LAW SOCIETY OF SOUTH AFRICA

DE REBUS

THE SA ATTORNEYS' JOURNAL

MARCH 2020

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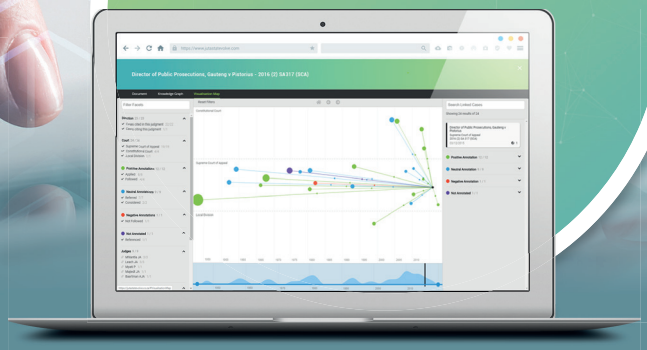

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LSSA and LPC discuss issues of importance to the legal profession

On 1 February the Executive Committee of the Law Society of South Africa (LSSA) and the Executive Committee of the Legal Practice Council (LPC) held a meeting to discuss issues of importance to the legal profession.

Legal practitioners (attorneys and advocates) in South Africa are registered with the LPC in terms of the Legal Practice Act 28 of 2014 (LPA). The LPC is a national, statutory body established in terms of s 4 of the LPA. The LPC and its Provincial Councils regulate the affairs of, and exercise jurisdiction over, all legal practitioners and candidate legal practitioners. Since 1998 the LSSA has represented the attorneys' profession. The LSSA brings together the Black Lawyers Association, the National Association of Democratic Lawyers and provincial attorneys' associations, in representing the attorneys' profession in South Africa. Below is a summary of some of the issues discussed at the meeting held between the LSSA and the LPC.

Cooperation between the LSSA and the LPC

Before the LPC came into existence, the provincial statutory law societies performed both regulatory and members' interest functions, this has been changed by the LPA. In the past the LSSA performed a professional interest function, which it still does to date. During the meeting it was agreed that the LSSA would draft a memorandum setting out reasons and rationalisation for why there should be a memorandum of understanding (MOU) between the two organisations. The MOU would be taken to the LPC for consideration.

International engagement

On the topic of international engagement with other legal professional organisations, it was decided that the LSSA should list all the international bodies that it belongs to and consider the following questions:

- What does the membership allow?
- What is the nature of the organisation?
- How can the LPC and the LSSA collaborate if they are both in attendance at an international conference?

Further, where it was clear that the membership of an international organisation was regulatory in nature, the LSSA and the LPC would jointly notify that organisation that in terms of the LPA, the regulatory body of the South African legal profession was the LPC. The LSSA remained as a voluntary association in the interest of its members.

Where the membership of an international body was on a voluntary basis and open to all that had an interest in the legal profession, the LPC and the LSSA would jointly inform the organisation that the LPC is the regulator and that the LSSA is a voluntary association.

Inspections by FIC

The LPC has entered into a MOU with the Financial Intelligence Centre (FIC), this decision is not supported by the LSSA. The taking over of the Financial Intelligence Centre Act 38 of 2001 (FICA) supervisory responsibilities by the FIC would see attorneys' practices being inspected by FIC inspectors.

The LPC advised that it considered many issues before signing the MOU with the FIC. The main issue was the fact that the LPC does not have the resources to carry out the supervisory functions over legal practitioners. Before signing the MOU with the FIC, the LPC requested advice from the directors of the former law societies who advised that it was difficult to do the FIC inspections. There had been non-implementation of FICA from the legal profession's side. The LPC was informed that it was a matter of time before the Minister of Justice would sign amendments to sch 8. According to the MOU signed by the LPC, the FIC will be conducting inspections but would not mete out penalties to legal practitioners.

It was agreed that the LSSA should prepare a memorandum for submission to the LPC on the concerns that the LPC should raise with the FIC.

Functioning of Provincial Councils

The LSSA noted that legal practitioners were concerned that Provincial Councils were not fully functional and asked whether there were committees set up to deal with the assessment of non-litigious fees. The LPC responded by saying, to date all Provincial Councils are functional with delegations of authority and appointed directors of the provincial offices, North-West is the only provincial office without a director, however, someone has been tasked with overseeing the office. At the first meetings of the Provincial Councils, Fee Assessment Committees had been set up.

The LPC further stated that if there were specific matters that were brought to a specific province and had not been attended to, the LSSA should inform the

Mapula Sedutla – Editor

LPC. Further, it was agreed that if the LSSA receives complaints about fee assessments it should bring them to the attention of the director of the Provincial Council concerned or to the executive officer of the LPC.

Legal education funding

The LSSA is aware of the financial constraints facing the LPC, however, for the LSSA to be able to deliver quality legal education there was a need for it to have some certainty regarding its budget before moving into the financial year.

Since funding for the LSSA was limited, one of the unintended consequences of limited funding was that senior legal practitioners were no longer willing to assist the LSSA as instructors because of the low fees paid to them. The LSSA requested the LPC to look at its processes and mechanisms so that service providers would be able to get some certainty and move forward in a positive way.

The LPC noted that it had appropriated funding to service providers in terms of its budgetary constraints. Further, the LPC stated that it was ironic that the LSSA was requesting for more funding to provide quality legal education to new entrants to the legal profession, yet it did not support the move to increase LPC subscriptions.

The LSSA highlighted the fact that the former provincial law societies used to convene annual general meetings to account to legal practitioners on how the funds were utilised. The LPC has no obligation to convene annual general meetings, therefore, it was difficult for legal practitioners to understand that the LPC does not have enough resources to fund

legal education. The LSSA thanked the LPC for the legal education funding that was granted in 2019 and assured the delegates at the meeting that the funding for legal education was utilised for its intended purpose.

It was agreed that compliance reports should be submitted to the LPC on time so that budgetary appropriations would not be unnecessarily delayed and that the LSSA should consider why the LPC should continue to fund the six months course instead of the five-week course only.

LSSA legal education accreditation

The LSSA requested that its accreditation to provide legal education services be extended from one to three years. The LSSA had submitted proposals to the LPC to revisit its accreditation criteria and was aware that the LPC was looking at its accreditation criteria and standards.

The Education Standards and Accreditation Committee of the LPC will be meeting to review the accreditation criteria/norms and standards. After the committee had reviewed the criteria, it would be approved by the LPC and published for comment. The expectation was that the process would be completed by April 2020.

LPC fees levied on legal practitioners

The LSSA requested to be furnished with the reasons that necessitated the subscriptions to be increased by the LPC. The LSSA was concerned that legal practitioners were going to be levied further by the Legal Practitioners' Indemnity Insurance Fund NPC (LPIIF) following the implementation of the professional indemnity cover payment. The cost to practise in South Africa was going to weigh heavily on legal practitioners. The LSSA had met with the Legal Practitioners' Fidelity Fund (LPFF) and raised its concerns as there was a need to look at the issue of cost to practice holistically.

The LPC explained that access to the profession was one of the main objectives of the LPA. The subscriptions were considered thoroughly by the LPC. In the past there were four provincial law societies, while the LPC has nine provincial offices that need to be funded and capacitated. The LPFF had indicated that it was not in a position to increase its appropriation to the LPC because it was having financial challenges.

The LPC was also concerned about the premium cover, which was to be paid by legal practitioners, particularly from the perspective of the sole practitioner. The LPC consulted with the LPFF and the LPFF agreed to postpone the implementation of the premium cover to 2021. The LPC has established a task team, which will engage with the LPIIF on the issue of the premium cover. Further, the LPC stated that the issue of cost to practise could not be complete without the LPC knowing how much subscription the LSSA was going to charge its members.

The LPC noted that it followed the law before increasing subscriptions payable by legal practitioners. The LPC issued a notice with the proposed fees and received comments from legal practitioners. The comments were considered by the LPC, which resulted in the LPC coming up with a figure of R 3 500 (excluding VAT). The subscription amount would have been much higher if the LPFF did not make the contribution it makes to the LPC.

Initially the National Forum on the Legal Profession had conducted modelling on the issue of fees and it worked out an amount of R 3 500 per annum per practitioner. It was then felt that it was going to be too much of an adjustment for the legal practitioners to pay such an amount in the first year. The National Forum then worked out some way to get through the first year at a lower figure of R 2 500 annual subscription per practitioner.

The LSSA noted that although the LPC had followed due process as required by law in coming up with an increased subscription, legal practitioners were feeling the weight of the cost to practise in South Africa. As the leaders of the profession, the LPC and the LSSA should continue to deal with the issue of fees until a solution was found.

It was agreed that:

- The LSSA should furnish a formal resolution requesting reasons why the LPC increased the subscriptions.
- The LPC should provide the LSSA with the default rate of legal practitioners in paying fees so that it could prepare itself in collecting levies and dealing with the issues that may arise such as members being suspended for not paying levies.

Debt Collectors Amendment Bill

Prior to the LPA coming into operation, the Debt Collectors Amendment Bill, 2016 had been on the table and the former Law Society of the Northern Provinces had made representations to the minister on the Amendment Bill.

The Deputy Minister of Justice and Constitutional Development, John Jeffery, had made a remark on the Debt Collectors Amendment Bill at the annual general meeting of the Council for Debt Collectors on 18 November 2019. He said that he had requested the department to amend the Bill to subject attorneys who did debt collecting to the provisions of the Act and making them accountable to the Council for Debt Collectors. The reason was that there was widespread abuse by attorneys on the collection of debts.

Deputy Minister Jeffery was also of the view that the Council for Debt Collectors was more efficient in addressing abuses and disciplining errant members than the regulatory body in the legal profession. His concern was that the definition of debt collection was taking money from someone. In 90% of litigation, legal practitioners would sue persons for money and that was debt collection. Conveyancers collected rent, which was also a form of debt collection. Further, the registration process with the Council for Debt Collectors was complex. In terms of the Debt Collectors Act 114 of 1998, every person who worked on the file had to be registered, including receptionists and typists. If an attorney had a staff of 20 people, they would pay a subscription for 20 persons.

It was agreed that the LSSA should prepare a memorandum to assist the LPC in its deliberations with the Deputy Minister Jeffery on the amendment of the Debt Collectors Bill. The LSSA would forward comments on the first Debt Collectors Bill to the LPC. Should the amendment sail through, the LPC would request an exemption for attorneys practising debt collection from the jurisdiction of the Council for Debt Collectors. The LSSA, as a professional interest organisation, will encourage attorneys to read the Debt Collectors Amendment Bill.

See also:

- Mapula Sedutla 'Bill to deal with debt collection issues' 2015 (Nov) *DR* 3; and
- Barbara Whittle 'LSSA strongly opposes Debt Collectors Amendment Bill' 2016 (March) *DR* 10.

Amendments to the LPA

It was suggested that the list of proposed amendments from the LSSA be forwarded to the LPC in the interest of time. The LPC had considered all the proposed amendments to the LPA, which were submitted to the Department of Justice and Constitutional Development had all been referred to the LPC. Since the LPA gave the LPC the responsibility of moving amendments to the Act, all the other organisations that are seeking amendments to the LPA should do so through the LPC. It was agreed that, going forward, the two organisations would engage each other on the proposed amendments to the LPA.

LPFF board elections

The process of getting the LPFF board elections to take place was underway. The LPFF board elections would be taking place around April 2020. The LPC and the LPFF had established task teams to facilitate the first LPFF board elections. The task teams were engaging and had finalised r 46, which would be published 30 days before the elections take place.

A victory for parents and children – the commencement of the amendments to the Basic Conditions of Employment Act

By Tshepiso Rasetlola and Asithandile Liwela

Prior to the amendments to the Basic Conditions of Employment Act 75 of 1997 (BCEA), an employee, who did not qualify for maternity leave was only entitled to three days paid family responsibility leave when the employee's child was born.

The amendments to the BCEA introduce the long-awaited parental, adoption and commissioning parental leave with effect from 1 January 2020, through the promulgation of the Labour Laws Amendment Act 10 of 2018 (the Act).

Parental, adoption and commissioning parental leave

Section 25A of the BCEA provides for the right to parental leave. The new section provides that an employee, who is a parent of a child, can apply and is eligible for, ten consecutive days parental leave. The leave commences on the day the child is born; the date that the adoption order is granted; or the day that a child is placed in the care of a prospective adoptive parent by a competent court, pending the finalisation of an adoption order in respect of that child, whichever date occurs first.

Section 25B of the BCEA provides for the right to adoption leave. This new section entitles an adoptive parent of a child below the age of two years to ten consecutive weeks of adoption leave or the ten days parental leave in terms of s 25A of the BCEA. The leave commences on the date that the adoption order is granted or the day that a child is placed in the care of a prospective adoptive parent by a competent court, pending the finalisation of an adoption order in respect of that child, whichever occurs first.

Notably, if an adoption order is made in respect of two adoptive parents, one of the adoptive parents may apply for adoption leave and the other for parental leave. The election is at the discretion of the two adoptive parents.

Lastly, s 25C of the BCEA provides a commissioning parent in a surrogate motherhood agreement with the right to commissioning parental leave of at least ten consecutive weeks or parental leave of ten days, as per s 25A of the BCEA. The commissioning parental leave will commence on the date the child is born as a result of the surrogate motherhood agreement.

In instances where a surrogate motherhood agreement has more than two commissioning parents, one of the commissioning parents may apply for commissioning parental leave and the other for parental leave as per s 25A of the BCEA. Once again, the election is at the discretion of the two commissioning parents.

Notification of the leave

The employee must notify the employer in writing of the date on which such employee intends to take parental, adoption or commissioning parental leave. The employee intending to take the respective leave, must provide the employer with notice at least one month before the expected date of birth or as soon as reasonably possible.

Important considerations for employers

- **Family responsibility leave**

Family responsibility leave is no longer permitted for the birth of a child and is restricted to instances when a child is sick or in the event of the death of a spouse or life partner or the employee's parent, adoptive parent, grandparent, child or adopted child, grandchild or sibling.

- **Parental benefits**

The amendments to the BCEA relating to parental benefits commenced with effect from 1 November 2019. Section 8(*a*) and (*b*) of the Act amended s 12 of the Unemployment Insurance Act 63 of 2001 to include parental benefits in addition to the benefits already provided for in terms of this section namely unemployment, dependent's and illness benefits.

The provisions of the new s 26A of the Unemployment Insurance Act provides that a contributor (subject to s 14 of the Unemployment Insurance Act) who is the parent of a child is entitled to parental benefits if the application is made in accordance with the prescribed requirements and provisions of the Unemployment Insurance Act. Parental benefits must now be paid at a rate of 66% of a beneficiary's earning at the date of application.

In conclusion, pursuant to the amendments, employers must review their outdated policies and contracts of employment and update their leave systems to align the leave provisions with the provisions of the Act.

Tshepiso Rasetlola *LLB (NWU)* is a legal practitioner and Asithandile Liwela *BA Law LLB (UP)* is a candidate legal practitioner at Fasken in Johannesburg. ❑

By the Financial Intelligence Centre

Using a risk-based approach to combat money laundering and terrorist financing

As accountable institutions listed in sch 1 of the Financial Intelligence Centre Act 38 of 2001 (FIC Act), legal practitioners are required to apply a risk-based approach when establishing a business relationship and/or conducting a single transaction with a client.

This requirement aligns with the Financial Action Task Force (FATF), which sets international standards on combating money laundering and terrorist financing.

The application of a risk-based approach – when implementing controls – allows a legal practitioner to mitigate money laundering and terrorist financing. Controls put in place by legal practitioners must be in proportion to the risks they identify. To comply with the requirement of applying a risk-based approach, legal practitioners must identify, assess, monitor, mitigate and manage the risk that their products and/or services may be abused by criminals for money laundering and/or terrorist financing.

Identifying and assessing risk

As part of identifying risks, legal practitioners must assess all factors relevant to establishing a business relationship and/or conducting a single once-off transaction with their clients.

Legal practitioners can take into account the following factors when identifying potential money laundering and terrorist financing risks:

- **Products and/or services:** Consider the extent to which the legal practitioner's product and/or service offers anonymity to the client; does the product and/or service allow for third party payments; can the product be converted easily to cash; and is the product and/or service subject to additional checks, such as credit or regulatory approvals and so on.
- **Client types:** From a money laundering and terrorist financing perspective, different client types present different levels of risk. Legal practitioners must delvelop a deep understanding of who their customers are, and the potential risks they pose. Such considerations would include whether the client is a natural person or a complex structure. Legal practitioners may find that dealing with a client who is a natural person presents less risk than dealing with a legal entity, such as a company. Some companies may be abused by a criminal attempting to hide behind a corporate structure. In light of this, it is vital that legal practitioners identify beneficial owners of legal persons. Beneficial owners can include shareholders of companies and beneficiaries of trusts, and so on. In addition, legal practitioners need to consider whether there is negative coverage on their clients in the media, the client's source of income and source of wealth. They need to ask, whether the client is in an occupation or sector that presents a higher risk from a money laundering and terrorist financing perspective.
- **Delivery channels:** The way in which a client is on-boarded (familiarising a client with one's services) must be considered. Do they on-board clients through an intermediary or on a virtual platform with no face to face contact? The latter approach to on-boarding clients may hold a higher risk than face to face on-boarding.
- **Geographic location:** Legal practitioners must take their own location into account, namely where they provide their products and/or services, in relation to where their client is located. Some accountable institutions do not necessarily provide products and services in different countries, in this instance the different provinces and even regions can be assessed and compared from a risk perspective. Some geographical locations may pose a higher risk due to a heightened perception of corruption, as well as lower levels of regulations regarding anti-money laundering and combating of terrorist financing.
- **Other factors,** which should be considered, include: Whether the client is a sanctioned person; a domestic prominent influential person; or a foreign prominent influential person.

