auditors in terms of the Auditing Profession Act 26 of 2005 for comment. BN158 GG42684/6-9-2019.
• Exposure drafts issued by the Accounting Standards Board in terms of the Public Finance. Management Act for comment. BN164 GG42697/13-9-2019.
• Administrative fees regulations in terms of the International Trade Administration Act 71 of 2002 for comment. GN1173 GG42707/16-9-2019.
• Extension of the OR Tambo Interna-
Compensation for substantively unfair dismissal where reinstatement is not appropriate

In *United National Transport Union obo Schrenk v Levy NO and Others* [2019] 9 BLLR 970 (LC), an employee was dismissed after relaying an idiom that compared his subordinates to baboons. The employee's defence was that the employees did not understand an Afrikaans idiom. The commissioner found that the use of the idiom was inappropriate but the employee was not found guilty of the charge for which he was dismissed. Furthermore, he had very long service at the employer. The award was accordingly set aside and replaced with an order for compensation equal to six months' remuneration.

Resignation without notice

In *Naidoo and Another v Standard Bank of SA Ltd and Another* [2019] 9 BLLR 934 (LC), the Labour Court (LC) was required to consider when resignation by an employee without notice takes effect. In this case, the employees were issued with disciplinary charges relating to financial misconduct and immediately resigned. The employees alleged that they resigned with immediate effect because they did not have faith in the disciplinary process and a finding of guilt would have had significant reputational and financial consequences for the employees. The employer advised the employees that they were bound by a 28 days' notice period and that the disciplinary process would continue during the notice period. The employees then approached the court for an urgent interdict to interdict the disciplinary process.

The LC considered the fact that resignation is a unilateral act and found that when the resignation takes effect depends on the type of resignation. In this regard, a resignation on notice would take effect at the end of the notice period. A resignation without notice is a contractual breach, which would entitle the employer to either seek specific performance and hold the employees to the contracts or to accept the repudiation and sue for damages. Thus, it was held that the employer should have approached the court for specific performance of the contract but failed to do so.

The LC considered the different case law regarding whether an employer still has the authority to discipline an employee after resignation without notice and concluded that the employer loses its disciplinary authority unless it approached the court for specific performance of the contract. It was held that the employer did not have authority to discipline the employees after their resignations and the employer was accordingly interdicted from continuing with the disciplinary proceedings.

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The employee took the matter on review as he was of the view that the compensation was unreasonable. The Labour Court held that a number of factors need to be taken into account to determine the quantum of the compensation. In this case, the dismissal was procedurally unfair, as well as substantively unfair as the employee was not found guilty of the charge for which he was dismissed. Furthermore, he had very long service at the employer. The award was accordingly set aside and replaced with an order for compensation equal to six months' remuneration.
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Competent verdict – employee charged for dishonesty yet dismissed for negligence


Under what circumstances, if any, can an employee at an internal disciplinary hearing be found guilty of a charge which was never put to them?

The employee in this matter was charged with dishonesty, theft, fraud and unauthorised removal of property.

The employer alleged that while working at its client’s premises, the employee intentionally gave a third party, intellectual property belonging to its client. The intellectual property in question was a Microsoft software licence product activation key. At the hearing the employee admitted to e-mailing an activation key to his girlfriend’s mother to assist her installing Microsoft onto her computer but denied doing so intentionally. The employee explained that he thought he was e-mailing his girlfriend’s mother an activation key, which he privately downloaded, and which was not the property of the employer – hence he did not act dishonestly or fraudulently.

The employee was found to have committed the offences, however, the chairperson of the disciplinary inquiry did not find any dishonesty on the part of the employee. In the absence of an intent to defraud or steal, the chairperson found the employee guilty of gross negligence pursuant to which he was dismissed.

Unhappy with his dismissal the employee referred a dispute to the Commission for Conciliation Mediation and Arbitration. The second respondent arbitrator found the dismissal substantively unfair on the ground that the employee was dismissed for gross negligence when in fact he was charged for theft, dishonesty and fraud. Simply put, the arbitrator found the employee’s dismissal unfair once he was dismissed for misconduct which he was never charged for.

On review the Labour Court (LC) dismissed the employer’s application to set aside the award. The court held:

‘[i]n this case, the employee was charged with dishonesty. That is the case he went to meet and that is the case that the employer could not prove. The arbitrator correctly found that the employer did not discharge the onus of proving intent, and thus could not prove the misconduct that it had alleged. That is why the dismissal was unfair.’

On appeal the employer argued that the employee was aware of the conduct described in the charges and that dishonesty was but one of the elements he was accused of. Therefore, according to the employer, the employee knew what charge he had to meet, that being unauthorised appropriation of the client’s property.

