LAW SOCIETY
OF SOUTH AFRICA

DE REBUS

THE SA ATTORNEYS' JOURNAL

DECEMBER 2019

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On behalf of the House of Constituents and staff of the Law Society of South Africa, we wish all legal practitioners and candidate legal practitioners a peaceful Festive Season and a happy and prosperous New Year.

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Chapter 6 of the Companies Act 71 of 2008 introduced the concept of business rescue into South African company law. Unsurprisingly, as with any new piece of legislation, the business rescue provisions have and will continue to give rise to interpretative disputes between parties, litigation and ultimately helpful clarificatory judicial pronouncements. In this article, legal practitioner, **Gavin Schär**, addresses one such recent 'litigious dispute' – a dispute about what 'liquidation proceedings have been initiated' in the context of s 129(2)(*a*) of the Companies Act means – and summarises Sutherland J's judgment in *Tjeka Training Matters (Pty) Ltd v KPMM Construction (Pty) Ltd and Others* (GJ) (unreported case no 19661/2019, 21-6-2019) (Sutherland J).

16 Winding-up a company – who benefits?

In many cases, companies are placed in business rescue and business rescue practitioners dispose of the company's assets and eventually the company is liquidated. What normally happens is that a company is liquidated, and a provisional liquidator or liquidator takes charge of the assets before business rescue proceedings are instituted. The aim of legal practitioner, **Keith Braatvedt**'s article is to suggest that in a situation like this, there should be communication and cooperation between liquidators and the business rescue practitioner (BRP).

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Legal practitioner, **Michael Kabai**, discusses how exchanges play a role of intermediary or facilitator between buyers and sellers of securities. Exchanges must develop their own listing requirements and rules that must be approved by the regulator or the Financial Sector Conduct Authority (FSCA) (which on 1 April 2018 replaced the Financial Services Board) in terms of ss 11 and 71 of the Financial Markets Act 19 of 2012.

20 Superannuation – a common law remedy

Roman law made provision for the superannuation of civil proceedings three years after *litis contestatio* (*Sanford v Haley NO* 2004 (3) SA 296 (C) at para 7). Legal practitioners, **Marius van Staden** and **Stephen Leinberger**, discuss how this provision has not been adopted either in the Roman-Dutch law or in our common law. Rule 10 of the old Rules of Court provided that a claim could lapse if no steps were taken for more than 12 months after the issuing of summons. At this stage there are no specific Rules of Court or practice that provide that an action becomes superannuated because of effluxion of time for want of prosecution (*Sanford* at para 6).

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LPC: A year into office

As 2019 draws to an end, it is interesting to note that it has been a year since the Legal Practice Council (LPC) took over its duties as a statutory body – established in terms of s 4 of the Legal Practice Act 28 of 2014 (LPA) – to regulate the affairs of and exercise jurisdiction over all legal practitioners (attorneys and advocates) and candidate legal practitioners. The LPC recently held a networking session with its stakeholders to discuss matters of interest to the profession and to give the profession an opportunity to ask the LPC questions, after a year in office.

Addressing delegates at the networking event, Chairperson of the LPC, Kathleen Matolo-Dlepu, noted that the work done by the LPC over the past year has been geared towards making sure that the council implements its mandate as the regulatory body of the legal profession to the fullest. Speaking about the LPA, Ms Matolo-Dlepu said that the LPA provides a legislative framework for the fundamental transformation and restructuring of the legal profession in line with constitutional imperatives and to broaden access to justice. She added that the LPC derives its mandate from the LPA, which includes the following actions:

- The regulation of the legal profession, in the public interest by means of single statute.
- The removal of any unnecessary barriers for entry to the profession.
- The strengthening of the independency of the profession.
- The ensuring of accountability of the profession to the public.
- To set norms and standards for adequate legal education.
- To provide for the admission and enrolment of legal practitioners.

Ms Matolo-Dlepu pointed out that the LPC has fully implemented the provisions of reg 3 promulgated in terms of s 109(1)(*a*) of the LPA, which calls for the establishment of provincial councils. 'We are now operational in all nine provinces capacitated by 261 staff members throughout South Africa. We are now able to regulate just over 32 000 practising legal practitioners who are in our roll,' she added.

On the issue of subscriptions Ms Matolo-Dlepu noted: 'As the council we would like to acknowledge all the responses received from the profession on the gazetted notice we sent out on 4 October, on the fees payable to the council made under the authority of sections 95(1), 95(2) and 109(2) of the Act. The council is currently in the process of reviewing all the comments received and will in due course make sure that whatever decision is taken is to the benefit of the profession,' (see GenN 525 *GG*42739/4-10-2019 and www.derebus.org.za/lpc-notices).

The De Rebus Editorial Committee and staff wish all of our readers compliments of the season and a prosperous new year.
De Rebus will be back in 2020 with its combined January/February edition, which will be available at the beginning of February 2020.
De Rebus staff, back from left: Kevin O'Reilly, Isabel Joubert, Shireen Mahomed and Kathleen Kriel.
Seated from left: Kgomotso Ramotsho and Mapula Sedutla.

Ms Matolo-Dlepu said that the LPC has had advanced discussions with the Legal Practitioners' Fidelity Fund (the Fund) about the professional indemnity cover premiums. 'In our discussions with the Fund, they have agreed to postpone the payment of the Professional Indemnity Cover premium to the 2021 Fidelity Fund Certificate application cycle, and not for the 2020 cycle. We would like to urge legal practitioners to prepare for the payment of this premium as per the provision of section 74(1). The council is committed in assisting the Fund to ensure that this is implemented and fully operation by 2021.'

Speaking about the conveyancing examinations, Ms Matolo-Dlepu noted that one of the changes that was implemented was that first-time candidates did not have to write both papers on the same day, the papers were written a week apart. This was done to allow candidates enough time to prepare for both conveyancing papers, but also to enable access to the conveyancing profession as this process is envisaged to increase the number of graduates who register and pass the examinations.

