THE SA ATTORNEYS’ JOURNAL

OCTOBER 2020

UNDERSTANDING THE LEGAL RISKS ASSOCIATED WITH ARTIFICIAL INTELLIGENCE

Introducing the bride – when is a customary marriage deemed to have been condoned by the families?

A look at the effective cause requirement with estate agent commission

Will the new Sulphur Regulations leave the maritime industry dead in the water?

When should a court award compensation as a remedy for unlawful administrative action?

Calculating the levying of municipal property rates

Finding legal support in an overused term: Reconsidering the term ‘community’
Transform how your legal department works with HighQ

Improve efficiency, reduce costs and streamline collaboration with HighQ. An intelligent work and client engagement platform that helps law firms and corporates solve real business problems.

For more information go to africa.thomsonreuters.com
Regular columns

Editorial

Practice management
- LPIIF claim statistics

Practice notes
- Jurisdiction of the CCMA to adjudicate disputes between DIRCO and locally recruited personnel employed at South African diplomatic and consular missions abroad
- Life through the lens of a candidate legal practitioner

Book announcement

The law reports

Case notes
- Do indigenous communities have a customary law right to access and exploit natural resources in a ‘protected area’?
- The Constitutional Court declares Electoral Act unconstitutional
- Costs are awarded where there is conduct that amounts to an abuse of process

New legislation

Employment law update
- Retrenchments during business rescue
- Employee alleges being dismissed on account of his depression

Recent articles and research

Opinion
- Another attack on attorneys by the estate agency industry?
FEATURES CONTINUED

14 Finding legal support in an overused term: Reconsidering the term ‘community’

In this article, retiree, Udo Richard Averweg and Professor Marcus Leaning, revisit the term ‘community’. This time they focus their attention on the term as it appears in the context of South African law through the lens of a recent Land Claims Court decision in which the plaintiff was required to first and foremost prove that it was a community as defined in the Restitution of Land Rights Act 22 of 1994.

16 Mortgage of immovable property – a first step to alienation?

In this article previously published in 2011, consultant Alex Abercrombie, and then candidate legal practitioner, Razyaan Johaardien, come to the conclusion that the mortgage of immovable property is not a ‘first step’ towards ‘alienation’ and, therefore, the Registrars’ Conference Resolutions referred to in the article are incorrect and should be rescinded.

18 A look at the effective cause requirement with estate agent commission

In terms of South African law of agency, estate agents are entitled to a commission for successfully finding a purchase of the property for their principal if they can prove on a balance of probabilities that they were the effective cause of the sale. It is against this backdrop that candidate legal practitioner, Sibabalo Mtonga, discusses the effective cause requirement in depth by analysing how South African courts have interpreted this requirement.

20 Calculating the levy of municipal property rates

Non-practising legal practitioner, Marli Venter, explains what is important to know and understand on a valuation roll and how not to be overwhelmed when one had the opportunity to rectify errors timeously. She explains that this can be done by seeking professional advice to proceed with an objection if there are any errors in the valuation roll.

22 Will the new Sulphur Regulations leave the maritime industry dead in the water?

As of 1 January 2020 the new sulphur regulations came into force affecting sea transportation globally. These regulations compel the owners of vessels to ensure their vessels burn fuel with a sulphur content of no more than 0,5%. This is down from the previous content amount of 3,5%. Although these regulations will go a long way to helping to reduce air pollution they will also place an enormous financial burden on the maritime industry, writes legal practitioner, Nicholas Kade Smuts.

25 When should a court award compensation as a remedy for unlawful administrative action?

Candidate legal practitioner, Geoffrey Allsop, suggests that an order requiring an administrator to pay compensation could achieve the legitimate constitutional objectives of deterring administrators from violating the right to just administrative action in an intentional, grossly negligent or corrupt manner and ensuring that ‘appropriate relief’ is granted for the violation of a constitutional right when no other appropriate remedy exists.
Three new Bills to curb gender-based violence

In his penned open letter to the country, President Cyril Ramaphosa announced that three new Bills have been introduced in Parliament. The Bills have been introduced in an effort to curb the recent spate of gender-based violence and femicide in the country. Many women’s organisations have demanded that South African laws need to be tightened on granting bail to suspects and that there be enforcement of long sentences for offenders. The aim of the three amendment Bills is to fill the gaps, which allow some perpetrators of these crimes, to evade justice.

The first Bill will amend the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. President Ramaphosa noted that the amendment ‘creates a new offence of sexual intimidation, extends the ambit of the offence of incest, and extends the reporting duty of persons who suspect a sexual offence has been committed against a child’. The amendment also expands the scope of the National Register for Sex Offenders to include the particulars of all sex offenders. President Ramaphosa went on to state:

‘Until now, it has only applied to sex offenders convicted of sex crimes perpetrated against children or persons with mental disabilities. The time an offender’s particulars must remain on the register has been increased, and those listed on the register will have to disclose this when they submit applications to work with persons who are vulnerable. The Bill also makes provision for the names of persons on the National Register for Sex Offenders to be publicly available.’

The second Bill is the Criminal and Related Matters Amendment Bill B17 of 2020, which will tighten the granting of bail to perpetrators of gender-based violence and femicide and expands the offences for which minimum sentences must be imposed. President Ramaphosa added: ‘When a prosecutor does not oppose bail in cases of gender-based violence, they have to place their reasons on record. Unless a person accused of gender-based violence can provide exceptional circumstances why they should be released on bail, the court must order their detention until the criminal proceedings are concluded.’

South Africa has unacceptable high levels of intimate partner violence, which has led to the introduction of the third Bill, which will tighten the provisions of the Domestic Violence Act 116 of 1998. According to President Ramaphosa, domestic violence will be defined to cover those in engagements, dating, in customary relationships, and actual or perceived romantic, intimate or sexual relationships of any duration. He added: ‘The Bill also extends the definition of “domestic violence” to include the protection of older persons against abuse by family members. Complainants will be able to apply for a protection order online. To prevent a scenario where perpetrators can hide past histories of domestic violence, an integrated repository of protection orders will be established.’

If the above amendments are implemented correctly, this will be a step in the right direction in dealing with the gender-based violence pandemic in the country.
The 2020/2021 Legal Practitioners’ Indemnity Insurance Fund NPC (LPIIF) scheme year commenced on 1 July. The team at the LPIIF thought that this would be an opportune time to give De Rebus readers an overall view of what the claims trends have been over the past few years and to highlight the main areas of risk. This will assist readers in understanding how the accumulation of claims over the past years have resulted in the current outstanding exposure.

The outstanding claims exposure

The LPIIF is a registered short-term insurance company and its regulatory obligations include the actuarial assessment of the reserve requirements for outstanding claims. The actuarial assessment was conducted on the reserve requirement for outstanding claims as at 30 June, being the end of the previous financial and insurance years. The outcome of the assessment was that the reserve requirement for outstanding claims was R 598 574 800. This number is significantly high, considering the nature, size and legislative mandate of the LPIIF. Legal practitioners must address the underlying conduct within their respective practices, which leads to professional indemnity (PI) claims against them. If the growth in claims continues unabated, the sustainability and affordability of the current South African professional indemnity insurance model is at risk.

The operating environment

It is often noted across many international jurisdictions that periods of economic downturn are characterised by a corresponding increase in PI claims. This was noted, in particular, with claims against legal practitioners following on the 2007 - 2008 global financial crisis. The underlying reasons for this are numerous across the respective jurisdictions. Legal practitioners in South Africa were also affected by the financial crisis, as will be gleaned from the statistics below.

The effects of the current unprecedented circumstances brought about by the COVID-19 pandemic are being monitored by insurers writing the various classes of risk. There is no empirical data available as yet (both locally and abroad) on which predictions can reliably be made on the long-term impact of the pandemic on PI claims.

The inability of firms to continue operating to their full operating potential in the current conditions has been widely covered. The team at the LPIIF are monitoring the situation closely and are keeping an eye on developments in the broader PI market locally and in other jurisdictions. Adequate data on which trends can be drawn will only become available in time. The Prudential Authority and the Financial Sector Conduct Authority have increased the reporting requirements on regulated entities during this period in an effort to collate data on the financial services sector in general, and the insurance sector in particular.

The claims statistics

The graphs on p 4 and p 5 show the LPIIF claims position as at 31 July.

• Graph 1

Graph 1 below shows the steady increase claims notified in each insurance year. From the 2004/2005 scheme year the LPIIF saw a sharp increase in the notification of prescribed Road Accident Fund (RAF) claims. That year was also the first year where under-settled RAF claims had to be reported separately as that claim type had grown significantly. Prescribed and under-settled RAF claims have, since then, perennially been in the top four claim types (as will be noted from graph 2).

The scheme years between 2007 and 2011 were characterised by an increase in conveyancing related claims as areas, such as bridging finance, emerged. Cybercrime related matters also began emerging in the conveyancing environment from 2010 and continued until 2015. It is for this reason that bridging finance related claims were excluded from the LPIIF policy in 2011 (clause 16(f)) and cybercrime related claims excluded from the policy in 2016 (see clause 16(o)). We have also written extensively about cyber scams and made risk management suggestions that legal practices can implement in order to mitigate this risk (see Risk Alert Bulletin November 2019, August 2019 and August 2018, see www.lpiif.co.za). One of the unfortunate legacies of the last decade is that the two layers of the LPIIF’s reinsurance cover (the excess of loss and the stop loss) have been expunged in the 2009 scheme year and the cover for the 2011 is also close to being expunged. The LPIIF reached its highest peak for incurred claims (reserved and paid) in 2011. The result is that all the outstanding claims for those two scheme years (2009 and 2011), for example, will have to be borne by the LPIIF out of its reserves. This erodes the available resources the LPIIF has, and is

Graph 1: Number of claims notified per insurance year.
WHY ARE SOME OF THE LEADING LAW FIRMS SWITCHING TO LEGALSUITE?

LegalSuite is one of the leading suppliers of software to the legal industry in South Africa. We have been developing legal software for over 25 years and currently 8,000 legal practitioners use our program on a daily basis.

If you have never looked at LegalSuite or have never considered it as an alternative to your current software, we would encourage you to invest some time in getting to know the program better because we strongly believe it will not only save you money, but could also provide a far better solution than your existing system.

Some of the leading firms in South Africa are changing over to LegalSuite. If you can afford an hour of your time, we would like to show you why.

Thomas Harban BA LLB (Wits) is the General Manager of the Legal Practitioners’ Indemnity Insurance Fund NPC in Centurion.

Professional indemnity claims are long tail in nature. This means that a claim may be reported in one insurance year, but the investigation involved, and the litigation process takes place over many years. Such claims thus take many years to be finalised.

Risk management

Legal practitioners who practice in the areas with the highest risk must make an extra effort to ensure that they have adequate risk management measures in place to avoid claims. The LPIIF website has extensive information available on risk avoidance and mitigation measures for legal practitioners.

The LPIIF team are also available to give risk management training to all legal practices at no cost. In the current conditions, the training can be done remotely. Contact the LPIIF’s Practitioner Support Executive, Henri van Rooyen, at henri.vanrooyen@lpiif.co.za in order to arrange a risk management training session for your practice.

a threat to its long-term sustainability, placing all stakeholders at risk.

As a registered insurer, the LPIIF is obliged to maintain the regulatory prescribed minimum solvency levels. High claim numbers and values will threaten the ability of the company to meet the regulatory minimum solvency levels. The genesis of the change in the regulatory model for insurers internationally post-2008 was the collapse of an insurer in Australia triggered by a high number of personal injury related claims against legal practitioners. All stakeholders thus have a role to play in mitigating the risks associated with PI claims.

Prescribed and under-settled RAF claims are particularly expensive for the LPIIF both in terms of the high quantum involved, the cost of investigation and assessing these claims, as well as defending them. The quantum of these claims, in many instances, exceed the available limit of indemnity for the insured legal practitioner against whom the claim is brought. This leaves the respective legal practitioner with huge personal exposure if they do not have adequate top up insurance cover or some other risk transfer measure in place. Many years of hard work in building up a legal practice (and your personal assets) are thus put at risk. The reality is that many of these claims could have been avoided had the legal practitioners concerned developed and implemented appropriate internal risk management measures and registered their claims with the LPIIF’s Prescription Alert Unit, for example. The LPIIF website (www.lpiif.co.za) has useful risk management tools available to legal practitioners. Failure to register matters with the Prescription Alert Unit and to adhere to the notices sent out by that unit will result in a penalty deductible (access) being applied in the event of a claim. More information on the Prescription Alert Unit is available on the LPIIF website.

The pursuit by some plaintiffs of claims against legal practitioners, which have no merit, is an unfortunate practice that must be curtailed. Where appropriate, the LPIIF will seek punitive costs orders against the litigants concerned and their legal representatives. Dishonest conduct on the part of the plaintiffs and/or the defendants (the insured attorneys) will be reported to the Legal Practice Council (the LPC).

The stabilisation of claim numbers since 2016 is welcomed. We wish to express our appreciation to those legal practitioners who have heeded the call to proactively manage risk in their practices.

• Graph 2

Graph 2 shows the breakdown of the various claim types notified since 2010.
Jurisdiction of the CCMA to adjudicate disputes between DIRCO and locally recruited personnel employed at South African diplomatic and consular missions abroad

By Riaan de Jager

At South Africa's (SA) more than 120 diplomatic and consular missions (missions) abroad, the Department of International Relations and Cooperation (DIRCO) employs both career diplomats and locally recruited personnel (ie, employees appointed in the country where the mission is situated). The duties and responsibilities of these two categories of employees differ substantially: Diplomats mainly represent SA and interact with the receiving state while locally recruited personnel are usually employed in a supporting capacity (ie, as secretaries, translators, drivers, or domestic helpers).

It is DIRCO’s established policy to employ locally recruited personnel at missions in terms of local law, being the proper law of the employment contract that exists between the mission and its locally recruited personnel component. As I have noted in a previous article ‘Diplomatic Law: Service of process on foreign defendants’ 2017 (Dec) DR 34, mission premises are not extraterritorial (ie, an extension of SA) but instead inviolable. (Inviolability in modern international law is a status accorded to premises, persons or property from physical invasion or interference with their functioning and from impairment of their dignity.) Accordingly, South African law will ordinarily not be regarded as the proper law of such contracts.

Like in any labour environment, disputes regarding alleged unfair employment practices will invariably arise between missions and locally recruited personnel – this could include unfair dismissal disputes. Such a dispute arose at the South African Permanent Mission to the United Nations on 13 August 2018 when a locally recruited consular clerk and South African national, Zinile Nkosi (Nkosi), had been dismissed by the head of the mission, Ambassador Nosipho Mxakato-Diseko (Mxakato-Diseko), without the necessary approval of DIRCO. After Nkosi had lodged an unfair dismissal dispute against DIRCO with the Commission for Conciliation, Mediation and Arbitration (CCMA) in Pretoria, the Director-General (DG) of DIRCO decided to settle the dispute and instructed Mxakato-Diseko to reinstate Nkosi at the mission. Not agreeing with the DG’s decision, Mxakato-Diseko approached the Labour Court (LC) on an urgent basis for interim interdictory relief to prevent its implementation. In the judgment of Mxakato-Diseko v Director General: Department of International Relations and Cooperation and Another [2020] 2 BLR 217 (LC), the LC, however, dismissed the application due to a lack of urgency.

It appears from paras 4.4 and 4.5 of the judgment that DIRCO initially objected to the CCMA having jurisdiction, arguing that Nkosi had been employed at the mission in Geneva, and was thus subject to Swiss law and should have made use of the dispute resolution mechanisms prescribed by Swiss law. As Nkosi’s dispute was settled, the CCMA never had an opportunity to address these points in limine. The purpose of this article is thus to investigate whether or not locally recruited personnel could lodge disputes with the CCMA in terms of the Labour Relations Act 66 of 1995 (LRA) in SA, despite the fact that they are employed abroad in terms of foreign law.

There is a presumption in our law which applies in the interpretation of statutes that laws do not apply extraterritorially unless they specifically provide to the contrary (see Bishop and Others v Conrath and Another 1947 (2) SA 800 (T) at 803; S v Makhutla en ’n Ander 1968 (2) SA 768 (O)). In Astral Operations Ltd v Parry (2008) 29 IJ 2668 (LAC) the Labour Appeal Court (LAC), however, ruled that the territorial application of the LRA to the dispute in question had to be determined according to the locality of the undertaking carried out by the employer (see paras 15 to 18).

The LAC also considered this issue in Monare v SA Tourism and Others (2016) 37 IJ 394 (LAC). In that case, Tebogo Brian Monare, employed as Finance and Administration Manager of SA Tourism’s London office, was dismissed from service due to misconduct. Monare then instituted unfair dismissal proceedings against SA Tourism at the CCMA. The LAC indicated that the court in the Astral case had emphasised that the undertaking where the employee was employed, and which is situated beyond the territorial jurisdiction of the relevant forum where the employer's undertaking is located, must be separate and divorced from the employer’s undertaking (para 34). In other words, the relevant issue is not about where the appellant was employed but whether the London office was an undertaking of SA Tourism, which was separate and divorced from its undertaking in SA (para 36). The LAC concluded that SA Tourism’s London office was not divorced or separate from its SA office; in fact, it was linked to, related to and dependent on it - its location in London did not make it a different undertaking to the SA office as both branches had the same purpose, which was to promote tourism in SA. The LAC also mentioned that SA Tourism’s was a creature of statute - the Tourism Act 72 of 1993 - which made the LRA applicable (see paras 37 to 42).

The LAC in Monare held as well (at para 24) that, if a claimant formulates
PRACTICE NOTE – CANDIDATE LEGAL PRACTITIONERS

Life through the lens of a candidate legal practitioner

The journey of a candidate legal practitioner is not as glamorous and exhilarating as perceived or envisioned from undergoing vacation work experience or shadowing an experienced legal practitioner for a temporary period at a law firm.

The glimpse into the legal profession in this manner does not provide a prospective candidate legal practitioner with a substantive feel for the expectations and the experiences they may encounter, from the point of applying for a practical vocational training (PVT) vacancy until completion of their training.

There are immense hurdles and obstacles to overcome before law graduates are afforded the opportunity to reap the rewards of their hard-earned efforts preceding the completion of their LLB degree. These barriers display themselves in all shapes and forms.

Firstly, when applying for a PVT vacancy, the inherent requirements stipulated by some law firms are rigid and exclude certain disadvantaged groups of prospective candidates.

Secondly, when a candidate legal practitioner is accepted and selected to undergo PVT at a specific law firm, some firms allocate practical tasks and work to be performed by candidates based on a selection process pertaining to their socio-economic background and the tertiary institution a candidate has attended.

Thirdly, most candidate legal practitioners are not afforded the rights and benefits of employees as contained in the employment laws, nor are they fully recognised as employees in terms of s 200A of the Labour Relations Act 66 of 1995 (the LRA) and s 83A of the Basic Conditions of Employment Act 75 of 1997 (the BCA).

In light of the above, the issues mentioned can be dissected as follows:

- The first issue: Law firms have a prerogative to maintain a high standard when employing candidate legal practitioners, depending on their organisational structure and client base. However, the selection process followed by firms for employing a prospective candidate should not be followed at the expense of excluding certain applicants due to the fact that they may not meet the tangible requirements of the vacancy. In this instance, it is unfair for a law firm to expect a prospective candidate fresh out of university to have obtained a driver’s licence, and have a motor vehicle simultaneously.

In turn, the above requirements automatically exclude certain disadvantaged groups of applicants, which results in direct and indirect discrimination in terms of s 9(3) and (4) of the Constitution read with s 6 of the Employment Equity Act 55 of 1998 (the EEA).

Therefore, an alternative solution should be sought by employers to provide assistance to applicants who meet all the other inherent requirements except those previously mentioned.

- The second issue: Some law firms exercise preferential treatment towards certain groups of candidates and exclude others. This results in some candidate legal practitioners being exposed to a wide variety of the aspects of what the legal field has to offer, and others are left in the dark.

This creates an imbalance in the practical skills and knowledge acquired by candidates as some are not provided with an equal opportunity to learn the trades of the profession and are placed at a disadvantage in the profession, while those candidates that are provided with the opportunity to learn have an advantage in the legal profession.

Therefore, well-rounded candidate legal practitioners are more equipped and knowledgeable and able to serve the interests of their clients on the one hand, and overcome the challenges that come with the Attorneys Admissions Examinations on the other hand. Candidates who have been excluded are not well equipped with the necessary practical skills to succeed and tend to struggle.

In order to resolve this problem, law firms should level the playing field by challenging all candidate legal practitioners undergoing practical legal
training at their respective law firms. Instead of using criteria that exclude certain candidates, law firms can utilise a system of dedicating time to grow each candidate without discrimination or prejudice.