Legal practitioners may also refer to industry guidance on whether certain products and/or services, client types, or sectors and so on, pose a higher risk from a money laundering and terrorist financing perspective.

After identifying and assessing the potential risks, the legal practitioner can then assign different weightings based on the perceived risk to yield an overall client rating. The higher the overall client rating, the more stringent the controls must be. Enhanced control measures should be applied to mitigate the heightened risk. Where the client risk rating is lower, there may be fewer control measures.

Key aspects to managing risk

Legal practitioners must develop controls, which mitigate and manage the risks, and which fulfil the Financial Intelligence Centre's (FIC's) compliance requirements. Controls include, but are not limited to –

- policies;
- procedures;
- systems;

- training;
- reporting; and
- other aspects.

All controls implemented must be monitored for adequacy and effectiveness. All the controls developed and implemented by the legal practitioner forms part of their risk management and compliance programme.

In summary, the controls that must be included in a risk management and compliance programme must provide for:

- Client profiling – factors and methods to be taken into account when determining the overall client risk rating.
- Customer due diligence, which includes identifying and verifying clients and all other required persons.
- Additional due diligence, which includes identifying and taking reasonable steps to verify beneficial owners and other persons.
- Enhanced due diligence, which includes obtaining senior management approval and putting in place any other enhanced measures to mitigate dealing with higher risk clients.
- Simplified due diligence, which includes less stringent measures when dealing with lower risk clients.
- Client transaction profiling methods, which includes profiling expected activity for products/services and client types.
- Ongoing due diligence, which includes keeping client information up to date and accurate.
- Account monitoring, where client products and services (ie, accounts) are monitored to identify suspicious and unusual activity.
- Client screening and payment screening against financial sanctions of the United Nations Security Council (UNSC), which is available on the UNSC website (www.un.org/securitycouncil/) and against the targeted financial sanctions list, which is available on the FIC website at www.fic.gov.za.
- Reports submitted to the FIC –
  - suspicious and unusual transactions reports;
  - terrorist property reports;
  - cash threshold reports; and
  - international fund transfer reports.
- Keeping records of all customer information, transaction information and reports submitted to the FIC.

Legal practitioners must ensure their risk management and compliance programme covers all the aspects as set out in s 42 of FIC Act. The risk management and compliance programme must be approved by the legal practitioner's board of directors, senior management or other person or group of persons exercising the highest level of authority in the accountable institution. ❑

Accounts receivable: Client billing

By Carl Holliday

Cash flows into the business bank account as payment received for work done. In order to receive payment, legal practitioners need to report to clients the nature of work done and request payment. This requires debiting fees to client accounts and sending statements to clients, to inform them of what they owe. It is central to practice management that a clear distinction be made concerning client account balances. A client account simultaneously represents a trust creditor and a business asset: The legal practitioner owes the client the value of the trust ledger, while at the same time, the client owes the legal practitioner the value on the business account. This account may never reflect a trust debit balance, but a business debit balance is normal. The distinction is critical. Poorly managed accounts receivable drains the business of vital cash and leads to obligations, which cannot be met. Manipulating financial records to avoid value added tax (VAT) liability is a crime (see *Africa Cash and Carry (Pty) Limited v Commissioner for the South African Revenue Service* [2020] 1 All SA 1 (SCA)).

Accounts receivable defined

Accounts receivable represent the value of work done, for which payment has not yet been received. Legal practitioners provide credit to clients from the time the work is done, until payment is received. On any account, this outstanding balance may be composed of fees, for work done, any reimbursable expenses and disbursements incurred on behalf of the client. The total value of accounts receivable represents an asset in the business books, similar to the value of the business cash book, but legal practitioners can only spend the value of the cash book. It is imperative that accounts receivable be converted to cash as soon as possible.

An outstanding balance represents the total legal practitioners and own client cost to client for services rendered. Cumulatively, all these outstanding balances together amount to accounts receivable.

The balance of accounts receivable act as an indication of the outstanding value due to legal practitioners, while income represents the value of work done. Income, cash and accounts receivable are related, but have different values and meaning.

How do legal practitioners convert accounts receivable to cash?

Having done the work, the client must be informed of the cash value of the work done, with a request for settlement of the account. Client billing is the process where transactions are debited to client accounts, and these accounts are submitted to clients for payment.

Reports to clients may take the form of letters, e-mail or SMSes, with instant messaging applications, such as WhatsApp also in use. These reports are typically narrative by nature, telling the client what the legal practitioner has done. Statements and invoices, and by extension bill of costs, are not narrative by nature. These are transactional documents, listing items and values. That transactions ought to be accurately and sufficiently narrated is required by common sense, accounting, auditing and legal practice. Simply billing a client for 'fees' is counterproductive and nearly mean-

ingless. Specifying 'fee consultation with client 45 minutes' is both clear and accurate. Verbose detailing the contents of the consultation risks exposing confidential information in a standard accounting report and is generally a waste of space. Bear in mind that reports and letters are generally sent and received to the client, and may become part of the formal process, whereas client billing documents are a request for payment, typically handled through an administrative process.

Invoices and statements are accounting documents generated by the firm as part of its ordinary business activities and reflect accounting transactions. These are primarily sent by the firm to its own clients.

Invoices

'To invoice' means to make up a list of items of work done, for which the client owes the legal practitioner. This implies that payments received are not reflected and there is no opening or closing balances. It simply states the nature of the work done, and the total value of those items the legal practitioner expects payment for. In the event of VAT registration, VAT particulars should also appear on this invoice. It should contain the words 'tax invoice', 'VAT invoice' or 'invoice'.

CHECKLIST

VALUE-ADDED TAX (VAT) INVOICES

FULL TAX INVOICE

(this is required where the supply (including VAT) exceeds R5000)

CRITERIA THAT THE INVOICE MUST MEET	Y/N
Contains the words "Tax Invoice", "VAT Invoice" or "Invoice"	
Name, address and VAT registration number of the supplier	
Name, address and where the recipient is a vendor, the recipient's VAT registration number	
Serial number and date of issue of invoice	
Accurate description of goods and /or services (indicating where applicable that the goods are second hand goods)	
Quantity or volume of goods or services supplied	
Value of the supply, the amount of tax charged and the consideration of the supply (value and the tax)	

Note: all seven criteria must be met for the invoice to meet the requirements of a Tax Invoice

ABRIDGED TAX INVOICE

(where the supply (including VAT) is greater than R50 and less than R5000)

CRITERIA THAT THE INVOICE MUST MEET	Y/N
Contains the words "Tax Invoice", "VAT Invoice" or "Invoice"	
Name, address and VAT registration number of the supplier	
Serial number and date of issue of invoice	
Accurate description of goods and /or services	
Value of the supply, the amount of tax charged and the consideration of the supply (value and the tax)	

Note: all five criteria must be met for the invoice to meet the requirements of an abridged Tax Invoice

SARS
South African Revenue Service

Above: The value added tax invoice checklist is available for download from www.sars.gov.za

This instrument makes it possible for the VAT registered client to recover input VAT on the services rendered.

An invoice is a once-off report, with no opening or closing balances, and typically has no reference to a trust balance. Using commercial accounting software reinforces this trend. Since legal mandates often extend over several months, multiple invoices are to be expected. Unfortunately, it is not uncommon to see firms come to a standstill at month end 'while we invoice clients.'

An invoice, especially a VAT tax invoice, is typically a once off affair as far as the transactions contained are concerned.

Statements

A statement of account may reflect individual transactions, as well as opening and closing balances, often with an age analysis computing how the balance is calculated. Both business, trust and net balances may be expected.

Where invoices are issued, it may be necessary to also issue statements in order to properly account for trust transactions.

Statements are not unique and should be updated with current transaction information.

It is possible to reflect transactions in various degrees of detail. An itemised statement should reflect all transactions in great detail, duplicating the content of preceding invoices, while a non-itemised invoice may compress each invoice to a single line entry.

Bill of costs

Part of the legal process, and not a normal business activity, is the drafting and taxing of a formal bill of costs.

A bill of costs is a formal document at the end of the litigation process. It is intended to allow recovery by the successful party from the opponent. It is not typically used to recover a legal practitioner's costs from their client. A bill of costs is not used for other types of work, such as conveyancing or commercial work.

Where a legal practitioner's normal, routine statements and invoices to clients are typically at their own agreed tariff, a bill of costs is drafted in terms of a court order and on a specific scale: Party and party; or attorney and client scale. Only where the parties are contractually bound, may a bill of costs be taxed on a scale as between attorney and own client, it is generally not sound in law to recover same from third parties, on the grounds that the third party was not privy to the terms of the agreement.

Where a client has been billed and a subsequent bill of costs may be taxed on behalf of that client, certain rules apply.

Some of the most pertinent rules, to

which such a bill of costs is subject, include:

- In litigation matters, interim invoices and statements of account may be sent at any time. There is no restriction on submitting interim statements to clients. An unlimited number of such statements and invoices may be submitted.
- A bill of costs may only be taxed under specific circumstances. Monthly bills submitted for taxation are not possible.
- Where a client has been billed a certain amount for a specific item, the final item contained in the bill of costs is restricted to the same amount.
- Where the client receives an invoice, including VAT, the rule in *Thoroughbred Breeders' Association of South Africa v Price Waterhouse* [2001] 4 All SA 161 (A) makes it impossible to recover VAT from a third party where the client is entitled to recover that input VAT.
- Formal taxation often results in a writ or warrant, and this is executed by the Sheriff.

A bill of costs should be seen as specialised legal work, much like drafting any other formal court document.

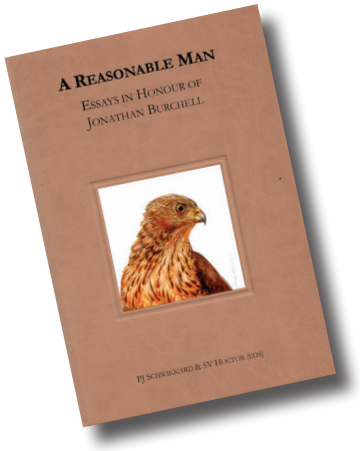
Debtor's statement

A debtor's statement of balance, commonly used in debt collection proceedings, is not a formal document in the same sense as a bill of costs. The content is often assessed by the clerk or registrar and while assessment is an administrative task, taxation is a formal, *quasi*-judicial final process. Taxation may override assessment. In addition, the debtor is liable for the capital debt due to the client, as well as allowed costs. The maximum scale to be recovered from a debtor would be attorney and client, as recovery of attorney and own client costs is not founded in law (see *Aircraft Completions Centre (Pty) Ltd v Rossouw and Others* 2004 (1) SA 123 (W)).

Regular statements and invoices are routine, administrative documents, which can be mass produced and sent by computer. Where an accounting software solution is implemented, care should be taken to ensure the accuracy of the transactions captured, allowing the bulk sending of statements and invoices at regular intervals. A cycle commencing with a pro forma invoice, subject to scrutiny and review, followed by a formal invoice and recurring monthly statements until settlement ought to facilitate billing and cash flow. Drawing a file from a cabinet to verify receipt of payment and scanning a typed statement for e-mail transmission is simply not productive or economical.

Carl Holliday *BProc LLB (NWU)* is a non-practising legal practitioner in Pretoria. ❑

Book announcements



A Reasonable Man – Essays in honour of Jonathan Burchell

By PJ Schwikkard and Shannon Hoctor (eds)
Cape Town: Juta
(2019) 1st edition
Price R 650 (incl VAT)
310 pages (hard cover)

This book is a collection of essays published in honour of Jonathan Burchell in recognition of his commitment to the academe and his strong sense of loyalty to the institutions in which he has worked, particularly to students and colleagues. The breadth and impact of his research in the fields of both delict and criminal justice are attested to by the esteemed multidisciplinary scholars who contributed to this work. ❑

Determining a trust position

By Simthandile Kholelwa Myemane

From the inspections that the Legal Practitioners' Fidelity Fund (LPFF) have conducted on the trust accounts of trust legal practices, the LPFF has noted that there is often a lack of clear understanding of trust deficits, and how to determine a trust deficit position. There are also trust legal practitioners who cannot distinguish between trust accounts in debit and trust deficits, and/or do not fully comprehend the impact of a trust creditor's account that has a debit balance. This article seeks to unbundle trust positions, and in doing so, will also deal with the debit balances and their potential impact.

Needless to mention that both situations are unacceptable as can be seen from the following extracts:

- Rule 54.14.8 of the final rules as per ss 95(1), 95(3) and 109(2) of the Legal Practice Act 28 of 2014 (the LPA) states: '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'.

This rule relates to the entire trust account of a trust legal practice, which trust account is made up of various trust creditors. To simplify this rule, it relates to all funds available in trust against the total owed to trust creditors by the trust legal practice. Funds available in trust are not limited to s 86(2) trust bank account, but also include cash on hand and money invested in terms of s 86(3) and s 86(4) of the LPA and interest thereon.

- Rule 54.14.9 of the final rules as per ss 95(1), 95(3) and 109(2) of the LPA states: 'A firm shall ensure that no account of any trust creditor is in debit'.

This rule relates to an individual trust creditor's account, which account forms part of the entire trust account. This rule essentially refutes overdrawing on trust creditors' accounts and it is meant to encourage taking of fees and making payments only from trust creditors' accounts with available funds. Taking fees or making payments from a trust account with insufficient funds implies that another trust creditor's funds have been used to service the obligations of another trust creditor.

We now look at the requirements in respect of keeping of trust accounting records for a trust legal practice. Section 87(1) of the LPA requires a trust legal practice to keep proper accounting records containing particulars and information in respect of –

'(*a*) money received and paid on its own account;
(*b*) any money received, held or paid on account of any person;
(*c*) money invested in a trust account or other interest-bearing account referred to in section 86; and
(*d*) any interest on money so invested, which is paid over or credited to it.'

This article does not seek to deal with all accounting records that a trust legal practice is expected to keep but will deal with those that mainly impact on the determination of a trust deficit position, and those related to such records. We now turn to explaining pertinent trust accounting records that a trust legal practice is expected to keep.

• Trust cashbook

A trust cashbook can be explained as a ledger that records movements in the entire trust account of a trust legal practice on a day to day basis. The salient features of a trust cashbook are –

- the period covered by the cashbook, for example, trust cashbook for the period 1 January 2020 – 31 January 2020;
- the opening balance at the beginning of the month covered by the cashbook, for example, balance brought forward – R 23 879,67;
- the transactions taking place during the month, receipts and payments as they occur; and
- the balance at the end of the month.

• Bank reconciliation statements

These statements are used to compare the trust cashbook to the trust banking account. Ideally, these two should always reflect the same transactions and balances, but there are instances when they do not, and reconciling items, therefore, need to be determined. This can happen when there are transactions recorded in the one and not on the other: For example, cash received at the trust legal practice's premises may be recorded in the trust cashbook, but not yet deposited in the trust banking account, leading to a difference between the two records by that outstanding amount.

Another example is when a trust legal practice writes out a cheque to pay a trust creditor or make a payment on behalf of the trust creditor, but the cheque may not yet be presented at the bank. The issued cheque will be recorded in the cashbook on the date of issuance, while the trust banking account does not have a record of the cheque until such time that the cheque is presented to and cleared by the bank; and the validity of the cheque spans over a number of months.

These outstanding amounts then become reconciling items, until they are cleared, which then brings the cashbook and trust banking account to reflect the same balances.

• Trust creditors listing

The trust creditors listing is clearly explained in the following extracted rules, and forms part of the accounting records to be maintained for the same period as other accounting records that they relate to.

- Rule 54.15.1 states: 'Every firm shall extract monthly, and in a clearly legible manner, a list showing all persons on whose account money is held or has been received and the amount of all such moneys standing to the credit of each such person, who shall be identified therein by name, and shall total such list and compare the said total with the total of the balance standing to the credit of the firm's trust banking account, trust investment account and amounts held by it as trust cash, in the estates of deceased persons and other trust assets in order to ensure compliance with the accounting rules'.
- Rule 54.15.2 states: 'The balance listed in respect of each such account shall also be noted in some permanent, prominent and clear manner in the ledger account from which the balance was extracted'.

The ledger accounts from which the balances listed in the trust creditors listings are extracted are the individual trust accounts referred to for determination of the debit balances.

Determination of a trust surplus or deficit position

A trust surplus or deficit position is determined by taking the trust creditors listing totalled balance from the cashbook balance at a specific date, for example, at month end. If the difference between the two records reflects that the cashbook balance is more than the trust creditors balance, it is a surplus trust position. However, if the difference reflects a trust creditors listing balance that exceeds the cashbook balance, it is a deficit trust position. What the latter position effectively suggests is that if the trust legal practice were to be called on to repay all its trust creditors it would be unable to do so as there would be insufficient funds to repay all trust creditors.

Besides a clear misappropriation of trust funds, there are other ways in which a trust position can be concealed or incorrectly determined, and trust legal practitioners are hereby cautioned. Below are a few scenarios, however, the list is not exhaustive.