Ms Matolo-Dlepu noted that one of the aspects the LPC will be tackling is transformation of the profession. She added that South Africa does not have enough legal practitioners in comparisons with other developing countries because the ratio is one legal practitioner for every 1 839 people, while Brazil has a ratio of one legal practitioner for every 262 people.

Send your views on the work conducted by the LPC in the past year to: mapula@derebus.org.za

Mapula Sedutla – Editor

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.**

- **Upcoming deadlines for article submissions: 20 January and 17 February 2020.**

LETTERS TO THE EDITOR

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Letters are not published under *noms de plume*. However, letters from practising attorneys who make their identities and addresses known to the editor may be considered for publication anonymously.

Are legal practitioners proficient in the conduct of their business?

In the recent case of *Fourie v Van der Spuy and De Jongh Inc and Others* (GP) (unreported case no 65609/2019, 30-8-2019) (Klein AJ) it was found that the legal practitioners were negligent, when they relied on an e-mail providing bank account details into which money held by the legal practitioners in trust was to be paid. The e-mail had been intercepted and the bank details changed to those of an account controlled by cybercriminals.

The judgment has a wider implication. Indeed, Leach JA (Nugent and Pillay JJA, Southwood and Erasmus AJJA concurring) in *Margalit v Standard Bank of South Africa Ltd and Another* 2013 (2) SA 466 (SCA) at para 23 quoted De Villiers CJ in *Van der Spuy v Pillans* 1875 Buch 133 at 135 as saying:

'Every attorney is supposed to be reasonably proficient in his calling, and if he does not bestow sufficient care and attention, in the conduct of business entrusted to him, he is liable; and where this is proved the court will give damages against him.'

The question that this begs is whether legal practitioners who use modern information and communication technologies in the conduct of their business are 'reasonably proficient in their calling'? As a practitioner who has dealt with information and communication technologies and the law that is evolving to address both the enormous benefits the information revolution holds, but also the abuse that may be catastrophic to unsuspecting victims, my view is that with a few shining exceptions the answer to this question must be a resounding no.

In 1996 I approached the Executive Council of the Association of Law Societies (as it was then known) to address this issue. At the time, I was dismissed and since then sporadic efforts have been made by the profession to ensure that attorneys are educated in the use and risks of modern technologies. These efforts have been all too few and have lacked the 'political will' and support of the leaders of the profession. Despite it being a requirement around the world that legal practitioners be cyber-capable, in South Africa we have chosen to be blind to the reality of the 21st century.

The business e-mail compromises referred to above, cost the legal practitioners in the case R 1,75 million. The Legal Practitioners' Indemnity Insurance Fund NPC advises that it has repudiated claims in excess of R 90 million since the exclusion of cyber-liability. In my dealings with the profession relating to education, both at academic institutions and in practical legal training, the excuse that has been made in dismissing suggestions to ensure proper training has often been one of cost. As the saying goes 'if you think education is expensive, try ignorance'. Indeed, R 90 million would have bought a whole lot of training.

Will the profession learn and take positive steps to rectify its own lack of proficiency, or will we doggedly cling on to 19th and 20th century practices? Those who are unwilling or unable to embrace the future will ultimately not only harm themselves, but also their clients, and of course the profession.

Mark Heyink *BA LLB (Wits) H Dip Company Law (Wits)* is a legal practitioner at Mark Heyink Information Attorney in Johannesburg.

Response from the Legal Practitioners' Indemnity Insurance Fund NPC

The Legal Practitioners' Indemnity Insurance Fund NPC (LPIIF) has read the letter from Mark Heyink 'Are legal practitioners proficient in the conduct of their business?'

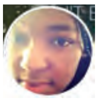
The LPIIF supports the point made

that legal practitioners must be aware of new and emerging risk areas, such as cyber risk. In recent years, legal practitioners around the world have increasingly been the target of cybercrime. Legal practitioners in South Africa have also suffered losses as a result of cyber risks. In considering the risks in the operating environment of a legal practice and developing appropriate internal controls and other risk mitigation measures, cyber risk must be one of the risks considered. The education program for legal practitioners and their support staff must include cyber risk (and all other emerging risks). Rule 54.13 of the Legal Practice Council Rules places an obligation that, before making any payment of any amount due to a client, legal practitioners must verify the banking details of the client and any subsequent changes to the banking details. Adherence to this rule will mitigate the risk of payments into fraudulent or phishing accounts. Adequately addressing all risks will protect legal practitioners, their clients and all other stakeholders. ❑

Seen on social media

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

The Legal Practice Council has voiced its concern with the trend that some law firms are making a driver's licence and or ownership of a motor vehicle as one of the key requirements for graduates.



There are a lot of practises that the @CouncilPractice @LawSociety_SA claim not to be aware of that lead to candidate attorneys leaving the profession and falling into depression. It is just one article after another with no real effort to help from bodies that are meant to supposedly protect us. They even ask during your interview. My mom had to take her life savings just to buy me a second-hand car because no law firm hires you without one. It is surprising that @CouncilPractice is only hearing of this now.

ChurchGirlFeminist @LeboSethusha

I remember in 2011 I applied to serve articles at one of the big law firms in Sandton. I was called for an interview and the first question from the interviewing panel was: 'Mr Ndabeni do you possess a driver's licence?' I said: 'No I do not'. One of the panellists said, 'I don't see a need for us to proceed further, you do not have a driver's licence and clearly you do not have a motor vehicle, thank you for your time'.

Gingqi @mndabeni

I am a law graduate and have been rejected by firms due to this requirement. It is sad and heart breaking to see some people call it 'common sense' because they do not know what we are going through on a daily basis. Having to work so hard in varsity only to find out that your academic transcripts and degrees are not enough. Being hindered by a driver's licence or a car to pursue your career is no joke. Being unemployed because you have neither truly cuts deep.