• **The third issue:** Is that practical vocational contracts between principals and candidate legal practitioners should be fair, equitable, and just, and in line with the employment laws of South Africa. Particularly, in accordance with the LRA, the BCEA, the EEA, and most importantly in line with the Constitution.

Despite the above, some law firms do not adhere to the abovementioned laws nor do they fairly and impartially apply these labour laws when candidate legal practitioners are employed to undergo PVT at these firms. One sees examples of candidates being deprived and/or denied study leave, which is utilised to prepare for the Attorneys Admission Examination. The remuneration, alternatively, the stipend paid to candidates, which is largely dependent on the size of the law firm, and which in some cases, cannot be regarded and measurable as disposable income for a decent standard of living should be addressed. Specifically, the fact that most candidate legal practitioners do not even reside in the province where they have been accepted to serve their PVT should be addressed. Furthermore, the overall unfair treatment imposed by some employers or some fellow employees towards people from disadvantaged groups in the organisation, at times is not conducive for candidate legal practitioner to thrive in the workplace. These issues are not addressed or resolved by some employers, and on many occasions, this form of unfair treatment and/or discrimination leads to constructive dismissals. It is important that all employers should ensure that each of their candidates are treated with human dignity, equality and respect.

To expand further, the affirmative action clause in terms of s 9(2) of the Constitution is a measure that ensures equal opportunity for all, particularly disadvantaged groups, which measure should be implemented by all law firms to overcome institutionalised discrimination.

Therefore, from the point of a candidate legal practitioner applying for employment, the playing field must be levelled by employers to provide each and every candidate with a fair and equal opportunity to thrive, regardless of their socio-economic background, the tertiary institution they have attended, or some objective criteria for systematic disadvantage of a particular category of persons to ensure that we create a sustainable future for all legal practitioners.

**Book announcement**

*Public Procurement Regulation in Africa: Development in Uncertain Times*

By Geo Quinot and Sope Williams-Elegbe (eds)

Durban: LexisNexis

(2020) 1st edition

Price R 500 (incl VAT) (hard copy)

Price R 450 (incl VAT) (eBook)

This book outlines the legal landscape for procurement, the fault lines that allow procurement irregularities, including conflict of interest and corruption and is a much needed arsenal not only to state functionaries, but also business persons dealing with public sector procurement.

The content transcends academic legalese and philosophical discourse and puts forward ideas on arresting procurement maladies and will also be useful for administrative, law enforcement functionaries, consultants, academics and students interested in expanding their procurement knowledge while contributing meaningfully to African procurement reform.
Understanding the legal risks associated with artificial intelligence

This article introduces the fourth industrial revolution philosophically, exploring the application of innovation and automation in broad terms. At its core, artificial intelligence (AI) is the science of teaching computers how to learn, reason, perceive, infer, communicate, and make decisions like humans do (Sterling Miller ‘Part II: The future of artificial intelligence’ (static.legalsolutions.thomsonreuters.com, accessed 31-8-2020)). It is evident that AI is the peak of today’s technological age as we push through super intelligence. Not long ago, technology was perceived as ‘science fiction’. However, fundamental changes are being made to the way people work. As a result, machines are taking over the drudgery work efficiently and at a speed quite impossible for humans to replicate.

Like any human or system, AI is not accurate. For this reason, its deficiency might result in detrimental consequences in our society. Some of the challenges are that important decisions, which affect our livelihoods, are delegated to imperfect systems. This simply means that there is no transparency about how these decisions are reached when automated systems are functioning, for example, how they conduct legal research (Aalia Manie ‘Artificial intelligence – apex of tech, policy challenges’ (www.itweb.co.za, accessed 31-8-2020)). Other related legal challenges are data privacy infringement. Artificial intelligence can also generate risks for human rights, not only by creating privacy threats and facilitating surveillance, but also by creating inequalities and discrimination (Barbara Rosen Jacobson ‘Artificial Intelligence, Justice and Human Rights’ (https://dig.watch, accessed 31-8-2020)).

Nonetheless, AI has its own advantages, for example, the machine intelligence will assist humans with repetitive jobs that are monotonous in nature. The best thing is that, machines think faster than humans and can be put to multitasking.
(Krishna Reddy 'Artificial intelligence - advantages and disadvantages' (https://content.wisestep.com, accessed 31-8-2020)). Equally, machine intelligence can be employed to carry out dangerous tasks that humans cannot do. This shows that their parameters unlike humans, can be adjusted. Hence, their speed and time calculations are based on parameters only.

**Privacy infringement**

Emerging AI is an ever increasing public concern for the many risks present where decisions are made by computers and not by humans. Artificial intelligence requires access to vast amounts of data, but poorly drawn laws and government policies can hinder beneficial access without reducing the risk of AI activities. Artificial intelligence also raises important ethical and privacy concerns that could erode trust in emerging technologies if not addressed thoughtfully. Artificial intelligence requires access to data because machines cannot learn unless they have large data sets from which to discern patterns (Mirjana Stankovic, Ravi Gupta, Bertrand A Rossert, Gordon I Myers and Marco Nicoli 'Exploring Legal, Ethical and Policy Implications of Artificial Intelligence' White Paper of the Global Forum on Law Justice and Development (2017)). For instance, this involves the retention and automated processing of vast amounts of personal data, some of which may be sensitive (Amy Edwards 'Using artificial intelligence to fight financial crime in the UK – a legal risk perspective' (www.allenoveroy.com, accessed 31-8-2020)). Therefore, governments should carefully assess whether existing data access laws should be updated to reflect the benefits of AI (Stankovic (op cit)).

Moreover, in an era of increasing data collection and use, privacy protection is more important than ever before. Not only do advances in AI benefit society, but policy frameworks must also protect privacy without limiting innovation (Stankovic (op cit)). Yet AI devices have no inherent notion of privacy or general principles of human dignity, which results in the violation of data protection legislation in South Africa (SA). It is true that: 'The processing of data can infringe on a person's personality primarily in two ways: where true personal information is processed, a person's privacy is infringed, and where false or misleading information is processed, the person's identity may be infringed' (A Roos 'Personal data protection in New Zealand: Lessons for South Africa?' (2008) 11.4 PER 62 at 89).

There are two main aspects of AI that are of particular relevance for privacy. The first is that the software itself can make decisions, and the second is that the system develops by learning from experience. In order for a computer system to learn, it needs experience, and it obtains this experience from the information that humans feed into it. Some systems utilise personal data, while other systems use data that cannot be linked to individuals, which then contradicts data protection policies, resulting in a legal risk.

**Data protection in SA**

Data protection is largely about safeguarding the rights of individuals to decide how information about themselves is used. This requires controllers to be open about the use of personal data, so that such use is transparent.

Privacy relates to personal facts, which a person has determined should be excluded from the knowledge of outsiders. '[I]t follows that privacy can be infringed only when someone learns of true private facts about the person against his or her determination and will' (Roos (op cit)).

Privacy is expressly protected by s 14 of the Constitution. The constitutional right to informational privacy has been interpreted by the Constitutional Court as coming into play wherever a person has the ability to decide what they wish to disclose to the public and the expectation that such a decision will be respected is reasonable (Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC) at 557).

The Protection of Personal Information Act 4 of 2013 (POPIA) recognises the right to privacy enshrined in the Constitution and gives effect to this right by mandatory procedures and mechanisms for the handling and processing of personal information. People often provide information for one reason and do not realise that it may be used for other purposes as well. Personal information may be used to predict the outcome of litigation and enable legal practitioners to provide more impactful advice to their clients in connection with dispute resolution issues (Garcia (op cit)). So, the processing of such information is limited, which means that personal information must be obtained in a lawful and fair manner. Therefore, a person processing data must ensure that the proper security safeguards and measures to safeguard against loss, damage, destruction and unauthorised or unlawful access or processing of the information, have been put in place.

It is evident that AI systems may result in a data breach, which poses a security, privacy and reputation risk. A law firm’s computer system can be hacked, with key and confidential data stolen and sabotaged. The hackers could be agents or organised crime, or terrorist groups, rival law firms or just malicious individuals taking pleasure in causing pain. As a result, cyber security is essential as both a prerequisite and enabler for the fourth industrial revolution (Keith Campbell ‘The Fourth Industrial Revolution is upon us and South African industry must adapt’ (www.engineeringnews.co.za, 31-8-2020)). The need to protect data is not only limited to the carrying on of a business, but legislation is also driving this need.

**Data protection in the European Union (EU)**

The rules governing the processing of personal data have their basis in some fundamental principles. Article 5 of the General Data Protection Regulation (GDPR) lists the principles that apply to all personal data processing. The essence of these principles is that personal information shall be utilised in a way that protects the privacy of the data in the best possible way, and that each individual has the right to decide how their personal data is used. However, the use of personal data in the development of AI challenges several of these principles.

It is clear that the GDPR and the POPIA are quite similar to each other. However, there is much debate on whether the GDPR protects data privacy in the data centric world we live in. This is because the GDPR does not protect legal entities, it also does not create serious penalties for failing to protect an account number.

**Data protection in the United States (US)**

Unfortunately, in the US, there is no single, comprehensive federal (national) law regulating the collection and use of personal data. However, California was the first state to enact a security breach notification law (California Civil Code § 1798.82). The law requires any person or business that owns or licenses computerised data that includes personal information to disclose any breach of the security of the system to all California residents whose unencrypted personal information was acquired by an unauthorised person.

There are no formal designations of controllers and processors under US law as there are in the laws of other jurisdictions. There are, however, specific laws that set forth different obligations based on whether an organisation would be considered a data owner or a service provider (Rosemary P Jay (ed) Data Protection & Privacy 2014 (London: Law Business Research Ltd 2013)).

**Discrimination and biased AI systems**

Artificial intelligence systems have the potential to reinforce the pre-existing human biases. A machine has no pre-determined concept of right and wrong,
only those which are programmed into it. A system that can learn for itself and act in a way unforeseen by its creators, may act contrary to its original intentions (Stankovic (op cit)). While the big data on which AI is based is extensive, it is neither complete nor perfect. This imperfect data feeds algorithms and AI, and can ‘bake discrimination into algorithms’ (Jacobson (op cit)). As a result, human biases will be accentuated and not resolved.

The truth is that many AI devices are better than human beings at identifying small differences. However, algorithms and machine learning may also develop (or embody) false correlations between appearance, origin or other human attributes, that replicate and extend discriminatory practices (Stankovic (op cit)). Several recent controversies have illustrated this type of bias in a particularly shocking way. In 2015, Google Photos, a face recognition software, caused an uproar when two young African Americans realised that one of their photos had been tagged as ‘Gorillas’ (Victor Demiaux and Yacine Si Abdallah ‘How can humans keep the upper hand? The ethical matters raised by algorithms and artificial intelligence’ (www.cnil.fr, accessed 31-8-2020)). The algorithms and model’s result may be incorrect or discriminatory if the training data renders a biased picture reality, or if it has no relevance to the area in question. Such use of personal data would be in contravention of the fairness principle (Stankovic (op cit)).

Whoever trains an algorithm, in some ways builds it into their own way of seeing the world, values or, at the very least, the values which are more or less directly inherent in the data gathered from the past (Abdallah (op cit)). Researcher, Kate Crawford, in particular, has lifted the lid on the ingrained social, racial and gender bias that is rife among the circles where those who are training artificial intelligence today are recruited (Kate Crawford ‘Artificial Intelligence’s White Guy Problem’ (www.nytimes.com, 31-8-2020)).

It is, therefore, clear that AI systems may create inequalities and discrimination, which are expressly prohibited by s 9 of the Constitution, thus posing a legal risk.

Cybercrimes and Cybersecurity Bill B6 of 2017

The Bill defines ‘data’, as ‘electronic representations of information in any form’. It provides that any person who unlawfully and intentionally secures access to data, a computer program, a computer data storage medium or a computer system is guilty of an offence. These are some of the penalties available in SA for perpetrators, who infringe data protection rules. This Bill works interchangeably with POPIA, and emphasises the importance of data protection especially with the constant advances of AI systems, which may pose a legal risk.

Conclusion

It is, therefore, clear that advances in AI hold the potential to reshape the way we live fundamentally. It is also true that the transformative nature of AI technology will impact law and policy. I submit that it cannot be predicted how this fourth industrial revolution will play out, but the protection of personal information appears to be an exercise worth pursuing without the threat of legal censure.
Introducing the bride – when is a customary marriage deemed to have been condoned by the families?

By Clarrence Mangena

One of the main aims of the Recognition of Customary Marriages Act 120 of 1998 (the RCMA), is to specify the requirements of a valid customary marriage. Section 1 of the RCMA also defines a ‘customary marriage’ as a ‘marriage concluded in accordance with customary law’. Section 3 of the RCMA stipulates requirements that have to be complied with for the conclusion of a valid customary marriage and these are:

(a) the prospective spouses –
   (i) must both be above the age of 18 years; and
   (ii) must both consent to be married to each other under customary law; and

(b) the marriage must be negotiated and entered into or celebrated in accordance with customary law’ (my italics).

Although the first two requirements are not onerous, the last requirement (s 3(1)(b)) turns out to be the most controversial in customary marriages. The controversy these customary marriages are faced with mostly relate to payments, namely, when there is no full-payment or payment made for lobola (bride price) and/or there was no handing over or integration thereof including, but not limited to, the performance of a certain ritual inherent in customary marriages. This article, therefore, aims at unpacking the content of s 3(1)(b) in line with the recent Supreme Court of Appeal (SCA) judgments.

By virtue of s 3(1)(b), traditional communities are at liberty to perform their flexible customs for the conclusion of a customary marriage (Mbungela and Another v Mkabi and Others 2020 (1) SA 41 (SCA) at para 17). It is trite in African traditions that lobola be paid and this falls within the ambit of negotiations. Families will meet to agree on the payment of the bride price and in doing so, they further agree on how and when same should be paid (Christa Rautenbach, Jan Christoffel Bekker and Nazeem Muhammad Ismail Goolam Introduction to Legal Pluralism 3ed (Durban: LexisNexis 2010) at p 52 and 56). When this happens, the marriage is entered into in accordance with customary law. Due to various cultural traditions, this section affords various communities the leeway to make use of their own customs. The confirmation of ‘in accordance with customary law’ is further required by the declaration contained in the regulations under s 11 of the RCMA. Section B of Form A of the Annexures to the regulations require that parties specify the custom that is inherent in their customary marriage (Regulations under the RCMA published under GN R1101 GG 21700/1-11-2000).

The intricacy of s 3(1)(b)

Section 3(1)(b) is the life-blood of a customary marriage in that non-compliance thereof may lead to an invalid customary marriage (Fanti v Boto and Others 2008 (5) SA 405 (C)). In order to determine such requirements regard must be made to the customary practices of the relevant community (MM v MN and Another 2013 (4) SA 415 (CC) at para 29). In Moropane v Southon [2014] JOL 32177 (SCA) the SCA found that the handing over of the makoti (bride) to her in-laws is the
most crucial part of a customary marriage (at para 40). It is through this symbolic customary practice that the *makoti* is finally welcomed and integrated into the groom’s family, which henceforth becomes her new family. In other words, there will be no customary marriage in the event the handing over did not take place.

**Purpose of handing over**

While noting the purpose of brid al transfer and the view that the legislature intended to leave open s 3(1)(b) for communities to give content to it in line with their cultural practices, it is in the hands of the families to agree about their customary law practices inherent in the conclusion of a valid customary marriage. According to Mkb v Minister of Home Affairs and Others (GP) (unreported case no 2014/84704, 9-6-2016) (Twala AJ) it is neither a requirement that lobola be paid in full nor that brid al transfer should take place in the event lobola is negotiated notably if there was an exchange of gifts between the two families, unless the families involved agree otherwise.

Noteworthy is that cohabitation precedes most customary marriages if not all, and this may under certain circumstances attenuate the purpose for which brid al transfer or handing over or integration may be sought. In other traditions, when a marriage is preceded by cohabitation the family of the bride will, during negotiations, impose a fine on the groom’s family to indicate displeasure against cohabitation (JC Bekker *Seymour’s Customary Law in Southern Africa* 5ed (Cape Town: Juta 1989) at 108 - 109). What happens in the event the cohabitation precedes a customary marriage and there is neither a fine nor any agreement as to when a customary marriage will be deemed concluded? The decision of Mkb answers this question in that it held that parties can do away with the integration of the bride by agreement.

What is more, the decision of Mbungela elaborates even further on this question by stating that the s 3(1)(b) requirements, insofar as they relate to the conclusion of customary marriages, may be waived by agreement or conduct or even condoned.

The appellants being Piet Mhungela and Thobile Carol Mkhonza (the latter in her capacity as the executrix in the estate of the deceased) appealed against the decision of the Gauteng Division of the High Court in Pretoria to the SCA. The appellants contended that the marriage between the respondent and the deceased was not a valid customary marriage because the deceased was not handed over to the Mkabi family and lobola was not paid in full with the effect that not all the requirements of s 3(1)(b) were complied with. In determining the question of whether the first respondent and the deceased complied with s 3(1)(b) of the RCMA and concluded a valid customary marriage, even when the deceased was never handed over to the respondent’s family in terms of custom, the following considerations were made -

- the RCMA does not specify the payment of lobola but it is accepted that same is covered under s 3(1)(b);
- it is accepted that it was the intention of the legislature to leave it open for various communities to give content to s 3(1)(b) in line with their living customary law (Mbungela at para 17).

In support of the view expressed in *Moropane* that although various African cultures generally observe the same customs and rituals, it is not unusual to find variations and even ambiguities in their local practice because of the pluralistic nature of African society (Mbungela at para 7).

The SCA pointed out “[t]he purpose of the ceremony of the handing-over of a bride is to mark the beginning of a couple’s customary marriage and to introduce the bride to the groom’s family. It is an important but not necessarily a key determinant of a valid customary marriage” (Mbungela at para 30).

In deciding whether the non-observance of brid al transfer invalidates the customary marriage, the SCA cited with approval *Mabuza v Mabatha* 2003 (4) SA 218 (C) where it was decided that the ukumekeza custom like so many other customs, has evolved and that it is inconceivable that it cannot be waived by agreement between the parties or their families. The court held that the customary marriage in the Mabuza case was valid despite the non-observance of the brid al transfer through the custom of ukumekeza.

In the Mbungela matter, the parties had an intimate relationship and cohabited for three years before the marriage process began. After the lobola negotiations, the deceased immediately resumed her life with Mr Mkabi without the approval from her family. If for all intents and purposes the family did not condone the cohabitation between the deceased and Mr Mkabi, the bride’s family should have expressed this disapproval by way of, including but not limited to, a fine and this was not done. The conclusion of this fact led to the conclusion that the families accepted the parties as husband and wife (Mbungela at para 25).

It was, therefore, concluded that due to evolution of living customary law, certain rituals may be waived or condoned by agreement and this means that the customaries in this regard are determinable. The SCA emphasized that parties can do away with the integration of the bride by agreement.

**Conclusion**

Although unregistered customary marriages are not invalid marriages, the tussle that surviving spouses and/or parties in unregistered customary marriages face, always leads to a litigious dispute that ultimately invokes the interpretation of s 3(1)(b). However, it appears today, that if parties were already cohabitating before concluding a customary marriage, and during the entering into, negotiation and celebration of such marriage, the families do not agree in terms of their customs about certain requirements subject to s 3(1)(b), the parties or families will be deemed to have condoned or waived any additional requirement in terms of customary law with the result that the customary marriage will be valid. The judiciary is weaving the thread of s 3(1)(b) to incorporate societal aspect of marriage to embrace fairness and equity in the lives of parties whose marriages are not registered.

It is, therefore, crucial to inquire into all factors that may assist members of the public in determining the existence of a valid customary marriage and not be limited by full-payment of lobola or lack of a marriage certificate. This is because to conclude that a customary marriage is invalid without considering various aspects may lead to far-reaching consequences on the parties and/or families involved hence each case is determined in line with its own circumstances. The intricacy of s 3(1)(b) is evident that to weave the validity of customary marriage, requires a factual inquiry.
Finding legal support in an overused term:
Reconsidering the term ‘community’

In our earlier article ‘Revisiting the term “community” in the South African context’ 2018 (Dec) DR 18, we offered an account of the term ‘community’ in Western society and argued that the term is mostly used in a positive sense. We noted that while the term enjoyed a Western focus, there might be a need to explore and review interpretations of ‘community’ in developing countries – such as those found in southern Africa. In that article we cited a Land Claims Court (LCC) matter, Elambini Community and Others v Minister of Rural Development and Land Reform and Others (LCC) (unreported case no LCC88/2012, 30-5-2018) (Meer AJP). We only referred to the term ‘community’ as it appeared in the judgment.

In the article, we concluded that the use of the term...
‘community’ in the South African legal context draws heavily on a conception that ‘community’ refers to a bounded group determined by historical links (p 20). We also noted that such interpretation is more precise than that often found in more popular parlance. In being precise, it draws on and reiterates a particular interpretation of what constitutes legitimate forms of association (or at least those forms deemed legitimate enough to be ascribed land rights).