• A trust account with a trust debit balance

Trust legal practitioners must not ignore the details in the accounting records as balances alone can easily conceal the underlying information and, therefore, mislead the trust legal practitioner. Consider the following scenario:

The trust account of XYZ Attorneys reflects three trust creditors as follows:

Trust creditors listing	**Trust Creditor**	**Balance**
	Say (Pty) Limited	R 386 435,21
	Write CC	R 27 321,43
	Same Same	(R 24 654)
	Total	**R 389 102,64**

The trust cashbook on the other hand also reflects a balance of R 389 102,64 since all the transactions that took place will reflect in the cashbook, including the payment in respect of client Same Same, which payment could have been from any of the other two trust creditors since this client clearly had no available funds.

This scenario can easily mislead a trust legal practitioner into thinking that everything is fine when just taking the balances as they will cancel out to a nil balance. However, upon scrutiny of the underlying records it becomes clear that someone else's funds were used to service someone else's obligations, suggesting that in fact the trust creditors listing balance is R 413 756,64 as opposed to the R 389 102,64 reflected. This is so because if the trust legal practice were to be required to repay its trust creditors, there are two trust creditors that essentially would have to be repaid: Say (Pty) Limited and Write CC and the totalled amount owed to the two trust creditors is R 413 756,64, while funds available amount to R 389 102,64, suggesting a trust deficit of R 24 654. This is an example of a concealed trust deficit.

• Accounting records not updated

A trust surplus or deficit position can be portrayed incorrectly due to lack of updating of one or more of the trust accounting records.

- For example, a trust cashbook may not be updated with a payment made against a trust creditor's account, while the trust creditor's ledger and trust creditors listing are both updated with the amount. This will incorrectly suggest a surplus position in the trust account, when in fact there is none. Here is an illustration:

Trust creditors listing	**Trust Creditor**	**Balance**
	Say (Pty) Limited	R 361 781,21
	Write CC	R 27 321,43
	Total	**R 389 102,64**

However, the cashbook may not have recorded the R 24 654 payment that happened during the month and continue to reflect a balance of R 413 756,64. This error results in the trust position suggesting a trust surplus position, whereas there is no surplus. A trust surplus is when the available trust funds exceed the trust creditors' balance, suggesting that there is an amount available to transfer to business.

- A trust deficit can also result from lack of updating the trust creditor ledger and thus an incorrect trust creditors listing, while the cashbooks have recorded all transactions that took place. Below on the illustration:

Trust creditors listing	**Trust Creditor**	**Balance**
	Say (Pty) Limited	R 386 435,21
	Write CC	R 27 321,43
	Total	**R 413 756,64**

In the meantime, the cashbook may reflect a balance of R 389 102,64 having taken into account a payment of R 24 654 from Say (Pty) Limited account. At face value, there is a trust deficit position because the trust creditors listing balance exceeds the trust funds available, meanwhile the trust creditor's ledger and trust creditors listing are not reduced by the amount paid.

Conclusion

In conclusion, trust legal practitioners, should ensure that the updating and/review of trust accounting records is holistic to avoid concealment and/or errors reflecting on their books resulting in unwanted consequences. When trust deficit positions and trust accounts in debit, and even incorrectly determined trust surplus positions, are discovered by inspectors and/or auditors, these lead to non-compliance and qualified reports respectively issued. These in turn have a negative impact on the profile of the trust legal practice. Trust legal practitioners linked to trust legal practices with such reports are denied issuance of Fidelity Fund Certificates by the Legal Practice Council and would most likely also not qualify for letters of good standing, thus limiting their economic activities.

The LPFF is alive to the reality that not all trust legal practices write up and balance their books and appoint experts in the field to perform this function on their behalf. The LPFF urges trust legal practitioners at such trust legal practices to take interest in the trust accounting records prepared by their appointed experts, as they ultimately take full responsibility for what is presented in the trust accounting records of their trust legal practices.

As the saying goes: 'If you think education is expensive, try ignorance'. Do not be ignorant and pay attention to all details.

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Two lawyers named Mpofu: Is the permanent residence requirement in the LPA unconstitutional?

By Muchengeti Hudson Hwacha

In August 2018 the world's attention was on Zimbabwe. The landmark elections and ensuing Constitutional Court challenge made quite a spectacle for the international media. One of the side-shows that accompanied the complex narrative, was that of an international team of legal practitioners, who brought aid to the Zimbabwean opposition, in its court challenge to set aside the election results. The legal practitioners – among them – South African advocate, Dali Mpofu, found it difficult to obtain the immigration permits necessary to represent his client in court. Ultimately, Mr Mpofu and others were denied permits and relegated to the public viewing gallery of the court.

Recounting the event, Mr Mpofu remarked poignantly: 'Because of colonial borders, one Mpofu (meaning Zimbabwean Thabani Mpofu, the lead advocate for the opposition) can talk, while the other Mpofu (meaning himself) cannot'. This remark made me think of a similar situation that plagues foreign candidate legal practitioners, desirous of admission, to practise as legal practitioners in South Africa. Section 24(2)(*b*)(ii) of the Legal Practice Act 28 of 2014 (LPA) requires foreign candidate legal practitioners to have a permanent residence permit to be admitted. I will argue that the permanent residence permit requirement, unconstitutionally encumbers foreign candidate legal practitioners in the admission process.

The legislative framework

Section 24(2) of the LPA stipulates:

'The High Court must admit to practise and authorise to be enrolled as a legal practitioner … any person who, upon application, satisfies the court that he or she –

(*a*) is duly qualified as set out in section 26;

(*b*) is a –

Picture source: Gallo Images/Getty

(i) South African citizen; or
(ii) permanent resident …'.

The argument is confined to persons who have satisfied all requirements for admission under the LPA, save the permanent residence permit requirement and do not meet the definition of 'foreign legal practitioner' envisaged by s 24(3)(*a*) of the LPA.

Section 24(2)(*b*) of the LPA, limits entrants into the profession to those who are either citizens or permanent residence permit holders. The purport of this provision is that holders of other permits and visas, that allow work are excluded from the legal profession. These include, but are not limited to, holders of –

- spousal visas;
- work permits; and
- refugee permits.

Constitutionality of the permanent residence permit requirement

Section 9(1) (the Equality clause) of the Constitution stipulates: 'Everyone is equal before the law and has the right to equal protection and benefit of the law'.

The purport of the equality clause is clear from its wording. It is intended to stand as a shield against discrimination. In *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC), Goldstone J highlighted the importance of the clause when he stated that: 'At the heart of the prohibition of unfair discrimination lay a recognition that the purpose of our new constitutional and democratic order was the establishment of a society in which all human beings would be accorded equal dignity and respect regardless of their membership of particular groups'.

In *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) the court set out this test to determine whether legislative provisions fall short of the constitutional standard in the equality clause:

'(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? ...

(b) Does the differentiation amount to unfair discrimination?

...

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause'.

Does the provision differentiate between people?

The first stage of this inquiry is twofold. First, it asks whether the provision in question differentiates between people? In *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* 2007 (4) SA 395 (CC), the court decided this very question, in relation to the permanent residence permit requirement in s 23(1)(*a*) of the Private Security Industry Regulation Act 56 of 2001. The court concluded that indeed the permanent residence permit requirement differentiated between people. I submit that the permanent residence permit requirement in the LPA, similarly, differentiates between people. The first question is, therefore, answered in the affirmative.

Second, the test asks whether said differentiation bears a rational connection to a legitimate government purpose. Judicial interpretation of the purview of 'legitimate government purpose' has been wide. In determining the purpose of the permanent residence permit requirement, I turned to affidavits filed by the respondents in the matter of *Tangkuampien v Law Society of South Africa* (CPD) (unreported case no 897/07). The applicant in this matter, sought a determination on the constitutionality of the permanent residence permit requirement, in the repealed, Attorneys Act 53 of 1979. The respondents argued that the requirement was intended for the 'protection of the South African public and advancing the administration of justice'. In the *Union of Refugee Women* case the respondents made similar arguments, noting that a need to protect the public necessitated a permanent residence permit requirement. In the *Union of Refugee Women* case the court held that considering s 12 of the Constitution, which guarantees everyone the right to freedom and security, the permanent residence permit requirement bears a rational connection to a legitimate government purpose. I submit that the significant public trust that the private security industry holds are comparable to that of the legal profession. Consequently, I submit that the permanent residence permit requirement does indeed bear a rational connection to a legitimate government purpose.

Is the discrimination unfair?

Testing then moves onto a second stage of the inquiry, which asks whether the differentiation amounts to unfair discrimination. The equality clause contemplates discrimination as either differentiation based on one of the listed grounds in s 9(3) of the Constitution or differentiation based on an unlisted ground, that is sufficiently analogous to those listed. The distinction between listed and unlisted, is that the former enjoys the presumption of unfairness, whereas the unfairness of the latter must be established. In the *Harksen* case the court held '[t]here will be discrimination on an unspecified ground if it is based on attributes or characteristics, which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner'. Therefore, establishing unfair discrimination hinges on the effect that it has on the victim. Reworded, the test asks: Does it impair dignity or negatively affect the complainant in a similar way? The court reaffirmed this jurisprudential thinking in *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) where it held that: 'The determining factor regarding the unfairness of the discrimination is its impact on the person …'. In analysing the impact on the complainant in the *Hoffmann* case, the following was considered –

- the position of the complainant in society;
- the purpose sought to be achieved by the discrimination;
- the extent to which the complainant's rights or interests are affected; and
- whether the discrimination has impaired the complainant's dignity.

The application of these considerations reveals the following: First, the position of the complaints in society is precarious. Foreign nationals are a minority with no political power. They are described by several court decisions (including in the *Union of Refugee Women* case), as being a vulnerable segment of society. They endure –

- social stigma;
- institutional exclusion;
- threat of xenophobic violence; and
- the residual psychological effects thereof.

Referencing the societal position of HIV positive persons, Ngcobo J in the *Hoffmann* case remarked: 'Society has responded to their plight with intense prejudice. They have been subjected to systematic disadvantage and discrimination. They have been stigmatised and marginalised. … [t]hey have been denied employment because of their HIV positive status'. I submit that these same remarks reflect the plight of foreign nationals.

Second, in determining the purpose sought to be achieved by the discrimination, I turn to the arguments by the respondents in the *Tangkuampien* case. These arguments establish that the purpose of the discrimination is to protect the public from untrustworthy legal practitioners.

In addressing the third consideration, I submit that the extent to which the rights and interests of foreign candidate legal practitioners are prejudiced is significant. I refer to the conclusions in the *Hoffmann* case, where the court held that the denial of employment has a devastating impact. The court elaborated, pointing out that, the denial of equal access to employment effectively condemned the complainant to 'economic death'.

In respect to the final consideration regarding impairment of dignity, the court held in the *Hoffmann* case that: '[T]he denial of employment to the appellant because he was living with HIV impaired his dignity and constituted unfair discrimination'. Consequently, it is established precedent that one's dignity is impacted significantly when equal access to employment is withheld. Having regard to the above four relevant considerations, I submit that unfair discrimination is established.

Justification in terms of the limitations clause?

The final stage of inquiry relates to s 36 of the Constitution ('limitations clause'). The right to equality is not absolute. Infringement may be constitutionally permissible in terms of the limitation's clause. The clause stipulates that the limitation of rights can only be permitted if it is –

'in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(*a*) the nature of the right;
(*b*) the importance of the purpose of the limitation;
(*c*) the nature and extent of the limitation;
(*d*) the relation between the limitation and its purpose; and
(*e*) less restrictive means to achieve the purpose.'

In regard to the equality clause, authors I Currie and J De Waal in *The Bill of Rights Handbook* 6ed (Cape Town: Juta 2013) question whether the limitations clause can be meaningfully applied. They conclude that because the criteria of the clauses are couched in the same or a similar manner, application would be largely superfluous. Expounding, they note that it would be: 'Difficult to see how discrimination that has already been characterised as "unfair" because it is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings can ever be acceptable in an open and democratic society based on human dignity, freedom and equality'.

I agree with the authors, but I would like to add the following: Subsection (*d*) considers the relationship between the limitation and its purpose. I submit that the relationship is difficult to establish. The purpose of the permanent residence permit requirement is to safeguard the public from untrustworthy legal practitioners. When given the opportunity to argue the connection between the limitation and the objective in the *Tangkuampien* case, the respondents failed to present the court with a convincing argument. They only argue that foreigners with permanent residence permit status have a demonstrably serious commitment to South Africa. This argument is dismissive of persons who by way of – marriage; education; refugee status; and employment commitments, etcetera, have demonstrated a significant commitment to South Africa. Additionally, the historical record of the introduction of the permanent residence permit requirement speaks more to manifesting naked preference than protecting of the public. Experts of the April 1964 *Hansard* quote the then Minister of Justice, BJ Vorster, saying 'Every country … regards the legal profession as a profession to be jealously guarded and preserved for its own citizens'.

Subsection (*e*) speaks to considerations of less restrictive means to achieve the purpose of the legislative provision. In this respect it is important to note that s 24(*c*) of the Act creates a 'fit and proper[ness]' requirement for admission. This requirement gives the court a broad scope in which to determine the trustworthiness of the persons desirous of admission. I submit that the proper application of this section is a less restrictive means of achieving the purpose. Additionally, I turn to the *ratio* of the court in the *Union of Refugee Women* case. The court held that the permanent residence permit requirement in the Private Security Regulation Act was only rendered constitutionally compliant when tempered by s 23(6) of the same Act. An exemption of this nature would save the LPA's permanent residence permit requirement from constitutional criticism.

Conclusion

In 2002, the chairperson of the task team, appointed by the Justice Minister to draft the LPA had concerns about the constitutionality of the permanent residence permit requirement. Resultantly, early versions of the Legal Practice Bill excluded it. I conclude that the chairperson's concerns were valid, the permanent residence permit requirement cannot stand up to constitutional scrutiny. The right to equality is foundational to our constitutional democracy and a violation of this nature should not be continued.

Muchengeti Hudson Hwacha *LLB (UKZN) Cert Intellectual Property and Banking law (Wits)* is a research intern at ALT Advisory and Power Singh Inc in Johannesburg. ❑

Fact corner

- **The African Court on Human and Peoples' Rights is composed of 11 judges, nationals of member states of the African Union.**

Picture source: Gallo Images/Getty

Understanding 'emergency monetary relief' in the Domestic Violence Act

By Dr Fareed Moosa

Domestic violence is a brutal onslaught against constitutional values and the fundamental right to freedom and security of the person. In *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC), Sachs J poignantly held at para 11: 'What distinguishes domestic violence is its hidden, repetitive character and its immeasurable ripple effects on our society and, in particular, on family life. It cuts across class, race, culture and geography, and is all the more pernicious because it is so often concealed and so frequently goes unpunished'.

Accordingly, the Domestic Violence Act 116 of 1998 (the Act) serves important objectives. It must be understood against the backdrop of its social context and legal purpose. In terms of the Act's preamble, it aims 'to afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide'. It does so by providing for interim and final protection orders under ss 5 and 6 respectively, and by creating a mechanism in s 8 for their enforcement through arrest. To bolster the efficacy of this protection, s 7(7) prohibits a court from refusing a protection order, or other competent relief, 'merely on the grounds that other legal remedies are available to the complainant'.

In *Omar v Government of the Republic of South Africa and Others (Commission for Gender Equality,* Amicus Curiae*)* 2006 (2) SA 289 (CC), the minutiae of the Act's scheme were outlined at paras 20 – 31. The Act is geared to 'emergency situations' (para 38). In terms of s 4, a 'complainant' in a 'domestic relationship' with a respondent may, by way of affidavit, apply to 'court' for a 'protection order' owing to the commission of an act of 'domestic violence' by the respondent. In this context, 'complainant', 'court', 'domestic relationship', 'domestic violence' and 'protection order' bear their meanings in s 1 of the Act.

In terms of s 5(1), the court must expeditiously apply its mind to an application for interim relief ('as soon as is reasonably possible consider an application') and, to this end, may 'consider such additional evidence as it deems fit, including oral evidence or evidence by

affidavit, which shall form part of the record of the proceedings'. Under s 5(2), the court must issue an interim protection order if 'satisfied that there is *prima facie* evidence that –

(*a*) the respondent is committing, or has committed an act of domestic violence; and

(*b*) undue hardship may be suffered by the complainant as a result of such domestic violence if a protection order is not issued immediately'.

For the legal meaning and effect of 'satisfied', see *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228A-B; *Income Tax Case no 1470* (1989) 52 SATC 88 (T) at 92; *Farjas (Pty) Ltd and Another v Regional Land Claims Commissioner, KwaZulu-Natal* 1998 (2) SA 900 (LCC) at para 41.

Section 5(2) is couched in peremptory terms. The duty on a court operates despite a respondent's *audi alteram partem* rights not being respected. For the distinction between directory and peremptory provisions (see *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) at para 13; and *MY Summit One: Farocean Marine (Pty) Ltd v Malacca Holdings Ltd* 2005 (1) SA 428 (SCA) at 439C).