The Labour Appeal Court (LAC) first observed that a key element of fairness is that an employee is made aware of the charge they have to meet and generally an employer cannot change the charge or introduce additional charges once the hearing commences. If in doing so, the employee would be unduly prejudiced. However, the LAC likewise remarked that courts and arbitrators should not adopt a rigid or technical approach. In striking a balance, the LAC held:

‘Employers embarking on disciplinary proceedings, not being skilled legal practitioners, sometimes define or restrict the alleged misconduct too narrowly or incorrectly. For example, it is not uncommon for an employee to be charged with theft and for the evidence at the disciplinary enquiry or arbitration to establish the offence of unauthorised possession or use of company property. The principle in such cases is that provided a workplace standard has been contravened, which the employee knew (or reasonably should have known) could form the basis for discipline, and no significant prejudice flowed from the incorrect characterisation, an appropriate disciplinary sanction may be imposed. It will be enough if the employee is informed that the disciplinary enquiry arose out of the fact that on a certain date, time and place he is alleged to have acted wrongfully in breach of applicable rules or standards.

In short, there is no requirement that competent verdicts on disciplinary charges should be mentioned in the charge sheet – subject though to the general principle that the employee should not be prejudiced.’

As to the test for deciding whether an employee would be prejudiced if they were found guilty of a charge not put to them, the LAC stated:

‘Prejudice normally will only arise where the employee has been denied knowledge of the case he had to meet. Prejudice is absent if the record shows that had the employee been alerted to the possibility of a competent verdict on a disciplinary charge he would not have conducted his defence any differently or would not have had any other defence’.

The LAC found that the arbitrator, in finding that it was not competent to sanction the employee for negligence, committed a material error in law, which the LC ought to have set aside.

Adopting and applying the correct approach to the facts of the case, the LAC found that the employee was indeed negligent by e-mailing a licence key, belonging to his employer’s client, to a third party. Despite the argument by the employee that if he had been charged with negligence, he would have presented a different case at the internal hearing, the LAC was guided by the fact that the employee was unable to explain how his case, in particular what evidence he would have introduced, would have differed had he been charged with negligence. On the facts, the employee’s own version made him guilty of negligence.

Considering the fact that the employee’s length of service with the employer was less than one year, together with the fact that he held a senior position; the court found dismissal an appropriate sanction.

The LAC upheld the appeal and substituted the LC’s finding with an order that the arbitrator’s award be set aside and replaced with a finding that the employee’s dismissal was both substantively and procedurally fair. No order as to costs was made.

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Constitutional law – expropriation of land

Consumer law
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Kathleen Kriel BTech (Journ) is the Production Editor at De Rebus.
The Internet has become an increasing part of many people’s day-to-day working lives and issues surrounding the use, abuse and addiction have surfaced. Internet addiction has serious implications on the workplace, such as loss of productivity, especially when companies do not implement Internet governance policies. There is currently no international consensus regarding the conceptualisation and diagnosis of Internet related disorders. An employee with an Internet addiction disorder is at risk and needs professional care and treatment. The most common sign of problematic Internet usage in the workplace is when employees look at pornography, when interactive chatting takes place during working hours or the employee plays games. A lot of companies have policies for Internet usage in the workplace, but few enforce these policies, because they are not aware of an employee’s Internet addiction.

Substance abuse and addiction is internationally recognised. It has been argued that non-substance (behavioural) addictions are no different from substance addictions such as alcoholism, in terms of the core components of addiction, which includes withdrawal, tolerance, salience, mood modification, relapse and conflict. South African legislation makes provisions for substance abuse and addiction in the workplace. Employers have dealt with substance abuse and addiction in the workplace. Employers have dealt with substance abuse and addiction in the workplace and there are policies and legislation, which promote the pre-
vent the substance abuse and addiction. Internet addiction shares the same characteristics as substance abusers and gambling addicts. Addictions, which include behavioural addiction, such as cybersex, online gambling and gaming, are Internet related, so why would it not be wise to treat new forms of addiction the same way as substance addiction?

Diagnostics assessments

South Africa (SA) adopted the use of the International Classification of Diseases (ICD), which is the foundation of how health trends and statistics are identified, it also includes the international standard for reporting diseases and health conditions. The ICD-11, which was released in 2018, does not only make provision for disorders due to substance use or addictive behaviour, but also makes provision for online gaming disorders. Another way of classification of diseases or disorders is the Diagnostic and Statistical Manual of Mental Disorders (DSM) based criteria, which is the most accepted way to define a disorder. The DSM is a medical classification of disorders and serves as a historical determined cognitive schema imposed on clinical and scientific information to increase its comprehensibility and utility. A detailed description of pathological use of electronic media is now added to the DSM-V, as a ‘condition for further study’. The reason for this is that there is not any official diagnostic system for Internet addiction (excessive use of the Internet with resulting adverse consequences) and it is argued that Internet addiction is a common disorder, which merits inclusion in the DSM. Fifteen percent of the South African population have substance-related problems. It is important to create a substance-free workplace to promote the safety and health of employees, it is as important to acknowledge Internet addiction and create a safe and healthy workplace for employees. It is essential to determine whether an employee suffers from an addiction, because there are certain job applications, which exclude individuals with addiction or a disability (inherent requirement).