Land restitution claim by the Luhlwini Mchunu Community

We now again focus our attention on the term ‘community’ as it appears in the context of South African law (with specific focus on the Restitution of Land Rights Act 22 of 1994 (the Act)) and a recent LCC matter Luhlwini Mchunu Community v Hancock and Others (LCC) (unreported case no LCC121/2017, 16-3-2020) (Meer AJP). The LCC application by the Luhlwini Mchunu Community was a claim against 23 families and companies in KwaZulu-Natal’s Lions River region. This claim was a community claim.

Section 2(1)(d) of the Act states as follows:

2. Entitlement to restitution

(1) A person shall be entitled to restitution of a right in land if –

(d) it is a community or part of a community dispossessed of a right in land after 19 June, 1913 as a result of past racially discriminatory laws or practices.

In order to succeed in its claim, the plaintiff (the Luhlwini Mchunu Community) was, therefore, required to first and foremost prove that it was a community as defined in the Act.

The word ‘community’ is defined in s 1 of the Act as ‘any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group’. Context to the definition of ‘community’ has been given in various judgments, including judgments in the Constitutional Court (CC). The CC established an ‘acid test’ to determine what constitutes a group of persons whose rights in land are derived from shared rules determining access to land held in common by a group. The acid test, therefore, remains whether a community derived their possession and use of the land from common rules. Furthermore, it was firmly established that no rights in land vested in labour tenants as a community.

The evidence of the plaintiff’s eight lay witnesses and two expert witnesses did not establish prima facie or on any basis that they or their ancestors were a group of persons whose rights in land were derived from share rules determining access to land held in common by them. Interestingly, the one expert witness (a PhD-historian) preferred to use his own definition of ‘community’ as opposed to the definition employed by the Act and ‘with which he took issue’ (the Luhlwini Mchunu Community case at para 17). As an expert witness he should have been aware that in scholarly work there is a multiplication of definitions. As Vered Amit (ed) Realising Community: Concepts, Social Relationships and Sentiments (London: Routledge 2002) at p 1 notes, there is a ‘multiplicity of definitions, descriptions and claims of community which occur in quotidien conversation as well as within a variety of scholarly work’.

Since the plaintiff failed to first and foremost prove that it was a ‘community’ as defined in the Act, the application for the land restitution claim in the Luhlwini Mchunu Community case was dismissed. As we noted in our previous article, the use of the term ‘community’ in the South African legal context draws heavily on a conception that ‘community’ refers to a bounded group determined by historical links and subjected to a present-day acid test.

Sociological critiques of such constructions of ‘community’ often note how contemporary articulations are often unmindful of the flows of power present in the development and establishment of the meaning of terms. Such analysis simultaneously throw light on the historical existence of concepts and the reason why terms have such concurrent yet different polysemic meanings.

Some concluding remarks

The term ‘community’ is so overused both in everyday language in South African society, that it can easily be dismissed as a truism. Two recent examples in the South African print media illustrate the point –

• ‘protesting refugees should either be re-integrated back into communities’ (Mayibongwe Maqhina ‘They must return to communities’ Cape Times 11 March 2020); and
• ‘we tend to ignore the greater good of the community’ (James Lappeman ‘Why coronavirus panic buying is on a roll among shoppers’ TimesLive 22 March 2020).

The persistence of the term itself shows that the idea continues to resonate powerfully in our South African lives, especially in the South African legal context. Community is a multifaceted concept with numerous contemporary meanings yet it underpins and supports numerous legal judgments. We argue that use of greater awareness be deployed of the historical and contemporary politics surrounding the term when we use it and that we remain mindful that as a term community has multiple meanings.

Udo Richard Averweg M.IT (cum laude) MSc MCom (UKZN) is a retiree in Durban, Marcus Leaning (PhD) (University of Luton) is a professor at the University of Winchester.

Deceased Estate Administration Services

Specialists in the administration of estates under Power of Attorney, focusing on:

– Intestate and Testate Deceased Estate Administration
– Insolvent Deceased Estate Administration

Call us at 086 100 5161 to discuss our service offerings
Find out more www.fdpadmin.co.za  E-mail: info@fdpadmin.co.za
Mortgage of immovable property – a first step to alienation?

In terms of the Registrars' Conference Resolutions 2010, the mortgagee of immovable property, which has a restraint against alienation, must obtain the consent of the holder of such right before a mortgage bond may be registered over the property.

The content of RCR 35/2005 and RCR 2/2006 is substantially identical, although RCR 2/2006 goes one step further by referring to case law in support of the resolution and RCR 6/2009 merely confirms the previous decisions.

The origin of the resolution

In Trustees of the Insolvent Estate of Foley, alias Melville v Natal Bank (1883) 4 NLR 26, Foley, prior to being declared insolvent, pledged 21 Natal Bank shares to a Revered Tonneson. The Bank was aware of this purported pledge. On his insolventcy his trustees, the holder of the pledge claimed the dividends from the Bank, which had been crediting his overdrawn bank account with the dividends.

There were other claims as well, but ultimately the only question that remained, was whether the Bank had a right to appropriate the dividends on the 21 shares, which had been pledged by the insolvent towards payment of the insolvent’s overdrawn account with the Bank after notice to it of the pledge of the shares.

The court found that the transfer of shares was conditionally prohibited in that it was not valid unless certain forms were completed. This finding was based on s 13 of the Natal Bank Law 15 of 1875, which provides that ‘no transfer of a share shall be valid, until it shall have been approved of by the directors at one of their meetings, such approbation being testified by endorsement, signed by two of the directors present at the meeting, and countersigned by the manager, and until the purchaser shall have signed the deed of settlement or a transcript of this law’; and by Code (4.51.7) and other authorities referred to therein.

Connor CJ stated that it is expressly enacted that when alienation is prohibited, so also shall, inter alia, be deemed to be prohibited, binding by pledge or hypothec.

In Ex Parte de Jager (1926) 47 NPD 413 the court found that a prohibition in a will against the ‘sale’ or ‘disposal’ of immovable property. However, in both cases reference is made to a prohibition against ‘alienation’ being a prohibition against hypothecation or mortgage.

The court stated that while the will did not prohibit mortgage of the property it had been decided by Connor CJ in the Foley case that the mortgage of immovable property amounts to an alienation. Tatham J supported this view ‘for a mortgage is a first step to a sale in execution, if the debt is not repaid’.

The Foley case dealt with a statutory prohibition against the ‘transfer’ of shares and the De Jager case dealt with the prohibition in a will against the ‘sale’ or ‘disposal’ of immovable property. However, in both cases reference is made to a prohibition against ‘alienation’ being a prohibition against hypothecation or mortgage.

What is a mortgage?

The term ‘mortgage’ is used in two senses. As a generic term it covers every form of hypothecation of property and in this sense it includes every real right, which one person has in and over another person’s property for the purpose of securing the payment of a debt or generally the performance of an obligation.

In a more restricted sense, the expression ‘mortgage’ signifies a special security over immovable property as opposed to a ‘pledge’, which denotes a special security over movable property. There arose a need on the part of the owners of corporeal property to borrow money or obtain credit without selling their properties and, on moneylenders to obtain security for repayment of the loans. This eventually gave rise to the recognition of pledges of movable and mortgages of
The significance of mortgages and pledges lies in the fact that they furnish the creditor with a ‘real security’ for the payment of the creditors claim, for if the debtor is unable to raise the necessary funds to pay the debt, which is thus secured, the creditor is entitled to demand that the property, being the thing which is the subject matter of the security, be sold and that the proceeds of such sale be used for the satisfaction of the claim.

It can, therefore, be said that the underlying purpose of a pledge and a mortgage is to provide the creditor with security for the debt and that there is no intention to pass ownership of the property, which is the subject matter of the creditor’s security, as the dominium in the property remains in the pledgor or mortgagor. The pledgee’s and mortgagee’s rights are limited during the debtor’s solvency, to securing under order of the court, a sale of the property for the purpose of satisfying the debt and, on insolvency, to a preference to the proceeds of the property as a secured creditor. Real security offers a limited real right in someone else’s property, namely, a real right ‘less than ownership’ in a thing owned by a person other than the holder of such a right (see PJ Badenhorst, Juanita M Pienaar and Hanri than the holder of such a right (see PJ Badenhorst, Juanita M Pienaar and Hanri

observation in Warwick Investments (Pty) Ltd v Maharaj 1954 (2) SA 470 (N), that the word ‘means’, which was the opening

word in the definition indicates ‘that what follows is in the nature of a precise definition’ and that the word ‘means’ is not as wide as ‘includes’. Therefore, we submit that because ‘mortgage’ was not expressly included in the definition of ‘alienate’ in the Act, the legislature did not intend to include it.

There is also a rebuttable presumption that the legislature did not intend that which is harsh, unjust, or unreasonable. Therefore, if from the language of the statute it is plain what the intention of the legislature is, the court must give effect to it, no matter how unreasonable the result may be (see GE Devenish Interpretation of Statutes 1ed (Cape Town: Juta 1992)).

In the case of Crouse NO v Utilitas Bellville 1994 (3) SA 720 (C) at 721, van Deventer J held that the generally accepted or ordinary meaning of ‘alienate’ implied a ‘voluntary and “intentional” transfer of ownership of a res by owner to new owner’. The Appellate Division in Bodasving v Christie, NO and Another 1961 (3) SA 553 (A) at 561, held that a restraint on the alienation of immovable property merely restricts a voluntary sale as opposed to a sale made compulsory by law.

The matter between Standard Bank of South Africa Ltd v Hunkydory Investments 188 (Pty) Ltd and Others (No 2) 2010 (1) SA 634 (WCC) provides an excellent analysis of why the mortgage of immovable property does not amount to alienation.

One of the issues that needed to be decided in the above matter was whether the registration of a mortgage bond over a company’s main asset constitutes an act whereby the company ‘disposes of’ the whole or the greater part of its assets within the meaning of s 228(1) of the Companies Act 61 of 1973. It was submitted at para 12, that ‘the ordinary meaning of the phrase “dispose of” is “to make over or part with by way of sale or bargain, sell”, “to transfer into new hands or to the control of someone else” (as by selling or bargaining away)’. The Afrikaans text uses the verb ‘vervreem’ which was said in Grobler v Trustee Estates De Beer 1915 AD 265 to mean the act of transferring ownership.

Rogers AJ (as he then was) stated that he did not think ‘that one would ordinarily describe a transaction whereby a debtor agrees to the hypothecation of his property as one whereby the debtor disposes of the property to the creditor or to anybody else’. Rogers AJ went on to say that ‘if the debtor defaults and the creditor becomes entitled to execute on his security the property may therefore be transferred and lost to the debtor, but the object of the transaction from the debtor’s perspective is not to part with his property, and if all goes well the property will stay with him. If the property is eventually disposed of, that is not because that is the wish or intention of the debtor, but because the creditor has rights under the bond which, because of the debtor’s default, the creditor can enforce, whatever the debtor’s wish may be. Moreover, when property is sold in execution, the person who sells the property is the sheriff, not the debtor’ (para 12).

Ex Parte De Jager (1926) 47 NPD 413 concerned a will, which created a fiduciary. In terms of the will the fiduciaries were not to sell or dispose of the property in any manner. The court held that the will prohibited the mortgaging of the property, since a mortgage ‘is a first step to a sale in execution, if the debt is not repaid’. Rogers AJ pointed out at para 15 that ‘a mortgage might result in a sale in execution, but whether such potential result means that the creation of the mortgage is itself a disposal depends on the proper interpretation of the relevant provision. While a mortgage might eventually result in a forced sale, it is not a transaction which has a sale as its object, and the forced sale, if it eventuates, is not one to which the mortgagor is party’.

Rogers AJ went on to say at para 16 that he considers that the description of a mortgage as the first step towards a disposal of the hypothecated property as not really being accurate. His reasoning was as follows:

‘Whenever a company borrows money or incurs a debt, the company’s assets are exposed to the risk of attachment and disposal by judicial sale. ... Thus, the transaction which exposes the company’s assets to the risk of forced disposal is the borrowing of money or the incurring of debt, not the mortgage per se.’

Conclusion

We are of the view that the obiter dictum in the Hunkydory case, while dealing with the issue of a ‘disposal’, correctly sets out the position regarding ‘alienation’, as it relates to mortgage bonds.

Consequently, the mortgage of immovable property is not a ‘first step’ towards ‘alienation’ and, therefore, the Registrars’ Conference Resolutions referred to above are incorrect and should be rescinded.

Alex Abercrombie AttAdmDip Cert (Sports Law) (UWC) PaDip (Company Law) (Stell) is a consultant at Cliffe Dekker Hofmeyr in Cape Town. Ra- zyaan Johaardien LLB (UWC) was a candidate legal practitioner at the time of writing.
A look at the effective cause requirement with estate agent commission

In terms of South African law of agency (Basil Elk Estates (Pty) Ltd v Curzon 1990 (2) SA 1 (T)), before estate agents can be entitled to a commission for successfully finding a purchaser of the property of their principal, they must first prove on a balance of probabilities that they are the effective cause of the sale. It is against this backdrop that in this article I discuss the effective cause requirement in depth by analysing how South African courts have interpreted the requirement. Furthermore, I discuss the statutory requirements in the Estate Agency Affairs Act 112 of 1976 (the Act) that estate agents must comply with in order to successfully claim commission.

Eloff DJP in the Basil Elk Estates case stated that the primary determinative issue of whether an estate agent is entitled to a commission for a successful sale of the property is whether the estate agent was the 'effective cause' of the sale. What is important to establish is that South African courts, as seen in cases such as Barnard & Parry Ltd v Strydom 1946 AD 931, have continuously echoed the fact that the estate agent who introduced the buyer to the property first, or who succeeded in closing the deal, is not necessarily the effective cause of the sale. All the facts and circumstances must be weighed to determine which estate agent’s efforts were the causa causans of the sale (Basil Elk Estates). Thus, an estate agent must prove that their efforts were the causa causans (effective cause) of the sale in order to successfully claim a commission.

Eloff DJP further stated that this involves a factual determination of
whether the estate agent introduced the purchaser to the property and whether or not the agent was mandated at the relevant time. In essence, the court simplified the effective cause requirement by stating that it is met when, first, the estate agent introduces the purchaser to the property and, secondly, when the agent is mandated at the relevant time. Therefore, an estate agent, in order to claim commission, needs to prove that they introduced the purchaser to the property, and that they were mandated by the principal.

In *Wakefields Real Estate (Pty) Ltd v Attree and Others 2011 (6) SA 557 (SCA)*, the Supreme Court of Appeal was faced with a situation wherein the principal had mandated an estate agent to secure a property for him but thereafter cancelled the mandate but subsequently mandated another estate agent to complete the deal or sale of the property. The court thus had to determine whether the estate agent who introduced the purchaser to the property and if that introduction was an effective cause of the sale. In determining this, the court used the ‘but-for’ test. Lewis JA held that if the first estate agent (Walker) had not shown the principal (Howards) the property first – the initial introduction – the property would not have been sold to the principal through the agency of the latter estate agent. The court noted that: ‘But for that introduction, De Marigny would not have known that the Howards were interested in the property (and that, as I have said, she discovered quite fortuitously). She would not have found a willing and able purchaser before Remax’s show day. She reaped where she had not sown. Despite De Marigny’s later intervention, in my view Walker’s introduction was the effective cause of the sale.’

In essence, the court concluded that if it was not for the initial introduction by the former agent, the latter agent would have not have had knowledge of the purchaser’s intention to purchase a house and thus the introduction by the former agent qualifies as the effective cause. What is equally important to note is that the court in *Basil Elk Estates* further stated that the failure to act immediately on an introduction or for the competing negotiators to place the introduction in temporary abeyance does not necessarily disqualify the introduction from being the effective cause of the sale. Therefore, a delay in finalising the purchase of the property after the introduction does not negate the presence of an effective cause. The court looks beyond the delay and, as a result, regardless of the delay, the primary introduction by the former agent was the effective cause of the purchase of the property.

The second aspect of effective cause is that the agent must have been mandated at the relevant time. However, as far as this element is concerned, Elhoff DJP noted that one ought to keep in mind that an ‘unempowered agent’ (Henk Delport ‘Estate agents’ commission: “Effective cause” explained (1)) may still be the effective cause of the sale and, therefore, be entitled to receive commission. The court in *Le Grange v Metter 1925 OPD 76* went further to state that the inquiry in such a case (the case of an unempowered agent) is normally whether despite the termination or non-existence of a prior mandate, the work done by the unempowered agent was sufficiently significant to meet the award of commission even though not constituting the proximate or immediate cause of the ultimate transaction. Therefore, even if a mandate might be terminated by the principal and if the work of the agent, regardless of the absence of a mandate, is the effective cause of the sale or purchase of the property, they will still be entitled to a commission. It is important to note, though, that there must be a mandate. Without a mandate or contract an estate agent cannot claim compensation in the form of a commission. This is where one of the major contradictions lie, as far as the effective cause requirement is concerned. On the one hand, courts seem to be of the strong view that estate agents are not entitled to a commission even though not constituting the proximate or immediate cause of the ultimate transaction. However, it is of general legal knowledge that a contract between parties (ie, between estate agent and principal) is formed on the basis of an agreement, which gives rise to a mandate. Therefore, how can a party claim commission on a contract or agreement that does not exist or has since been terminated by revocation of a mandate by the principal? It is clear that the law ought to be developed to iron out the contradiction.

Although most of the case law in South Africa (SA) focuses on effective cause being an imperative requirement, there are other requirements that ought to be met in order for an estate agent to be entitled to a commission. One of the requirements is a statutory one, which is encapsulated in the Act. The Act requires that all estate agents be registered with the Estate Agency Affairs Board (the Board) before operating as estate agents in SA. Thereafter, on successful registration with the Board, every estate agent must apply to the Board for a Fidelity Fund Certificate (FFC). Without the aforementioned requirements being met, an estate agent cannot claim commission from their clients. An FFC is renewable each year and serves as proof of registration and confirmation that a person is legally entitled to carry out the activities of an estate agent.

Therefore, the requirements emphasised by the courts in various judgments must be coupled with the statutory requirements encapsulated in the Act and only once these requirements are met an estate agent can claim compensation in the form of a commission.

**Conclusion**

It is clear (based on the *Wakefields* judgment) that South African courts, insofar as estate agencies are concerned, seek to protect the interests of an agent who uses their skills to yield results but could easily be overtaken by another agent who is a competitor. For example, agent A can make an effective introduction but agent B, by chance or coincidence, stumbles on and partakes of the benefit of the introduction by agent A.

Lastly, in order for estate agents to protect themselves, they ought to ensure that they, at all material times, are the effective cause of the sale as compared to other competing agents. This means that, they must ensure that the successful sale or purchase of a property is a by-product of the introduction of the purchaser to the property and the mandate that they have been given by the principal. Equally, estate agents must ensure that they have adhered to the statutory requirements of the Act and have a valid FFC, which serves as proof of both registration and entitlement to a commission.

Sibabalou Mtonga LLB (UWC) is a candidate legal practitioner at Herold Gie Attorneys in Cape Town and is currently completing his Masters in Employment Law.
Calculating the levying of municipal property rates

If you are a business, residential or agricultural property owner, you will know that you are billed for certain municipal charges on a monthly basis among others, property rates.

This article will provide a brief overview of the levying of municipal property rates in general and specific reference will be made to the City of Tshwane where necessary.

Property rates represent about 21,12% of the current total revenue of the City of Tshwane, clearly a vital source of revenue for the municipality (City of Tshwane Medium Term Revenue and Expenditure Framework Budget 2019/2020).

The power of a municipality to impose rates on properties is regulated in terms of the Local Government: Municipal Property Rates Act 6 of 2004 (the Act) and s 229 of the Constitution and the (property) Rates Policy adopted by each municipality. In terms of s 8 of the Act, a municipality may levy different rates for different categories of rateable properties.

The Rates Policy of each municipality, which accompanies the annual budget of the municipality and must be reviewed annually, must set out the criteria for which different rates will be levied for different categories of rateable properties. Categories of properties could be according to the use of the property, or the permitted use of the property, or a combination of both.

The permitted use of the property is the use as permitted by the municipality. Whereas the use of the property, is the actual function for which the property is being used, irrespective of the permitted use (for example, if the permitted use of a property is agricultural, but the current use of the property is for residential purposes, the valuer will categorise it accordingly and, therefore, value the property based on the residential use. Or if a residential property is being used as offices, it will be categorised as a business property). In short, the valuer values what the valuer sees.

Section 8(2) of the Act continues to state that a municipality must determine various categories of rateable properties, for example –

- residential properties;
- industrial properties;
- agricultural properties;
- mining properties;
- public service infrastructure properties; and
- properties used for multiple purposes.