When issuing an interim protection order, a court must prohibit the respondent from performing any act listed in s 7(1). Under s 7(2), it may also impose conditions. Although the Act is not prescriptive as to the nature of the conditions, it provides that a condition must be such that it is 'reasonably necessary to protect and provide for the safety, health or well-being of the complainant'. This includes, *inter alia*, the seizure of a firearm or dangerous weapon in the respondent's possession or control. Under s 7(3), if a court prohibits a respondent from entering a residence shared with the complainant under s 7(1)(*c*), it may also oblige the former to discharge the rent or mortgage payments pertaining to such residence but only after 'having regard to the financial needs and resources of the complainant and the respondent'.

'In the context of s 7(4), "emergency monetary relief" bears its meaning as defined in s 1, namely, 'compensation for monetary losses suffered by a complainant at the time of the issue of a protection order as a result of the domestic violence...'

Under s 5(3), an interim protection order must be served on the respondent in the manner prescribed by ministerial regulation issued under s 19 of the Act. Under s 5(6), an interim protection order 'shall have no force and effect until it has been served'. On the return date, a court may discharge the interim protection order or may issue a final protection order under s 6 with or without conditions or obligations under ss 7(2) and (3) respectively (see *Omar* (*op cit*) at para 38).

Section 7(4) reads: 'The court may order the respondent to pay emergency monetary relief having regard to the financial needs and resources of the complainant *and* the respondent, and such order has the effect of a civil judgment of a magistrate's court' (my italics). The conjunction 'and' has the effect that the power in s 7(4) cannot be exercised with reference only to the needs and means of one party (but both) (see *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) at para 50). Section 7(4) is also couched in permissive language. A court has discretion ('may order') whether to grant the relief concerned. For the circumstances when 'may' can have the effect of 'shall' (see *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) at paras 14 – 16).

In the context of s 7(4), 'emergency monetary relief' bears its meaning as defined in s 1, namely, 'compensation for monetary losses suffered by a complainant at the time of the issue of a protection order as a result of the domestic violence, including –

(*a*) loss of earnings;

(*b*) medical and dental expenses;

(*c*) relocation and accommodation expenses; or

(*d*) household necessities'.

Thus, emergency monetary relief is compensatory in nature. 'Including' is a word of extension; its effect is that the losses listed are not a *numerus clausus* (see *S v Dzukuda and Others*; *S v Tshilo* 2000 (4) SA 1078 (CC) at para 9). The complainant bears the burden to show a causal nexus ('as a result') between the commission of an act of domestic violence by a respondent and the incurrence of a present (not future) loss. By parity of reasoning with that in *Narodien v Andrews* 2002 (3) SA 500 (C), emergency monetary relief cannot be granted as a 'stand-alone' order. It is relief ancillary to a protection order prohibiting the performance of an act mentioned in s 7(1). The questions arising are:

- Can emergency monetary relief be granted in an interim protection order?

- Also, in the light that orders under s 7(4) have the same effect as a civil judgment, would the granting thereof under s 5 without prior notice of the proceedings unjustifiably limit a respondent's right of access to court under s 34 of the Constitution?

In law, interim orders are, generally, not appealable (see *Machele and Others v Mailula and Others* 2010 (2) SA 257 (CC) at paras 21 – 22). An interim protection order under s 5 of the Act is not appealable. To challenge such order, a respondent can appear on the return date and, under s 6(2) of the Act, oppose the granting of final relief; alternatively, the respondent can, under s 5(5), anticipate the return date. Since an interim protection order is not appealable and an order under s 7(4) is appealable, it appears that emergency monetary relief is not relief competent to be granted on an interim basis under s 5 of the Act. The compensatory nature of such relief reinforces this view.

A further consideration that appears to militate against the granting of emergency monetary relief under s 5, as opposed to s 6 of the Act, is that interim protection orders are, generally and for good reason, granted without prior notice to a respondent. In *Omar* (*op cit*) the constitutionality of this practice was upheld. The crux of the court's reasoning in rejecting the appellant's challenge on the basis of his s 34 fundamental right of access to court, is that 'notice to the respondent – the very source of the threat of violence – would defeat the object of protection for the complainant'. While this justification holds true for protective relief contemplated in s 7(1) of the Act, as regards possible future violence being perpetrated against the complainant by the respondent who becomes aware of the court application, it would not, I submit, hold true for compensatory relief under s 7(4). Such relief is not designed to, nor does it, protect a complainant against future harm from a respondent. Rather, it seeks to compensate for financial losses already suffered.

A further consideration favouring the view that relief under s 7(4) may accompany orders under s 6 but not necessarily those under s 5 of the Act, is that emergency monetary relief is enforceable by a writ of execution. This is so unless its operation is suspended by agreement *inter partes*, or by a court on application. Its operation is not suspended by a respondent anticipating a return date or appearing on a return date to oppose final protective relief. As stated above, s 7(4) orders are, *ex lege*, final in effect. Thus, there is nothing to oppose in relation thereto. A respondent would either have to appeal or review such order under s 16, or apply to have it set aside under s 10 of the Act on 'good cause' (for the meaning of 'good cause', see *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352 – 353).

I submit that the approach contended for here accords, with the directive in s 39(2) of the Constitution, namely, legislative interpretation through the prism of the 'spirit, purport and objects of the Bill of Rights' (see F Moosa 'Understanding the "spirit, purport and objects" of South Africa's Bill of Rights' (2018) 4 *HSOA Journal of Forensic, Legal and Investigative Sciences* at 1). My approach balances, on the one hand, the rights of victims of domestic violence to compensation suffered by reason of such violence and, on the other, the *audi alteram partem*, fair trial rights of a respondent engrained in s 34 of the Constitution, which ought to be respected before a final judgment for compensatory relief is granted.

The word 'emergency' in 'emergency monetary relief' suggests that the legislature viewed compensatory relief under s 7(4) as urgent and ought to be available to a complainant on an expedited basis. This apparent intention ought to be given effect to, but in a manner that does not unduly limit a respondent's fundamental rights to fair judicial proceedings.

Applications under s 7(4) must be fast-tracked. In practice, this may be difficult, particularly in busy domestic violence courts with congested court rolls, large case backlogs, and few magistrates. A suggested approach may be the following: Under s 6(2), applications under the Act can be decided on affidavit. Oral evidence is not compulsory. If an interim protection order is granted under ss 5(2) read with 7(1), two return dates can then be issued. A longer one for the main relief and a shorter one for the emergency monetary relief. As part of the interim protection order, the court may then direct the respondent to file an answering affidavit in relation to the s 7(4) claim within a truncated time period. It may also direct that a complainant can file a reply within a specified period. On the shorter return date, the court can then, on affidavit, determine whether a complainant is entitled to compensation and, if so, the quantum thereof. Brief submissions can also be received from the parties or their representatives, as occurs in High Courts for r 43 applications.

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Fact corner

In a study done by the World Health Organisation, it was found that 60 000 women and children are victims of domestic violence in South Africa.

Picture source: Gallo Images/Getty

When does the Constitutional Court have jurisdiction to hear competition law appeals?

By Candice Slump

The recent decision in *Competition Commission of South Africa v Media 24 (Pty) Ltd* 2019 (5) SA 598 (CC) exposed the Constitutional Court's (CC's) disparate views on the right of appeal to the CC on competition issues, and the constitutional (as opposed to legislative) imperatives of the Competition Act 89 of 1998 (the Act).

Competition law appeals to the CC

Both before and after the Seventeenth Amendment of the Constitution, differing views have been expressed regarding the appropriate forum to hear appeals in competition matters. As the *Media 24* case shows, the CC itself remains at odds on this issue. There are, however, certain recognised principles establishing when the CC has jurisdiction to hear a competition law appeal. Recent legislative amendments further impact on the application of such principles.

The Competition Appeal Court (CAC) and the Competition Tribunal are generally considered to be better qualified to determine the economic issues in competition matters than other courts. The CAC has exclusive and final appeal jurisdiction in certain matters. The CC has jurisdiction to hear any issue in terms

of s 62(4) of the Act and any arguable point of general public importance. Until the recently proclaimed amendments to ss 62(4) and 63 of the Act (after the *Media24* case), the Act expressly provided for appeals to the Supreme Court of Appeal (SCA) and the CC.

In the *Media24* case, the respondent argued that the SCA had appeal jurisdiction. The CC was divided on this issue. The recent implementation of certain provisions of the Competition Amendment Act 18 of 2018, has resulted in the removal of all references to the SCA's appellate jurisdiction in the Act. The Rules for the conduct of proceedings in the Competition Appeal Court (the CAC Rules) have not yet been amended and still contemplate appeals to the SCA. The ongoing debate regarding the SCA's appellate jurisdiction in competition matters remains unresolved.

Access to the CC is regulated by s 167(6) of the Constitution and the Rules of the CC, which do not require a litigant applying for leave to appeal against a decision of any court to first apply to that court for leave. In the *Media24* case, the majority found the failure to apply to the CAC for leave to appeal, even when required by the Act, is not a bar to an appeal to the CC. The interests of justice permitted the appeal, without the SCA having heard it first.

The express requirement that the CAC should grant leave to appeal has been removed and s 63(2) of the Act now provides that an appeal in terms of s 62(4) may be brought to the CC, with its leave. The amended Act is not a model of clarity. The express requirement that the CC must grant leave to appeal, appears to obviate the need for the CAC to grant leave to appeal. However, s 62(4) renders such right of appeal subject to the provisions of s 63 and the Rules of the CAC and CC.

Sections 63(5) and 63(6) have not been amended and respectively require that applications for leave to appeal to the CAC and the CC must be made in the manner and form required by their corresponding rules. Amended s 63(4) further provides: 'If the Competition Appeal Court, when refusing leave to appeal, made an order of costs against the applicant, the Constitutional Court may vary that order on granting leave to appeal.' This clearly contemplates an application for leave to appeal to the CAC, rather than the CC.

Competition Appeal Court r 29 requires that an application for leave to appeal to the CC must be considered by the judges who presided over the hearing. Constitutional Court r 19 requires a litigant who wishes to appeal directly on a constitutional issue to bring an application for leave to appeal to the CC.

Until such time as these rules and provisions are amended, the CC may require litigants to first apply for leave to appeal to the CAC and thereafter, if refused, to the CC. The CC in *Competition Commission v Yara South Africa (Pty) Ltd and Others* 2012 (9) BCLR 923 (CC), considered that the views of the specialist CAC, may be necessary in assessing the constitutional strength of the issue raised. In contrast, it may be contended that the amended s 62(4) of the Act allows direct appeals to the CC in respect of all issues contemplated in s 62(2), but that leave to appeal must be obtained from the CAC before any matter in respect of which it would otherwise be the final arbiter is considered on appeal by the CC. This issue will have to be determined by the courts as soon as possible, in order to clearly assert the correct process to be followed by litigants when applying for leave to appeal.

The *Media24* case indicates that, when in the interests of justice, the CC will likely consider an application for leave to appeal, in the absence of an application for leave to the CAC, even if required.

The CC's disposition to consider competition matters

The disparate findings of the CC in the *Media24* case are reflected in four judg-


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ments. The first held that a constitutional issue and arguable point of law of general public importance was raised. The second found it is not in the interests of justice to grant leave to appeal. The third and fourth found the application raised an arguable point of law of general public importance. A majority of six judges granted leave to appeal, and four members of the court dissented.

These diverse judgments indicate that whether or not a matter satisfies the CC's jurisdictional requirements is likely to be an ongoing debate. That said, competition matters will clearly only be considered by the CC when a particular constitutional or jurisdictional issue or point of law of general public importance is raised.

The second judgment levelled strong criticism against the first judgment's determination that a constitutional issue was raised. Constitutional jurisdiction does not exist where a provision of the Act does not purport to delineate the boundaries of the powers and functions of the Act's public bodies. The interpretation and application of the entire Act cannot be a constitutional matter. The Act, unlike the Promotion of Administrative Justice Act 3 of 2000 and the Labour Relations Act 66 of 1995, does not give legislative expression to fundamental rights in the Constitution. If the interpretation and application of the provisions of the Act infringe the equality clause, the CC has jurisdiction by virtue of that infringement alone.

The second judgment also criticised the first judgment allowing an evidential matter to become a constitutional issue. While the Commission's competence to investigate any particular subject matter raises legality issues, the issue of what evidence it may legally present before the adjudicative bodies does not.

The majority in the *Media24* case found the application for leave to appeal raised an arguable point of law of general public importance within the CC's jurisdiction. The impact the determination will have on the interpretation and implementation of s 8(*c*) of the Act going forward was also deemed important. While the second judgment considered the issue in dispute a factual matter, the majority considered it a legal inquiry, requiring the critical examination of the policy and normative implications of the standards for predatory pricing.

The CC employs a conservative approach when determining whether a constitutional issue has been raised in competition matters. It seems satisfied that the Tribunal and the CAC should finally determine competition matters, even when directed at achieving constitutional and policy aspirations. Only where the dispute addresses a constitutional legality issue or an infringement of a constitutional provision, is the CC likely to find constitutional jurisdiction.

The CC seems more inclined to find jurisdiction where an arguable point of law of general public importance is raised. Although still the subject of debate, and dependant on the relevant facts, an issue requiring inquiry into normative, social or economic considerations may be considered a legal, as opposed to factual, issue.

Given the many social and economic factors associated with competition disputes, it is inevitable that the CC will find it has jurisdiction to consider an increasing number of competition matters in future.

The relationship between competition law and the Constitution

The Act recognises that the past economic and social marginalisation of Black South Africans led to significant structural distortions in the economy. The Act records as its purpose –

- the promotion and maintenance of competition in order to advance the social and economic welfare of South Africans;
- to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
- promote a greater spread of ownership, particularly of historically disadvantaged persons.

The Tribunal and CAC are enjoined to apply the provisions of the Constitution when interpreting and applying the Competition Act. The Act must be interpreted through the prism of the Bill of Rights. The debate, however, persists on whether competition law should focus on achieving the socio-economic aspirations of the Constitution or simply ensuring that the Act's economic objectives are achieved.

With so many strong indicators of the transformative nature of the Act, it is tempting to contemplate all the means by which the Act may achieve the protection and achievement of constitutional rights. The *Media24* case, however, puts a halt to such fantastic musings and asserts that the Act is 'just legislation' without 'elite constitutional allure'.

This by no means dilutes the impact of the Act as aspirational legislation. As competition specific legislation it aims to regulate and improve economic conditions in South Africa (SA). The right to pursue a remedy in competition law is itself a human right and any enforcement in terms of the Act must follow due process. This includes the right to a fair and public hearing by an impartial tribunal, the right to just administrative action, reasons for decisions and rationality of determinations. In executing its obligations, the Commission is bound to respect claims of confidentiality. The right to privacy is central thereto.

Issues relating to data access and Internet connectivity will likely form the subject of future competition disputes. It may be necessary to consider the socio-economic implications of connectivity in order to access constitutional rights.

While the Act is not specifically designed to enforce constitutional rights, it is inevitable that determinations of the competition authorities will impact on or require consideration of certain constitutionally entrenched rights, even when the provisions of the Act are applied purely in order to regulate and improve economic conditions in SA. To date the Commission and the Tribunal have dealt with numerous matters involving constitutional rights and issues, including the right to education and the provision of healthcare.

Over the past 20 years an increasing number of constitutional debates have emanated from competition law disputes. It is anticipated that this trend is likely to continue as the issues that competition law grapples with continue to impact on the fundamental rights contained in the Bill of Rights. This portends for interesting and challenging litigation in the future.

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Did you know?

- **When interpreting the Constitution, the court is required to consider international human rights law and may consider the law of other democratic countries.**
- **Since the enactment of the Seventeenth Amendment of the Constitution in 2013, the Constitutional Court has jurisdiction to hear any matter if it is in the interests of justice for it to do so.**
- **The ordinary courts, notably the small claims courts, the magistrates' courts, the High Courts and the Supreme Court of Appeal, deal with day-to-day disputes between citizens and between citizens and the state.**

Picture source: Gallo Images/Getty

By Tshephisho Somo

Full disclosure – the materiality test for insurance explained

'The object of devising a means or criterion for determination of the materiality of undisclosed facts must surely be to ensure … that justice is done to both parties. The insurer is to be protected against non-disclosure which could … prejudice him but at the same time the insured ought not to be unfairly required to forfeit his rights under a policy which he entered into in good faith …' (*Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* [1985] 1 All SA 324 (A)).

It is against this backdrop that this article considers the materiality test outlined in s 59 of the Long-Term Insurance Act 52 of 1998 and s 53 of the Short-Term Insurance Act 53 of 1998. The test for materiality is that: 'The representation or non-disclosure shall be regarded as material if a reasonable, prudent person would consider that the particular information … should have been correctly disclosed to the insurer *so that the insurer could form its own view as to the effect of such information on the assessment of the relevant risk*' (my italics).

The causal connection is between the non-disclosure and the conclusion of the contract and not between the non-disclosure and the claim event (Ombudsman for Long Term Insurance 'Annual Report 2018' www.ombud.co.za, accessed 3-2-2020 at 16 (the *Ganas/Momentum* case)). This article attempts to determine whether the test for materiality is indeed fair and just to both the insurer and insured.

Origins of the materiality test

The materiality test was first cemented in the *Mutual and Federal Insurance* case. Briefly put, the insurer rejected Oudtshoorn Municipality's claim after it discovered that the municipality failed to disclose the hazardous height of an electric pole near an aircraft runway. After considering the position in English law and Roman-Dutch law, the court held that the reasonable man would consider this information to be material and disclose it to the insurer when assessing the risk. Therefore, the insurer was entitled to repudiate the claim when an aircraft collided with the pole (see paras 2 – 11).