Thulisile Manana, law graduate seeking articles and employment opportunities

But what I do not understand is why this is news today, when it has been happening for ages. This is not sudden. They are reporting on it as if this just happened yesterday.

Kgabo Maupye @Kgabza07

The only transformation we recognise. It is the whole system that must be overturned. Nothing to do with individuals.

Lethabo Mbawo @MbawoLive

Hence, we have more graduates who are unemployed.
The economic divide persists to disadvantage the underprivileged.

Lufuno Tshikalange Khorommbi (Cyberlaw) Advisory Committee Member at MICT SETA

After a million years of exclusion...

Andani Muofhe @MuofheAndani

It is about time!!! Can we now address *umcimbi weSalary*?

MaLeta @ntlez__ngeyakhe

Voicing a concern but no action.

Tumelo @TumeloMok

Better late than never I guess.

Uncle Sena @senamisomoyo

Legal practitioner Maresa Kurz writes about the recent case of E v E *that has brought about significant changes to r 43 applications*

Now for a similar development to r 58 and the Civil Regional Court Practice Directives.

aquila non capit muscās @UncleThato

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By Simthandile Kholelwa Myemane

Customer due diligence and risk management and compliance programme

In my previous article, 'How FICA affects you and your legal practice' 2019 (Oct) *DR* 6, I explored the requirements of the legal practitioner's annual statement on trust accounts required in terms of the Legal Practice Council Rules (LPC Rules). In it I dealt extensively with ss 43B, 21, 42, 28, and 29 of the Financial Intelligence Centre Act 38 of 2001 (FICA). This article seeks to dig deeper into s 21 of FICA, and focusses specifically on customer due diligence, as well as the value of preparing and maintaining a risk management and compliance programme by an accountable institution to achieve the requirements of s 21. Readers are advised and encouraged to read this article together with my previous article, as well as the article by Nkateko Nkhwashu 'Do trust account advocates need a mind shift to deal with FICA?' 2019 (Oct) *DR* 13 for the best understanding and benefit of FICA, as well as the article written by the Financial Forensic Investigation Team of the Attorneys Fidelity Fund 'Find the problem before it finds you' 2015 (July) *DR* 29.

Section 21 of FICA specifically deals with knowing your client. For an accountable institution to fulfil this requirement, accountable institutions are expected, especially for legal persons, trusts and partnerships, to conduct a due diligence on their prospective and existing clients. This due diligence is aimed at ensuring that the accountable institution is onboard when dealing with a client known to the accountable institution. This requirement automatically poses an obligation on an accountable institution to comply with the requirements of FICA. As already indicated in my previous article, it is compulsory for accountable institutions to register with the Financial Intelligence Centre, and legal practices are listed as accountable institutions in terms of sch 1 of FICA.

The purpose of FICA, *inter alia*, is to introduce transparency into the South African financial system. A country's measure to combat money laundering and terrorist financing work effectively if the financial system in that country is transparent (based on robust customer due diligence measures) to ensure that adequate information is captured in the records of financial and other institutions and to make the sharing of information that may support further investigation of money laundering and terrorist financing possible ('Guidance Note 7 on the implementation of various aspects of the Financial Intelligence Centre Act', 2001 (www.fic.gov.za, accessed 17-10-2019)).

From the foregoing paragraph it becomes evident that at the cornerstone of adhering to the requirements of FICA is s 21, which requires that an accountable institution knows who they are dealing with. This is so because, the requirements of s 29 reporting can only be meaningful if the accountable institution knows their client, whom they would know through customer due diligence performed on the client (for purposes of this article client refers to existing and prospective client). Simply put, unless an accountable institution knows who or what they are dealing with, they would have difficulty identifying suspicious transactions and activity for that client. The suspicion is brought about by the understanding or knowledge of the client and the business and/or source of income for the client, which, if anything out of the ordinary for that specific client happens, then becomes suspicious to the accountable institution.

In case of prospective clients, accountable institutions need to have a general understanding of the type of business that the prospective client is involved in. In this regard, the requirements of s 42 regarding the risk management and compliance programme of the accountable institution become important, these are important even for existing clients especially in respect of ongoing due diligence. FICA incorporates a risk-based approach to customer due diligence, which helps accountable institutions understand their exposure to money laundering and terrorist financing risks. Rule 54.14.7.1 of the LPC Rules on the other hand, requires of legal practices to ensure implementation of adequate internal controls for safeguarding of trust funds. Internal controls are a response mechanism to identified and assessed risks.

Risks for an accountable institution, simply put, are events that influence the strategic objectives of an accountable institution, and these can have negative or positive effects. Events with positive effects on the objectives are opportunities to the accountable institution and should be channelled back to the strategic objectives of the accountable institution, whereas events with negative effects should be managed. The latter events are those, which the accountable institution must concern itself with and respond to, and it is these events that I pay attention to in the next paragraphs.

Risks are measured in terms of likelihood and impact. Likelihood concerns itself with the probability of an event taking place, while impact deals with the extent to which the strategic objectives will be affected should that probability materialise. At this stage, I deal with inherent risks and residual risks. Inherent risks are risks that exist before any control measures are put in place, they exist by the mere existence of a business or an activity. Residual risks are those risks that remain after control measures have been put in place, and their effectiveness assessed, and these are the risks to which the accountable institution should respond as they may expose the accountable institution to unwanted consequences.

There are mainly four ways in which an accountable institution may respond to residual risks:

- **Treat:** Introduce control measures in order to reduce the impact and likelihood of the risk materialising. This speaks to mitigating the risk exposure.
- **Tolerate:** The risk is known to and accepted by the legal practice.
- **Transfer:** The risk continues to exist, but it is passed on to a third party to manage, for example an insurer or outsourced company.
- **Terminate:** The legal practice has no appetite for the risk and will, therefore, move away from the activity that attracts that particular risk.