Duties of employers to their employees, dismissals and discrimination

The employer and employee have an employment relationship to maintain and there are certain laws, regulations and policies, which protect workers and promote decent work. Internet abuse raises serious occupational issues, such as a lack of productivity. The Code of Good Practice states that substance addiction in the workplace leads to incapacity. Internet addiction could lead to the dismissal of an employee. Section 10(3) of the Code of Good Practice states that dismissal specifically includes alcoholism as a form of incapacity and suggests that counselling and rehabilitation may be appropriate measures to be undertaken by a company in assisting such employees. In the case of Transnet Freight Rail v Transnet Bargaining Council and Others [2011] 6 BLR 594 (CC), the distinction between incapacity and misconduct is a direct result of the fact that it is now accepted in scientific and medical circles that alcoholism is a disease and that it should be treated as such (see Mahlangu v Minister of Sport and Recreation [2010] 5 BLR 551 (LC)).

This has been accepted by the Commission for Conciliation, Mediation and Arbitration and bargaining councils. When an employee has become too ill to perform their current work, an employer should follow the guidelines regarding the dismissal for incapacity before terminating an employee’s service. Why should non-substance addiction in the workplace be treated differently and offer no protection to the employee as to where there is protection for employees with substance addictions? Most employers dismiss employees for Internet abuse in the workplace without being aware of the fact that the employee could be suffering from an Internet addiction. Addictions, such as Internet addiction, will lead to incapacity rather than misconduct. Internet addiction is not just an abuse or excessive use of Internet in the workplace but should be classified as an addiction from which employees need protection.

Schedule 8 of the Labour Relations Act 66 of 1995 (the LRA) further recommends that employers should treat situations where, it is suspected or known that, an employee is dependent on intoxicating liquor or drugs and not misconduct. This should refer to not only alcohol or drugs, but also Internet addiction. Currently, the LRA makes no specific provision for Internet addiction, and there is currently no South African case law that has dealt with this addiction in the workplace. According to s 9 of the Constitution employers may not discriminate on one or more grounds, which could impair their right to have their dignity respected and protected as stipulated in s 10. To not classify this addiction as a known disorder can lead to unfair dismissal and discrimination. It is also important to know when ‘excessive use’ will become addiction.

Deconstructing abuse, excessive use and addiction

In order to understand Internet addiction better, it is critical to distinguish between ‘abuse’, ‘excessive use’ and ‘addiction’. It is also important to know when ‘excessive use’ will become addiction. This distinction is necessary, because the abuse of a substance could lead to misconduct and such an employee would not be protected by law, but when an employee has an addiction, which is considered to be an illness, they will be protected by law (see the Mahlangu case). Internet addiction is a form of behavioural addiction similar to pathological gambling. Behavioural addiction starts when habits change into obligations, which then becomes an addiction. Excessive use of the Internet may not always be problematic, but the case study will create a condition for some individuals, excessive Internet usage is a real addiction and of genuine concern. Employers need to know which Internet related behaviour is reasonable (an occasional e-mail to a friend) and which Internet related behaviour is unacceptable (online gaming during work hours). Despite the difference between behavioural and substance addiction, an employee...
with a behavioural or substance addiction needs to be protected.

A way to classify behavioural addiction is to mirror it with the symptoms and consequences of alcohol and drug addiction. Behavioural addiction has attained the quality of substance abuse. Extensive research suggests that Internet use can develop into compulsive behaviour, which continues despite the consequences, and it indicates behavioural addiction, which potentially includes Internet addiction. Technological addictions are operationally defined as nonchemical (behavioural) addictions that involve human-machine interaction’ (M Griffiths ‘Does Internet and computer ‘addiction’ exist? Some case study evidence’ (2000) 3 (2) Cyberpsychology & Behaviour 211). An employee who shows symptoms of addiction needs sufficient medical treatment.

Policies in the workplace for employees with addiction

Employers should provide their employees with information, instructions, training and supervision as may be necessary to ensure, as far as is reasonably practicable, the health and safety at work of their employees. Employers must also ensure that such measures are enforced. The Occupational Health and Safety Act stipulated that their representatives need to assist in the promotion of this Act. Policies, which are implemented, must make mention of the Occupational Health and Safety Act to determine whether the employer provides a safe workplace that includes managing substance abuse in the workplace.