It is noteworthy that –

- the test originates from the 'reasonable insurer test' that favoured the insurer;
- the purpose of the 'reasonable man test' was to prevent fraud, encourage good faith and to treat parties equally

while preventing the insured from unfair exposure to forfeiture of his rights; and
- the undisclosed material fact caused the event that led to the claim.

Identifying the limitations of the materiality test – the barriers to justice and fairness

The shortfall of the materiality test, as set out in the *Mutual and Federal Insurance* case, was first identified by Didcott J in *Pillay v South African National Life Assurance Co Ltd* 1991 (1) SA 363 (D). Didcott J held that the unjust implication that an insurer is entitled to cancel the contract even in the event of a breach of warranty by the insured when there is evidence that had the insurer not been misled, it would still have accepted the risk but on different terms (MFB Reinecke and PM Nienaber 'Mis- or non-disclosure: Reconstructing the policy' www.ombud.co.za, accessed 3-2-2020 at 9). Although the court in *Pillay* dealt with breach of warranty, it still recommended that the law be revised to prevent an insurer from cancelling the contract on the grounds of misrepresentation, whether warranted or not (Reinecke and Nienaber (*op cit*) at 9).

Insurers have, in some instances, agreed to the application of what is termed as the 'Didcott principle' (the *Ganas/Momentum* case). However, although application of the principle is encouraged in the industry, the law is yet to be amended to afford an insured this protection (Reinecke and Nienaber (*op cit*) at 12 – 13). Therefore, strictly speaking, an insurer may elect not to consider the Didcott principle. The legislator's intervention is, therefore, required.

One could argue that the Didcott principle is but a stepping stone when considering the 'all or nothing' approach of s 59 and s 53.

The dilemma posed by the materiality test became evident in the *Ganas/Momentum* case of 2018. Mr Ganas, the deceased, failed to disclose a blood sugar condition when applying for life cover. In 2018, the deceased passed away after a fatal shooting. When his spouse lodged a claim with the insurer, Momentum, the claim was rejected on the grounds of non-disclosure of material information at the application stage as the insured had failed to disclose his blood sugar condition. The insurer's decision was upheld by the office of the ombudsman (the *Ganas/Momentum* case). However, following backlash from the public, the insurer accepted the claim and even changed its practice – where the deceased passed away in an incident of violence, the insurer undertook to pay the claim even if there was non-disclosure of material information, which would entitle it to reject the claim and rescind the policy.

The *Ganas/Momentum* case illustrated the disconnect between the materiality test and the principle that 'in respect of insurance agreements in particular, they should be interpreted strictly against the insurer' (*Jerrier v Outsurance Insurance Company Limited* [2015] 3 All SA 701 (KZP) at para 23). The main point of contention was that the materiality test does not consider the causal connection between the non-disclosure and the claim event. Instead, it only considers the causal connection between the non-disclosure and the conclusion of the contract (the *Ganas/Momentum* case and Reinecke and Nienaber (*op cit*) at 3).

In the *Mutual and Federal Insurance* case, the causal link between the non-disclosure and claim event was not addressed. However, it should be borne in mind that the claim event occurred as a direct result of the undisclosed information.

The 'all or nothing' approach of the current materiality test is not universally favoured. In this regard, there are countries that have taken further steps to afford an insured the necessary protection (Reinecke and Nienaber (*op cit*) at 11). For instance, the Australian Insurance Contracts Act 1984 affords the insured protection in cases of non-disclosure or misrepresentation of material information. If it is revealed that the insurer (had there not been non-disclosure) would still have concluded the contract but on different terms, the insurer is not entitled to cancel the contract. Instead, the insured's claim is reduced proportionally (Reinecke and Nienaber (*op cit*) at 12 and ss 27–31 of the Australian Insurance Contracts Act). This approach is in line with the Didcott principle.

The German Insurance Contract Act 2008 goes even further and actually applies the causation principle (Reinecke and Nienaber (*op cit*) at 11). In this regard, notwithstanding the insurer's right to terminate a contract where there was a non-disclosure of material information, the insurer 'may still be obliged to pay a claim if the non-disclosed circumstance is not responsible for the occurrence of the insured event that gave rise to the claim' (F Herdter and C Drave 'Getting the deal through – insurance litigation 2016: Germany' www.wilhelm-rae.de, accessed 3-2-2020 at 29). In terms of this approach, the non-disclosure is irrelevant if there is no causal connection between the non-disclosed information and the event that led to the claim (Reinecke and Nienaber (*op cit*) at 11). Naturally, both the Australian Insurance Contracts Act (s 31) and the German Insurance Contract Act make provision for addressing fraudulent and grossly negligent non-disclosure of material information and thereby putting in place measures to protect the insurer against prejudice.

It cannot be argued that the provisions of s 59 of the Long-Term Insurance Act and s 53 of the Short-Term Insurance Act are just and fair to both the insurer and insured. The current materiality test embodies an 'all or nothing' approach and limits the relevant factors to be considered solely to the nexus between the non-disclosed material information and assessment of the risk when the contract was concluded. The nexus between the actual loss and non-disclosed material information is not considered. This oversight is what led to the pub-

lic outcry and change in an insurer's practice in the *Ganas/Momentum* case.

Application of the materiality test

A few notable cases in which the criteria for the materiality test was analysed and applied are for example:

- *President Versekeringsmaatskappy Bpk v Trust Bank van Afrika Bpk en 'n Ander* 1989 (1) SA 208 (A);
- *Clifford v Commercial Union Insurance Co of SA Ltd* 1998 (4) SA 150 (SCA); and
- *Regent Insurance Co Ltd v King's Property Development (Pty) Ltd t/a King's Prop* 2015 (3) SA 85 (SCA).

Although these matters solidified the materiality test in precedent, it would be fruitful to consider application of the test by the office of the ombudsman as the process paints a better picture of the inadequacies of the test.

Ombudsman for Long-Term Insurance: CR200 Non-disclosure – materiality – remedies

In the first case considered, the insured contracted for a life policy that included disability cover. The insured then sustained brain injuries in a motor vehicle collision. When he lodged a claim with the insurer, the claim was rejected, and the contract rescinded. The insurer argued that the insured answered a question relating to hypertension incorrectly and this amounted to a material misrepresentation. The office of the ombudsman held that such a misrepresentation was indeed material.

However, during assessment of the matter, it was revealed that had there not been a misrepresentation, the insurer would not necessarily have elected not to conclude the contract. Accordingly, the office of the ombudsman suggested that the insurer apply the Didcott principle. The insurer, using its discretion, agreed to the application of the Didcott principle and amended the policy and accepted the claim.

Ombudsman for Long-Term Insurance: CR153 Non-disclosure

In this case, the insured was the life insured under two policies. When the insured lost his ability to work due to Parkinson's disease, he claimed from the insurer for disability benefit. However, his claim was rejected, and the insurer cancelled the policies due to non-disclosure of material information.

The insurer argued that the insured failed to disclose certain material medical information at application stage. The non-disclosed information was a visit to a neurologist, after the insured experienced difficulties with his back, neck and tremors in his hand. The neurologist suspected Parkinson's disease but did not communicate this to the insured.

The office of the ombudsman found that the non-disclosure of the visit to the neurologist and the non-disclosure of the tremors constituted material non-disclosure and entitled the insurer to repudiate the policy. It was further held that although it was evident that the insured's non-disclosure was 'innocent' – he was not aware that he suffered from early Parkinson's disease – the office of the ombudsman could not find in favour of the insured as fraud is not a factor that is considered in the materiality test. In the circumstances, the insurer was entitled to rescind the policy.

These cases serve as an indication that the materiality test is not in line with current insurance law practices in that, *inter alia*, the 'all or nothing' approach may very well require the insured to unfairly forfeit his rights under a policy, which he entered into in good faith. In addition, even though a misrepresentation may have been made in good faith, the only factor that is considered is the misrepresentation and its bearing on assessment of the risk.

Conclusion

According to Joubert JA (the *Mutual and Federal Insurance* case), the purpose of the materiality test is to prevent fraud, encourage good faith and to treat parties equally while preventing the insured from unfair exposure to forfeiture of their rights. In my view, it cannot be argued that the 'all or nothing' implications of the materiality test serve this purpose. It is noteworthy that even though the Short-Term Insurance Act and Long-Term Insurance Act were recently consolidated into the Insurance Act 18 of 2017, the legislator has still not made substantive amendments to the provisions dealing with the materiality test (Donald Dinnie 'Understanding non-disclosure' www.cover.co.za, accessed 12-2-2020). Accordingly, intervention from the legislature is necessary having due regard to industry practices and the insured's rights as they currently stand.

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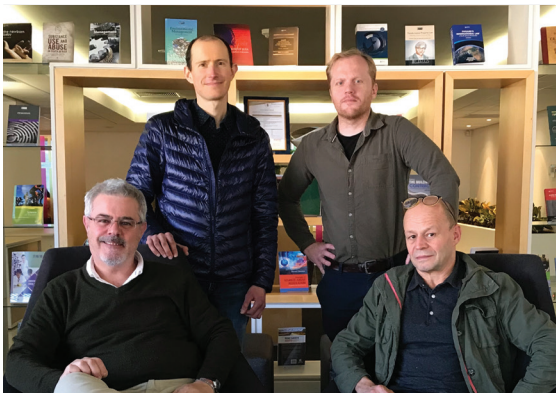

By Johan Botha and Gideon Pienaar (seated); Joshua Mendelsohn and Simon Pietersen (standing).

January 2020 (1) South African Law Reports (pp 1 – 326); January 2020 (1) South African Criminal Law Reports (pp 1 – 112)

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

Abbreviations:

- **CC:** Constitutional Court
- **GJ:** Gauteng Local Division, Johannesburg
- **GP:** Gauteng Division, Pretoria
- **KZP:** KwaZulu-Natal Division, Pietermaritzburg
- **LP:** Limpopo Division, Polokwane
- **SCA:** Supreme Court of Appeal

Advocates

Standing of General Bar Council and its constituent member societies of advocates to participate in readmission applications: In *Pretoria Society of Advocates and Others v Nthai* 2020 (1) SA 267 (LP) the Johannesburg Society of Advocates (the JSA) and the South African Legal Practice Council applied for leave to appeal against the court's decision to admit the respondent – who had previously been struck from the roll of advocates for misconduct – as a legal practitioner to be enrolled as an advocate. One of the grounds of appeal, taken up by the JSA, was a finding in the main judgment that ss 4 and 5 of the Legal Practice Act 28 of 2014 (the LPA) had the effect that the General Council of the Bar (the GCB) and its constituent members no longer had any role to play as *custos morum* of the legal profession. The JSA argued that if this view was upheld or was left as a precedent, it would deprive the GCB and its constituent members of their formal standing to participate in readmission applications by their members who had been struck off the roll at their application.

The court, per Makgoba JP and Mabuse J, was not persuaded that it had erred in its interpretation. The court held that the fact that the legislature intended regulating the legal profession by a single statute (the LPA) and furthermore that it had repealed the Admission of Advocates Act 74 of 1964 in its entirety, meant that there was no residual power for the JSA to act in such matters. It accordingly concluded that there was no reasonable prospect of success if leave to appeal against this finding was granted.

Children

A court's discretion to allow a parent to leave its jurisdiction with a child and to relocate to another part of the country, where the other parent refuses to agree to this: In *LW v DB* 2020 (1) SA 169 (GJ) the applicant and respondent were, respectively, the unmarried mother and father of a minor child (the child). The parties had separated, and by order of court the child's primary residence was with the mother. At this point, everyone involved in the matter lived in Gauteng. Then the mother applied for the court's permission to relocate, with the child, to the Western Cape in order to take up a job there. The issue before the GJ was whether the court should allow the mother to do so. The GJ, per Satchwell J, considered the factors bearing on its discretion to permit the proposed relocation, beginning with the child's best interests. The GJ cautioned, however, against considering just the child's best interests and described its role in assessing competing interests. Emphasising that no single factor was to receive preeminence, the court considered the right of children to have contact with their parents and the parents' responsibility to maintain it. It held that when a relocation decision was reasonable and *bona fide*, permission should not be lightly withheld, and that sensitive consideration should be given to the situation of the parent left behind. The GJ proceeded to grant the mother's relocation application but subjected it to various provisions for reasonable contact between the child and his father.

Criminal law

Conduct constituting domestic violence for the purposes of a protection order and the requirement of unlawfulness: In *KV v WV* 2020 (1) SACR 89 (KZP) the husband (appellant) sought to overturn the confirmation by the magistrates' court of an interim protection order issued under the Domestic Violence Act 116 of 1998 (the Act). He argued that unlawfulness was a necessary requirement to determine whether the alleged conduct constituted domestic violence.

The court *a quo* had rejected this argument, concluding that this was not what was contemplated in the Act and the Constitution. It had further found that since the appellant had admitted to pushing and pulling the respondent, leading to her falling to the floor, his conduct constituted domestic violence in the form of physical abuse. There was, however, insufficient evidence to conclude that there was verbal abuse and the order was discharged in that regard.

The court, per Masipa J (Chetty J concurring), found that there was no need to interfere with this interpretation. It pointed out that in defining domestic violence the Act had specifically excluded the word 'unlawfulness' and re-

ferred only to conduct that 'harms, or may cause imminent harm to, the safety, health or well-being of the complainant'. The legislature, in enacting the Act, had been alive to the criminal and delictual principles dealing with abuse, but had emphasised the rights protected in the Constitution, more particularly, the right to equality, freedom and security of the person, and violence against women and children. It had introduced a wider form of protection by making a reference to 'harm' and a more restrictive interpretation to the provisions of the Act would be to defeat the purposes for which it was passed. The appeal was accordingly dismissed.

Customary law

Whether bridal transfer was an absolute requirement for a valid customary marriage: The matter of *Mbungela and Another v Mkabi and Others* 2020 (1) SA 41 (SCA), heard before the SCA, highlighted and reaffirmed the flexible and pragmatic nature of customary law, as well as the obligation of courts to recognise the living law truly observed by communities. The background was as follows: Mr Mkabi – who was Swati – had successfully launched action proceedings in the High Court for an order declaring that he had entered into a valid customary marriage with the late Ms Mbungela (the deceased) – who was Shangaan. The defendants – the deceased's brother, Mr Mbungela, and daughter, Ms Mkhonza – brought an appeal to the SCA. They argued that, according to customary law, there was no marriage unless there had been a 'handing-over of the bride' ceremony. According to the defendants that had not taken place. Accordingly, there was not a valid customary marriage as envisaged by s 3(1)(*b*) of the Recognition of Customary Marriages Act 120 of 1998, because the union between the deceased and Mr Mkabi had not taken place in accordance with customary law.

The SCA, per Maya P (Zondi JA, Molemela JA, Mokgohloa JA and Dlodlo JA concurring) found that, in the circumstances of the present case, there had indeed been a valid customary marriage despite the absence of the handing-over of the bride, which requirement, the SCA found, had been waived. The SCA, while acknowledging the importance of the bridal transfer custom, stressed, however, that it was 'not necessarily a key determinant' of a valid customary marriage. In the SCA's view it could not be placed above a couple's clear intent to marry under customary law, where, as it happened here, their families (who came from different ethnic groups) were involved in, and acknowledged, the formalisation of their marital partnership, and did not specify that the marriage would be validated only on bridal transfer. The SCA added that to insist on an inflexible rule that there could be no valid customary marriage in the absence of this ritual in these circumstances, would be contrary to customary law's inherent flexibility and pragmatism. The SCA ruled that the requirements of a valid customary marriage had been met and dismissed the appeal.

Delict

Vicarious liability of an employer for the acts of its employee: Vicarious liability of an employer for the acts of its employee: *Stallion Security (Pty) Ltd v Van Staden* 2020 (1) SA 64 (SCA) was an appeal against a finding in the GP that a security company (the appellant) was vicariously liable for the conduct of one of its employees, one Khumalo. Khumalo was a site manager who oversaw security at an office block in which the deceased, Mr van Staden often worked late. Khumalo had been issued with an override key to bypass the biometric security at the office block. Sometime later Khumalo was placed on sick leave.

In trouble with loan sharks, Khumalo decided to rob the safe he knew to be in the office block. Having armed himself with a firearm, he used his bypass key to gain access to Van Staden's office, where he proceeded to demand cash at

gunpoint. Van Staden told Khumalo he did not have the safe keys but persuaded him to accept an electronic transfer of R 35 000 from his personal bank account. Khumalo then escorted Van Staden out of the building and to Van Staden's car. On Khumalo's instruction Van Staden drove to a nearby shopping centre, where Khumalo, allegedly under the impression that Van Staden was about to phone the police, shot and killed him. Khumalo ran away but was apprehended shortly afterwards.

Van Staden's wife sued both the appellant and Khumalo for loss of support. Her claim against the appellant was founded only on vicarious liability for the wrong committed by Khumalo. The GP found the appellant vicariously liable for the Khumalo's act and awarded damages.