A rate levied by a municipality on a property must be an amount in Rand, based on the market value of the property. The rates are applicable for the financial year of the municipality and will be reviewed annually in accordance with the budget process of the municipality.

As set out in s 15, the Act provides for certain instances where, in terms of criteria set out in a municipality’s rate policy, a municipality may grant exemptions, rebates and reductions to owners of specific categories of properties.

There is often confusion about rebates and reductions. The Act distinguishes between these terms as follow:

- A rebate, in relation to a rate payable on a property, means a discount granted in terms of s 15. For example, granted to owners of properties with an income below a certain amount and other social circumstances. Such owners must apply for the rebate at the municipality.
- A reduction, in relation to a rate payable on a property, means the lowering of the amount for which the property was valued and the rating of the property at that lower amount.

In the instance of residential properties some relief is provided to certain owners in terms of s 17, which states that:

‘(1) A municipality may not levy a rate –

(a) on the first R 15 000 of the market value of a property assigned in the valuation roll or supplementary valuation roll … -

(i) for residential properties; or

(ii) for properties used for multiple purposes, provided one or more components of the property are used for residential purposes; or

(b) on a property registered in the name of and used primarily as a place of public worship by a religious community, including the official residence registered in the name of that community…’.

The municipality may grant further reductions apart from the R 15 000 legislative amount. For example, the City of Tshwane currently grants a further R 135 000 reduction on the market value of residential properties, which means that the market value of a residential property is reduced by R 150 000, before a rate is levied.

In order for a municipality to levy a rate on property, a municipality should have taken the necessary steps, in terms of the Act, to ensure that a general valuation of all the properties in the municipality was made and, thereafter, prepare a valuation roll, which consist of all properties within the municipality.

In terms of s 45 of the Act, property...
must be valued in accordance with generally recognised valuation methods and standards, and the provisions of the Act. The basis of valuation remains market value and is explained in the Act (s 46) as the amount the property would have realised if sold on the date of valuation in the open market by a willing seller to a willing buyer.

The Act does, however, make it clear that physical inspection of the property to be valued is optional, and that comparative, analytical and other systems or techniques may be used, including aerial photography and computer-assisted mass appraisal systems or techniques.

The market value – as determined by the municipality, at date of valuation – will reflect on the valuation roll and will be valid until the next valuation roll is published, which in the instance of a metropolitan municipality, will be every four years. The date of valuation may not be more than 12 months before the commencement date of the financial year, which is the effective date of the valuation roll.

In accordance with the Act, a valuation roll must reflect the following particulars, in respect of each property situated within a municipality, as at date of the valuation, to the extent that such information is reasonably determinable –

• the registered or other description of the property;
• the category determined (in terms of s 8 of the Act) in which the property falls;
• the physical address of the property;
• the extent of the property;
• the market value of the property, if the property was valued;
• the name of the owner; and
• any other prescribed particulars.

Once the valuation roll has been compiled, the municipal valuer must submit the certified valuation roll to the municipal manager. The municipal manager must, within 21 days of receipt of the roll, inter alia, publish the roll in the prescribed form in the provincial Gazette, as well as in the media once a week for two consecutive weeks. A notice stating that the roll is open for public inspection and includes an invitation to any person who wishes to lodge an objection in respect of any matter in, or omitted from, the roll to do so in the prescribed manner.

It is worth noting that the City of Tshwane has extended the objection period to any matter in the 2020 General Valuation Roll from 5 May to 26 June, due to the national lockdown currently imposed in South Africa.

Furthermore, a notice must be served on every owner of property listed in the valuation roll, together with a copy of the relevant notice as published, and an extract of the valuation roll pertaining to that owner’s property.

The notice must contain the period when the roll will be available for inspection and indicate the closing date for lodgement of objections.

Any person (not just the owner of a property) may, within the relevant period stated in the notice, lodge an objection with the municipality against any matter reflected in, or omitted from, the roll.

The most common grounds for an objection, is the market value and/or the category of a property as it appears in the valuation roll.

The objection must be in respect of a specific property and not against the valuation roll as such.

Once the municipal valuer receives the objections, from the municipal manager, the municipal valuer must consider the objection, decide the objection on facts and adjust the valuation roll in accordance with any decisions taken by the municipal valuer (see s 51 of the Act).

Section 52 requires a compulsory review process by the Valuation Appeal Board, of the decision taken by the municipal valuer, if the valuer has adjusted the value by more than 10% upwards or downwards.

In terms of s 53(1) the municipal valuer must thereafter, in writing, notify every person who has lodged an objection, and also the owner of the property concerned (if the objector is not the owner) of the valuer’s decision, the adjustments to the valuation roll and whether the compulsory review according to s 52 is applicable.

Section 53(2) affords the objector or owner the option to, within 30 days after such written notification, apply in writing to the municipal manager for reasons for the decision. A prescribed fee must accompany the application.

The municipal valuer must in turn, after 30 days of receipt of the application, provide reasons in writing.

In the event where the objector or owner is not satisfied with the decision of the municipal valuer, an appeal can be lodged within the following time frames –

• within 30 days after the date on which notice referred to in terms of s 53(1) was sent to the objector or owner; or
• if the objector or owner has requested reasons in terms of s 53(2), within 21 days after the day on which the reasons were sent to the objector or owner.

Lodging of an appeal does, however, not defer a person’s liability for payment of rates while the appeal is pending.

The appeal process will thereafter proceed as prescribed in terms of the Act. Clearly, the Act, as well as the notices issued by the municipalities, contain strict timelines, which should be adhered to. Property owners should be mindful of what the entry in the valuation roll reflects of their property and of the possible impact on their monthly rates.

It is important to follow the timeline within which one must act in order not to miss the deadline for submissions of objections or appeals.

The following example is a clear indication of what the financial impact can be, should a property be incorrectly categorised, as the rate will differ for different categories of properties.

Should a residential property, with a municipal value of R 5 million be wrongly categorised as a business property, the rate in Rand for business properties will be applied, which will have a huge impact on the amount payable per month.

Calculation according to the rate in Rand as stated in the 2020/2021 Budget and Rates Policy of the City of Tshwane.

Calculation for residential properties:

\[ \text{Municipal value} \times \text{Rate in Rand} \div 12 = \text{Monthly rate payable} \]

\[ (\text{R 150 000} \times 0.02560) \div 12 = \text{R 4 138.67 per month} \]

\[ \text{R 150 000 reduction due to R 15 000 legislative plus R 135 000 reduction as set out in the Rates Policy of City of Tshwane, in respect of residential properties.} \]

Calculation for business properties:

\[ \text{Municipal value} \times \text{Rate in Rand} \div 12 = \text{Monthly rate payable} \]

\[ (\text{R 5 000 000} \times 0.02560) \div 12 = \text{R 10 666.67 per month} \]

If the owner in this example failed to object against the incorrect category as contained in the valuation roll, they would have to pay a monthly amount of R 10 666,67 in respect of property rates for the next four years. By successfully objecting against the incorrect category as it appeared in the valuation roll, the monthly saving will be R 6 528 (R 10 666,67 – R 4 138,67) for the next four years.

It is, therefore, important to stay up to date with the information as it appears in the valuation roll, not to be overcharged when one had the opportunity to rectify errors timeously. It is also advisable to obtain the necessary professional advice to proceed with an objection if there are any errors in the valuation roll.
Will the new Sulphur Regulations leave the maritime industry dead in the water?

By Nicholaas Kade Smuts

From 1 January 2020 the new sulphur regulations came into force affecting sea transportation globally. These regulations compel both vessels and the owners thereof to ensure that their vessels burn fuel with a sulphur content of no more than 0,5%. This is down from the previous content amount of 3,5%. These regulations are aimed primarily at reducing air pollution, protecting the health of humans and the environment.

These regulations have placed an enormous burden on the maritime industry to ensure compliance and in response the International Maritime Organisation (IMO) has issued a set of guidelines to facilitate and assist the maritime industry in realising these new regulations pertaining to sulphur content in fuel.

On the one hand shipping is considered the driving force of the global economy and approximately 90% of trade takes place by sea. On the other hand, it is one of the planet’s most environmentally damaging industries. One of the biggest contributions to environmental pollution comes from sulphur emissions of vessels at sea.

Vessels emit large quantities of pollution into the air, which has been on the rise and presents an existential threat to human and environmental health. This seems to be the case specifically along shipping routes. Sulphur oxide (SOx) is emitted from the vessel’s combustion engine and combines with nitrogen dioxide (NOx) in the atmosphere, which leads to acid rain. This leads to respiratory and cardiovascular dis-
The International Convention for the Prevention of Pollution from Ships (MARPOL) is the main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes. The 1973 Protocol was adopted to amend the MARPOL Convention and a new Annex VI was added which came into force on 19 May 2005 (www.imo.org, accessed 27-8-2020). It set limits on SOx and NOx emissions from new ships to be cut by 16–22% as from 2011 and by 80% (only in [NOx Emission Control Areas) (NECAs) from 2016/2021 compared to 2000 levels]. Whereas the ship fuel sulphur cap applies to the entire fleet, the NOx cap only applies to new ships and ‘the strictest limit, called Tier III, currently only applies to new ships sailing in designated areas around North America from 2016’ (www.transportenvironment.org, 27-8-2020). There have been attempts from as early as 2007 to have NOx included in the Baltic Sea, North Sea and English Channel NECAs, but delays in studies and the adoption by countries have hampered this. After considerable negotiations a compromise was reached whereby the start date of each new NECA will in future be decided on an individual basis. The stricter Tier III NOx standards will apply to new ships built after 2021 only while sailing in the North Sea, Baltic Sea and English Channel.

Vessels are not allowed to carry non-compliant fuel oil unless they have been fitted with a scrubber or equivalent as provided in terms of reg 4 of Annex VI to MARPOL, which provides that ‘equivalents’ may be fitted onto vessels as long as they are effective in reducing sulphur emissions as the required low sulphur fuel. The compliance and enforcement of the new regulations pertaining to sulphur will require co-operation by various governments and national authorities of member states that have ratified the MARPOL Convention and acceded to Annex VI. In response, the MARPOL Convention ‘has developed a set of guidelines for port state control which can be found under Resolution MEPC.321(74)’ (www.lexisnexis.co.za, accessed 27-8-2020). This puts pressure on states to achieve a balance between compliance with the new sulphur regulations by vessels entering their coastal waters and avoiding unnecessary delays or detention of vessels.

Where there is non-compliance with the sulphur regulations the port state must take fuel samples and report the non-compliance to the flag state of the vessel. The port state may prevent the

These measures include:

- Zero emission berth standard in ports. Shore-side electricity can be used while the vessels are at the port thereby eliminating ship caused SOx, NOx, particulate matter and carbon dioxide (CO2).

- Using low-sulphur fuels. It is suggested that these fuels can make the vessel’s engine run smoother and more effectively with less operating problems and maintenance costs while reducing other pollutant emissions such as black carbon.

- Scrubbers are a form of air pollution control device that remove sulphur oxide from the vessel’s engine and boiler exhaust gases. Scrubbers are regarded as an appropriate means to meet the sulphur content cap.

- Internal engine modifications such as water injection and exhaust gas recirculation.

- Hybrid air motor.

- Selective catalytic reduction is a system to treat exhaust gases after their production but before emission. Selective catalytic reduction is best suited to reduce NOx emissions beyond Tier III and works more efficiently with low-sulphur fuels.

- Development of alternative energy sources, such as battery electric or wind propulsion, hydrogen and ammonia to name a few.

- Hybrisation and electrification, which can deliver emission savings, regardless of the type of fuel used to generate electricity.

- Vessels are not allowed to carry non-compliant fuel oil unless they have been fitted with a scrubber or equivalent as provided in terms of reg 4 of Annex VI to MARPOL, which provides that ‘equivalents’ may be fitted onto vessels as long as they are effective in reducing sulphur emissions as the required low sulphur fuel.

- The compliance and enforcement of the new regulations pertaining to sulphur will require co-operation by various governments and national authorities of member states that have ratified the MARPOL Convention and acceded to Annex VI. In response, the MARPOL Convention ‘has developed a set of guidelines for port state control which can be found under Resolution MEPC.321(74)’ (www.lexisnexis.co.za, accessed 27-8-2020). This puts pressure on states to achieve a balance between compliance with the new sulphur regulations by vessels entering their coastal waters and avoiding unnecessary delays or detention of vessels.

Where there is non-compliance with the sulphur regulations the port state must take fuel samples and report the non-compliance to the flag state of the vessel. The port state may prevent the
non-complying vessel from continuing on its voyage until the proper steps have been taken to ensure compliance. Sanctions may be imposed by a state party on the non-compliance vessel after taking into account all relevant circumstances and evidence available.

Taking all of this into consideration the following questions need to be asked:
- Are companies prepared for big changes in fuel demand?
- Will governments enforce these regulations and will ship-owners comply?
- Will these measures significantly contribute to reducing air pollution including shipping’s massive environmental footprint?

Once the sulphur regulation limits are globally achieved regulators will then go after carbon emissions. However, are there many effective ways to drastically cut carbon emissions as of 2020? Many ship-owners express doubt in this regard. Moreover, is further regulation the best route to go? I submit that time after time it has been seen that more regulations do not necessarily yield the results we expected.

Another important consideration is that for decades the maritime sector operated as a waste disposal system for the oil industry. While refineries improved at producing better quality fuel for cars the lower quality bits of the barrel ended up being used as fuel for ships. The debate continues as to who is responsible for cleaning up the global maritime industry. Is it the fuel producers, the ship-owners who use the fuel, the corporations and individuals who use vessels to transport their goods or the buyers of these goods?

Then there is the question of regional responsibility. The sulphur regulations are only taking effect 12 years after an agreement on draft regulations was reached and decades after the worst effects of these emissions were realised. Some companies such as BP and Royal Dutch Shell have improved their refineries to align with legislative change and some predict their refining earnings may double during the course of 2020.

Producers of lighter crudes such as the United States and Nigeria will benefit too. Certain shipping groups are expected to incur higher fuel costs. Maersk estimates that the sulphur regulations will result in a $2 billion rise in annual fuel costs as it makes the switch from high sulphur fuel oil to marine gas oil, which is approximately 50% more expensive. Maersk has also committed to retrofitting some ships with scrubbers amid concerns there may be a shortage of the higher specification marine gas oil (www.dw.com, accessed 11-9-2020).

According to energy consultancy Wood Mackenzie, there are scrubbers for more than 2,000 ships on order. Essentially, the majority are either choosing to or are being forced to switch to the higher end marine gas oil. This could have adverse implications as pressure mounts on suppliers of low sulphur fuels with higher demands resulting in reduction of availability for trucks and aeroplanes, which will cause prices to spike. However, the IMO says there are more than adequate supplies of low-sulphur products.

Compliance will be the biggest hurdle to ensure the aims of the regulations are met. Goldman Sachs estimates that compliance will be around 80% in 2020 but gradually rising to 95% by 2024 (see https://avantismarine.com, accessed 7-9-2020). One must keep in mind that many ports will not have the capabilities to adequately test the content of sulphur in the vessels fuel.

However, there are concerns that despite the millions that will be spent in fiat money (government-issued currency that is not backed by a physical commodity, such as gold or silver, but rather by the government that issued it (www.investopedia.com, accessed 11-9-2020)) on new fuels and retrofitting vessels with scrubbers and other measures mentioned above to achieve the sulphur cap as per the regulations it will do very little overall in reducing the shipping sector’s carbon footprint. Presently there is a high demand for scrubbers but questions still remain regarding their longevity. Some ports such as Singapore and the United Arab Emirates have banned this type of cleaning system.

In the private sector, ship-owners are looking at ways to reduce air pollution and emissions. Some have looked at slow-steaming, which will have the positive effect of decreasing capacity in a market where freight rates have been dropped. Companies such as Maersk are investing billions into cleaner technology development.

In May 2019 at a meeting of the IMO’s Marine Environment Protection Committee in London it was agreed to consider slow-steaming as a short term measure to speed up energy efficiency requirements for new container and cruise ships. These measures could reduce approximately 2% of CO2 emissions between 2022 and 2050, according to the International Council on Clean Transportation.

There are also mixed opinions concerning switching to low sulphur fuel. It is argued by persons like Hiroki Sato, Managing Executive Officer at JERA, that this move will not be enough. It is argued that despite the increased cost the move will only reduce CO2 levels by approximately 20%. Some advocates of clean shipping are saying companies need to be building new vessels to meet the IMO’s 2050 target.

At the time of writing this article, South Africa promised to pass new legislation in line with the new 0.5% sulphur regulation. What is clear is that the maritime industry’s carbon footprint must be drastically reduced and the IMO 2020 has prioritised the maritime industry becoming an environmentally sustainable and green industry. The result of these new regulations pertaining to sulphur content are still to be seen. However, the problem will need to be addressed in a sensible way that does not completely hamstring the industry.

Nicholaas Kade Smuts LLB (Unisa) LLM Shipping Law (UCT) is a legal practitioner in Cape Town.
When should a court award compensation as a remedy for unlawful administrative action?

By Geoffrey Allsop

Section 33(1) of the Bill of Rights guarantees the right to administrative action that is lawful, reasonable and procedurally fair. Pursuant to s 33(3) of the Constitution, the Promotion of Administrative Justice Act 3 of 2000 (PAJA) was enacted to ‘give effect’ to the constitutional right to just administrative action (see Bato Star Fishing (Pty) Ltd and Others v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC) at para 22 – 26 and Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae) 2006 (2) SA 311 (CC) at para 94 – 95 and 431 – 438).

Section 8 of PAJA gives the courts a wide discretion to make any ‘just and equitable’ order to remedy the violation of the right to just administrative action (see Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others 2011 (4) SA 113 (CC) at para 81 – 85). The usual remedy appears in s 8(1)(c)(i) where an order setting the unlawful decision aside and remitting it back to the administrator for a new decision that properly complies with the requirements of lawfulness, reasonableness and procedural fairness (see Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another 2015 (5) SA 245 (CC) at para 42 and Gauteng Gambling Board v Silverstar Development Ltd and Others (SCA) (unreported case no 80/2004, 29-3-2005) (Heher JA) at para 29).

Aside from the usual remedy of setting aside and remittal, s 8(1)(c)(ii)(bb) of PAJA states that in exceptional circumstances a just and equitable remedy could be an order ‘directing the administrator or any other party to the proceedings to pay compensation’. PAJA, however, does not indicate when a case will be ‘exceptional’ or what factors a court should consider to determine whether compensation will be a ‘just and equitable’ remedy (see Cora Hoexter Administrative Law in South Africa 2ed (Cape Town: Juta 2012) at p 570). Thus far, the courts do not appear to have considered compensation under s 8(1)(c)(ii)(bb) in much detail and have only made general findings to the effect that:

• whether compensation is appropriate depends on the facts of each case (Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC) at para 30);

• compensation is not available where the unlawful administrative decision is remitted back to the administrator (Trustees, Simcha Trust v De Jong and Others 2015 (4) SA 229 (SCA) at para 27); and

• that it is necessary to establish some sort of loss suffered as a result of the unlawful administrative decision before compensation as a remedy can even be considered (Minister of Defence and Others v Dunn 2007 (6) SA 52 (SCA) at para 40).

This article examines when a court should consider ordering the payment of...
compensation as a remedy for unlawful administrative action in terms of PAJA. First, it briefly sets out the two general requirements for compensation in s 8(1)(c)(ii)(bb). Second, it considers when a case will be ‘exceptional’ and what factors a court should consider to determine whether compensation would be ‘just and equitable’.

The two requirements for compensation

According to case law based on s 8(1)(c)(ii)(bb) of PAJA – which allows a court to substitute an unlawful administrative decision if it is an ‘exceptional case’ and where it will be ‘just and equitable’ – it seems that a court should undertake a two-step inquiry to determine whether compensation should be granted as a remedy:

- First, the court must be satisfied that the case is ‘exceptional’.
- Second, that it would be ‘just and equitable’ to make an order requiring the payment of compensation (see Trencon (op cit) at para 35).

Each requirement is considered in turn.

‘Exceptional case’

As noted, the courts have not yet provided a clear test to determine when a case will be ‘exceptional’ for the purposes of compensation in terms of s 8(1)(c)(ii)(bb) of PAJA. However, the fact that compensation may only be awarded in ‘exceptional cases’ clearly indicates it is supposed to be an extraordinary remedy which will not usually be granted (see Steenkamp (op cit) and Darson Construction (Pty) Ltd v City of Cape Town and Another [2007] 1 All SA 393 (C) at p 408).