South Africa has a Medical Research Council (MRC) regulated by the South African Medical Research Council Act 58 of 1991 and the council’s purpose, which is to research projects that include alcohol and drug abuse. The objective of this council is to help improve the health systems in SA in accordance with that of the Department of Health. These objectives can be promoted through development, research and technological transfer. This will improve the health and quality of life for South African employees. The MRC can compel the council to act according to their functions. The MRC did research on gambling disorder, which they described as the ‘inability to resist gambling despite severe disruption to work, social and family life’.

Employers can use the code of conduct on the management of alcohol and drug related issues from the ILO to implement effective measures to prevent, reduce and control substance-related problems in the workplace. Measures to control include:

- the restriction on alcohol and drugs in the workplace;
- prevention through information;
- education and training programmes;
- identification of symptoms;
- assistance, treatment and rehabilitation programmes;
- intervention; and
- disciplinary procedures.

Interception of communication by employers is currently regulated by the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002. Through this Act, employers are able to regulate e-mail and Internet use by limiting the use of e-mails for operational means only and the employer can also regulate the attachments received in e-mails. Employers are authorised to implement Internet use policies in the workplace with sanctions for the non-compliance of these policies. According to s 30 of the Basic Conditions of Employment Act 75 of 1997, employers are obliged to give notice of these policies. The policies should regulate the conduct of the employees and also the employers, therefore, protecting both parties. Employers can stipulate in an employment contract that the private use of Internet is prohibited.

Conclusion and recommendations

Employees who can prove that they suffer from Internet addiction should be protected by South African legislation just as employees who have a substance addiction are protected. Excessive use becomes an addiction when life threatening consequences occur. This excessive problematic use causes conflict with an employee’s co-workers and employer. People with Internet addiction (which has been established is a form of behavioural addiction) should be treated the same as other substance addictions in the workplace. There is currently no criteria in SA to determine whether an employee suffers from Internet addiction. Internet addiction merits acknowledgement in a known assessment criterion such as the DSM-V or the ICD-11.

South African legislation does not provide sufficient protection for employees with Internet addiction in the workplace, therefore, SA should incorporate some of the legal principles established by other countries such as the United States, to combat Internet addiction in the South African workplace. South African legislation is familiar with Internet abuse/misuse in the workplace but does not acknowledge Internet addiction. Although there is limited medical research on Internet addiction, it is important to acknowledge the ‘coexistence of Internet abuse and other psycho-pathologies without considering one as the cause or symptom of the other’ (Ö Senormanci, R Konkan and MZ Sungur ‘Internet addiction and its cognitive behavioural therapy’ www.intechopen.com, accessed 15-10-2019). The acknowledgment of Internet addiction as a known disorder, will maintain a decent employer and employee relationship and will also promote the health of employers, employees and others.

Elma Pohl LLB (UFS) is a candidate legal practitioner at Thomas & Swanepoel Inc in Tzaneen.
This invaluable proposed amendments as published in the 2018 Amendment Bills, aided by Juta’s prelex and included. Furthermore, the pendlex, as at 1 January 2019. A useful digest of tax cases from 2007 to 2018 is also incorporated. Related supplementary material such as Regulations, Notices, Practice Notes, Interpretation Notes and Binding Rulings have been incorporated in Volume 2. Content within the different tax Acts. Related supplementary material such as Regulations, Notices, Practice Notes, Interpretation Notes and Binding General Rulings) is contained in Volume 2, which is available online and can be redeemed using the unique reference code on the inside back cover of Volume 1. The index also includes chronological listings of Statutes and Rules of Court judicially considered.

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Aifheli Enos Tshivhase, Letlhokwa George Mpedi and Managay Reddi (Editors)

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**Language preference for notarial notes**

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<td>24 June</td>
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Supplement to De Rebus, November 2019
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Supplement to De Rebus, November 2019
**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.

**What does De Rebus need from you?**
For those seeking or ceding their articles, we need an advert of a maximum of 30 words and a copy of your CV.

Please include the following in your advert –
- name and surname;
- telephone number;
- e-mail address;
- age;
- province where you are seeking articles;
- when can you start your articles; and
- additional information, for example, are you currently completing PLT or do you have a driver’s licence?

Please remember that this is a public portal, therefore, **DO NOT** include your physical address, your ID number or any certificates.

An example of the advert that you should send:
25-year-old LLB graduate currently completing PLT seeks articles in Gauteng. Valid driver’s licence. Contact ABC at 000 000 0000 or e-mail: E-mail@gmail.com

Advertisements and CVs may be e-mailed to: Classifieds@derebus.org.za

**Disclaimer:**
- Please note that we will not write the advert on your behalf from the information on your CV.
- No liability for any mistakes in advertisements or CVs is accepted.
- The candidate must inform **De Rebus** to remove their advert once they have found articles.
- Should a candidate need to re-post their CV after the two-month period, please e-mail: Classifieds@derebus.org.za

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** opinión, articles, and letters can e-mail their contributions to derebus@derebus.org.za.**

For more information, see the ‘Guidelines for articles in **De Rebus**’ on our website (www.derebus.org.za).
OVER PAYMENT/INCORRECT PAYMENT SCAM ALERT!