The appellant appealed to the SCA. The SCA, per Van der Merwe JA (Leach JA, Mbha JA, Dambuza JA and Hughes AJA concurring), considered the test for an employer's vicarious liability, namely that an employer was liable if the employee committed a wrongful act while wholly or partly going about the employer's business. It also considered the qualification to the test, namely that an employer will not be liable where the employee committed the act while wholly about his own purposes, unless there was a sufficiently close link between the employee's act and the business. The SCA then considered the strength of the link in the present case. Going against sufficient closeness was that Khumalo had carried out the actions described while on sick leave, outside the workplace, and with a firearm unconnected to the business. But in favour of sufficient closeness was that, by employing Khumalo, the appellant had enabled him to enter the office, thereby creating the risk that he might abuse his powers. It was, moreover, the appellant's business to protect Van Staden's safety and to safeguard his constitutional right thereto. And it had put the guard in charge of doing so. Having weighed all this up, the SCA concluded that a sufficiently close link was established to hold the employer liable.

- See Moksha Naidoo 'Employer held vicariously liable for the murder committee by its employee' 2019 (Dec) *DR* 35.

Government procurement

Effect of corruption on awarded tenders: In *Swifambo Rail Leasing (Pty) Ltd v Prasa* 2020 (1) SA 76 (SCA) the facts were as follows: In July 2012 Prasa, the state entity responsible for commuter rail services, selected Swifambo, a recently incorporated black-owned company, as the approved bidder to provide Prasa with a series of new locomotives. The resulting contract between Prasa and Swifambo was concluded in March 2013. The locomotives were to be manufactured by Vossloh, a Spanish company that was, according to the bid, regarded as Swifambo's subcontractor. Swifambo and Vossloh then, in July 2013, concluded their own contract for the supply of the locomotives, however, the delivered locomotives exceeded the maximum height suitable for South Africa's rail network.

It appeared that Prasa's award of the tender to Swifambo was marred by a number of material irregularities, primarily the dishonest and corrupt conduct of Prasa officials. Swifambo claimed that it was an innocent tenderer and unaware of Prasa's dishonesty.

Having belatedly discovered the full extent of its former officials' wrongdoing, a reconfigured Prasa board in November 2015 approached the GP to rescind the award and Prasa's subsequent contract with Swifambo. Prasa alleged that Swifambo was a mere 'front' for Vossloh, which was itself disqualified from bidding because it lacked the required broad-based black economic empowerment (B-BBEE) credentials. Swifambo, by contrast, had a high B-BBEE rating. According to Prasa, Vossloh – the real bidder – was hiding behind Swifambo. While Swifambo agreed that the bidding process was shot through with irregularities, it took issue with Prasa's allegation of 'fronting'.

The GP agreed with Prasa. It found that the award of the tender and the ensuing contract were tainted by corruption, fraud and fronting, and declared them invalid.

Steadfastly proclaiming its innocence, Swifambo appealed to the SCA. It argued that it was in the circumstances inequitable to set aside the contract.

In its judgment the SCA (per Lewis JA (Ponnan JA, Zondi JA, Makgoka JA and Schippers JA concurring)) confirmed the GP's findings that the tender and contract were tainted by pervasive corruption and that Swifambo was a front whose only role was to enable Vossloh to become the real bidder. It accordingly left the GP's order rescinding the tender award and the contract between Prasa and Swifambo intact. The SCA ruled that Prasa's delay in bringing its application before court was, in the circumstances, reasonable, and that it was in any event in the public interest to condone it.

The appeal was dismissed.

Interdicts

Interim or final? In *Andalusite Resources (Pty) Ltd v Investec Bank Ltd and Another* 2020 (1) SA 140 (GJ) the applicant approached the GJ for an interim interdict to secure the release by the respondent of funds to pay its staff. The respondent argued that although the applicant had cast the interdict it sought in the form of an interim interdict, the application was actually one for a final interdict. The applicant conceded that it would establish only *prima facie* right, not the clear right required for a final interdict.

This case was important because there were two competing lines of authority in the GJ on the classification of interdicts, namely –

- *BHT Water Treatment (Pty) Ltd v Leslie and Another* 1993 (1) SA 47 (W), in which the Witwatersrand Local Division (now the GJ) held that the court had to look at the substance and not the form of the relief; and
- *Radio Islam v Chairperson, Council of the Independent Broadcasting Authority and Another* 1999 (3) SA 897 (W), in which the same court concluded that an interdict was final when the order stated it to be so.

The respondent suggested that the court *a quo* follow *BHT* to find in its favour.

The parties had in 2011 entered into a suite of agreements that included a loan and an account cession agreement. The respondent argued that the sums advanced to the applicant were due and applied for a money judgment. It advised the applicant that it was exercising its right under the account cession, so that all deposits into the applicant's bank account would vest in the respondent. In response, the applicant applied for what it termed interim relief to secure the release of money from its bank account. Specifically, the interdict was to restrain the respondent from preventing the applicant from accessing its bank account and from enforcing the account cession pending the decision in the main application. While the respondent argued that the interdict was final in its effect because it would finally and irreversibly deprive it of the security it held over the money in the account, the applicant insisted that it sought no more than a common-or-garden interim interdict that would operate only until the final determination of the issues in the main application.

The court, per Keightley J, held that courts had to distinguish between the effect of the interdict on the 'disputed right itself' and its effect on the 'object of that right'. It held that it was not, however, necessary to decide whether *BHT* was correctly decided since in the present case the interdict would not have a final effect on the respondent's underlying right. And the prejudice it would suffer – lack of access to the money and the curtailment of its ability to preserve it – could be properly addressed during the balance of convenience inquiry typical of interim interdicts. The GJ accordingly found that the application was for an interim interdict, and the normal test

pertaining to interim interdicts would apply.

The GJ proceeded to decide the application principally on the balance of convenience, which, given the applicant's parlous financial state, favoured the respondent. It was clear from the applicant's financial state that releasing the account would not enable it to pay its creditors, but instead deprive the respondent of security in respect of a debtor (the applicant) in financial straits. The GJ accordingly dismissed the application for an interim interdict.

Medical law – action for damages

The National Health Act 61 of 2003 prohibition on disclosure of information: In *Thabela v Nedgroup Medical Aid Scheme and Another* 2020 (1) SA 318 (GJ) the first defendant, a medical aid scheme, conveyed medical information regarding one of its members, the plaintiff, to the second defendant, the plaintiff's employer. (The plaintiff claimed the information was confidential and that he did not consent to its disclosure and sued for damages based on the infringement of his constitutional right to privacy, the breach of the duty contained in s 14(2) of the National Health Act 61 of 2003, and under the *actio iniuriarum*. In dismissing the claim, the GJ, per Modiba J, found that the information was no longer confidential at the time of its provision. It then considered the ambit of s 14(2) of the Act, which, with s 14(1), provides that: 'All information concerning a user, including information relating to his or her health status, treatment or stay in a health establishment, is confidential' and that in subs (2) 'no person may disclose any information contemplated in subsection (1) unless –

(*a*) the user consents to that disclosure in writing;
(*b*) a court order or any law requires that disclosure; or
(*c*) non-disclosure of the information represents a serious threat to public health'.

The GJ held that the prohibition in s 14(2) was not, as contended, confined to health care providers or workers and dismissed the action.

Practice

Does the service of an application for joinder interrupt prescription? In the *Nativa Manufacturing (Pty) Ltd v Keymax Investments 125 (Pty) Ltd and Others* 2020 (1) SA 235 (GP) case, the applicant sought the joinder of the third respondent in a pending action for damages. The third respondent opposed the relief, arguing that the joinder would serve no purpose because the applicant's claim against it had prescribed: At the time the application came before the court, more than three years had passed since the applicant acquired the knowledge that it had a potential claim against it, and without summons in the action having ever been served. Of significance was that the joinder application had been served within the requisite three years. Section 15(1) of the Prescription Act 68 of 1969 provides that the 'running of prescription shall … be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt'. The critical question, then, was whether service of an application for joinder of a party, without more – namely, service of summons on the joined party – interrupted the running of prescription for the purposes of s 15(1) of the Act? If the answer was yes, it would mean that the applicant's claim had not prescribed.

The present facts and the legal issue were on all fours with the recent decision in *Huyser v Quicksure (Pty) Ltd and Another* 2017 (4) SA 546 (GP). The GP, per Keightley J, pointed out that it was bound by that decision unless it was clearly wrong. Of particular relevance was *Huyser*'s treatment of the SCA's decision in *Peter Taylor & Associates v Bell Estates (Pty) Ltd and Another* 2014 (2) SA 312 (SCA). In that case the SCA ruled that the service of a joinder application did not interrupt the running of prescription. In *Huyser* the GP, however, distinguished the case before it from *Peter Taylor*. It drew a distinction between so-called 'preliminary-type joinders' – where the notice of motion sought relief in the form of a prayer that 'leave be granted to join' the respondent, along with a request that the court give further directions regarding amendment of pleadings and service of summons, and 'straightforward joinders' – where an order was sought simply 'joining' the respondent. The former was akin to the relief sought in *Peter Taylor*, while the latter was what was sought in *Huyser*. The GP ruled that the notice of motion before it qualified as a process for purposes of s 15(1) the Act, and that its service had interrupted prescription.

However, the court held that there was no underlying basis for the distinction sought to be drawn in *Huyser* between 'straightforward' and 'preliminary-type' joinders. It added that the same fundamental issue arose in *Huyser* and *Peter Taylor*, in other words, whether the service of the joinder application interrupted the running of prescription. It followed that the findings and conclusion reached in *Huyser*, that it was not bound by *Peter Taylor*, were clearly wrong. As such, the court could depart from such a decision. In conclusion, it held that, on the authority laid down by the SCA, the service of the application for the joinder on the third respondent did not constitute service of process for the purposes of s 15(1) of the Act. The applicant's claim against the third respondent had prescribed, and it would, therefore, serve no purpose to grant the joinder. The court, therefore, dismissed the application with costs.

Surety

Liability: Invalid principal agreement settled by acknowledgment of debt. In *Shabangu v Land and Agricultural Development Bank of South Africa* 2020 (1) SA 305 (CC), Mr Shabangu and the fourth to ninth respondents stood surety for the indebtedness of a company under a loan agreement with the Land Bank. After it transpired that the Land Bank was not empowered to make the loan and that the loan agreement was, therefore, invalid, the company signed an acknowledgment of debt accepting liability for a lesser amount in full and final settlement of its indebtedness. When the company failed to make payment under the acknowledgment of debt, the Land Bank instituted proceedings against it and its sureties. Shortly after proceedings were instituted, the company was liquidated, and the Land Bank then proceeded only against the sureties – not directly based on the original principal debt under the loan agreement, but on the sureties' alleged liability under the acknowledgement of debt.

The CC, having granted leave to appeal, held that if the terms of the accessory suretyship agreement were wide enough to cover an enrichment claim, the sureties may well also be liable, but that here it was common cause that they did not. In effect it perpetuated the original invalidity so that it remained tainted and could not found suretyship liability.

Trusts

The removal of a trustee on the ground of the breakdown in the relationship between trustees: In *McNair v Crossman and Another* 2020 (1) SA 192 (GJ) a court dealing with the fallout from the breakdown in the relationship between co-trustees had to decide whether it could remove one of them.

The facts were as follows: Before his death, the deceased created a trust operated by himself, his wife the appellant and the first respondent. The deceased was replaced as trustee by his friend, the second respondent. Another trustee was the deceased's brother, who ran a business with the first respondent.

The relationship between the appellant, the first respondent and the deceased's brother ran aground, and the second respondent was soon enmeshed in the conflict. As a result, the trust's business suffered. The appellant, under the impression that the second respondent was acting in cahoots with the first respondent and deceased's brother, the

appellant bought and application to have the first and second respondents discharged from their duties as trustees. They both opposed the application, which was dismissed by the GJ.

In an appeal to a full bench of the GJ, the court noted that the relationship between the appellant, the first respondent and deceased's brother had clearly broken down irretrievably. The breakdown was rooted in competing business interests. During the course of the litigation the first and second respondents levelled some very serious allegations against the appellant, including –

- that she was engaged in a corporate power grab;
- had unlawfully enriched herself; and
- was responsible for the destruction of her family unit.

The appellant in turn alleged that the second respondent's conduct, in particular, had jeopardised the administration of the trust, and that his continuance in office was detrimental to the welfare of the beneficiaries.

By the time of the appeal hearing the appellant had settled her dispute with the first respondent, who fell out of the picture. But the second respondent elected to resist the appellant's quest to overturn the GJ's order.

In its judgment the GJ, per Vally J (Wepener J and Mahalelo J concurring) pointed out that, while courts have tended to remove trustees only on the grounds of misconduct, incapacity or incompetence, they could do so also on another, more unusual, ground: A breakdown in the relationship between co-trustees to the extent that there was no longer any mutual respect and trust. Having found such a situation to exist, the GJ ordered the removal of the second respondent as trustee.

Other cases

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

- agency and representation: Termination of mandate;
- animal welfare and protection of the environment;
- constitutional damages and homeless persons;
- contracts: Notice to offeror not required;
- costs against the Road Accident Fund;
- defence of moderate and reasonable chastisement of children;
- engineering and construction law – dispute resolution;
- interception of communication;
- private security provider registration;
- sale of land – option consisting of offer and agreement to keep it open;
- summary judgment – amended r 32 of the Uniform Rules of Court; and
- the winding-up of a company and the termination of employee contracts.

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Did you know?

On 29 November 2016, then Minister of Justice and Correctional Services, advocate, Michael Masutha, officially opened the Limpopo Division of the High Court in Polokwane.

By Nonhlanhla Mtshali

Can a WhatsApp message be held as an enforceable contract?

Kgopana v Matlala (SCA) (unreported case no 1081/2018, 2-12-2019) (Van der Merwe JA (Petse DP and Leah, Wallis and Mocumie JJA concurring))

During July 2015, one Kgopana, won a prize in the National Lottery that amounted to R 20 814 582,20. A number of months after Kgopana's winnings were received, he sent a WhatsApp message to Ms Matlala, who is the mother of one of his seven children.

The message by Kgopana reads: '[i]f I get 20m I can give all my children 1m and remain with 13m. I will just stay at home and not driving up and down looking for tenders'.

The Limpopo Division of the High Court in Polokwane, concluded that the content of the message was clear and unequivocal and contained an offer that was 'certain and definite in its terms'. It held that an offer had been made 'with the necessary *animus contrahendi*' and that the respondent had 'readily accepted the offer'. The court also ruled that the appellant was contractually liable in accordance with the message, even if he might not have intended to make an offer to contract.

Moreover, the court, per Makgoba JP, found that the WhatsApp message sent by Kgopana constituted a valid offer. Accordingly, Kgopana was ordered to make payment as set out in his WhatsApp message.

Legal question

The issue in the appeal at the Supreme Court of Appeal (SCA) is whether a WhatsApp message sent by Kgopana to the mother of one of his seven children constituted an offer, which on acceptance could give rise to an enforceable contract.

Judgment

It follows that the question in this case is whether in the context thereof, the message conveyed an offer *animo contrahendi*. The admissible context was that Kgopana consistently denied having won a prize in the National Lottery. The message was sent in response to a statement that she knew that he had won the prize. It, therefore, constituted a denial that he had done so.

The context thus strongly suggested that the appellant never intended to agree to part with a portion of his winnings. And in its terms, the message related what the appellant could possibly do in the hypothetical future event of him receiving R 20 million. It set out what the appellant might do if he received R 20 million. In respect of the manifestation of the intention of the respondent it is significant that she never responded to the message and did not immediately claim payment.

The SCA held that the message clearly did not contain an offer that could on acceptance thereof be converted into an enforceable agreement. Therefore, this is also not a case where the offeror's true intention differed from his expressed intention.

Kgopana subjectively had no intention to contract and the message did not suggest otherwise. Thus, there was no room for the application of the doctrine of quasi-mutual assent.

Pertinent legal principle

True agreement or consensus can generally only be determined by an examination of the external manifestations of the intention of the respective parties.

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By Kgomotso Ramotsho

Application for the extension period for the declaration of constitutional invalidity of s 7(1) of the Recognition of Customary Marriages Act

Minister of Justice and Correctional Services v Ramuhovhi and Others (CC) (unreported case no CCT 194/16, 26-11-2019) (Mhlantla J (Khampepe ADCJ, Froneman J, Jafta J, Madlanga J, Majiedt J, Mathopo AJ, Theron J, Tshiqi J and Victor AJ))

The Constitutional Court (CC) suspended an application by the Minister of Justice and Correctional Services, for an extension period for the declaration of constitutional invalidity of s 7(1) of the Recognition of Customary Marriages Act 120 of 1998 (the Act) to afford Parliament an opportunity to correct the defect. On 15 October 2019, six weeks before the expiry of the suspension period, the Minister of Justice and Correctional Services approached the CC seeking an extension of the suspension period for another 12 months, until 30 November 2020.

In the alternative, the minister asked for an extension while the CC was considering and determining whether the extension should be granted. The application was not opposed. In that regard, the first, second, third and tenth respondents filed notices to abide.

The matter was determined without oral argument or written submissions. The issue was whether the application should be granted having regard to the trite principle relating to applications of this nature and the terms of the order in the *Ramuhovhi I* case (*Ramuhovhi and Others v President of the Republic of South Africa and Others* 2018 (2) SA 1 (CC)). In support of the application, the minister submitted that the Department of Justice and Correctional Services and Parliament have been unable to timeously enact new legislation and it is unlikely they will have done so before 29 November 2019.