There are various databases that may be available to an accountable institution at a national and regional scale, which may influence what is contained in an accountable institution's risk management and compliance programme. There are also various factors, which may contain risk indicators that an accountable institution should consider such as –

- indicators relating to products and services;
- indicators relating to delivery channels;
- indicators relating to geographic locations;
- indicators relating to clients; and
- other factors.

To indicate the link between customer due diligence as required under ss 21 and 42, I specifically deal with the indicators relating to clients. Clients of an accountable institution are not always natural persons, but sometimes legal persons/entities. Clients bring about their own risks to an accountable institution, depending on the type of client. For an accountable institution to deal effectively with risks brought about by their clients, it becomes important for the accountable institution to consider the client against the products and services to be rendered to the client. Different clients pose different risks, even for specific products, and could require of an accountable institution to individualise the risks assessments or deal with them in terms of categories considering similarity in the profiles of the various types of clients that the accountable institution deals with.

Customer due diligence refers to the knowledge that an accountable institution has about its client and the understanding of the business that the client is conducting with it, and customer due diligence is a risk mitigation measure. The risk mitigation measure attribute stems from the fact that the accountable institution on having conducted a proper due diligence on the client, may better identify possible attempts by the client to exploit the institution's products and services for illicit purposes. Among the different types of clients that an accountable institution may deal with are legal persons, trusts and partnerships. These types of clients call for additional due diligence measures. While legal persons, such as shell companies are generally legitimate entities in their nature, there is a tendency by criminals to abuse such structures and use them for illicit purposes, and legal practitioners need to be awake to that reality. '[S]hell companies are considered to be companies that are incorporated that have no significant operations or related assets' (FATF 'Guidance on Transparency and beneficial ownership (Recommendations 24 & 25)' (2014) (www.fatf-gafi.org, accessed 31-10-2019)). Criminals who intend using such entities for illicit purposes tend to create complex structures using these entities together with trusts and other legal arrangements, which enable the separation of legal ownership and beneficial ownership of assets in a bid to confuse the flow of funds; and to disguise and convert the proceeds of crime before introducing them into the financial system, as well as hide the ultimate beneficiaries (natural persons).

'Each accountable institution may face risks that are different from another, even within the same industry.'

It is important, therefore, that, as part of the risk management and compliance programme framework of an accountable institution, the programme deals specifically with how due diligence for legal persons, trusts, partnerships and hybrid structures should be undertaken. More importantly, the accountable institution needs to know who the beneficial owner of these entities and structures are. A beneficial owner is always a natural person or individual – irrespective of how complex a structure is – there is ultimately a natural person who is the ultimate beneficiary.

The Financial Action Task Force (FATF), an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction, has issued certain recommendations, and these recommendations are encapsulated in various legislations in various jurisdictions, including South Africa. Recommendations 24 and 25 of the FATF deal with transparency and beneficial ownership, while recommendations 10 and 22 deal with customer due diligence. The FATF recommendations define a 'beneficial owner' as 'natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement'. This definition applies in those cases where ownership or control is exercised through a chain of ownership or by means of control other than direct control. Readers are urged to read the FATF 'Guidance on Transparency and Beneficial Ownership (Recommendations 24 & 25)' (*op cit*).

An accountable institution's risk management and compliance programme must, at a minimum, describe the customer due diligence measures, which the institution applies to individual clients, legal persons, trusts and partnerships, and hybrid structures; and how these measures are intensified on the basis of money laundering and/or terrorist financing risks. An accountable institution can also determine how to conduct due diligence on its clients depending on whether the client is for a single transaction or a business relationship, and the risk management and compliance programme of an accountable institution must be clear on these, including the frequency of conducting ongoing customer due diligence. A risk management and compliance programme of an accountable institution should, therefore, allow for sufficient customer due diligence, which must be consistently applied to similar situations.

Conclusion

In conclusion, each accountable institution may face risks that are different from another, even within the same industry. An accountable institution should, therefore, assess its own position relative to the risks the institution wishes to address and apply such measures as are commensurate to the risks faced by the institution. In doing so, the institution should also fully appreciate its size and capabilities and take on risks that it is able to deal with and has an appetite for. As part of risk mitigation measures for terrorist financing, institutions should access and monitor the lists issued from time to time warning of countries that are burdened with terrorist attacks and, therefore, blacklisted, and should also be aware of jurisdictions that are embroiled in tax evasion, with minimal or no legislative regime around tax issues. These are referred to as tax havens. Additional and ongoing customer due diligence is always advisable.

If legal practices heed the call to implement these measures, not only will they be protecting their reputation as individual legal practices, but they will also be positively influencing and/or contributing to the global fight or plight against money laundering and terrorist financing.

Simthandile Kholelwa Myemane *BCom Dip Advanced Business Management (UJ) Cert Forensic and Investigative Auditing (Unisa) Certified Control Self Assessor (Institute of Internal Auditors) Cert in Management and Investigation of Cyber and Electronic Crimes Cert in Fraud Risk Management Cert in Law for Commercial Forensic Practitioners Cert in Investigation of Financial Crimes Cert in Investigation and Detection of Money Laundering (UP)* is the Practitioner Support Manager at the Legal Practitioners' Fidelity Fund in Centurion.