A long-running scam appears to have resurfaced. Communication in respect of the scam was recently distributed by the Legal Practice Council (the LPC) and the Law Society of South Africa (the LSSA) – a copy of the alert can be accessed at https://lpc.org.za/warning-against-fraud-statement/.

Put briefly, the *modus operandi* of the scam is that a person purporting to be from the Legal Practitioners’ Fidelity Fund (the Fidelity Fund) contacts the legal practice claiming that an amount of money has been paid to the firm. The caller will claim that the amount paid is in respect of a refund for trust account audit fees and/or trust account bank charges and that an overpayment or an incorrect payment has been made to the firm. The phone call may be followed up with an email or fax purporting to be from the Fidelity Fund – a cursory examination of the ‘letterhead’ used will show that the details (address, phone number, logo and email addresses) are not those of the Fidelity Fund. The type of language used and the numerous typographical errors in the emails or faxes sent by the scammers should also raise a red flag for recipients of the communication.

The caller will inform the firm that the amount was paid in error or that there was an ‘overpayment’ and that a refund should be made into a fraudulent bank account nominated by the caller. In order to induce the firm to act on the misrepresentation, the caller may add that the firm may retain a random portion of the purported payment. In many instances, a fraudulent cheque would have been deposited into the firm’s bank account and the caller will put pressure on the firm to make the payment into the fraudulent bank account as soon as possible – the aim is to get the firm to make the payment into the fraudulent account before the
discovery is made that the ‘deposit’ was in fact a cheque that will not be honoured by the bank. In the event that the firm acts on this instruction to pay, it will be out of pocket for the amount paid to the scammers.

As set out in the communication from the LPC, firms should be aware of a few basic points in order to avoid falling victim to the scam. These include that:

- The Fidelity Fund will never contact practitioners by telephone for refunds or use a private email address alleging an overpayment or payment made in error. Payments will also not be made by cheque (the scam artists will give the impression that the ‘payment’ was made by electronic funds transfer (EFT) and may even send a fraudulent, manipulated document which purports to be a ‘proof of payment’). Be aware of emails sent from Gmail, Yahoo and other similar email addresses purporting to be official communication.

- No ‘refund’ should be made without first verifying the validity of the amount and the ownership of the account into which the funds are to be deposited.

- All staff, and especially those dealing with finance, should be informed and educated about such scams.

- The scammers are very persistent and will be in a hurry to get you to pay the money out immediately knowing that the fraudulent cheque will not be honoured and will be returned marked ‘referred to drawer’. In other instances, the scammers may adopt a very friendly and apologetic attitude in order to gain the confidence and sympathy of the person they are dealing with in the firm.

- The Fidelity Fund will not pay trust bank charges/audit fee refunds into the practitioner’s trust account but into the practitioner’s business account – ask yourself, if the Fidelity Fund were to purportedly pay funds into your trust account, does it become a trust account creditor?

- The amounts of the purported payments bear no relation to the actual refund (if such refund is due to the firm) or the audit fee/trust account banking charge payment cycle.

- The Fidelity Fund should always be contacted directly using the correct contact details (available on the website www.fidfund.co.za) to confirm to confirm the authenticity of any communication asking for payment and to report any suspicious behavior. The telephone numbers for the Fidelity Fund are (021) 424 5351 or (012) 622 3900.

- Before making any payment (whether the Fidelity Fund or any other party) practitioners must verify the account details as prescribed in Rule 54.13.

We can also add that payments (even legitimate payments) should never be made unless and until there is confirmation from your bank that the funds have indeed cleared in your account and the manner in which the deposit has been made (EFT, cheque or cash) accords with what is claimed by the depositor. Questions should also be asked why the purported depositor will offer that the firm can retain part of the funds to which the firm was not entitled in the first place – there would be no legal basis for the firm to retain any of the funds if the payment had indeed been made in error. The ‘fee’ offered by the scammers is as a means (a sweetener) to induce the firm to fall for the scam when no such fee is due as the firm has not rendered any legal services in this instance and thus not entitled to any fee.

Practitioners must also keep as much detail as possible of their interaction and communication with the scammers. If possible, the phone calls should be recorded. An information and technology expert may be able to advise you on how best to preserve evidence that can be used in later court proceedings. Please also report this (and all other scams) to your bank and the South African Police Services (the SAPS).