In Simcha Trust (op cit) at para 28, the SCA remarked that whether a case is ‘exceptional’ turns not so much on the quality of the decision itself – such as whether it was ‘conspicuously bad’ – but rather on whether there ‘are unusual circumstances which make it appropriate’ to order compensation and not the usual remedy of setting aside and remittal. One possible interpretation of this finding is that a case will only be ‘exceptional’ when it has some ‘unusual’ feature which any other remedy, such as setting aside or even an appropriate costs order, cannot adequately rectify (see Dunn (op cit) at para 36 – 37).

Aside from this general finding, it is difficult to articulate a comprehensive principle to determine when a case will be ‘exceptional’ as each case necessarily depends on its own facts (Steenkamp (op cit)). However, the above finding from Simcha Trust does arguably indicate that there are two situations where a case would not be ‘exceptional’ for the purposes of compensation under PAJA.

First, as noted, it arguably articulates the general principle that a case will not be ‘exceptional’ where an established administrative law remedy such as setting aside and remittal (or even substitution) will effectively rectify that violation of the right to just administrative action (Simcha Trust (op cit) at para 18 and 28).

Second, even when remittal and setting aside are not appropriate, a case will arguably not be ‘exceptional’ when a litigant has an alternative remedy that will effectively prevent the harm they may suffer as a result of the unlawful administrative decision, for example an interdict (see Olitzki Property Holdings v State Tender Board and Another 2001 (8) BCLR 779 (SCA) at para 37 – 38).

Whether a potential damages claim in delict or contract would constitute an effective alternative remedy – which could prevent a case from being ‘exceptional’ – is an open question (see Simcha Trust (op cit) at para 19).

There are, however, conflicting views on whether a breach of contract will imply the right to just administrative action (see Cora Hoexter ‘Contracts in Administrative Law: Life After Formalism’ (2004) 121 SALJ 595 at 609 – 613). Delictual claims in administrative law are also usually difficult to establish. Where the delict is based on pure economic loss, a violation of the right to administrative justice will not necessarily be delictually wrongful (see Steenkamp (op cit) at para 37). Without evidence that the administrative decision was tainted by intentional bad faith or corruption or was taken ‘completely outside the legitimate scope of the empowering provision’, it is unlikely that the delictual requirement of wrongfulness will be easily met (see Steenkamp (op cit) at para 55 and Telematrix (Pty) Ltd v Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) at para 25 – 26).

‘Just and equitable’

The courts have not yet developed clear factors that one should take into account to determine whether it would be ‘just and equitable’ to awarded compensation as a remedy for unlawful administrative action in terms of s 8(1)(c)(ii)(bb) of PAJA.

I submit that the starting point to determine this question should be informed by the Constitution itself (see Steenkamp (op cit) at para 32 and Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) at para 44). Section 172(1)(b) and s 38 of the Constitution could provide guidance regarding what factors a court should consider. Respectively, these two provisions empower any competent court to make any ‘just and equitable order’ and grant ‘appropriate relief’ for any unjustifiable infringement of a constitutional right – such as the right to just administrative action in s 33 of the Constitution.

In Hoffmann v South African Airways 2001 (1) SA 1 (CC) at para 45, the Constitutional Court (CC) held that a ‘just and equitable’ remedy is one that properly balances the various interests, which may be affected by it. When engaging in this balancing process, at least four factors should be kept in mind to determine whether a particular remedy will grant ‘appropriate relief’ yet also be ‘just and equitable’:

- It should effectively redress any harm caused by the violation of the right.
- It should strive to deter future violations of the Bill of Rights.
- It should be capable of being compiled with.
- It should be fair to everyone who may be affected by it (Hoffmann (op cit)).

Based on these four factors, the following considerations would be relevant to determine whether it would be ‘just and equitable’ to grant compensation under s 8(1)(c)(ii)(bb) of PAJA: Whether compensation would effectively redress...

Have you come across an interesting case or do you know of a new development in your area of law?

De Rebus also welcomes articles, case notes, practice notes, practice management articles and opinion pieces. Articles should not exceed 2 000 words. Case notes, opinions and similar items should not exceed 1 000 words. Contributions should be original and not published or submitted for publication elsewhere.

Send your contribution to: derebus@derebus.org.za and become a thought leader in your area of law.
the harm caused by the violation of the right to just administrative action, whether it would deter future violations of the right and whether it would be fair to society to require that compensation – and not some other order – be granted as a remedy.

While the SCA in Simcha Trust (op cit) at para 28 remarked that the ‘quality of the decision’ is not necessarily relevant to determine whether a case is ‘exceptional’, this factor could be relevant to determine whether it would be ‘just and equitable’ to grant compensation as a remedy. For example: Where the administrative act is unlawful because of an intentional act of bad faith, corruption or ‘inexcusable incompetence’ it could be ‘just and equitable’ to require the administrator to personally pay compensation.

Another relevant factor is whether the unlawful administrative decision indirectly violated another constitutional right of a vulnerable group: Such as their right to inherent human dignity or a socio-economic right (see MEC, Department of Welfare, Eastern Cape v Kate 2006 (4) SA 478 (SCA) at para 22 and 33). Where the unlawful administrative decision indirectly violates another constitutional right, and where there is no other appropriate remedy available, the presence of this factor could make it more likely that it would be ‘just and equitable’ to require the administrator or another party to the proceedings to pay compensation.

Justice and equity also require the court to consider competing factors, which could equally tip the scales against an order requiring the administrator or another party to pay compensation. Three relevant considerations are the following:

- First, the CC has held that monetary compensation is not usually an appropriate remedy to rectify the violation of a constitutional right (see Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) para 58 and 67 – 68). This applies equally in the administrative law context, given that the primary purpose of administrative law remedies is to vindicate the rule of law and promote the public welfare by preventing or correcting the improper exercise of an administrative power or function (see Steenkamp (op cit) at para 29). Unlike private law remedies, the remedies for unlawful administrative action are, therefore, not necessarily concerned with compensating an individual litigant with a sum of money for the harm caused by the violation of their rights. However, in limited circumstances, both the SCA and CC have recognised that monetary compensation could be the only available remedy, which would provide ‘appropriate relief’ for the violation of a constitutional right and be ‘just and equitable’ to all those affected by it (see Ngomane and Others v Johannes burg (City) and Another 2020 (1) SA 52 (SCA) at para 21 – 27 and President of the Republic of South Africa and An other v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae) 2005 (5) SA 3 (CC) at para 52 – 64).

- Second, the severity of the violation of the right to just administrative action could be relevant. While an intentional act of bad faith or corruption could render it more likely that compensation will be ‘just and equitable’, a relatively minor infringement caused, for example, by negligence or a clerical error could equally render it less likely that compensation will be just and equitable.

- Third, the amount of compensation could be relevant. The CC has held that claims for punitive damages should not be granted for the violation of a constitutional right (Fose (op cit) at para 65 and 71 – 72). On this basis, the amount of compensation awarded should be strictly limited to the actual harm caused by the violation of the right to just administrative action. Furthermore, the conduct of the parties could also be relevant. Where a litigant unreasonably inflates their claim for compensation, or fails to take reasonable steps to prevent or mitigate the financial loss caused by the unlawful administrative decision, it could be ‘just and equitable’ for a court to award a reduced amount of compensation.

Conclusion

Compensation is an extraordinary remedy in the administrative law context and will usually only be considered as a remedy of last resort. Whether compensation should be granted appears to require a court to engage in a balancing process, which should be informed by the Constitution and the broad requirements of administrative justice in each case. Generally speaking, administrative justice would usually be better achieved through another remedy, such as setting aside and remittal or even substitution. However, in appropriate circumstances, an order requiring an administrator to pay compensation could also achieve the legitimate constitutional objectives of deterring administrators from violating the right to just administrative action in an intentional, grossly negligent or corrupt manner and ensuring that ‘appropriate relief’ is granted for the violation of a constitutional right when no other appropriate remedy exists.
A pleading, which does not disclose a parties to be properly ventilated. Thus, enabled the real issues between the and counterclaim.
r 28(1), of its intention to amend the plea 1969. It also pleaded over on the mer-
amount claimed was a debt within the of prescription on the grounds that the The municipality raised a special plea 2014 and the amount, which the munici-
fact paid the municipality between the R 89,5 million. That represented the dif-
Ergo also instituted a claim in recon-
for payment of close to R 73,5 mil-
Ergo maintained that it received its sup-
Ergo also maintained as managers of the respond-
employed as managers of the respond-
Ergo also appeared to move funds between all the entities, which they con-
Ergo also appeared as managing director of the latter Act, all directors of SAA
tamount to recklessness. The court, per Spilg J, found that the respondent companies had failed to pay over an amount in terms of their obliga-
tion under the employment contracts, and that they were shown to be finan-
cially distressed.
The directors appeared to move funds between all the entities, which they con-
trolled and a trust, without disclosing a complete financial picture, notwithstanding that they were all separate companies that were all financially dis-
tressed. Placing the respondent compa-
nies under business rescue would allow the business rescue practitioner to attain a clear and complete understanding of the financial positions of the respond-
ent companies, so that an attempt can be made to rescue them or, if that is not possible, wind them up. The court was satisfied that there was a reasonable possibility that the companies could be rescued. The applications accordingly succeeded.

Civil procedure
Amendment of plea and counterclaim: In Ergo Mining (Pty) Limited vEkurhuleni Metropolitan Municipality and Another [2020] 3 All SA 445 (GJ) the respondent municipality had sued the applicant (Ergo) for payment of close to R 73,5 million plus interest in respect of charges for electricity, which it alleged it had been supplying to Ergo since the end of November 2014. Ergo disputed the claim and raised a number of defences, which included a denial that the municipality had been supplying it with electricity. Ergo maintained that it received its supply of electricity from Eskom and had been paying the municipality only the amount it claimed it was liable for in terms of Eskom’s applicable tariff rates. The municipality’s claim, therefore, was for the difference between the Eskom tariff and what it had been charging Ergo. Ergo also instituted a claim in recon-
vention for an amount of just under R 89,5 million. That represented the dif-
fact paid the municipality between the period December 2008 to November 2014 and the amount, which the municip-
iability to pay over to Eskom. The municipality raised a special plea of prescription on the grounds that the amount claimed was a debt within the meaning of the Prescription Act 68 of 1969. It also pleaded over on the merits. In June 2018, Ergo gave notice under r 28(1), of its intention to amend the plea and counterclaim.

An amendment will generally be grant-
ed to enable the real issues between the parties to be properly ventilated. Thus, a pleading, which does not disclose a cause of action or defence, will not quali-
fy. An amendment will also not be grant-
ed if it results in prejudice that cannot be cured by an award of costs or a post-
ponement. Provided that the substance of the matter claimed in an amendment, as opposed to its precise legal charac-
terisation, is set out in the original claim then it will remain the same ‘debt’ for purposes of avoiding prescription.
The court, per Spilg J, examined each of the grounds for objecting to the amendments and found none to have any merit. The application for leave to amend was granted.

Company law
Business rescue proceedings: In Mats-
shazi v Melrose Arch (Pty) Ltd and Others [2020] 3 All SA 499 (GJ), four applications were before the court, where orders were sought placing the first respondent in each application under supervision and commencing business rescue proceed-
ings under s 131(4)(a) of the Companies Act 71 of 2008. The applicants were each employed as managers of the respond-
ent companies.
The defences raised by the respondent companies were that as a result of the national lockdown, force majeure pre-
sented, excusing the respondent compa-
nies from their obligations to their em-
ployees and their other creditors, who therefore, had no locus standi to bring the applications. It was also contended that the companies (other than one of them) were not financially distressed.
The respondents appeared to be rais-
ing force majeure only in respect of their employment contracts. The defence was not raised when payment was demanded by other creditors. If provision is not made contractually by way of a force ma-
jeure clause, a party will only be able to rely on the very stringent provisions of the common law doctrine of supervening impossibility of performance, for which objective impossibility is a requirement. Such impossibility was not proven in this case.

THE LAW REPORTS
August [2020] 3 All South African Law Reports (pp 305 – 632)

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:
FB: Free State Division, Bloemfontein
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
MM: Mpumalanga Division, Mbombela
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

By Merilyn Rowena Kader

Delinquent directors: The first de-
fendant (Myeni) was chairperson of the board of the second defendant (SAA) until 2017. In Organisation Undoing Tax Abuse and Another vMyeni and Others [2020] 3 All SA 578 (GP) the plaintiffs sought an order declaring Myeni a delinquent director in terms of s 162(5) of the Companies Act 71 of 2008. Where the grounds for delinquency have been established, the court has no discretion and must grant the order. The only discretion given to the court concerns the conditions that may be attached to the order. It has been stated in case law that the four grounds for delinquency under s 162(5)(c) all share the common feature that they involve serious misconduct on the part of the director who grossly abuses his position and acts in a way tantamount to recklessness. The court, per Tolmay J, considered the duties imposed on a director under the Companies Act, as amplified by the Public Finance Management Act 1 of 1999. In terms of s 50 of the latter Act, all directors of SAA were subject to heightened fiduciary
duties. The said legislative instruments and SAA's corporate policy documents formed the background against which Myeni's conduct had to be evaluated. Despite a range of benefits posed by the Emirates deal for SAA, Myeni thwarted the signing of the deal. She was shown to have acted dishonestly, stating false facts to support her stance, and grossly abused her powers in blocking the deal. In court, Myeni's explanation of her actions was nonsensical and contradictory. She had no reasonable grounds for blocking the Emirates deal, and was found to have breached her fiduciary duty to act in good faith, for a proper purpose and in the best interests of SAA. The failure of the deal led to irreparable harm for SAA and the country.

The Airbus swap involved an agreement between SAA and Airbus to cancel their old agreement (involving onerous terms) and begin to renegotiate the deal unilaterally – backtracking on the resolution to their old agreement (involving onerous terms) and begin to renegotiate the deal unilaterally – backtracking on the resolution to proceed and altering the terms. The court expressed its displeasure with the conduct of Myeni in the trial. She was found to be a dishonest and unreliable witness. Her explanations for the inexplicable course of actions taken by her at SAA were unconvincing. Her conduct satisfied several grounds for delinquency.

Issuing a declaration that Myeni was a delinquent director, the court ordered her to resign as director satisfied several grounds for delinquency.

The court, per Hughes J, held that the RAF was a social security scheme, acting on behalf of the state to protect the freedom and security of persons and is obliged to afford an appropriate remedy to victims of motor vehicle accidents. Recognising that the contract between the parties was governed by administrative characteristics, the court rejected the RAF's contention that it was exercising its contractual rights in a private law relationship. The administrative characteristic still remained as it performed its social duty for the state and was bound to exercise its contractual rights in a procedurally fair and lawful manner. The fact that the contractual rights arose from a tender was irrelevant. The unilateral prescription by the RAF of the terms of the addendum was found to be an abuse of its power in performing a public duty. The RAF's power to procure the services of the panel attorneys derived from s 217 of the Constitution, and insofar as the second addendum would have been imposed on the panel attorneys in contravention of s 217, it was invalid and unlawful. The court concluded that the notices to cancel and the cancellation of the contract were reviewed and set aside on the ground of invalidity. The RAF was ordered to fulfil all of its obligations to the panel attorneys in terms of the existing service agreement, and the said order was to operate for six months from date of issue.

See also:

- Kgomo Kgomo Ramotsoha 'The RAF to use new litigation model to reduce its litigation costs' [2020] (May) DR 22;
- Kgomo Kgomo Ramotsoha 'Will the RAF have to fulfil its obligation to its panel of attorneys?' 2020 (July) DR 36; and
- Kgomo Kgomo Ramotsoha 'Court dismisses appeal due to no prospect of success' 2020 (Aug) DR 37.

Procurement and unlawfulness of contract: Following the termination of the contractual relationship by the provincial government in Valor IT v Premier, North West Province and Others [2020] 3 All SA 397 (SCA), the appellant Valor IT (VIT) applied for a declaratory order that the termination was unlawful. It held that it was entitled to payment of a further amount of R 146 473 747,49 as damag-es. In 2011, VIT submitted an apparently unsolicited proposal to the Department concerning an enterprise content man-

Constitutional and administrative law

Access to information: The appellant lodged a request with the respondents (the South African Reserve Bank (SARB)) under the Promotion of Access to Information Act 2 of 2000. It sought access to records obtained by the bank as part of investigations into a list of persons, relating to fraud or smuggling of precious metals. The information was sought in the process of collecting material for a book, which was to deal with Apartheid-era procurement. The refusal of the request led the appellants to apply to the High Court for relief in terms of s 78(2) of the Act. The dismissal of the application led to the present appeal of South African History Archive Trust v South African Reserve Bank and Another [2020] 3 All SA 460 (GP) attorneys (panel attorneys) had been selected by the Road Accident Fund (RAF) after a tender procurement process. The selected attorneys formed part of a panel contracted to the RAF for a period of five-years, and the RAF from time to time would select an attorney from the panel to provide specialist litigation services in the various courts. As a result of ongoing severe financial constraints experienced by the RAF, it was decided that legal services be sourced internally and no longer outsourced. That led to the decision to cancel the panel attorney tender.

The panel attorneys in the three applications sought the review, setting aside and declaration as constitutionally invalid, the RAF's decisions to require the panel attorneys to hand over their files, which were not finalised; to cancel the tender; and to dispense with the services of the panel attorneys.

The court, per Hughes J, held that the RAF was a social security scheme, acting on behalf of the state to protect the freedom and security of persons and is obliged to afford an appropriate remedy to victims of motor vehicle accidents.
agreement, system, to manage its records. A few months later, the Department directed a request for quotations for the rendering of services on a ‘Records Management Solution’ to entities that were accredited. One of them was VIT. In August 2011, VIT was informed of its successful bid. VIT and the Department signed an agreement that they called a service delivery agreement (SDA). The fee that VIT would be entitled to for the work was R 498 000. However, the contract price escalated over about three years from that to R 41 729 647.

The court, per Plasket JA (Mokgohloa JA, Molemele JA, Wallis JA and Koen AJA concurring) held that the provincial government's prospects of success on the merits were strong. The scheme in terms of which VIT purported to provide services, and for which it was handsomely remunerated, was unlawful from start to finish. Section 217 of the Constitution requires organs of state, such as the Department, when it procures goods and services, to do so in terms of a system that is fair, equitable, transparent, competitive and cost-effective. In this case, no public tendering process was ever held in respect of the SDA or any of the agreements that followed it. The SDA was awarded to VIT after it and two other firms had responded to a closed request for quotations. The subsequent entering into of a settlement agreement by the parties was unlawful. The settlement agreement sought to give effect to the unlawful arrangement, and was correctly rescinded by the court below. The appeal was dismissed with costs.

**Delict**

**Malicious prosecution:** The respondent (Lincoln) was charged in the regional court on 47 charges, including numerous counts of fraud. He was convicted on 17 counts, 15 of which related to fraud, and he was sentenced to nine years' imprisonment. However, on appeal, the High Court set aside the convictions and sentence. Lincoln then sued the appellant (the minister) for damages arising from an alleged malicious prosecution. Although the trial court dismissed the action, the Full Court upheld an appeal in respect of all but two of the charges brought against him. That resulted in the appeal, reported as *Minister of Safety and Security v Lincoln* [2020] 3 All SA 341 (SCA)

Lincoln worked for the South African Police Service as a director and his reports on allegations of corruption led to the establishment of the Presidential Investigative Task Unit (PITU) with Lincoln as the commander. In an investigation an officer (Smith) later made serious incriminating allegations against Lincoln and the PITU. Another director, Knipe, enlisted the assistance of Superintend

**Legal practice**

**Provincial Councils (PC) – race and gender composition:** In an attempt to facilitate transformation in the legal profession, the Legal Practice Act 28 of 2014 (the LPA) was brought into effect. The applicant (the Cape Bar) in *Cape Bar v Minister of Justice and Correctional Services and Others* (National Bar Council of South Africa and Others as Amici Curiae) [2020] 3 All SA 413 (WCC) challenged the constitutionality of the Regulations and Rules published under the LPA, and in particular, the provisions relating to the composition of the PC provided for. It brought the challenge of unfair discrimination in the Equality Court under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, and simultaneously a review under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), alternatively in terms of the doctrine of legality. The applications were consolidated.

Regulations 4(3) and 4(4) of the Regulations and r 16.15.3 of the Rules were specifically challenged by the Cape Bar. The Regulations require 50% of the PC to be male and 50% to be female and it is specified how composition of PCs will be structured in each province. Essentially, the provisions create six seats for attorneys (eight in Gauteng) and four seats for advocates in each PC. The four seats for advocates must be composed of one white male, one white female, one black male and one black female. The Cape Bar submitted that those provisions comprise a formula, which was rigid and, while ostensibly aimed at affirming black and female representation in order to rectify past and present discrimination, it capped such representation, which was inimical to the objective. The contention was that the provisions thus lent themselves to irrationality, arbitrariness and unreasonableness.

The court, per Mabindla-Bqwana J and Papier J, held that the case turned on the determination of the objectives of the electoral scheme. The LPA provides that when the composition of Councils is considered, the need and gender composition of South Africa is a factor to be considered.