❑

By Ciresh Singh

A consideration of r 46A(9) and the setting of court set reserve prices for sales in execution

Over the years there has been much concern about the lack of governance surrounding the sale in execution process. Several courts and academics have expressed concern that the sale in execution process allows for homes to be sold for a fraction of their true value. Further, there have been several allegations of collusion and corruption during sales in execution and this has tarnished the image of this process (see F Forde 'Exposed: Levitt's kickback racket' *Business Day* 13 May 2016, and *Report on the public hearing on housing, evictions and repossessions* (2007) by the South African Human Rights Commission (www.sahrc.org.za, accessed 4-11-2019)). After a sale in execution the debtor is left helpless owing a huge shortfall on the mortgage debt and may possibly end up without a roof over their head. Accordingly, it has become necessary to consider whether the sale in execution process is the best way to satisfy a creditor's judgment debt. In order to prevent the situation of homes being sold for less than their true value, r 46A of the Uniform Rules of Court was recently amended to allow courts the discretion to set a reserve price for a sale in execution – however, the question now exists, how low are the courts willing to go in setting a reserve price?

The position prior to r 46A

Prior to the implementation of r 46A, there were several instances of homes being sold far below the true value of the property. *Nxazonke and Another v Absa Bank Ltd and Others* (WCC) (unreported case no 18100/2012, 4-10-2012) (Davis J) is an example of where a sale in execution resulted in a home being sold for an unrealistically low price when compared to the true value of the property. In *Nxazonke*, the property was sold for R 10, when the municipal value of the property was R 81 000. The court held that the valuation of the property, and the fact that it was sold for R 10, inferred that there had been a simulated or fraudulent transaction and that in the absence of any plausible explanation there had been an abuse of process.

The fact that a property could be sold for R 10 highlighted a serious problem in the previous sale in execution process. Even if the court processes of judgment and the sale in execution were followed correctly, there still appeared to be room for abuse, as properties could still be sold for unrealistically low prices (see R Brits 'Purging mortgage default' (2013) 1 *Stellenbosch Law Review* 165). Research has revealed that up to 13 000 homes are sold in execution in South Africa every year, and these properties are usually sold for a third of their true market value (see D Shaw, 'Too quick to execute – how does SA's new rules on sale in execution compare internationally?' 2016 (Aug) *DR* 32). As indicated, after the sale, the debtor will possibly be left homeless and becomes liable for any shortfall on the mortgage debt. If at the sale in execution the property is sold for a higher price, the debtor may receive the surplus after the settlement of the judgment debt and may use these funds to acquire alternative accommodation. Brits suggested that the sale in execution process could be improved and would be more constitutionally compliant if judicial approval would be added to the process. He further suggested that after a sale is concluded, an application must be made to court for the selling price to be approved before the property may be lawfully transferred (see R Brits 'The "reinstatement" of credit agreements: Remarks in response to the 2014 amendment of section 129 (3) – (4) of the National Credit Act' (2015) 48.1 *De Jure* 75). A judge would have to consider the value of the property and assess whether there is any indication of abuse or fraud.

The position after r 46A and the current challenges experienced

As a result of the many concerns expressed, the rules relating to the sale in execution process were amended by the Rules Board for Courts of Law. Rule 46A(9) of the Uniform Rules of Court now provides that the court 'may' set a 'reserve price' for a sale in execution. The amendment seeks to protect debtors by ensuring that homes are not sold for extremely low prices. The effect of the amendment is that if the sale fails to reach its court-set reserve price, that property will not be sold and the court will be required to set another reserve price for the property or consider alternatives. Rule 46A(9), however, fails to prescribe the exact factors the court should take into consideration when determining a reserve price or how the reserve price should be calculated.

Rule 46A(9) merely provides that the court must take into account, *inter alia*, the market value and municipal rates of the property. No mention is made of other factors applicable to a sale, such as transfer costs, eviction costs and holding costs. I submit that further guidance is required to enable a court to make a fair assessment and calculation of a sale in execution reserve price. This gap exposes a failure on the part of the legislature to provide guidance and clarity on the implementation of the foreclosure process. It is noted that the courts are currently setting reserve prices in accordance with

'In order to set a reasonable reserve price for a property while striking a fair balance between the rights of the debtors and creditors, how low is the court willing to set a reserve price?'

the market value or forced sale value of the property. In most instances, these properties are not sold at a sale in execution due to the reserve price being too high. This accordingly results in the matter having to be referred back to court for the court to reconsider the reserve price. I submit that such a process and delay is detrimental to both the debtor and creditor as it results in increased litigation costs, disinterest in the property, and deterioration of the dwelling. The resulting question is: In order to set a reasonable reserve price for a property while striking a fair balance between the rights of the debtors and creditors, how low is the court willing to set a reserve price?

The question must further be asked whether the idea of setting a court-set reserve price is favourable in the South African economy. I submit that while the setting of a reserve price may potentially resolve the problem of homes being sold at low prices, the disclosure of a reserve price by the court may reduce the potential selling price of the property at the sale in execution, as buyers will reduce their bidding prices in accordance with the court-set reserve price. On the other hand, should the court-set reserve price be too high and not met, buyers will detach themselves from these sales and this may result in some homes becoming non-equitable, leaving mortgagees without any security.

Recommendations

Despite the potential cracks in r 46A(9) in failing to provide detailed guidelines to enable the court to calculate a reserve price, I submit that the amendment is favourable as it has the potential to remedy the current stigma attached to the sale in execution process. The sale in execution process has been tarnished with allegations and evidence of collusion and corruption. In addition to the current amendments, and as per with Brits (*op cit*), it is recommended that further judicial oversight is required in the sale in execution process. It is, therefore, suggested that all sales in execution should take place at court, in partnership with the Sheriff and the Registrar of the High Court (a specialised foreclosure court – see C Singh *A critical analysis of the home mortgage foreclosure requirements and procedure in South Africa and proposals for legislative reform* (unpublished PhD thesis, University of KwaZulu-Natal, 2018) and C Singh, 'Eeny, meeny, miny, moe, to which court will foreclosures go? A brief analysis of recent foreclosure proceedings and a consideration of the need for specialised foreclosure courts in SA' 2019 (Oct) *DR* 31). I submit that the introduction of judicial oversight in the sale in execution process will eradicate the potential for fraud and abuse of process. Further, it is contended that the Constitution and rules governing judicial oversight mandate the courts to play an active role in the sale in execution process. The involvement of the courts in the sale in execution process will allow for a more uniform process, which will prevent potential abuse. Despite the above amendments and proposals, it must be accepted that sales in execution, which by their very nature are forced sales, will not always achieve market value prices. Nevertheless, it is necessary that procedural checks are in place to ensure that all outcomes from the sale in execution process are in line with our constitutional values.