The Legal Practitioners’ Indemnity Insurance Fund NPC (the LPIIF) will not indemnify firms that suffer losses as a result of falling victim to the scam. This loss will be a trading debt (clauses XXVII and 16 (a) of the Master Policy) and not a loss arising from professional legal liability to pay compensation to a third party (clauses 1 and 16). Losses arising from cybercrime are also not covered by the LPIIF policy (see clauses IX and 16 (o)). Firms must implement appropriate internal measures to mitigate against this and other scams. Educating staff on the modus operandi and prevalence of scams is an important and effective risk mitigation measure. The purchase of appropriate insurance cover (a commercial crime policy, misappropriation of trust fund cover and fidelity guarantee cover (the latter will apply in cases business account is the target of the scam), for example) is a risk transfer option that the firm can also consider.

In the event that the firm falls victim to the scam, resulting in a shortfall in the trust account, there is a responsibility on the practice to notify the LPC as...
prescribed in the rules issued in terms of the Legal Practice Act 28 of 2014 (the Act). The relevant rules provide that:

**Trust moneys not to be less than trust balances**

54.14.8 A firm shall ensure that the total amount of money in its trust banking account, trust investment account and trust cash at any date shall not be less than the total amount of the credit balances of the trust creditors shown in its accounting records.

**Trust accounts not to be in debit**

54.14.9 A firm shall ensure that no account of any trust creditor is in debit.

**Reports to Council of non-compliance**

54.14.10 A firm shall immediately report in writing to the [Legal Practice] Council should the total amount of money in its trust bank accounts and money held as trust cash be less than the total amount of credit balances of the trust creditors shown in its accounting records, together with a written explanation of the reason for the debit and proof of rectification.

54.14.11 A firm shall immediately report in writing to the Council should an account of any trust creditor be in debit, together with a written explanation of the reason for the debit and proof of rectification.

Vigilance at all times and the implementation of a risk management culture will assist firms in avoiding this and other scams.

Thomas Harban  
Telephone: (012) 622 3928  
Email: thomas.harban@lpiif.co.za

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**GENERAL PRACTICE**

**FIDELITY FUND CERTIFICATE APPLICATION PERIOD OPENS**

The application period for Fidelity Fund certificates for the 2020 year commenced on 1 October 2019. Practitioners liable to apply for Fidelity Fund certificates (sole practitioners, partners or directors and advocates practising with trust accounts in terms of section 34(2) (b) of the Legal Practice Act 28 of 2014 (the Act)) are urged to keep a look out for communication from the Legal Practice Council (the LPC) regarding their applications for Fidelity Fund certificates. Practitioners are advised to go to the LPC website (https://lpc.org.za/) or to that of the Legal Practitioners’ Fidelity Fund (the Fidelity Fund) (http://www.fidfund.co.za/register-your-business/fidelity-fund-certificate-applications/) for information regarding the Fidelity Fund certificate application process and the requirements to be met by applicants.

The obligation to be in possession of a Fidelity Fund certificate arises from the Act. Section 84 of the Act provides as follows:

**Obligations of legal practitioner relating to handling of trust moneys**

84. (1) Every attorney or any advocate referred to in section 34(2) (b), other than a legal practitioner in the full-time employment of the South African Human Rights Commission or the State as a state attorney or state advocate and who practises or is deemed to practice —  
(a) for his or her own account either alone or in partnership; or  
(b) as a director of a practice which is a juristic entity,  
must be in possession of a Fidelity Fund certificate.

(2) No legal practitioner referred to in subsection (1) or person employed or supervised by that legal practitioner may receive or hold funds or property belonging to any person unless the legal practitioner concerned is in possession of a Fidelity Fund certificate.

(3) The provisions of subsections (1) and (2) apply to a deposit taken on account of fees or disbursements in respect of legal services to be rendered.

(4) A Fidelity Fund certificate must indicate that the legal practitioner concerned is obliged to practise subject to the provisions of this Act, and the fact that such a legal practitioner holds...
such a certificate must be endorsed against his or her enrolment by the [Legal Practice] Council.

(5) A legal practitioner referred to in subsection (1) who —
(a) transfers from one practice to another; or
(b) ceases to practise,
must give notice of this fact to the [Legal Practice] Council and comply with the Council’s relevant requirements in relation to the closure of that legal practitioner’s trust account and in the case of paragraph (b) return his or her certificate to the Council.

(6) The Council may withdraw a Fidelity Fund certificate and, where necessary, obtain an interdict against the legal practitioner concerned if he or she fails to comply with the provisions of this Act or in any way acts unlawfully or unethically.

(7) The provisions of this section do not apply to a legal practitioner who practises in the full time employ of Legal Aid South Africa on a permanent basis.

(8) An advocate, other than an advocate referred to in section 34(2)(b), may not receive or hold money or property belonging to any person in the course of that advocate’s practice or in respect of any instruction issued to the advocate by an attorney or a member of the public.

(9) No legal practitioner in the full-time employ of the South African Human Rights Commission or the State as a state attorney, state advocate, state law adviser or in any other professional capacity may receive or keep money or property belonging to any person, except during the course of employment of such legal practitioner with the State or the South African Human Rights Commission and in such case only on behalf of the South African Human Rights Commission or the State and for no other purpose.