When a measure is challenged for violating an equality provision, its defender may meet the challenge by showing it as that which is contemplated in s 9(2) of the Constitution, in that it promotes the achievement of equality and is designed to protect and advance persons disadvantaged by unfair discrimination. The test to determine whether a measure falls within s 9(2) is threefold:

- whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination;
- whether the measure is designed to protect or advance such persons; and
- whether the measure promotes the achievement of equality.

The court found that test to have been fulfilled in this case. The court went on to address the Cape Bar’s contention that the Minister’s decision to promulgate the impugned Regulations, the decision to issue the impugned Rules, and the Council’s application of the impugned Rules, all constituted administrative action, which was subject to review under PAJA. However, the court held that regs 4(3) and 4(4), which related to the composition of the representative advocates to be elected to the PCs did not appear to be dealing with matters that were administrative in nature. The Rules were closely related to the impugned Regulations. As such, PAJA would not be applicable.

The Cape Bar also contended that the Minister acted *ultra vires* his powers, which were said to be limited to establishing the PCs, but not the election procedure. That was shown not to be correct as the relevant powers and functions of the Minister were enabled by ss 94 to 97 of the LPA.
Arguments by the Cape Bar based on arbitrariness, rationality and reasonableness were all found to be unsustainable. In the premises, the applications were dismissed.

See also:

Prevention of organised crime

Restraint order and pension fund: In the wake of two white rhinos being killed and maimed for their horns in a national park, the defendant in National Director of Public Prosecutions v Gumede [2020] 3 All SA 554 (MM) was found with two fresh white rhino horns, as well as equipment usually associated with rhino poaching, in his vehicle. He was arrested and charged with rhino poaching. As rhino poaching constitutes organised crime, the Prevention of Organised Crime Act 121 of 1998 applied. The applicant, the National Director of Public Prosecutions (NDPP), in terms of the provisions of the Act, approached the court on an urgent basis and without notice to the defendant, for an order restraining the defendant’s pension fund (it being stated that that was the only realisable property of the defendant).

The court ordered that the defendant’s pension benefit be kept in the fund and that no money could be paid from the fund to any person pending final judgment in the matter. Section 26 of the Act provides for the restraint of realisable property held by a person against whom the restraint order is made. In terms of r 6(12) of the Uniform Rules of Court, an applicant in an urgent application must establish urgency and the urgency must be to such a degree that the court is prepared to allow for a relaxation in respect of the normal requirements that are listed in sub-r 6(12). Section 26(1) permits the NDPP to apply to court for a restraint order on an ex parte basis. Although the NDPP was entitled to immediately on the defendant’s arrest, approach the court in terms of s 26(1), it delayed and only approached the court more than a year later and only when the defendant wanted to withdraw his pension benefit from the pension fund. The court, per Roelofse AJ, found that it was, therefore, not justified in bringing the application on an urgent basis.

As the application lacked urgency, it was struck from the roll. In any event, having regard to s 37A(1) of the Pensions Fund Act 24 of 1956, the defendant’s pension fund was not susceptible to a restraint order in terms of s 26 of the Prevention of Organised Crime Act.

Other cases
Apart from the cases and material dealt with or referred to above, the material under review also contained cases dealing with -
• company law and debarment of representative of financial service provider;
• criminal procedure and combining of separate charges;
• neighbour law and duty of lateral support;
• restitution of land rights and meaning of ‘community’; and
• review of the Auditor-General’s findings and retrospection.

Merilyn Rowena Kader LLB (Unisa) is a Legal Editor at LexisNexis in Durban.
The National Environmental Management: Protected Areas Act 57 of 2003 (the Act) does not clearly define what a ‘protected area’ is; the Act merely lists the different types of protected areas. However, in the International Union for the Conservation of Nature Guidelines for Applying Protected Area Management Categories a ‘protected area’ is defined as ‘a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values’.

The basis of whether the indigenous communities have a customary law right to access and exploit natural resources in a ‘protected area’ is found in the landmark case of Alexkor Ltd and Another v the Richtersveld Community and Others 2004 (5) SA 460 (CC).

The Alexkor case

In the Alexkor case, a community of indigenous people (the Richtersveld community) successfully established a claim for the restoration of land. The court found that the content of the land rights held by the community must be determined by reference to the history and the usages of the community of the Richtersveld. Evidence presented showed a history of prospecting in minerals by the community and conduct that was consistent with ownership of the minerals being vested in the community.

The Constitutional Court (CC) took the view that the real character of the title that the Richtersveld community possessed in the subject land prior to appropriation was a right of communal ownership under indigenous law. The court, therefore, granted the land claim inclusive of mineral resources and the right to claim compensation for past use in terms of a settlement agreement. Alexkor confirms that customary law may serve as the basis for claims to natural resources and echoes the importance of customary law as a vital part of our law. The case furthermore, shows ‘the legal validity of customary claims to natural resources and that customary law, like any other source of law such as common law, provides the legal basis for claims to access and use’ (Loretta Feris ‘A customary right to fish when fish are sparse: Managing conflicting claims between customary rights and environmental rights’ (2013) 16.5 PER 555 at 566).

Magistrate’s court decision in the Gongqose case

In Gongqose, the three accused were found guilty in the magistrate’s court for “entering a national wildlife reserve area (Dwesa-Cwebe Nature Reserve) without authorisation” and “fishing or attempting to fish in a marine protected area in contravention of section 43(2)(a) of the Marine Living Resources Act [18 of 1998] (MLRA)”, which prohibits fishing in a marine protected area (Feris (op cit)). The three accused plead not guilty, contending that they were exercising their customary right to fish. The court, however, could not pronounce on the constitutional validity of the MLRA, as a magistrate’s court lacks the jurisdictional capacity to do so. It thus convicted all three accused. It is noted that when the three accused were found guilty, s 43 of the MLRA had not been repealed yet (S v Gongqose and Others (Elliotdale Magistrate’s Court) (unreported case no E382/10, 22-5-2012) (GS Nel)).

The High Court’s decision in the Gongqose case

The High Court held that when the MLRA was passed, the lawgiver took into consideration that there were people like the appellants who were exercising customary rights in respect of marine resources. The court, however, held that the appellants’ conduct was unlawful because they had not applied for an exemption. Therefore, the High Court found them guilty and upheld the convictions of the magistrate’s court (see paras 18 – 19).

Supreme Court of Appeal’s decision in the Gongqose case

The Supreme Court of Appeal (SCA) held that the Constitution recognises customary law as an independent and original source of our law. In terms of s 211 of the Constitution, the status of traditional leadership and their role in terms of customary law is recognised. Section 211(2) provides that ‘traditional authority that observes a system of customary law may function subject to any applicable legislation and customs’. Section 211(3) further provides that ‘the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law’. In examining the status of customary law the SCA referenced Alexkor and held that: ‘As an independent source of norms within the legal system, customary law may give rise to rights, such as access and use rights to resources. Thus, in Alexkor, the [CC] held that the Richtersveld Community possessed a right of communal ownership under customary law in the relevant land, which included use and occupation of the land; and the rights to use its water and exploit its natural resources above and beneath the surface. The question is whether the appellants proved customary rights of that kind’. Therefore, in this case the SCA had to answer whether the appellants proved their customary right to marine resources. The court found that the appellants did prove their customary right to access marine resources. The court had to further answer whether the MLRA extinguished the appellants’ customary rights. The court held that on a proper construction of the MLRA, it did not extinguish the appellants’ customary right of access to and use of marine resources. These rights continued to exist subject to the limitations already imposed by customary law. The court further held that the amended MLRA constitutes legislation that along with s 211(3) of the Constitution alters
customary rights. The unamended MLRA did not. The interpretation that the applicants’ customary rights survived the enactment of the MLRA not only grants them the fullest protection of their customary system guaranteed by s 211 of the Constitution, but also accords with the position in international law, which ‘a court is enjoined to consider when interpreting the Bill of Rights - that indigenous peoples have the right to their lands and resources traditionally owned’. The appeal was upheld and the applicants’ convictions and sentences were set aside.

In conclusion, indigenous communities may claim customary rights to access and exploit natural resources in protected areas. However, there may be conflicts between custom and the conservation of the environment. Therefore, customary and environmental rights must be reconciled in a way that includes indigenous communities as a vital part of the natural resource management.

**The Constitutional Court declares Electoral Act unconstitutional**

By Muchengeti Hudson Hwacha

**New Nation Movement NPC and Others v President of the Republic of South Africa and Others (Council for the Advancement of the South African Constitution and Another as Amici Curiae) 2020 (8) BCLR 950 (CC)**

In 2018, the New Nation Movement NPC and four others, applied to the Western Cape Division of the High Court to have s 57 read with sch 1A of the Electoral Act 73 of 1998 declared unconstitutional. The provisions compel individuals running in provincial or national (general) elections to do so through a political party. The applicants argued that compelling the use of a political party limits the rights to stand for public office, and freedom of association, guaranteed in ss 18 and 19(3)(b) of the Constitution, respectively.

**The case in the High Court**

The High Court dismissed the applicants’ arguments, stating that s 19(3) does not expressly create the right to stand for office as an independent candidate. Further, the court reasoned that other provisions of the Constitution support the argument that the right to stand for public office must be exercised through political parties. The court pointed to s 1(6) of the Constitution, which requires the establishment of a ‘multi-party system of democratic government’, without mentioning independent candidates.

The court also took note of ss 4(1)(a) and 105(1)(a) of the Constitution, which empower Parliament to determine the type of electoral system to be applied. The court held that Parliament duly exercised this authority by enacting the Electoral Act and the choice not to accommodate independent candidates, is not unconstitutional.

The court concluded that the applicants’ grievance with the party-centred election process may be remedied by asking voters to decide on it.

Disstisfied with this outcome, the applicants appealed to the Constitutional Court (CC).

**The case in the CC**

The CC began by interpreting the rights in question. The court noted that the right to stand for public office is closely related to the right to freely make political choices as indicated in s 19(1) of the Constitution. The court determined that the right to make political choices and the right to freedom of association must be interpreted broadly. Broadly interpreted, the rights to make political choices and to associate, also encompass the rights to refrain from making political choices and to disassociate. Put differently, the rights permit the choice to exercise them or not, to compel a choice in either direction is a violation of the right.

The court took cognisance of the right to freedom of conscience, under s 15(1) of the Constitution. It held that compulsion to join a political party, may leave one susceptible to the dictates of a party, limiting the exercise of individual conviction. The court recognised this limited the freedom of conscience of persons, such as one of the applicants, Chantal Dawn Revell. As a representative of the indigenous Korana nation, she argued that she holds herself answerable to her nation and cannot be beholden to a political party. The court added that the contestation between individual conviction and political party dictates is salient in contemporary South Africa (SA), as illustrated by the case of United Democratic Movement v Speaker of the National Assembly and Others (Council for the Advancement of the South African Constitution and Others as Amici Curiae) 2017 (8) BCLR 1061 (CC).

The weight of the rights outlined above, led the CC to rejecting the High Court’s conclusions. The CC concluded that none of the sections the High Court relied on prescribed the exclusive implementation of a party-based system.

**Proportional representation**

The court then moved onto an analysis of sch 6 of the Constitution. Provisions of this schedule specify that general elections must be based on a proportional representation system, where parties nominate candidates for office. The provisions make no accommodation for independent candidates. However, further analysis of the provisions, revealed that they were intended to be temporary; only applicable to the first elections under the Constitution. The court took note of its previous finding in the **United**
**CASE NOTE – LEGAL PRACTICE**

Democratic Movement case confirming the temporary nature of the provisions. Accordingly, the court held that the continued application of a strict proportional representation system based on these provisions is improper. Advancing further argument for a strict proportional representation system, the respondents referred the court to s 157(2)(a) of the Constitution. This section empowers Parliament to choose an electoral system for Municipal Councils based strictly on proportional representation. The respondent’s argument that interpreting s 19(3)(b) of the Constitution in a manner that allowed independent candidates in general elections, would contradict the position in Municipal Councils. Such a contradiction, they argued, could not be permitted.

The court rejected this argument, reasoning that the history of racially based spatial planning in municipalities necessitated the implementation of a proportional representation system at that level to achieve fairness. The court held that this historical context was unique to municipalities and not present at provincial or national level. Therefore, the respondents’ argument failed.

**Exclusive political party system**

The respondents directed the court to several other sections of the Constitution that mention political parties. The court was unconvinced that any of them justified the implementation of an exclusively party-based system.

**Constitutionality of previous elections**

The respondents argued should the applicants’ case succeed, it would jeopardise the validity of previous elections. A result, the respondents continued, that would be absurd. The court disagreed, noting its authority to craft a remedy that has limited retrospective effect, thereby preserving the sanctity of previous elections.

**Conclusion**

The CC declared the Electoral Act unconstitutional, insofar as it limits the rights of independent candidates to stand for public office in general elections. The court suspended the order for 24 months, to allow Parliament to remedy the defect. This landmark judgment marks the evolution of the South African democracy. It opens the possibility of an independent candidate being elected to the presidency.

---

**Costs are awarded where there is conduct that amounts to an abuse of process**

**Tjirazo v Appeal Board of the Financial Services Board (CC)**


In the Tjirazo matter, the Constitutional Court (CC) denied leave to appeal to the applicant Hitjive Obafemi Tjirazo, after he approached the CC on the basis that his s 34 right to a fair hearing had been undermined by collusion between the second respondent, the Financial Sector Conduct Authority (FSCA) and Senyatsi AJ, because the judge ‘knowingly held an interest in the matter’. This was after the respondent brought an application for leave to amend the notice to reflect its name correctly. This was a notice filed in a review proceeding instituted by the applicant in the Gauteng Division of the High Court in Pretoria. In the notice the second respondent referred to itself as the ‘Registrar of Financial Services Board’ instead of the ‘Registrar of Financial Services Providers’.

All other particulars were correctly reflected. However, the applicant opposed the interlocutory application, arguing that the notice of intention to oppose should be set aside, and the main application heard unopposed. Senyatsi AJ granted the application for leave to amend the notice of intention to oppose on the basis that the applicant had failed to substantiate the factual or legal basis for the prejudice he claimed he would suffer if leave was granted. The applicant, thereafter, instituted an urgent application in the High Court for the ex post facto recusal of Senyatsi AJ and ‘nullification’ of both the judgment granting the amendment and the one refusing leave to appeal. He stated that Senyatsi AJ had a conflict of interest arising, from, among others an alleged prior association with Norton Rose Fulbright and alleged that direct family relations between Senyatsi AJ and a Mr Nare Senyatsi, an employee of the second respondent.

The applicant had claimed that the urgency arose from the fact that the taxation of costs was imminent. That once the costs had been taxed, the second respondent would be entitled to enforce the ‘fraudulently obtained’ orders. He refused to oppose the taxation itself because if he entered that fray, he would be acquiescing to what he termed ‘unlawful and irregular’ proceedings.

The CC said that the applicant was seeking –

- leave to appeal the High Court judgments and orders of Senyatsi AJ and Holland-Muller AJ;
- the ex post facto recusal of Senyatsi AJ for the reason mentioned above;
- a declaration that Senyatsi AJ’s judg-

---

By Kgomotso Ramotshe

Muchengeti Hudson Hwacha LLB (UKZN) Cert Intellectual Property and Banking law (Wits) is a candidate legal practitioner at Lebea Inc Attorneys in Johannesburg.
ment and order relating to the inter-
locutory amendment application are
nullified;

• an order that the amendment applica-
tion be heard de novo;

• a declaration that the answering af-
idavit in the urgent application that
was determined by Holland-Muller AJ
should not have been considered by
the High Court; and

• an order setting aside the costs orders
against the applicant in the amend-
ment and urgent application.

The second respondent opposed the
applicant’s application at the CC on vari-
ous grounds. Firstly, the FSCA argued
that the matter was moot because –

• the second respondent was now the
FSCA;

• in the pending review the FSCA had
since been substituted for the Regis-
trar of Financial Services Providers;

• the amendment that the applicant was
seeking to undo related to the citation
of the second respondent before the
substitution;

• the applicant did not oppose the sub-
stitution; and

• that substitution now exists in fact
and in law.

The CC said that the second respond-
ent argued that an ex post facto recusal
application and consequent nullification
of a judgment is not competent in our
law. It averred that Senyatsi AJ was not
conflicted as at the time he determined
the amendment application, he had not
been with Norton Rose Fullbright for
about two decades and had last been
with that firm in 1999; and Mr Nare Sen-
yatsi is not directly related to Senyatsi AJ
does not even know him. The appli-
cant baldly asserted that Mr Nare Seny-
atsi was lying. The CC added that the
second respondent prayed for a punitive
costs order because of the applicant’s
litigation tactics and downright abuse of
court process.

The CC explained that the case is moot
‘if it no longer presents an existing or
live controversy’. The CC added that if
Senyatsi AJ was recused, and his order
granting leave to amend the citation of
the second respondent is overturned,
this would have no practical effect on
the parties or anyone else. Neither the
Registrar of the Financial Services 'Pro-
vider' nor the Registrar of the Financial
Services 'Board' remains a respondent
in the main application. The CC pointed
out that it is so because the substitution
of the FSCA in terms of s 300(3) of the
Financial Sector Regulation Act 9 of 2017
and under the notice of substitution filed
on 13 April 2018. In addition, since the
applicant has not opposed the substitu-
tion, it stands. The application falls to be
dismissed on this basis as well.

The CC said based on the above find-
ing the matter does not raise a consti-
tutional issue, the principles set out
in Biowatch Trust v Registrar, Genetic
Resources, and Others 2009 (6) SA 232
(CC) at para 23 do not apply. The CC
questioned if the punitive scale prayed
for was warranted? The CC referred to
a matter between the Public Protector v
South African Reserve Bank 2019 (6) SA
253 (CC) at para 8 where Mogoeng CJ not-
ed that “[c]osts on an attorney and client
scale are to be awarded where there is
fraudulent, dishonest, vexatious conduct
and conduct that amounts to an abuse
of court process.” The CC pointed out
that although that was in the minority judg-
ment, the CC did not read the majority
judgment to differ on this. In the minor-
ity judgment Khampepe J and Theron J
further noted that “a punitive costs order
is justified where the conduct concerned
is “extraordinary” and worthy of a
court’s rebuke”. Both judgments referred
to Plastics Convertors Association of SA
on behalf of Members v National Union of
Metalworkers of SA and Others (2016) 37
ILJ 2815 (LAC) at para 46, in which the
Labour Appeal Court stated: “The scale
of attorney and client is an extraordinary
one which should be reserved for cases
where it can be found that a litigant con-
ducted itself in a clear and ineluctably
vexatious and reprehensible manner.

Such an award is exceptional and is in-
tended to be very punitive and indicative
of extreme opprobrium.’

The CC said that the applicant has been
litigating frivolously and vexatiously at
great expense to the second respondent.
In so doing, he has defamed a member
of the judiciary and gratuitously accused
some individuals of lying under oath
without an iota of evidence in substana-
tion. The CC added that the litigation,
which was plainly vexatious, was an at-
tempt by the applicant to hold onto what
he misleadingly perceives to be an advan-
tage. The CC pointed out that the subtext
is that an amendment will result in the
applicant losing that advantage; and that
it is what will cause him ‘prejudice’. The
CC said that has never been our law on
what constitutes prejudice of the nature
that may result in an amendment being
denied.

The CC said the norm is always to
grant an amendment if it will not cause
the other side an injustice that is incapa-
ble of being compensated by appropri-
ate award costs. The CC added that in
all three applications (including the one
that was brought to it), the applicant had
attempted to attack the second respond-
ent’s opposition based on minor techni-
calities. The CC pointed out that this was
purely to have the applications proceed
unopposed notwithstanding the second
respondent’s clear intention to oppose
all three applications. The court said in
doing so the applicant was abusing the
court process.

The CC said the cumulative effect of
all this called for a punitive costs order.
The CC refused leave to appeal and or-
dered the applicant pay the costs of
the second respondent on an attorney and
client scale.

Kgomotso Ramotsao
Cert Journ
(Boston) Cert Photography (Vega)
is the news reporter at De Rebus.
New legislation

Legislation published from 2 – 28 August 2020

Philip Stoop BCom LLM (UP) LLD (Unisa) is an associate professor in the department of mercantile law at Unisa.

Bills

Promulgation of Acts

Division of Revenue Amendment Act 10 of 2020. Commencement: 7 August 2020. GN873 GG43605/7-8-2020 (also available in isiXhosa).

Defence Amendment Act 6 of 2020. Commencement: To be proclaimed. GN874 GG43606/7-8-2020 (also available in isiZulu).


National Public Health Institute of South Africa Act 1 of 2020. Commencement: To be proclaimed. GN872 GG43604/7-8-2020 (also available in Sepedi).