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By Vernon Fortune

The regional court's jurisdictional limitation to grant contempt of court in divorce matters

The former divorce court established under s 10(4) of the Administration Amendment Act 9 of 1929 was repealed on 15 October 2010. Consequently, regional courts were seized with jurisdiction. The enabling legislation is the Jurisdiction of Regional Courts Amendment Act 31 of 2008, which directed for the amendment of the Magistrates' Courts Act 32 of 1944 to confer the necessary jurisdiction on the regional courts.

However, despite the regional courts having jurisdiction extended to grant divorce orders, the jurisdiction does not include the application for the contempt of court of such an order. This might be a drawback when it comes to the enforcement of the orders granted in divorce matters.

Different court orders

Before proceeding with this topic, it is important to note that only the breach of certain court orders will constitute contempt of court. Common law differentiates between two different forms of court orders namely, *ad pecuniam solvendam*, and *ad factum praestandum*. The former relates to monetary payments whereas the latter is to call on a person to perform a certain act or to refrain from doing so (L Jordaan 'The "gagging writ" and contempt of court – the correct means to the correct end? A comparative analysis of South African and English law' (1990) 23 *CILSA* 219 at 220). Failure to comply with an order to pay money does not constitute contempt of court, whereas insubordination of the latter does (*Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others* 1995 (4) SA 631 (CC) at 665).

Contempt of court

Contempt of court is a criminal law remedy, which has been derived from English law (C Marumoagae 'Recognition of the concept of contempt of "determination" of the Pension Fund Adjudicator's determination: A missed opportunity – with particular reference to *Mantsho v Managing Director of the Municipal Employee Pension Fund and Others* (37226/14) [2015] ZAGPPHC 408 (26 June 2015)' (2017) 50 *De Jure* at 175 – 185). In South Africa, this remedy makes provision for both criminal and civil contempt of court (CR Snyman *Criminal Law* 5ed (Durban: LexisNexis 2008) at 325). This remedy is defined by Snyman as to 'unlawfully and intentionally … violating the dignity, repute or authority of a judicial body or a judicial officer in his judicial capacity'. In the case of *S v Beyers* 1968 (3) SA 70 (A) at 80C – H the court more directly stated: 'The crime of contempt of court arises from unlawful and intentionally disobeying an order of court'.

Contempt of a civil court order

In the case of *Dreyer v Wiebols and Others* 2013 (4) SA 498 (GSJ), the High Court reiterated that magistrates' courts (district and regional courts) do not have jurisdiction to entertain applications for contempt of court in civil matters. However, there has been uncertainty on whether this jurisdictional limitation includes contempt of divorce orders granted by regional courts.

The uncertainty is substantiated as the regional courts have been granted concurrent jurisdiction with the High Courts to adjudicate divorce matters. One could, therefore, fairly draw the inference that regional courts would also have jurisdiction in contempt of court applications pertaining to divorce matters.

The case of *MC v MJ*

The uncertainty has been resolved in the appeal case of *MC v MJ* (GJ) (unreported case no A3076/2016, 28-3-2017) (Modiba J (Carelse J concurring)). The respondent, in this case, agreed with the position held in the case of *Dreyer* pertaining to civil matters. However, the respondent argued that the regional courts should have jurisdiction based on s 29(1B)(*a*) and (*b*) of the Magistrates' Courts Act, which states:

'(*a*) A court for a regional division, in respect of causes of action, shall, subject to section 28 (1A), have jurisdiction to hear and determine suits relating to the nullity of a marriage or a civil union and relating to divorce between persons and to decide upon any question arising therefrom, and to hear any matter and grant any order provided for in terms of the Recognition of Customary Marriages Act, 1998 [Act 120 of 1998].

(*b*) A court for a regional division hearing a matter referred to in paragraph (*a*) shall have the same jurisdiction as any High Court in relation to such a matter.'

However, Modiba J, disagreed with the respondent's argument. The court held that the jurisdiction conferred to the regional courts in divorce matters cannot include jurisdiction in contempt of court proceedings. The court motivated its reason by emphasising that when a High Court grants an order for contempt of court, including in divorce matters, the court does so by invoking its inherent jurisdiction and not in accordance with statute.

Furthermore, the court held that the magistrates' courts and, in this regard, the regional (divorce) court is a creature of statute and consequently does not have inherent jurisdiction. The doctrine of inherent jurisdiction, which has been codified in s 173 of the Constitution, is exclusively borne by the High Court. This doctrine evidently excludes a postulation of its inherent jurisdiction to a creature of statute.

Consequently, the legislature could not have intended to extend the High Court's inherent jurisdiction to grant an order for civil contempt to regional (divorce) courts. If that was indeed the intention of the legislature, it should have been done through a specific legislative provision (see para 17).

How to proceed with a contempt application?

Despite the jurisdictional limitation to enforce a divorce order in the regional court, the applicant is not entirely left without a remedy. A party who wishes to bring such an application may approach the criminal magistrate's court or the High Court.

The criminal magistrate's court has the requisite jurisdiction by virtue of s 106 of the Magistrates' Court Act, which specifically affords the Criminal Court such jurisdiction. However, the procedure in this court involves the laying of a charge with the police. Therefore, the matter would be in the hands of the prosecuting authorities, whereas, the application in the High Court is a normal motion proceeding.