The minister contended that 2018 and 2019 were atypical years in the legislative process due to the 2019 elections, which caused inevitable interruptions and changed the ordinary deadlines for government departments to submit Bills to be passed. He explained further that the bulk of the work had been done by the department and that the legislative process largely rests with Parliament. He, however, noted that because the Recognition of Customary Marriages Amendment Bill (the Bill) deals with customary law (a functional area of concurrent legislative competence in terms of sch 4 of the Constitution) it will be required to follow the process set out in s 76 of the Constitution. The minister pointed out that he was expecting further input from the National House of Traditional Leaders given the public interest in the Bill.

The minister anticipated that an extension of 12 months would be sufficient and explained that even though the Bill had reached Parliament the department deemed it prudent to approach the CC soon after it became apparent that the 29 November 2019 deadline would not be met. He submitted that the department acted reasonably and diligently in attending to the administrative procedure required before Parliament continues with the process.

The CC ascribed certain factors, which should be taken into account when exercising the discretionary remedial power, including –

- the sufficiency of the explanation for failing to correct the defect in the prescribed time;
- the potential prejudice if the extension is not granted;
- prospects of remedying the defect during the extended period of suspension; and
- the need to ensure functional and orderly state administration for the benefit of the general public.

However, the power extends the period of suspension of the declaration of invalidity should be exercised sparingly.

The CC looked at whether it was necessary to consider the application. The CC said the point of departure was its reasoning in the *Ramuhovhi I* case. The CC added that the reasoning and judgment in the *Ramuhovhi I* case was clear and unequivocal. The CC pointed out that there was a specific purpose for the inclusion of para 6 of the order and this was articulated in the judgment where Madlanga J stated: 'I think it best to leave it to Parliament to finally decide how to regulate the proprietary regime of pre-Act polygamous customary marriages. I consider appropriate relief to be a suspension of the declaration of invalidity accompanied by interim relief. This twin-relief has the effect of granting immediate succour to the vulnerable group of wives in pre-Act customary marriages whilst also giving due deference to Parliament. In the event that Parliament finds the interim relief unacceptable, it is at liberty to undo it as soon as practically possible. Should Parliament fail to do anything during the period of suspension, the interim relief must continue to apply until changed by Parliament'.

The CC said that para 6 of the order reflects this reasoning: 'In the event that Parliament fails to address the defect referred to in paragraph 4 during the period of suspension, the orders in paragraphs 5(a) and 5(b) will continue to apply after the period of suspension.' The CC added that it is trite that court orders must be complied with. It is imperative to the rule of law and the functioning of the constitutional democracy that court orders are respected. The CC pointed out that Parliament was given sufficient time to address the issue.

The CC said it took a precautionary measure and made provision in the event that Parliament failed to do so. The CC noted that it was clear that Parliament was not going to be able to remedy the defect in time, as the suspension period was to expire end of November 2019. The CC pointed out, that it was confirmed by the Minister of Justice and Correctional Services, who indicated that the deadline was not going to be met. Therefore, the CC said in compliance with para 6 of the order, from 29 November 2019, the regime in terms of para 5 of the order will continue to apply to polygamous customary marriages concluded before the Act came into operation.

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New legislation

Legislation published from 3 – 31 January 2020

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Promulgation of Acts

Adjustments Appropriation Act 29 of 2019. *Commencement:* 15 January 2020. GN17 *GG*42948/15-1-2020 (also available in Setswana).

Division of Revenue Amendment Act 30 of 2019. *Commencement:* 15 January 2020. GN22 *GG*42949/15-1-2020 (also available in Sesotho).

Rates and Monetary Amounts and Amendment of Revenue Laws Act 32 of 2019. *Commencement:* 15 January 2020. GN19 *GG*42950/15-1-2020 (also available in Afrikaans).

Taxation Laws Amendment Act 34 of 2019. *Commencement:* 15 January 2020. GN21 *GG*42951/15-1-2020 (also available in Afrikaans).

Tax Administration Laws Amendment Act 33 of 2019. *Commencement:* 15 January 2020. GN23 *GG*42952/15-1-2020 (also available in Afrikaans).

Commencement of Acts

Judicial Matters Second Amendment Act 43 of 2013 (except s 4). *Commencement:* 31 January 2020. Proc R5 *GG*42987/31-1-2020 (also available in Afrikaans).

Judicial Matters Amendment Act 8 of 2017, ss 35 and 38. *Commencement:* 31 January 2020. Proc R5 *GG*42987/31-1-2020 (also available in Afrikaans).

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Airport charges. GenN9 *GG*42956/17-1-2020.

Basic Conditions of Employment Act 75 of 1997
Amendment of regulations. GN R39 *GG*42965/22-1-2020.

Commissions Act 8 of 1947
Amendment of the Regulations of the Commission of Inquiry into allegations of state capture, corruption and fraud in the public sector including organs of state. Proc1 *GG*424947/10-1-2020 (also available in Afrikaans).

Gas Regulator Levies Act 75 of 2002
Levy and interest payable on piped-gas industry. GN47 *GG*42970/23-1-2020.

Health Professions Act 56 of 1974
Amendment of the regulations relating to the conduct of inquiries into alleged unprofessional conduct. GN53 *GG*42980/31-1-2020.

Income Tax Act 58 of 1962
Regulations under items (*a*) and (*c*) of the definition of 'determined value' in para 7(1) of sch 17 of the Act on retail market value in respect of the right of use of a motor vehicle. GN37 *GG*42961/17-1-2020.

Magistrates' Courts Act 32 of 1994
Appointment of Ritchie located at Main Road, Motswedimosa as place for holding of a periodical court within Magisterial District of Frances Baard. GN50 *GG*42976/29-1-2020.

Medical Schemes Act 131 of 1998
Adjustment to fees payable to brokers. GenN24 *GG*42980/31-1-2020.

Mine Health and Safety Act 29 of 1996
Guideline for compilation of a mandatory code of practice for prevention of flammable gas and coal dust explosions in collieries. GN28 *GG*42956/17-1-2020.
Guideline for compilation of a mandatory code of practice for management of self-contained self-rescuers in mines. GN27 *GG*42956/17-1-2020.
Guidance note on strengthening the HCT (HIV Counselling and Testing) uptake in the South African Mining Industry. GN31 *GG*42956/17-1-2020.

National Environmental Management Act 107 of 1998
Amendment of the Financial Provision Regulations, 2015. GN24 *GG*42956/17-1-2020.

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Amendment of the fields of practice set out in sch 1 to the Act. GenN17 *GG*42967/24-1-2020.

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- Draft amendment of the Civil Aviation Regulations, 2011 in terms of the Civil Aviation Act 13 of 2009 for comment. GN R4 *GG*42940/3-1-2020.
- Beneficiary Selection and Land Allocation Policy published by the Department of Rural Development and Land Reform for comment. GN2 *GG*42939/3-1-2020.
- Draft guidelines to applicants for new industry sites and retail licences in terms of the Petroleum Products Act 120 of 1977 for comment. GN8 *GG*42946/10-1-2020.
- Procedures to be followed for assessment and minimum criteria for reporting of identified environmental themes when applying for environmental authorisation in terms of the National Environmental Management Act 107 of 1998 for comment. GN9 *GG*42946/10-1-2020.
- Draft national spatial development framework in terms of the Spatial Planning and Land Use Management Act 16 of 2013 for comment. GenN11 *GG*42962/20-1-2020.
- Amendment of the Registration Authority Regulations in terms of the National Environmental Management Act 107 of 1998 for comment. GN40 *GG*42967/24-1-2020.
- Draft Merchant Shipping (Construction and equipment of fishing vessels of less than 24 metres in length but more than 25 GT) Regulation, 2020 in terms of the Merchant Shipping Act 57 of 1951 for comment. GenN41 *GG*42984/31-1-2020.
- Exposure draft issued by the Accounting Standards Board to comment on

the Post-implementation Review of the Standard of Generally Recognised Accounting Practice (GRAP) on Heritage Assets (GRAP 103) (ED 180) in terms of the Public Finance Management Act 1 of 1999. BN5 *GG*42980/31-1-2020.

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- Draft Municipal Fiscal Powers and Functions Amendment Bill for comment. GenN3 *GG*42939/3-1-2020.
- Draft National Sport and Recreation Amendment Bill, 2020 for comment. GN16 *GG*42946/10-1-2020.
- South African Institute for Drug-Free Sport Amendment Bill, 2020 for comment. GN15 *GG*42946/10-1-2020. ❑

Employment law update

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Breach of employment contract

In *Pilanesberg Platinum Mines (Pty) Ltd v Ramabulana* [2020] 1 BLLR 24 (LAC), the employee was employed by Pilanesberg Platinum Mines (the company) as a Socio-Economic Development Manager. As part of her duties and responsibilities, she was required to ensure that new employees employed at the company's mine were members of the local community. This was because the community was a material shareholder of the company and there was an agreement between the company and the community that the company would look after its interests by offering new employment opportunities to local residents.

During 2012, the community became severely aggrieved as it believed that its members were not given preference when posts became available at the company's mine. The community alleged that the employee had effectively 'sold' proof of residence to individuals that were not members of the community and was accordingly 'selling' jobs in return for money. The community was so outraged at the employee's conduct that they were intent on visiting violence on her. Given the serious nature of the allegations against the employee, the company escorted the employee to her place of residence and instructed her to stay there for her own safety. She was neither suspended nor was her salary withheld.

During a period of eight months, the company consulted with the employee. The employee alleged that she had been 'illegally and unprocedurally' removed from the workplace without any explanation. The company stressed that, despite its meetings with the community, it was unable to resolve their concerns about the employee's presence and it was not prepared to allow the employee to continue working for her own personal safety and the company's interests within the community. The company furnished the employee with a settlement agreement offering her four month's salary so as to amicably part ways. The employee rejected this offer and proposed that she be paid an amount equal to what she would have earned over a period of five years. The company rejected this counter offer and terminated the employee's employment. The reason it offered for the termination was its 'operational reasons'.

The employee claimed that her termination 'based on operational requirements' had breached her employment contract, which required the company to give her one month's written notice of termination, provided that the company complied with the pre-dismissal procedures as set out in the Labour Relations Act 66 of 1995 (the LRA), unless there was sufficient reason in law to summarily dismiss her. The employee instituted an application in the Labour Court (LC) in terms of s 77 of the Basic Conditions of Employment Act 75 of 1997 (the BCEA) seeking orders declaring that –

- the company's decision to terminate her employment was unlawful; and
- reinstating her with retrospective effect.

Alternatively, that the company pay damages equal to the amount she would have earned 'until the date of her retirement age'.

The LC found that the decision by the company to terminate the employee's employment was a breach of her employment contract and ordered the company to reinstate the employee and to pay her remuneration from the date of her dismissal. The company instituted an appeal against the LC's judgment. Although it failed to lodge its appeal timeously in accordance with the court rules, the Labour Appeal Court (LAC) condoned the company's non-compliance having regard to the company's prospects of success on the merits of the matter.

The LAC found that the complaints from the community against the employee were of a serious nature involving employing people from outside of the community by subterfuge creating the impression that the employees were in fact from the community. This amounted to the company failing to implement its agreement between it and the community by consciously employing people who were disqualified. The community was so enraged that some had threatened violence against the employee.

Despite all of the community's complaints being brought to the employee's attention, on her own version, she adopted a rather malicious approach. She simply did not respond to these allegations and challenged the company to prove the allegations against her. In the circumstances, the company decided, pursuant to traversing the issues with the community, that the only option it had was to terminate the employee's employment so as to continue its relationship with its material shareholder and to ensure no harm was visited upon the employee.

While the company labelled the employee's termination as one for 'operational reasons' and the employee immediately equated this to be a dismissal based on the company's 'operational requirements' as contemplated by s 189 of the LRA, the court held that this was erroneous. There was no reason for the parties to classify the form of dismissal. All the company was required to do was to set out the facts and provide reasons for its decision. The reason why the company terminated the employee's employ-

ment was that it was confronted with a conflict between its material shareholder and its employee and was left with no option but to dismiss the employee. In the circumstances, the court held that the termination of the employee's employment could not constitute an unlawful termination.

The court went on further to state that whether the employee's dismissal was unfair was not what the LC was called on to decide. The employee disavowed reliance on the LRA when it pursued a breach of contract claim in terms of the BCEA rather than approaching the Commission for Conciliation, Mediation and Arbitration (CCMA) on the basis of an unfair dismissal. The onus was accordingly on the employee to satisfy the court that there was a breach of contract. She failed to do so. The court found that the provisions of her employment contract on which the employee relied, related to a dismissal based on the employee's conduct or capacity. The employee was not dismissed for either of these reasons. The court held that the employee's dilemma was her proceeding in terms of the BCEA instead of the LRA's unfair dismissal jurisdiction.

Even if the employee had proved a breach by the company of her employment agreement, the only relief available to her was an order for either specific performance or damages. The court held that specific performance would have been inappropriate in the circumstances and to simply demand damages in the amount that the employee would earn until her date of retirement was misconceived. There was a duty on the employee to prove the quantum of her damages and she failed to do so, nor did she allege that she had been out of work from the date of her employment being terminated.

The appeal was upheld with no order as to costs.

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Dismissed while serving notice – is resignation a factor when assessing the quantum of compensation to award an employee?

Bester (Scott) v Small Enterprise Financial Agency SOC Ltd and Others (LAC) (unreported case no JA41/2018, 11-12-2019) (Sutherland JA with Kathree-Setiloane AJA and Murphy AJA concurring).

The appellant employee had several clashes with her superior, which prompted her to enter discussions with her employer on terms of her resignation. Ironically on the very same day, namely 21 May 2014, she was placed on paid suspension pending disciplinary action being instituted against her. On 4 September 2014 and while still on suspension, the employer ceased remunerating the employee, which resulted in the employee tendering her resignation with immediate effect.

The employer rejected her resignation on short notice and insisted she serve her full months' notice. During her notice period the employee was charged and dismissed for absenteeism and insolence.

At the Commission for Conciliation, Mediation and Arbitration (CCMA) the employee's dismissal was found to be substantively and procedurally unfair following which the arbitrator awarded her eight months compensation.

Aggrieved with the award the employer sought to set aside the arbitrator's findings on review. Although the Labour Court (LC) upheld the arbitrator's findings, it found that under circumstances where the employee had voluntarily resigned, the arbitrator erred in awarding her eight months' salary. Accordingly, the LC found that the employee was only entitled to one-month compensation, that being the amount she would have received while serving her notice period.

On appeal the sole issue before the Labour Appeal Court (LAC) was a challenge on the arbitrator's discretion to award the employee eight months compensation. Referring and quoting from a relevant authority, the LAC restated the test concomitant to the issue before it was 'to evaluate whether the decision-maker acted capriciously, or upon the wrong principle, or with bias, or whether or not the discretion exercised was based on substantial reasons or whether the decision-maker adopted [an] incorrect approach'.

What weight, if any, should the arbitrator have placed on the fact that the employee resigned, when assessing how much to compensate the employee? The LAC held that once the employment relationship terminated on grounds of dismissal, the employee's resignation was irrelevant when quantifying the compensation to award her. Compensation in terms of s 194 of the Labour Relations Act 66 of 1995, according to the LAC, serves a broader purpose than mere patrimonial damages and is determined within the consideration of being just and fair.

As to the approach adopted by the court *a quo*, the LAC held:

'The Labour Court, curiously, subordinated its perspective wholly to the fact of a tendered resignation which approach was inappropriately narrow and, in any event, misdirected. The argument advanced in support of the Labour Court's view before us, as I understand the contention, is that the appellant could have no material interest in her job beyond her notice period, given the tendered resignation. Thus, on that premise, there ought to be a cap on any compensation order commensurate with that material interest. In our view, this is not the way to construe the purpose or effect of a compensation order in terms of section 193. The contention seems to assume that her "positive interest", (ie, the value to the aggrieved party, had the contract not been breached) in the job is the defining consideration, as if this were a straightforward contractual dispute. That premise is inappropriate in the paradigm regulated by sections 193 and 194 of the LRA. Apart from the questions of fact about the character of the tendered resignation not being freely made and the break in logic between awarding a sum in compensation for a dismissal which *ipso facto* rendered the tendered resignation irrelevant, the function of sections 193 and 194 is not to yield a quantum based on the concept of positive interest, but rather is premised on the broader consideration of fairness, having weighed the circumstances holistically.'

Having considered the fact that the arbitrator, in awarding the employee eight months compensation, took into account the employee's length of service, how long she had been unemployed at the time of the arbitration, the employer's failure to consider progressive disciplinary measures as an alternative to dismissal and the unfair manner in which the employee was dismissed; the LAC was satisfied that his decision was rational and free from criticism.

The appeal was upheld, and the arbitration award confirmed with costs of both the review and appeal applications.