Section 85 of the Act (read with rules 47, 48 and 49) sets out the procedure for the application for a Fidelity Fund certificate. The offences and penalties for contravening section 84 of the Act are set out in section 93 (8) which provides that:

(8) Any person who contravenes sections 84(1) or (2) or section 34, in rendering legal services —
(a) commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both such fine and imprisonment;
(b) is on conviction liable to be struck off the Roll; and
c) is not entitled to any fee, reward or reimbursement in respect of the legal services rendered.

Practitioners must thus ensure that they apply for their 2020 Fidelity Fund certificates timeously and that they comply with all the requirements for the granting of such certificates.

In the December 2018 edition of the Bulletin (accessible at https://lpiif.co.za/wp-content/uploads/2019/04/RAB_December-2018_WEB.pdf) we reported on the judgement delivered by the Limpopo Division of the High Court in NW Civil Contractors CC v Anton Ramaano Inc and Another (993/2016) [2018] ZALMPTHC 1 (14 May 2018). In that matter, the Limpopo High Court, considering the provisions of the Attorneys Act 53 of 1979, held that the actions of an attorney who practiced without a Fidelity Fund certificate, when obliged to be in possession of such a certificate, were void ab initio. That judgment has been taken on appeal and the matter was argued before the Supreme Court of Appeal on 3 September 2019. The LPIIF’s application to be admitted as amicus curiae in this was granted by the SCA. Legal argument was advanced by the LPIIF on the issues for determination by the SCA. The SCA, in a judgment handed down on 14 October 2019, found that the relief granted by Phatudi J was never sought nor pleaded. The court confirmed that section 41 (1) of the Attorneys Act prohibited a practitioner from practising or acting as such without being in possession of a Fidelity Fund certificate. A copy of the SCA judgment can be accessed at http://www.justice.gov.za/sca/judgments/sca_2019/sca2019-143.pdf.

The LPIIF will not indemnify practitioners who, in violation of the Act, practice without a Fidelity Fund certificate. In order to qualify for indemnity under the LPIIF policy, the principal(s) in the practice – defined in the policy as an advocate referred to 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 (see clause XXIII) — must, on the date that the cause of action giving rise to the claim arose, have had a Fidelity Fund certificate (see clauses 5 and 6 of the policy). Practice conducted in violation of the provisions of the Act and the rules is not indemnified by the LPIIF (clause 16 (t) of the policy). In the event that the firm has placed top-up insurance cover (professional indemnity insurance in excess of the primary layer provided by the LPIIF) or any of the insurance products available in the commercial market, practitioners must have regard to the wording of those respective policies in order to assess whether or not they will be entitled to indemnity (and to what extent) in the event of a claim where the cause of action arose when there was no Fidelity Fund certificate. It is thus prudent that practitioners liable to apply for Fidelity Fund certificates do so timeously in order to ensure that there is no break in the period between one Fidelity Fund certificate and the next one.
THE LPIIF CLAIM STATISTICS

At the end of the 2018/2019 financial year on 30 June 2019, outstanding professional indemnity claims notified to the Legal Practitioners’ Indemnity Insurance Fund NPC (the LPIIF) were actuarially calculated at R565,559,300. This represents a 7% increase in just one quarter when compared to the corresponding figure as at the end of March 2019. Outstanding professional indemnity claims of over half a billion rand must be a cause for concern for all stakeholders in the South African legal profession.

The main claim types have remained constant in the last four years as will be noted from the table below:

Table 1

Claims arising out of the prescription of matters pursued against the Road Accident Fund (the RAF) make up the highest number by far. This is despite the efforts of the LPIIF in highlighting this risk to the profession and the making of the Prescription Alert system, as a backup diary system, available to the profession. On average, RAF related claims, by their nature, are also the most expensive claim type for the LPIIF both in terms of the value of the quantum paid in respect of such claims but also in terms of the amount spent on investigation and defence costs.

We have also published a number of suggestions for practitioners to consider implementing in their firms on order to mitigate the risk of prescription. In prior editions of the Bulletin we have also highlighted several legal arguments that practitioners can consider advancing, in appropriate circumstances, in order to challenge the prescription point raised by the RAF.

Breaking the claim notifications down into quarterly intervals, it will be noted that an average of just under 50 prescribed RAF claims are being notified per quarter as will be noted from table 2 on the next page. This shows the constant frequency and severity of the risk associated with the prescription of RAF claims.
In so far as conveyancing claims are concerned, the peak noted just before July 2016 mainly related to cybercrime claims. Claims related to cybercrime were excluded from the LPIIF Master Policy (see clause 16(o)) with effect from 1 July 2016. The number of cybercrime related claims notified to the LPIIF since the exclusion came into effect now stands at 143 (an increase of 6,72% in number since the last quarter and a corresponding increase of 6% in the value of such claims notified). Despite the large amount of communication from various sectors regarding cyber risk, phishing scams and alerts directed to the profession regarding the prevalence of emails purporting to give instructions to change beneficiary banking details, the warnings have gone unheeded in many instances unfortunately.