Interesting points to note

As a side note, it is worth noting that civil contempt of court has survived tremendous constitutional scrutiny over the years which brought about interesting changes, for example, the respondent may not be referred to as an 'accused' despite the matter being before a Criminal Court. The parties must be referred to as they would be in motion proceedings (*Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA)).

Also, the onus of proof rests on the applicant who must prove contempt of court beyond a reasonable doubt and not on a balance of probabilities. However, there is an evidential burden on the respondent to prove that their non-compliance was not wilful and *mala fide*.

Conclusion

Contempt of court may be an effective remedy to enforce an order of the regional divorce court. However, as the regional divorce courts lack jurisdiction, one should be mindful that another court will normally not grant civil contempt of court for the enforcement of another court's judgment. Thus, the court will only do so at its discretion and provided all other remedies available to the applicant had been depleted.

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The difference between a non-profit company and a non-profit organisation

By Elli Bissett

The idea of giving and helping others (charity) has been around since the beginning of time. Unfortunately, with the passing of time, and as humans became more evolved, charitable organisations were more often than not used for fraudulent and mischievous purposes rather than furthering their charitable objective. A legal solution was required in order to make the notion of charity more credible and less subject to malicious use. Enter non-profit companies (NPC) and non-profit organisations (NPO). These different legal entities and concepts are often used in South Africa (SA), however, they are confused with one another. So what is the real difference between NPC and NPO?

The Companies Act 71 of 2008 provides for two types of companies –

- a profit company; and
- a non-profit company.

An NPC is described in s 1 of the Companies Act as a company –

'(*a*) incorporated for a public benefit or other object as required by item 1(1) of Schedule 1; and

(*b*) the income and property of which are not distributable to its incorporators, members, directors, officers or persons related to any of them except to the extent permitted by item 1(3) of Schedule 1'.

Schedule 1 of the Companies Act predominantly deals with NPC, and broadly speaking, the goal of the NPC is not to make a profit but to further a certain public benefit, by using the legal entity of an NPC to do so, and any income received must be applied to further this benefit. The income may not be distributed to any persons involved, except as reasonable compensation for services rendered. As with all things in the law, there are some expectations and further specific requirements to these statements (see sch 1 of the Companies Act).

Non-profit companies are incorporated in a similar fashion as profit companies on the Companies and Intellectual Property Commission's (CIPC) website. However, there must be three initial directors, and if its Memorandum of Incorporation provides for it, members. Thus, an NPC can be registered as a

- standard non-profit company (with members);
- standard non-profit company (without members);
- customised non-profit company (with members); or
- customised non-profit company (without members).

The name of a non-profit company must end with NPC. An NPC is a juristic person, recognised by South African law as having rights and duties.

The Nonprofit Organisations Act 71 of 1997 (the NPO Act) states in s 1 that an NPO is 'a trust, company or other association of persons –

(*a*) established for a public purpose; and

(*b*) the income and property of which are not distributable to its members or office-bearers except as reasonable compensation for services rendered'.

Clearly from this definition the confusion that most people have regarding the difference between NPC and NPO is evident, as the description of these two concepts are almost identical. Non-profit organisations are predominantly regulated by the NPO Act.

To register an NPO, you can either visit the offices of the Department of Social Development or apply online on their website at www.npo.gov.za. Only a trust, company or other associations of persons established for a public purpose (voluntary association) can be registered as an NPO. Registering an NPO is beneficial because it will improve your credibility and funding opportunities, allow your charity to open a bank account and can help with tax incentives.

Every new era ushers in a new set of ideas, principles and practices that affect how the charity-sector functions in society. As illustrated, the NPC and NPO co-exist in the South African legal environment, although they are commonly mistaken for one another. They mainly differ in the way they are registered (ie, how they come into existence) but their objectives are quite similar, if not identical. One main difference is that an NPC can register as an NPO, but an NPO cannot incorporate a company. Best practice will be to incorporate an NPC and to register it as an NPO to give the charitable organisation the best possible credibility, which will result in more donations and ultimately furthering the charitable objective with as little mischief as possible.

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By Samuel Mariens

Costs do not follow the result in labour matters

In *Long v South African Breweries (Pty) Ltd and Others* [2019] 6 BLLR 515 (CC) the employee, following his suspension, was dismissed by his previous employer, South African Breweries (Pty) Ltd (SAB), after he was found to have been derelict in his duties as district manager, grossly negligent in his management of SABS's fleet of vehicles and guilty of bringing the name of the employer into disrepute. Aggrieved by his suspension and eventual dismissal, the employee found success in the Commission for Conciliation, Mediation and Arbitration (CCMA) after the arbitrator found that his suspension amounted to an unfair labour practice and his dismissal was substantively unfair. SAB took both arbitration awards on review to the Labour Court (LC). The LC set aside both arbitration awards and ordered the employee to settle the legal expenditure incurred by SAB in both matters. The LC made the adverse costs order against the employee on the basis that both parties had argued that costs follow the result. When the matter came before the Labour Appeal Court (LAC), the LAC was tasked with determining whether it was correct for a party to incur an adverse costs order merely on the basis that he was unsuccessful.

The law

Section 162 of the Labour Relations Act 66 of 1995 (LRA) reads as follows:

'(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.

(2) When deciding whether or not to order the payment of costs, the Labour Court may take into account –

(*a*) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and

(*b*) the conduct of the parties –

(i) in proceeding with or defending the matter before the Court; and

(ii) during the proceedings before the Court.'

Section 162 of the LRA sets out the considerations, which a court is required to take into account before deciding whether or not to make an order as to costs. This can be summarised as follows:

- whether making the order would be in accordance with the requirements of the law and fairness (in *Vermaak v MEC for Local Government and Traditional Affairs, North West Province and Others* (LAC) (unreported case no JA15/2014, 10-1-2017) (Makgoka AJA), it was held at para 10 that no hierarchy exists between the requirements of law and fairness, and thus, both requirements are on an equal footing);
- whether the applicant ought to have referred the matter to arbitration, as opposed to the court and, if so, the cost implications resulting from the incorrect referral;
- the conduct of the applicant in prosecuting its case and the conduct of the respondent in defending the matter; and
- the conduct of the litigants during the ventilation of their dispute before the court.