Selected list of delegated legislation
Architectural Profession Act 44 of 2000
Final Guidelines and Framework for Professional Fees. BN91 GG43591/7-8-2020.

Broad-Based Black Economic Empowerment Act 53 of 2003
Determination of the address of the Broad-Based Black Economic Empowerment Commission. GenN428 GG43591/7-8-2020.

Companies Act 71 of 2008

Copyright Act 98 of 1978

Deeds Registries Act 47 of 1937
Amendment of regulations. GN R884 GG43614/14-8-2020 (also available in Afrikaans).

Disaster Management Act 57 of 2002
• Agriculture, land reform and rural development
Directions regarding spatial planning, land use management and land development processes. GenN431 GG43598/7-8-2020 (also available in Afrikaans).

• Education

• Employment and labour

• Environment, forestry and fisheries
Amendment of the directions to address, prevent and combat the spread of COVID-19 in the biodiversity sector. GN870 GG43602/7-8-2020.

• Healthcare
Directions in respect of measures to prevent and combat the spread of COVID-19 in the health sector. GN R868 GG43600/7-8-2020.

• General regulations
Directions in terms of reg 3(3) of the regulations made under sub 2(7): Criteria that will guide the determination of alert levels. GN R867 GG43599/7-8-2020. Determination of Alert Level 2 (COVID-19 lockdown) in terms of reg 3(1). GN891 GG43620/17-8-2020.

• Home Affairs
Amendment of the directions in respect of measures to prevent and combat the spread of COVID-19 in Home Affairs services. GN923 GG43650/25-8-2020.

• Social development
Amendment of the directions issued in terms of reg 4(5) in respect of measures to prevent and combat the spread of COVID-19: Temporary disability grants and the review procedure regarding the rejected applications of the COVID-19 social relief of distress grant and related matters. GN853 GG43588/6-8-2020.

• Sports, arts and culture
Amendment of directions regarding measures to address, prevent and combat the spread of COVID-19 in the sports, arts and culture: Allowing sporting events, training and matches to resume and allowing the opening of libraries, museums, cinemas, theatres, galleries and archives. GN852 GG43584/6-8-2020. Amendment of directions regarding measures to prevent and combat the spread of COVID-19 in sport, arts and culture. GN943 GG43667/28-8-2020.

• State of disaster

• Tourism

• Transport

Electronic Communications Act 36 of 2005

Financial Sector Regulation Act 9 of 2017
Amendment of the Regulations. GN850 GG43581/5-8-2020 (also available in Setswana).

Financial Services Board Act 97 of 1990

International Trade Administration Act 71 of 2002

DE REBUS - OCTOBER 2020

Labour Relations Act 66 of 1995
List of bargaining councils that have been accredited by the Commission for Conciliation, Mediation and Arbitration. GenN453 GG43660/28-8-2020.

Local Government: Municipal Finance Management Act 56 of 2003
Exemption of municipalities and municipal entities for the 2019/2020 financial year, from complying with the deadlines in subss 120(1) and (2), 127(1) and (2), 129(1) and 133(2). GN851 GG43582/5-8-2020.

National Education Policy Act 27 of 1996

National Environmental Management Act 107 of 1998

National Environmental Management: Biodiversity Act 10 of 2004

National Health Laboratory Services Act 37 of 2000
Determination of 1 September 2020 as the date on which the Act shall apply to the Forensic Chemistry Laboratories under the control of the Department of Health. Proc R28 GG43661/28-8-2020.

Planning Profession Act 36 of 2002

Project and Construction Management Professions Act 48 of 2000

Public Finance Management Act 1 of 1999

Rules Board for Courts of Law Act 107 of 1985
Amendment of the rules of the Supreme Court of Appeal, the High Court and the Magistrate's Courts of South Africa: Fees and tariffs. GN R858 GG43592/7-8-2020 (also available in Afrikaans).

Sectional Titles Act 95 of 1986
Amendment of regulations. GN R883 GG43614/14-8-2020 (also available in Afrikaans).

Special Investigating Units and Special Tribunals Act 74 of 1996

Draft Bills
- Draft Victim Support Services Bill. GN856 GG43591/7-8-2020.

Draft delegated legislation
- Amendment of the Plastic Carrier Bags and Plastic Flat Bags Regulations of 2003 in terms of the National Environmental Management Act 107 of 1998 for comment. GN869 GG43601/7-8-2020.
- Declaration of certain printing industry activities as controlled emitters and establishment of emission standards in terms of the National Environmental Management: Air Quality Act 39 of 2004 for comment. GN855 GG43591/7-8-2020.
- Draft dispensing fee to be charged by persons licensed in terms of subs 22C(1)(a) of the Medicines and Related Substances Act 101 of 1965 for comment. GN R886 GG43614/14-8-2020.
- Amendment of rules relating to the registration by medical practitioners and dentists of additional qualifications in terms of the Health Professions Act 56 of 1974 for comment. BN97 GG43632/21-8-2020.
- Regulations relating to a transparent pricing system for medicines and scheduled substance (draft dispensing fee for pharmacists) in terms of the Medicines and Related Substances Act 101 of 1965 for comment. GN R914 GG43633/21-8-2020.
- Regulations relating to the scope of the profession of radiography in terms of the Health Professions Act 56 of 1974 for comment. GN907 GG43632/21-8-2020.
- Amendment of directions regarding measures to address, prevent and combat the spread of COVID-19 in the National Department of Basic Education, all provincial departments of education, all education district offices and all in South Africa in terms of the Disaster Management Act 57 of 2002 for comment. GenN448 GG43642/21-8-2020.
- Amendment of the Ethical Rules of Conduct for Practitioners registered under the Health Professions Act 56 of 1974 for comment. BN98 GG43632/21-8-2020.
- Draft technical guidelines for validation and verification of greenhouse gas emissions in terms of the National Environmental Management: Air Quality Act 39 of 2004 for comment. GN920 GG43644/24-8-2020.
- Proposed regulations regarding fees for the provision of aviation meteorological services in terms of the South African Weather Service Act 8 of 2001 for comment. GN927 GG43655/26-8-2020.
- Amendment of the rules relating to good pharmacy practice in terms of the Pharmacy Act 53 of 1974 for comment. BN100 GG43660/28-8-2020.

NEW LEGISLATION

Opt in to receive a free digital copy of De Rebus sent to your inbox

www.derebus.org.za
Retrenchments during business rescue

In South African Airways (SOC) Ltd (in Business Rescue) and Others v National Union of Metalworkers of South Africa obo Members and Others (3) [2020] 8 BLLR 756 (LAC), the Labour Appeal Court (LAC) considered whether dismissals for operational requirements during business rescue are permissible.

In this case, business rescue practitioners had been appointed following South African Airways (SAA) being placed under voluntary business rescue in December 2019. The business rescue practitioners issued the employees with s 189(3) notices to commence a retrenchment consultation process. These notices were issued prior to a business rescue plan being finalised. The business rescue practitioners also attempted to agree to reduce the time frame of the consultation period under s 189A of the Labour Relations Act 66 of 1995 (the LRA). The unions refused to participate in the consultation process and approached the Labour Court (LC) in terms of s 189A(13) of the LRA seeking a declaratory order stating that the s 189(3) notices be declared unlawful, alternatively, that the notices be withdrawn. It was found, however, that SAA was entitled to offer voluntary severance packages to employees.

The matter was then taken on appeal. The business rescue practitioners argued that the LC had misinterpreted the Companies Act and that the notices could be issued prior to the business rescue plan being finalised. The unions cross-appealed against the finding that voluntary severance packages could be offered in circumstances where retrenchments are prohibited. By the time of the hearing of the appeal the business rescue plan had already been finalised and published rendering the appeal moot. The LAC found that in terms of the Companies Act it is clear that a business rescue plan must be finalised before embarking on retrenchments. The appeal was accordingly dismissed.

As regards the cross-appeal, it was found that the LC did not make any order regarding the offer of voluntary retrenchment packages. The judgment simply stated that there is no basis in s 189 of the LRA or s 136 of the Companies Act to argue that a moratorium on retrenchments during business rescue proceedings prohibits a business rescue practitioner from offering a voluntary severance package as a measure to avoid retrenchment. Given the fact that there was no order to this effect, this was not

Join the Law Society of South Africa’s Legal Education and Development Department for a webinar in

LABOUR MATTERS

The ‘new normal’ rules of Workplace Health and Safety brought on by COVID-19

7 October 2020 • 10:00 - 13:00
Visit www.LSSALEAD.org.za for more information.
Unilateral changes to terms and conditions of employment during national state of disaster

In Macsteel Service Centres SA (Pty) Ltd v National Union of Metalworkers of South Africa and Others [2020] 8 BLR 772 (LC), the Labour Court (LC) per Prinsloo J considered whether employees who embarked on strike action participated in a protected strike when their employer made a reduction to their salaries as a result of the national state of disaster relating to the COVID-19 pandemic.

During Alert Level 5 of the national lockdown, which took place in South Africa (SA) to deal with the national state of disaster, the employer had been unable to operate as it was not an essential service and this resulted in severe financial loss. The employees were nevertheless paid their full salaries during March and April and they were not required to use annual leave during the shutdown period. However, on 1 May the employer announced to the employees that they would all be required to have a 20% pay cut for the next three months and this would be reviewed from time to time. It was also communicated to the employees that there would be no increases and other allowances and benefits would be done away with. The employer also did not require its entire workforce to return to work after SA moved into Alert Level 4 and a number of employees were required to stay at home. The employer undertook to apply for benefits from the Temporary Employee/Employer Relief Scheme (TERS) and to pay these benefits to employees as soon as such benefits were received.

The National Union of Metalworkers of South Africa (NUMSA) objected to these measures and referred a dispute to the bargaining council seeking that the employer would not unilaterally amend its members’ terms and conditions of employment. The employer argued that these amendments were required in order to avoid drastic measures such as retrenchments. Furthermore, the employer alleged that together with the benefits that the employees would receive from TERS the employees would effectively still receive their full salary for May. NUMSA then gave notice of an intended strike if the employer did not revoke its decision. When the strike commenced the employer launched an urgent application to have the strike declared unprotected and to order the employees to resume work. The employer argued that the strike was unlawful because the salaries would not be reduced given the TERS benefits that the employees would receive and furthermore that the demands related to matters that had not yet taken place or been decided on.

The LC declined to grant an order directing the employees to return to work, as there were other means available to the employer if the strike was indeed unprotected. In determining whether the strike was protected, the LC considered whether the employees would receive their full salaries in May, June and July. The employer argued that their intention had been to ensure that all employees received a salary even those who did not return to work as it did not want to treat one group of employees more favourably than the other. Prinsloo J expressed concern with this approach and suggested that those who were working their normal hours should continue to receive their normal salary and there should be a distinction between those employees who were working their normal hours and those who were not working at all.

The employer also referred to the fact that it had fully paid employees for the five weeks of lockdown during which no services had been rendered and it only applied a 20% reduction in salary despite the fact that the employer had only been permitted to operate at 50% capacity.

The LC found that the 20% reduction in salary constituted a unilateral change to terms and conditions of employment and the employees had not agreed to this change. Therefore, the LC found that the 20% reduction in salary constituted a unilateral change to terms and conditions of employment. The LC accordingly found that a change to remuneration constitutes a change to terms and conditions of employment and the employees had not agreed to this change. The LC further noted that the decision may have been different had the employer given an undertaking that it would meet the shortfall if the TERS payment did not cover the employees’ entire salaries.

The application was dismissed.

The respondent employee commenced his employment with Legal Aid South Africa in 2007. In 2010 he was diagnosed and treated for depression. Later that same year the employee, suffering from depression and high anxiety, was booked off for a week. It was at this stage and by way of the medical certificate that the employer became aware of the employee’s health condition.

Over the following years the employee’s depression caused him to be absent from work. Prior to September 2013 he received a final written warning for absent without due cause. From February 2013 he was suffering from depression and high anxiety, was booked off for a week. It was at this stage and by way of the medical certificate that the employer became aware of the employee’s health condition.

The LC found that the strike was protected but the employees had not agreed to this change. Therefore, the LC found that the 20% reduction in salary constituted a unilateral change to terms and conditions of employment. The LC accordingly found that a change to remuneration constitutes a change to terms and conditions of employment and the employees had not agreed to this change. The LC further noted that the decision may have been different had the employer given an undertaking that it would meet the shortfall if the TERS payment did not cover the employees’ entire salaries.

The application was dismissed.

Moksha Naidoo BA (Wits) LLB (UKZN) is a legal practitioner holding chambers at the Johannesburg Bar (Sandton), as well as the KwaZulu-Natal Bar (Durban).

Employee alleges being dismissed on account of his depression

Legal Aid South Africa v Jansen (LAC) (unreported case no CA3/2019, 21-7-2020) (Murphy AJA with Waglay JP and Phatshoane ADJP concurring)

The respondent employee commenced his employment with Legal Aid South Africa in 2007. In 2010 he was diagnosed and treated for depression. Later that same year the employee, suffering from depression and high anxiety, was booked off for a week. It was at this stage and by way of the medical certificate that the employer became aware of the employee's health condition.

Over the following years the employee's depression caused him to be absent from work. Prior to September 2013 he received a final written warning for absent without due cause. From February 2013 he was suffering from depression and high anxiety, was booked off for a week. It was at this stage and by way of the medical certificate that the employer became aware of the employee's health condition.

The LC found that a change to remuneration constitutes a change to terms and conditions of employment. The LC accordingly found that a change to remuneration constitutes a change to terms and conditions of employment. The LC further noted that the decision may have been different had the employer given an undertaking that it would meet the shortfall if the TERS payment did not cover the employees' entire salaries.

The application was dismissed.

Moksha Naidoo BA (Wits) LLB (UKZN) is a legal practitioner holding chambers at the Johannesburg Bar (Sandton), as well as the KwaZulu-Natal Bar (Durban).

Employee alleges being dismissed on account of his depression

Legal Aid South Africa v Jansen (LAC) (unreported case no CA3/2019, 21-7-2020) (Murphy AJA with Waglay JP and Phatshoane ADJP concurring)

The respondent employee commenced his employment with Legal Aid South Africa in 2007. In 2010 he was diagnosed and treated for depression. Later that same year the employee, suffering from depression and high anxiety, was booked off for a week. It was at this stage and by way of the medical certificate that the employer became aware of the employee's health condition.

Over the following years the employee's depression caused him to be absent from work. Prior to September 2013 he received a final written warning for absent without due cause. From February 2013 he was suffering from depression and high anxiety, was booked off for a week. It was at this stage and by way of the medical certificate that the employer became aware of the employee's health condition.

The LC found that a change to remuneration constitutes a change to terms and conditions of employment. The LC accordingly found that a change to remuneration constitutes a change to terms and conditions of employment. The LC further noted that the decision may have been different had the employer given an undertaking that it would meet the shortfall if the TERS payment did not cover the employees' entire salaries.

The application was dismissed.
being unfairly discriminated against as a result of his depression.

At proceedings before the LC, the court curiously ruled that the employer lead its evidence first despite the parties not agreeing to the reason why the em- ployee was dismissed. Pursuant to this ruling, the employer opted not to lead any evidence.

On behalf of the employee, the only person to testify was Ms Farre, the em- ployee’s clinical psychologist. Her evi- dence was that the employee showed ‘in- tense symptoms of temporary reactive depression’, which worsened in 2013 and that he was clearly not coping with his work environment. She further testi- fied that he displayed signs of burnout and that in her view, he was emotionally drained and, therefore, unable to func- tion properly in his daily tasks.

The court a quo found that the em- ployee had put up a prima facie case in support of the reasons for his dismissal as alleged and that he had been unfairly discriminated against. In the absence of the employer leading any evidence to re- but the version before the court, the em- ployer was ordered to retrospectively re- instate the employee and to further pay him six months’ salary as compensation.

On appeal the Labour Appeal Court (LAC) reiterated the principle that an em- ployee claiming an automatically unfair dismissal bears the evidentiary burden to sufficiently raise a credible possibility that the reason of their dismissal is as alleged. This is done by meeting both the factual and legal requirements of causa- tion.

The central question as phrased by the LAC was whether there was ‘a cred- ible possibility that the respondent was subject to differential treatment on the prohibited ground of depression’.

The LAC noted that the employee ad- mitted to all four counts of misconduct but maintained that his conduct was a consequence of his depression, which obscured his ability to conduct himself in a manner where he could appreciate the wrongfulness of his misconduct and which effected his self-control.

The LAC held that depression is a form or illness that calls on an employer to in- voke the procedures set out in items 10 and 11 of the Code of Good Practice: Dis- missal when addressing an employee’s inability to deliver a satisfactory stand- ard due to their depression.

Depression may also play a material factor when charging an employee for misconduct. If it is established that an employee who, on account of their de- pression, their state of mind (cognitive ability) as well as their will (conative abil- ity) has been impacted to the extent that they are unable to appreciate the wrong- fulness of their actions – then dismissal for reasons of misconduct would be inappropriate and substantively unfair and the employer ought to approach the issue in terms of incapacity or an opera- tional requirements perspective.

Alternatively, if an employee’s depres- sion does not impede their cognitive and conative abilities, their depression may nevertheless diminish their culpability which in turn will serve as a mitigating factor when deciding the appropri- ateness of a sanction.

Conative ability, according to the LAC was a question of fact where the onus lies with an employee claiming their de- pression impacted their conative ability, to prove same.

Moving on from this point the LAC held: ‘However, for an employee to suc- ceed in an automatically unfair dismissal claim based on depression, the question is different. Here the inquiry is not con- fined to whether the employee was de- pressed and if his depression impacted on his cognitive and conative capacity or diminished his blameworthiness. Rather, it is directed at a narrower determina- tion of whether the reason for his dis- missal was his depression and if he was subjected to differential treatment on that basis. Here too, the employee bears the evidentiary burden to establish a credible possibility (approaching a prob- ability) that the reason for dismissal was differential treatment on account of his being depressed and not because he mis- conducted himself.’

In casu, notwithstanding the fact that the employee did indeed suffer from depression, he had failed to put up a plausible case to accept that his acts of misconduct was caused by his state of depression. The employee led on evi- dence to establish for example, that his depression formed the basis why he could not call or send his manager a mes- sage informing him of his absence. His psychologist examined him a year before the misconduct and she likewise could not determine whether the employee’s state of depression was the underlying reason for his misconduct.

The court held: ‘It may well be that but for his depression factually (conditio sine qua non) the respondent might not have committed some of the misconduct; but, still, he has not presented a credible pos- sibility that the dominant or proximate cause of the dismissal was his depres- sion. The mere fact that his depression was a contributing factual cause is not sufficient ground upon which to find that there was an adequate causal link between the respondent’s depression and his dismissal so as to conclude that depression was the reason for it. … What most immediately brought about the dismissal? The proximate reason for the respondent’s dismissal was his four instances of misconduct. It was not his depression, which at best was a contribut- ing or subsidiary causative factor.’

Having found the employee had not presented a credible case, which sup- ported the reasons for dismissal as he alleged, the LAC upheld the appeal with no order as to costs.

It is noteworthy that the court again repeated the fact that depression would be a consideration when determining the substantive fairness of an employee’s dismissal. However, the employee did not – in his pleadings before the LC – challenge the substantive fairness of his dismissal vis-à-vis the acts of miscon- duct for which the employer dismissed him. Hence, whether his dismissal for misconduct was substantively fair in light of the employee’s depression was not an issue the LAC or the LC was called to decide on.

---

**What we do for ourselves dies with us, What we do for others and the world remains and is immortal** – Albert Pine

www.salvationarmy.org.za
Recent articles and research

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Title</th>
<th>Publisher</th>
<th>Volume/issue</th>
</tr>
</thead>
<tbody>
<tr>
<td>AHRLJ</td>
<td>African Human Rights Law Journal</td>
<td>Centre for Human Rights, Department of Law, University of Pretoria</td>
<td>(2020) 20.1</td>
</tr>
<tr>
<td>ANULJ</td>
<td>Africa Nazarene University Law Journal</td>
<td>Juta</td>
<td>(2020) 7.2</td>
</tr>
<tr>
<td>BTCLQ</td>
<td>Business Tax and Company Law Quarterly</td>
<td>SiberInk</td>
<td>(2020) 11.2</td>
</tr>
<tr>
<td>EL</td>
<td>Employment Law Journal</td>
<td>LexisNexis</td>
<td>(2020) 36.4</td>
</tr>
<tr>
<td>ILJ</td>
<td>Industrial Law Journal</td>
<td>Juta</td>
<td>(2020) 41</td>
</tr>
<tr>
<td>JCLA</td>
<td>Journal of Comparative Law in Africa</td>
<td>Juta</td>
<td>(2019) 6.1</td>
</tr>
<tr>
<td>PER</td>
<td>Potchefstroom Electronic Law Journal</td>
<td>North West University, Faculty of Law</td>
<td>(2020) 23</td>
</tr>
<tr>
<td>TPCP</td>
<td>Tax Planning Corporate and Personal</td>
<td>LexisNexis</td>
<td>(2020) 34.4</td>
</tr>
<tr>
<td>TSAR</td>
<td>Tydskrif vir die Suid-Afrikaanse Reg</td>
<td>Juta</td>
<td>(2020) 3</td>
</tr>
</tbody>
</table>

Administrative law
Henrico, R ‘Legislative administrative action and the limited extent of public participation’ (2020) 3 TSAR 496.