Though cybercrime related claims are now excluded from the LPIIF policy, practitioners falling victim to this type of crime are urged to report these matters to the South African Police Services (the SAPS) and to provide the LPIIF with details of the criminal cases opened so that we can have a record of all such cases. As with the scam referred to on page 1, practitioners must also retain as much information and evidence as possible relating to cybercrime related matters. Working with a number of other stakeholders, the LPIIF is making efforts to have the cybercrime related matters investigated and prosecuted by the SAPS and the National Prosecuting Authority (the NPA) in a coordinated manner. In order to convince the authorities of the importance of establishing such a project, we will need as much information on each and every cybercrime incident as possible.

We are aware of the challenge faced by some practitioners in certain parts of the country where the SAPS members may either refuse to register the case (on the basis that it is purportedly a civil matter), the difficulties in getting certain law enforcement agents to understand the nature of this crime and the _modus operandi_ used or to get the SAPS members to put an effort into the investigation – we have been informed that in some instances the officers registering the cases have asked the practitioners who have fallen victim to the cyberscams whether they are merely reporting the matters for insurance purposes. In many instances, the scam targeting legal practitioners is part of an organised criminal enterprise with international links. The perpetrators of the scam must be identified, investigated and prosecuted and, where possible, action must be taken to recover the funds lost by the victims. The cooperation and efforts of the profession and all other stakeholders are required in this regard.

### FIDELITY FUND CLAIM STATISTICS

In the period from 1 July 2018 to 1 July 2019, the Fidelity Fund had received 866 claims with a combined value of R420,009,920. The Fidelity Fund’s potential liability stands at R389,182,912 in respect of these claims.

Tables 3 and 4 on the next page show the number and value of claims notified to the Fidelity Fund and the value of claims paid, respectfully, in the last decade. The Fidelity Fund claims statistics relate to misappropriation of...
Table 3

NUMBER OF CLAIMS AS AT 30 JUNE 2019

Table 4

VALUE OF CLAIMS PAID AS AT 30 JUNE 2019
trust fund claims.

**Contingent claims**

As at 30 June 2019, the Fidelity Fund had 1242 claims on record with a total value of R695,108,856. As will be noted from table 5 below, misappropriation of trust fund related claims occurs mainly in the areas of conveyancing, Road Accident Fund (RAF) claims and the administration of estates. (The claims falling into the 5% category (other) arise from administrations, collections, work in the area of criminal law, matrimonial matter and insolvencies.)

As with any other business enterprise, law firms face a number of internal and external risks in so far as the protection of funds are concerned. For law firms this is compounded by the fact that, in the nature of legal practice, funds belonging to third parties are received and paid. Firms must thus develop and implement the appropriate internal controls over their financial functions as prescribed in the rules. In addition thereto, legal practices should also strive to ensure that best practices are developed and implemented in the financial areas of their operations.

Rule 54.19 provides that:

**Responsibility for ensuring compliance**

54.19 Every partner of a firm, and every director of a juristic entity referred to in section 34(7) of the Act, and every advocate referred to in section 34(2) (b) of the Act, will be responsible for ensuring that the provisions of the Act and those of the rules relating to trust accounts of the firm are complied with.

The ultimate responsibility (and liability for) losses resulting from the theft of trust funds lies with the partners or directors in the legal practice- in the case of an advocate practising with a trust account, the responsibility and liability will lie with the practitioner concerned. Directors of juristic entities conducting legal practice in terms of section 34 (7) are jointly and severally liable with the juristic entity, *inter alia*, in respect of any theft committed during their period of office (section 34 (7) (ii)).

As will be noted from the statistics published above, the misappropriation of trust funds is, unfortunately, widespread and the quanums of the funds involved are very high.

Practitioners must develop and implement appropriate measures in their practices to mitigate against this risk.

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**Table 5**

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<thead>
<tr>
<th>Category</th>
<th>Amount</th>
<th>Percentage</th>
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<tr>
<td>Conveyancing</td>
<td>R 290 915 660</td>
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</tr>
<tr>
<td>Estates</td>
<td>R 104 516 741</td>
<td>15%</td>
</tr>
<tr>
<td>RAF</td>
<td>R 121 333 187</td>
<td>17%</td>
</tr>
<tr>
<td>Investments</td>
<td>R 234 092</td>
<td>0.03%</td>
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<td>B / Finance</td>
<td>R 23 205 688</td>
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<td>Litigation</td>
<td>R 35 023 112</td>
<td>5%</td>
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<tr>
<td>Other</td>
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