Recent articles and research

By Kathleen Kriel

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Abbreviation	Title	Publisher	Volume/issue
Acta Juridica	Acta Juridica	Juta	(2018) (2019)
Advocate	Advocate	General Council of the Bar	(2019) 32.3
EL	Employment Law Journal	LexisNexis	(2019) 35.6
JCCLP	Journal of Corporate and Commercial Law and Practice	Juta	(2019) 5.1
LitNet	LitNet Akademies (Regte)	Trust vir Afrikaanse Onderwys	(2019) 16.3
PER	Potchefstroom Electronic Law Journal	North West University, Faculty of Law	(2019) 22
PLD	Property Law Digest	LexisNexis	(2019) 23.4
SA Merc LJ	South African Mercantile Law Journal	Juta	(2019) 31.1
SAJELP	South African Journal of Environmental Law and Policy	Juta	(2018) 24.1
THRHR	Tydskrif vir Hedendaagse Romeinse-Hollandse Reg	LexisNexis	(2019) 82.4

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

Fact corner

- It has been estimated that there are around 3 000 shipwrecks off the coast of South Africa. They are all protected by South African laws.
- South Africa became the first African country and the fifth country in the world to recognise same-sex marriage in 2006.
- In Mexico, it is illegal for bicyclists to lift their feet off the pedals while riding as this might cause them to lose control of the bike.
- It is illegal to chew gum in Singapore. No gum is bought or sold there. The law is said to be in place to keep public spaces clean.

The plight of the homeless under PIE: A critical analysis of *Ngomane and Others v City of Johannesburg*

By Ndivhuwo Ishmel Moleya

The history of forced removals and unregulated evictions in South Africa (SA) under the auspices of the Prevention of Illegal Squatting Act 52 of 1951 is a distressing one to say the least. With this painful history in mind, one appreciates the noble intentions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), which was designed to regulate the eviction of unlawful occupiers from land in a fair manner. The narrow question that arose in *Ngomane and Others v City of Johannesburg Metropolitan Municipality and Another* [2019] 3 All SA 69 (SCA), was whether homeless people who unlawfully occupied a 'traffic island' as a residential area may avail themselves of the legal protection of PIE. The applicants were homeless people who derived their meagre income from recycling garbage and had 'built' their 'home' on the traffic island from various materials. However, the walls of their 'homes' were only erected in the evenings when it was time to sleep and would be dismantled in the morning. The materials used to erect their makeshift homes were confiscated by the city police as part of a 'clean-up' exercise in terms of the by-laws. The applicants alleged that the items taken, included, mattresses, blankets, clothing, money, identity documents and other important documents. No inventory of what was taken was made and their belongings were taken without prior engagement or a court order.

The High Court judgment

The applicants lodged an urgent application in *Ngomane and Others v City of Johannesburg Metropolitan Municipality and Another* [2017] 3 All SA 276 (GJ) seeking the return of all property and material confiscated from their 'home'. The court found that there was evidence that the officials had visited the island and took the applicants' belongings. It found that the officials were well aware that they were gathering, not only rubbish but personal belongings as well. It expressed doubt on whether there was any 'structure' that was demolished during the incident since these were already dismantled and stored. However, the court acknowledged that the structural materials – dismantled as they were – were used for shelter. It found that the applicants' vindicatory claim could not succeed because they could not identify or accurately describe the property, which they wished to vindicate.

The court also dealt with the question of what constitutes 'property' for purposes of s 26 of the Constitution and PIE and reasoned that it is 'inappropriate' and 'grossly misleading' for the applicants to label the traffic island as a 'piece of land' or 'property'. The court reasoned further, that a 'home' may not be made on a traffic island and that the applicants could not, therefore, be 'evicted' in violation of PIE. The court found that a traffic island cannot be 'occupied' as a home and that it could also not be equated to 'vacant land' or a 'park'. It reasoned that it was absurd to suggest that people may occupy a public space like a traffic island and seek refuge under s 26 of the Constitution or PIE. The court rejected the view that habitual sleeping at a traffic island – in a shelter that could be dismantled every morning – constitutes 'occupation' for purposes of s 26 of the Constitution or PIE. The court concluded that there can be no eviction without occupation. Although the application itself was dismissed, the court nonetheless made an order directing how future clean-up operations should be carried out without violating rights of others.

The SCA judgment

The applicants appealed the decision to the Supreme Court of Appeal (SCA) and raised four issues, of which two are relevant for present purposes. The first issue was whether the traffic island constituted 'land' in terms of PIE. The applicants had argued that the traffic island was their 'place of residence or abode' and their 'home' within the meaning of s 26(3) of the Constitution since they had occupied it for periods between two and five years. Another issue was whether the makeshifts constituted a 'home' or 'shelter'. On this issue, they urged the court to adopt a purposive interpretation of the definitions of a 'building' or 'structure' in PIE to include their makeshifts. They argued that the removal of the plastic sheets, cardboard boxes and wooden pallets used to construct their makeshifts constituted a demolition of their homes or structures and an unlawful eviction from their homes in terms of PIE. The SCA accepted that the respondents knew that the applicants lived in the traffic island. It also noted that no structure was demolished during the clean-up operation. Although it found that the applicants had sought no relief in terms of the PIE Act in the Gauteng Local Division of the High Court in Johannesburg (GJ), it went ahead to deal with the applicants' arguments in order 'to dispel the applicants' misapprehension relating to the protections provided by the PIE Act in light of their belated claim for constitutional damages'. It dealt with the question of whether the applicants' makeshifts constituted a 'building' or 'structure' in terms of PIE. The court referred to the Oxford English Dictionary in which a 'building' or 'structure' is defined as a 'construction, edifice, erection or other object constructed from several parts or material put together … that has a roof and walls'. The court pointed out that the officials 'found and took away a pile of loose wooden pallets, cardboard boxes and plastic sheets at the traffic island' and that 'not even the most generous interpretation of the words' supports the conclusion that the material confiscated by the respondents constituted a 'building' or a 'structure'. The SCA concluded that since there were no buildings or structures, there simply could not be any demolition and that there was also no eviction. Regarding the issue of a destruction of property, the court agreed with the GJ that the applicants could not invoke the *mandament van spolie*. However, it found that the respondents' conduct was demeaning, disrespectful and in violation of the applicants' right to privacy and the right to property. It also found the conduct to be in breach of the applicants' dignity. The court declared the respondents' conduct unconstitutional and ordered for the applicants to be compensated for the violation of their constitutional rights.

An analysis of the SCA's interpretation of the meaning of a 'structure' and 'building'

The SCA's interpretation of the words 'structure' and 'building' is questionable. It adopted a too literal interpretation, which does not seem to resonate with our constitutional aspirations or the broader objectives of PIE. PIE specifically provides that words must be given meanings ascribed by the Act 'unless the context indicates otherwise'. It is also axiomatic that statutes must be interpreted purposively. Now, the SCA defined a 'building' or 'structure' as a 'construction, edifice, erection or other object constructed from several parts or material put together . . . that has a roof and walls'. In terms of PIE, a 'building or structure' 'includes *any* hut, shack, tent *or similar structure or any other form of temporary or permanent dwelling or shelter*' (my italics) (s 1 of PIE). Firstly, use of the word 'includes' connotes expansiveness as opposed to restrictiveness (*Gees v Provincial Minister of Cultural Affairs and Sport, Western Cape and Others* 2017 (1) SA 1 (SCA)). Secondly, the use of the word 'any' underscores the fact that the 'hut', 'shack' or 'tent' need not be of a particular nature or character. Most importantly, the statutory definition makes no mention of 'walls' or a 'roof'. Therefore, the SCA adopted an inappropriately restrictive approach by adopting a dictionary definition which requires a 'building' or 'structure' to have walls and a roof. This restrictive interpretation is incongruent with the statutory definition. To illustrate the point, a 'tent' – which is included in the definition – may be dismantled and folded if not in use. However, this does not mean it cannot be assembled and erected to assume the posture of a structure with walls and a roof. To require a tent to always be erected, with walls and a roof, would diminish the dichotomy between temporary and permanent structures which is clearly recognised by PIE.

It is also important to note that PIE recognises a 'similar structure' or 'any other form of temporary' dwelling or shelter. Therefore, any other form of temporary structure, which is used as a dwelling or shelter would fall within the ambit of the statutory definition. The last part of the definition is crucial as it shows that the use of the building or structure is more germane than the nature of the building or structure itself. The indisputable evidence was that the applicants lived on the traffic island for years and even stored their personal belongings there. They clearly regarded the place as their 'home'. The mere fact that the structure, which they used as their 'dwelling' or 'shelter' was not always within its four walls with a roof on top did not take away its purpose.

The meaning of the word 'land' in terms of PIE

Both the GJ and the SCA found that the traffic island on which the applicants resided did not constitute land for purposes of PIE and s 26 of the Constitution. The GJ effectively found that people who reside in a public space like a traffic island – as did the applicants – cannot avail themselves of the statutory protection of PIE and s 26 of the Constitution. It pointed out that the traffic island was functionally designed to facilitate movement of traffic and that it could not be transformed and occupied as a 'home' or equated to a vacant land or public park. It also jettisoned the argument that the applicants' conduct of habitually sleeping at the traffic island constituted 'occupation' for purposes of PIE and s 26 of the Constitution.

PIE simply provides that "'land" includes a portion of land' (s 1 of PIE). The definition does not require the land to have a certain character or function. What is required is that the land be unlawfully occupied. Therefore, to suggest that the land must be of a character like that of a 'vacant land' or 'park' is implausible. It is so that a 'traffic island was functionally designed to facilitate traffic movement' but this does not mean it cannot be unlawfully occupied for residential purposes like any other public space, such as a vacant public land or a public park. The original function of the land is irrelevant for purposes of PIE. If it were so, the applicants in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) would not have benefited from the provisions of PIE as they occupied 'dilapidated commercial premises' as opposed to a residential property. There is simply no indication that the word 'land' or 'property' must be interpreted in relation to its original function. A restrictive interpretation like that of the GJ would inappropriately deny unlawful occupiers of certain public spaces the legal protection of PIE and s 26 of the Constitution.

Conclusion

The interpretive approaches of the GJ and SCA in this matter eschewed the mischief PIE was designed to redress. They ignored the context and overall objective of PIE. Such an approach unjustifiably deprives deserving unlawful occupiers of the procedural protections of PIE read with s 26 of the Constitution.

- See Mziwamadoda Nondima 'Legality of occupation of property by homeless persons' 2019 (June) *DR* 24.

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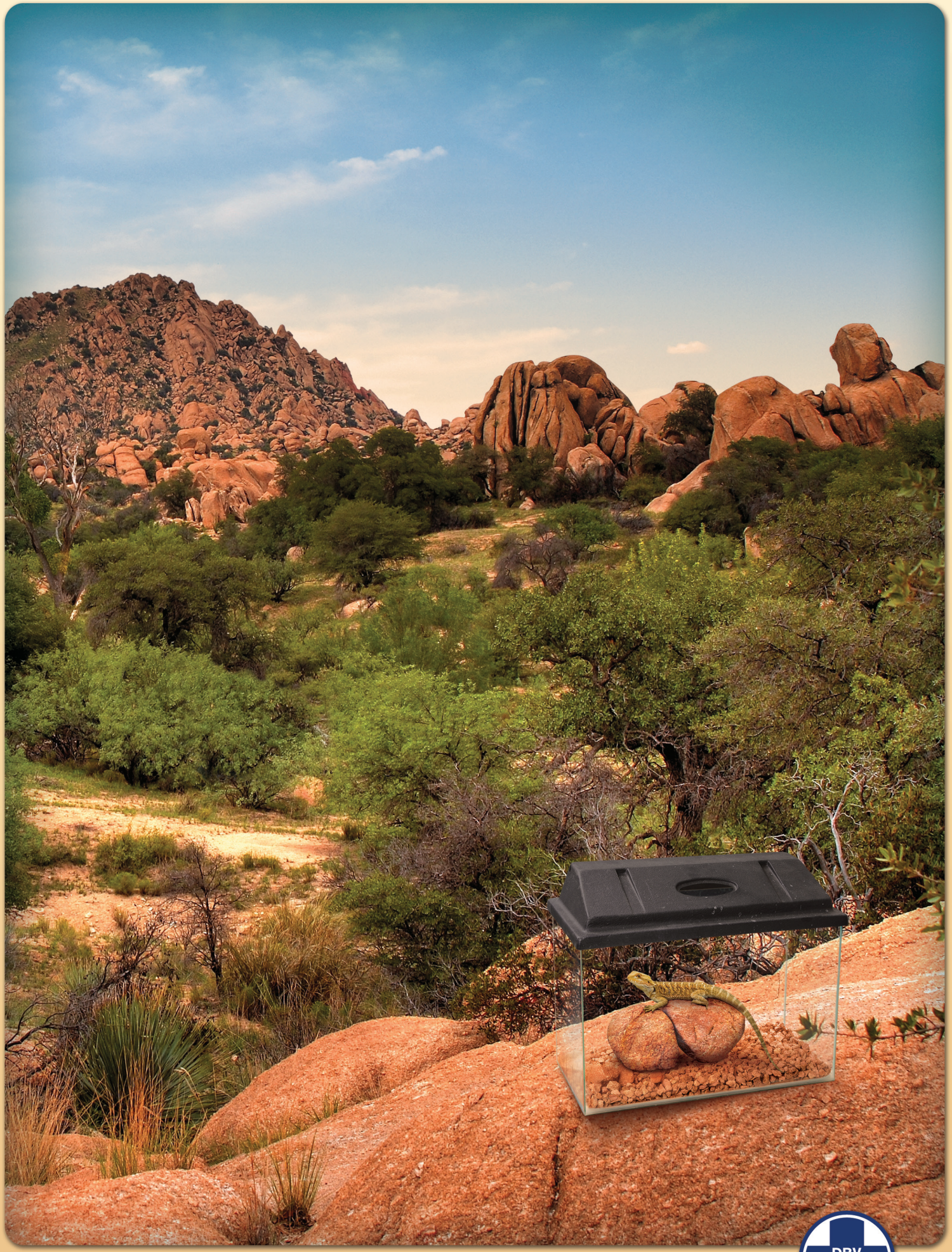

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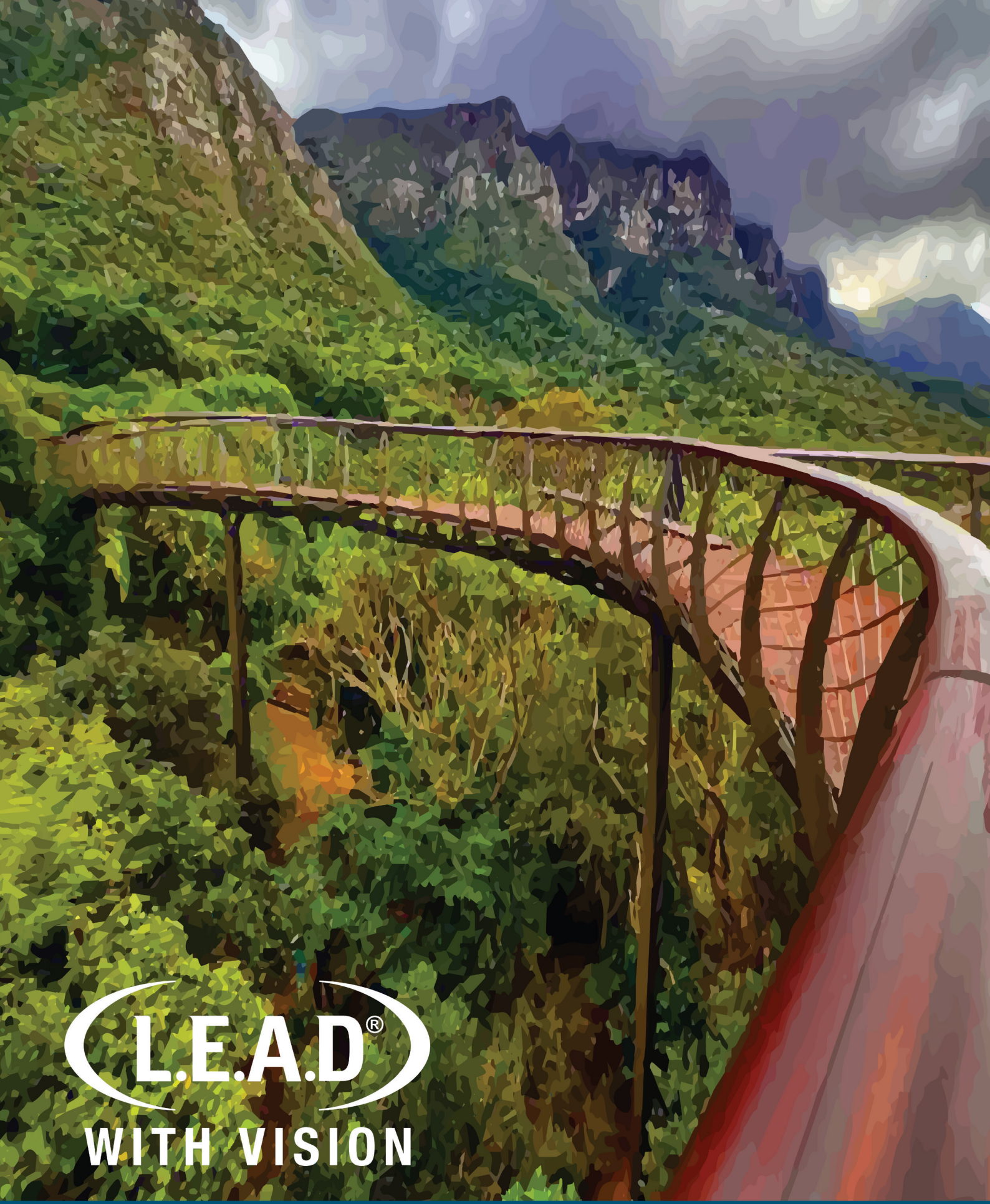

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