Basic education

Child law

Constitutional law
Kathi, T; Mhiribidi, R; Shezi, N; Kamoleane, B; Makuwa, A and Moloko, T ‘Constitutional Court statistics for the 2018 term’ (2020) 36.1 SAJHR 112.
Moleya, NL ‘Revisiting the jurisdiction of the Constitutional Court on constitutional matters in light of Jacobs v S’ (2020) 36.1 SAJHR 93.

COVID-19 – labour law
Grogan, J ‘No pay, no work: Strike action during lockdown’ (2020) 36.4 EL.

COVID-19 – tax relief
Davey, T ‘Tax dispute time period relief: Certain “lockdown” days are dies non’ (2020) 34.4 TPCP.

Criminal law, litigation and procedure

Delictual law

Disaster management – sectional titles
Van der Merwe, GG ‘Comparative law review of how South Africa and other comparable jurisdictions have catered for the holding of general and trustee meetings in sectional title schemes without coming into conflict with the regulations issued in terms of the Disaster Management Act’ (2020) 3 TSAR 401.

Divorce law
Sonnekus, JC ‘Uitstaande skuld van ’n egpaar getroud in gemeenskap van goed jeens derdes ná egskeiding steeds ver- haalbaar van beide voormalige gades’ (2020) 3 TSAR 562.

Estate planning, wills and trusts
Mitchell, L ‘Lump sum or annuity: Election of a deduction or an exemption?’ (2020) 34.4 TPCP.
Mochela, RJ and Smith, BS ‘Mind the gaps!’: Legal differentiation between same-sex and heterosexual cohabittees regarding intestate succession – options for reform and comparative insights into the regulation of “polygamous” life partnerships (part 1)’ (2020) 2013 (1) SACR 42 (SCA)’ (2020) 20.1 AHRLJ 315.

Freedom of expression and hate speech

International child law

International company law
Kilian, N ‘Legal implications relating to being “entitled to serve” as a director: A South African–Australian perspective’ (2020) 23 PER.

International criminal law
Ojwang, D ‘The place of culture at the International Criminal Court: The trial of Ruto and Sang’ (2019) 7.2 ANULJ 47.

International cyber law

International environmental law

International human rights law
Murigi, HK ‘Adjudicating international humanitarian law and human rights law in the application of international humanitarian law’ (2020) 20.1 AHRLJ 41.

International labour law
Mujuzi, JD ‘The right not to be discriminated against in employment in Kenya’ (2020) 41 ILJ 1547.

International public health
Twinomugisha, BK ‘Using the right to health framework to tackle non-communicable diseases in the era of neoliberalism in Uganda’ (2020) 20.1 AHRLJ 147.

International law

Labour law


Grogan, J ‘“Deemed” dismissals: Why aren’t they dealt with under the LRA?’ (2020) 36.4 EL.


Mitchell, K ‘Foreign employment – III: Full days and “work days” requirements’ (2020) 34.4 TPCP.


Land reform

Matrimonial law
Smith, B ‘The dependant’s action for loss of support and a life partnership involving a pre-existing civil marriage: An unfortunate tale’ (2020) 3 TSAR 576.

Property law
Afolabi, SO ‘Demystifying the myth of immovability attached to immovable property in terms of property law’ (2019) 7.2 ANULJ 33.


Sonnekus, JC and Schlemmer, EC ‘Ge-perfekteerde notariële verband van ‘n bank in mededinging met die aanspraak van ‘n korporatietjie’ op dieselselfe kalwers as verhaalsobjekte’ (2020) 3 TSAR 510.


Refugee law

Khan, F ‘Does the right to dignity extend equally to refugees in South Africa?’ (2020) 20.1 AHRLJ 261.

Socio-economic rights
Mahomed, S ‘Extra-judicial engagement in socio-economic rights realisation: Lessons from #FeesMustFall’ (2020) 36.1 SAJHR 49.

Maziwisa, MR and Lenaghan, P ‘Rethinking the right to water in rural Limpopo’ (2020) 20.1 AHRLJ 233.

Surrogacy

Tax law
Barker, P ‘Systems shortcomings: Determination of a capital gain or capital loss’ (2020) 34.4 TPCP.

Clegg, D ‘Namibian manufacturers’ (2020) 34.4 TPCP.


Meiring, G ‘The tax director – IV: Understand and be prepared for changes’ (2020) 34.4 TPCP.


Venter, Z ‘Split lotto winnings: Some tax thoughts’ (2020) 34.4 TPCP.
Another attack on attorneys by the estate agency industry?

By Maartens Heynike

There appears to be a perception in the real estate agency industry that it should control the entire supply chain in a property transaction. That is, from accepting a mandate, to finally paying the proceeds of the sale to the seller, including the role of the legal practitioner.

This is probably why Proxi-Smart Services (Pty) Ltd (Proxi-Smart) was conceptualised. Fortunately, the bold and dangerous ambitions of Proxi-Smart were thwarted in court (see Proxi Smart Services (Pty) Ltd v Law Society of South Africa and Others (CC) (unreported case no CCT114/19, 5-8-2019) (Mogoseng CJ, Cameron J, Fromeman J, Jafita J, Khampa pe J, Madlanga J, Mhlantla J, and thermal JJ). (The dire consequences to both the legal profession, and the public at large, had Proxi-Smart been successful, are widely acknowledged by the legal profession and is not discussed in this article. It has been ably and persuasively argued in court.)

The history of attorneys acting as estate agents

It is trite law that legal practitioners have been acting as estate agents from time immemorial and are, arguably, the oldest regulated estate agents in South Africa (SA) (see Incorporated Law Society of the Orange Free State v Kalil and Meltz 1951 (3) SA 645 (O) at 648F and De Jager & Vennote v Van Ravensteyn [1983] 1 All SA 416 (C)).

The Estate Agency Affairs Board

Of late, the Estate Agency Affairs Board has adopted a policy that legal practitioners may only act as estate agents in a very narrow band of circumstances. (That is, only when a legal practitioner is instructed by an existing client. For example, a mandate from an executor of a deceased estate or a liquidator of an insolvent estate.)

This policy is probably based on a restrictive interpretation of the phrase ‘... in the course...’ in s 1(d) of the Estate Agency Affairs Act 112 of 1976 (the Act).

The same terminology is used in the Property Practitioners Act 22 of 2019 (the New Act). (This is probably why reg 35(a)(6) found its way on the statute book (see GenN139 GC43073/6-3-2020 (the regulations)).

In the De Jager case, the precise import and meaning of the words ‘... in the course of ...’ in s 1(d) of the Act, were debated and ruled on.

The relevant excerpt, the De Jager case, which I freely translated from Afrikaans into English appears below: ‘... but I am of the opinion that the Legislature, when bearing in mind, the relevant words [‘... in the course of ...’ in s 1(d) of the Act], was mindful of the type of multi-practice activities of a practising attorney and intended to exclude estate agency work from the ambit of the Estate Agency Affairs Act.’

Sadly, this important practice of legal practitioners gradually fell into disuse through the years.

The rise of the estate agent

Conversely, whether by design or accident is uncertain, but with the introduction of the Act in 1976, estate agents were forced to organise and structure themselves to comply with the Act. (The use of the expression ‘estate agent’ was preferred to ‘property practitioner’ as the New Act was not in force at the time of writing this article.)

During this period, a number of estate agencies developed into powerful and influential businesses, while legal practitioners preferred to rely on estate agents for an income stream, rather than plying their century-old trade of selling properties themselves.

Thus, in the real estate agency realm, which includes the sale and transfer of immovable property, the pendulum of power gradually swung from the legal profession to estate agencies, which began to control the entire industry and for good reason as explained below.

The essential role of the estate agent

It is generally accepted, that after death and divorce, relocation is the most stressful experience a person may have to endure. Relocation usually goes hand-in-hand with selling immovable property.

During this time, most sellers and purchasers are uncertain, uninformed, and anxious and rely heavily on the estate agent for guidance when important and life-changing decisions have to be made.

Thus, the role of the estate agent has evolved into one, of not only being an expert in their field, but also that of a ‘therapist’. In short, they manage the stress of both seller and buyer.

The unethical alliance between attorney and estate agent

By the time the deal is closed, both the seller and purchaser trust the estate agent completely.

Legal practitioners, like any other service provider, rely on the estate agent for a mandate to transfer the property, which is only one of a range of new business opportunities (such as interior decorators, garden services, builders, painters, bond originators, banks, etcetera) that follow from the sale of immovable property.

Add to the mix, the fact that there is a plethora of legal practitioners vying for conveyancing work through estate agents, and a perfect storm is created for a dangerous and unethical relationship between the legal practitioner and estate agent.

It is widely known, but less often mentioned, that unless some estate agents (mercifully not all) are ‘persuaded’ with free lunches, gifts, even holidays, hunting trips, sponsored school fees, marketing or rental expenses, the attorney will not get conveyancing mandates via the estate agent.

Although estate agents are ethically and legally bound to inform the seller that it is the seller’s prerogative to appoint a conveyancer of his choice, this rarely happens in practice.

The problem is compounded by the seller being ignorant of their rights and by relying on the estate agent to recommend a conveyancer.

It is, therefore, understandable that estate agents began to believe that they control the entire supply chain in a property transaction – including the appointment of a conveyancer.

The reliance on the estate agent is misplaced and abused. Sellers should always...
The proposed regulations

Sadly, as noble, and well-intended as the New Act may be, should the proposed regulations, stand unamended, it will seriously frustrate the goals of the New Act, not to mention a loss of benefits to and rights of the members of the public who will be deprived of a cost-effective and comprehensive property law service exclusively provided by practising attorneys.

This potential threat has been brought about by legal practitioners, inexplicably and irrationally, in the regulations.

The regulations (the disputed regulations) that affect the attorneys are:

- Regulation 34(a)(vi):

  ‘34. Code of conduct: Residential property practitioners
  General duty to protect the public’s interest
  a) In terms of a property practitioners’ general duty to members of the public and other persons or bodies, a property practitioner -...
  vi) shall not have any interest, whether directly or indirectly in any legal practice that provides conveyancing services to the clients and customers of such property practitioner or any sole proprietorship, partnership, company, close corporation, business trust or similar entity in which that property practitioner holds a direct or indirect interest.’

- Regulations 35(a)(i) and 35(a)(ii):

  ‘35. Undesirable business practices
  a) Pursuant to the provisions of section 63(1) of the Act, the following business practices are prohibited -
  i) The soliciting or acceptance of mandates for the sale of properties from members of the public by an attorneys’ practice (whether such practice is on the attorney’s own account, as a partner in a firm of attorneys or as a member of a professional company), save that this shall not apply to the existing clients of the practice;
  ii) Any arrangement in terms of which any attorney or attorney’s practice provides conveyancing services to any parties to a property transaction which has in any way been brokered or arranged either by such attorney or attorneys [sic] practice or by any property practitioner in which such attorney or member of such attorney’s practice or any person related to such attorney or member of an attorney’s practice has any direct or indirect interest.

The shocking reality is, should the disputed regulations stand, it will not only affect legal practitioners, acting as estate agents, but most legal practitioners, whether they trade as estate agents or not.

This means that any legal practitioner, instructed by either a seller or a purchaser to prepare a sale agreement, and who has negotiated and finalised (brokered or arranged) the terms of such an agreement, will be precluded from attending to the conveyancing services and the transfer of property that flow from this property transaction.

I submit that the disputed regulations are not only irrational and unconstitutional but also ultra vires.

It begs the question why attorneys, who are already supervised by the Legal Practice Act 28 of 2014, the regulations published thereunder and the Legal Practice Council, must now be subjected to these regulations.

Add to this the fact that legal practitioners, per se, are expressly excluded (see the definition of respectively an ‘estate agent’ in the Act and ‘property practitioner’ in the New Act) from both the Act and the New Act, and the inclusion of attorneys in the regulations, become even more bizarre.

I submit that the disputed regulations do not offer a single benefit to the public who will, inter alia, be deprived of their constitutional right to appoint an attorney of their choice. However, it would hugely benefit estate agents, as competition from the legal practitioners, acting as estate agents, would be virtually non-existent.

Time for action

I suggest that the legal profession should at all costs, oppose these disputed regulations. Although many legal practitioners have submitted objections to the Minister for Human Settlements, Water and Sanitation and have requested that the disputed regulations be removed from the final regulations, there is no guarantee that the minister will heed to these requests. Should the disputed regulations stand the legal profession will have no choice but to take the matter to court.

I suggest that the time has come for legal practitioners, who practise both as attorneys and estate agents, to form an independent association to promote and protect the specific interests of these legal practitioners.

This is critically important, not only to the legal profession and the public, but also to historically disadvantaged individuals.

Maartens Heynike BCom LLB (Stell) LLM (UJ) is a legal practitioner at Heynike Inc Attorneys in Randburg.

have the right to appoint legal practitioners of their choice to protect the interests of the seller without a conflict of interest between legal practitioners and estate agents.

This is acknowledged in the Estate Agency Affairs Board Code of Conduct, which forbids estate agents from influencing seller to refer a transfer to such agent’s preferred legal practitioner.

The return of the attorney as estate agent

Legal practitioners became increasingly aware of this dilemma. Approximately 20 years ago and probably borne from the frustration of receiving mandates through estate agents, legal practitioners began to sell properties themselves.

And so, an age-old trade and practice that has been plied by the legal profession for hundreds of years, was re-dusted, polished, and put to use again.

I submit that legal practitioners, by reason of their knowledge, training, and practical experience, are ideally suited to fulfil both the role of estate agent and conveyancer.

There are many benefits to the selling and buying public when an attorney fulfils the role of both estate agent and transferring conveyancer.

Legal practitioners can do it at a lower sales commission. By using their law offices as the business hub from which to run their estate agency, a huge cost is saved. This saving is passed on to the seller by lowering the sales commission.

Interestingly, the estate agent’s commission structure in SA is of the highest in the world. Worldwide the going rate is between 2% – 3% of the sale price. In SA it is between 5% and 10% of the sale price. By reducing the sales commission, the seller can reduce the price, which in turn benefits the purchaser.

Practising legal practitioners, through their comprehensive knowledge of the law, skills, and experience also provide legal advice and ensure legal compliance.

Transformation

More importantly, legal practitioners are in an ideal position to provide a cost-effective platform to train and qualify aspirant estate agents within their law practices. Legal practitioners have been training candidate legal practitioners for centuries. It, therefore, makes perfect sense to take on would-be estate agents and to train them as well.

Thus, practising legal practitioners can offer an ideal and unique opportunity to accelerate transformation in the estate agency industry. (The preamble of the New Act notes that ‘transformation of the property market is a necessary intervention that will benefit the historically disadvantaged individuals.’)
There's no place like home.

We have our place. They have theirs. Visit nspca.co.za for more about the hazards of capturing and breeding exotic animals.
The Kirstenbosch Centenary Tree Canopy Walkway, also known as The Boomslang, takes visitors on a 130 metre-long walkway, snaking its way through the canopy of the National Botanical Garden’s Arboretum. The walkway is crescent-shaped and takes advantage of the sloping ground, touching the forest floor in two places and raising visitors to 12 m above ground in the highest parts. Kirstenbosch National Botanical Garden was established in 1913 to promote, conserve and display the extraordinarily rich and diverse flora of southern Africa. It was also the first botanical garden in the world to be devoted to a country’s indigenous flora.
Classified advertisements and professional notices

Closing date for online classified PDF advertisements is the second last Wednesday of the month preceding the month of publication.

Advertisements and replies to code numbers should be addressed to: The Editor, De Rebus, PO Box 36626, Menlo Park 0102.
Tel: (012) 366 8800 • Fax: (012) 362 0969.
Docex 82, Pretoria.
E-mail: classifieds@derebus.org.za

Account inquiries: David Madonsela
E-mail: david@lssa.org.za

Vacancies

A well established Garden Route Attorney firm requires the services of an experienced Cape Town based CONVEYANCER.

The successful candidate must:
• have at least three years' experience as an admitted attorney and Conveyancer;
• have extensive experience in preparation and lodgment of deeds at Deeds Registry and be able to attend to the Cape Town Deeds Office daily; and
• be able to work independently and remotely from Cape Town.

Recognising that diversity is key to excellence, preference will be given to suitably qualified candidates who are members of designated groups as defined in s 1 of the Employment Equity Act.

An attractive remuneration package will be offered to the right candidate.

CVs can be addressed to christine@stadlers.co.za

Young Dynamic Conveyancer

Miltons Matsemela Inc. a Cape Town based law firm is expanding to the Southern Cape.

We are looking for a qualified conveyancer who is driven and very marketing orientated to head up the office we will be opening in George.

Excellent prospects and benefits to the right candidate.

Send your CV through to frediw@miltons.law.za

Wanted

Legal practice for sale

We are looking to purchase a personal injury/Road Accident Fund practice.
Countrywide (or taking over your personal injury matters).

Contact Dave Campbell at 082 708 8827 or e-mail: dave@campbellattorneys.co.za

Nortje Attorneys Incorporated

— Northern Cape —

Legal practice for sale due to retirement.

Contact Marina Nortje at 082 825 7000 or e-mail: mcnortje@telkomsa.net

To let/share

Law Chambers to share

Norwood, Johannesburg

Facilities include reception, Wi-Fi, messenger, boardroom, library, docex and secure on-site parking. Virtual office also available.

Contact Margot Howells at (011) 483 1527 or 081 064 4643.
TALITA DA COSTA
CLINICAL PSYCHOLOGIST

WITH A SPECIAL INTEREST IN
NEUROPSYCHOLOGY

Expert testimony and medico-legal
assessments in:
Personal injury, RAF and insurance claims.

Tel: (011) 615 5144 • Cell: 073 015 1600
E-mail: officedacosta@gmail.com
ITALIAN LAWYERS
For assistance on Italian law (litigation, commercial, company, successions, citizenship and non-contentious matters), contact

Anthony V. Elisio
South African attorney and member of the Italian Bar, who frequently visits colleagues and clients in South Africa.

Rome office
Via Aureliana 53
00187 Rome, Italy
Tel: 0039 06 8746 2843
Fax: 0039 06 4200 0261
Mobile: 0039 348 514 2937
E-mail: avelisio@tin.it

Milan office
Galleria del Corso 1
20122 Milan, Italy
Tel: 0039 02 7642 1200
Fax: 0039 02 7602 5773
Skype: Anthony V. Elisio
E-mail: a.elisio@alice.it

LAND CLAIMS COURT
Correspondent
We are based in Bryanston, Johannesburg only 2.7 km from the LCC with over 10 years’ experience in LCC related matters.

Zahne Barkhuizen: (011) 463 1214 • Cell: 084 661 3089
E-mail: zahne@law.co.za
Avril Pagel: Cell: 082 606 0441 • E-mail: pagel@law.co.za

Handskrif- en vingerafrukdeskundige
Afgetrede Lt-Kolonel van die SA Polisie met 44 jaar praktiese onderrig in die ondersoek van betwiste dokumente, handskrif en tikskrif en agt jaar voltydse onderrig in die identifisering van vingerafrukdek. Vir ’n kwotasie en/of professionele ondersoek van enige betwiste dokument, handskrif, tikskrif en/of vingerafrukdek teen baie billike tariewe, tree in verbinding met

GM Cloete by tel en faks (012) 548 0275
of selfoon 082 575 9856.
Posbus 2500, Montanapark 0159
74 Heron Cres, Montanapark X3, Pta
E-pos: gerhardcloete333@gmail.com
Besoek ons webtuiste by www.gmc-qde.co.za
24-uur diens en spoedige resultate gewaarborg.
Ook beskikbaar vir lesings.

LindsayKeller effectively mediates disputes

LindsayKeller Attorneys offers mediation services prescribed by Rule 41A of the High Court.

Partner Danie Weideman is a CD/ACDS accredited mediator who helps parties to a dispute to find an amicable, out-of-court solution. Weideman brings 53 years of litigation experience to the mediation table.

Mediation preserves relationships and gives parties control over the outcome of a dispute. It is swift, confidential and cost effective.

For further information, contact Danie Weideman:
dweideman@lindsaykeller.com or (011) 880 8980

www.lindsaykeller.com

Would you like to write for De Rebus?

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

For more information, see the ‘Guidelines for articles in De Rebus’ on our website (www.derebus.org.za).

Supplement to De Rebus, October 2020