The principles set out in *Dorkin*

In *Member of the Executive Council for Finance, KwaZulu-Natal and Another v Dorkin and Another* (2008) 29 ILJ 1707 (LAC), the LAC was tasked with deciding whether or not an adverse costs order should be made. The LAC found that it was not bound by the principle that costs follow the result. Instead, the LAC held that cost orders ought not to be made unless such an order would be in accordance with the requirements of the law and fairness. The LAC held that – in labour matters – a balancing act should be performed by the court, whereby a fair balance should be struck between, on the one hand, not unduly discouraging prospective litigants from approaching the court seeking relief in employment disputes and, on the other hand, permitting prospective litigants from crowding the court roll with frivolous cases, which ought not be brought before the court. The LAC held that, in the event that a court errs in performing the balancing act, the court should err on the side of not unduly discouraging prospective litigants from approaching the court in pursuit of appropriate relief. In so doing, the LAC held that it plays a role in dissuading employees from participating in industrial action, instead of approaching arbitral bodies or the courts for appropriate relief (para 19).

The findings in the *Zungu* case

The Constitutional Court (CC) in *Zungu v Premier of the Province of KwaZulu-Natal and Others* 2018 (6) BCLR 686 (CC) reiterated that the general principle that costs follow the result does not apply in employment matters. The CC relied on its findings in *Zungu*, wherein it confirmed the principles relating to costs, which were set out in the *Dorkin* matter, and held that it is incorrect for a court to follow the principle that costs follow the result. In addition, it was held in *Zungu* that a court is conferred with a discretion when determining an appropriate costs award and that such discretion is required to be exercised judicially. In circumstances where a court *a quo* errs in exercising its discretion judicially, the LAC or the CC, as the case may be, is permitted to interfere with the decision to mulct a party with an adverse costs order.

The findings of the CC in *Long*

The CC held that the LC erred in making an adverse costs order against the employee, which was premised on the principle that costs follow the result. The CC held that the LC failed to take into account the principle of fairness and the consideration of the disputants' conduct when exercising its discretion. Consequently, the LC failed to exercise its discretion judicially. After inviting the parties to present contentions, the CC dismissed the employer's bald submission that the employee's seniority and conduct warranted the imposition of an adverse costs order. In the absence of reasons to support the employer's contention, the CC held that there was no basis for making a costs order as both parties achieved a proportion of success at the conclusion of proceedings.

Conclusion

In employment matters, costs do not follow the result. A court is conferred with a discretion and is required to take into account the considerations set out in s 162 of the LRA when exercising it. In addition, the court is required to perform a balancing act, whereby it strikes a fair balance between, on the one hand, not unduly discouraging prospective litigants in the employment sector from approaching the court in pursuit of relief and, on the other hand, permitting prospective litigants from bringing frivolous cases before the court. Finally, a court must ensure that it exercises its discretion judicially before mulcting a party with an adverse costs order.

- See also Moksha Naidoo 'Employment law update – *Audi alteram patem vis-à-vis* precautionary suspension' 2019 (May) *DR* 26; and Christo Opperman 'Precautionary suspension – right to be heard' 2019 (Sept) *DR* 7.

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LAW SOCIETY OF SOUTH AFRICA

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Timing is everything when liquidation proceedings are initiated

By Gavin Schär

Chapter 6 of the Companies Act 71 of 2008 introduced the concept of business rescue into South African company law. Unsurprisingly, as with any new piece of legislation, the business rescue provisions have and will continue to give rise to interpretative disputes between parties, litigation and ultimately helpful clarificatory judicial pronouncements. In this article, I address one such recent 'litigious dispute' – a dispute about what 'liquidation proceedings have been initiated' in the context of s 129(2)(*a*) of the Companies Act means – and then I will summarise Sutherland J's judgment in *Tjeka Training Matters (Pty) Ltd v KPMM Construction (Pty) Ltd and Others* (GJ) (unreported case no 19661/2019, 21-6-2019) (Sutherland J).

On 15 May 2018, the directors of KPMM Construction (Pty) Ltd passed a s 129(1) resolution to voluntarily place KPMM into business rescue. That resolution and accompanying documentation was duly filed with the Companies and Intellectual Property Commission (CIPC) on 15 May 2019 and Messers Miller and Chevalier of Mazars Recovery and Restructuring (Pty) Ltd were subsequently appointed by the CIPC as the business rescue practitioners of KPMM.

On 22 May, a notice in terms of s 129(3) and (4) of the Companies Act was sent, by the business rescue practitioners, to each 'affected person', informing them of the fact that KPMM had resolved to begin business rescue proceedings and that Messrs Miller and Chevalier had been appointed as the business rescue practitioners. On 23 May, notice in terms of s 147 of the Companies Act was sent by the business rescue practitioners to all known creditors of KPMM, informing them of the time, date and place of the first meeting of creditors. One such affected person and creditor that received these notices was Tjeka Training Matters (Pty) Ltd.

On 27 May, five days after notice of KPMM's business rescue was sent to creditors, the business rescue practitioners received an e-mail from Tjeka's attorney stating that Tjeka had already 'initiated' liquidation proceedings against KPMM during April 2019 and that as a consequence KPMM's s 129(1) resolution was void in terms of s 129(2)(*a*) of the Companies Act. The business rescue practitioners were thus called on to confirm that they would immediately withdraw and discharge any notices to the CIPC. Tjeka also threatened to launch an urgent application to interdict the business rescue proceedings if the business rescue practitioners did not confirm that they would immediately withdraw and discharge any notices to the CIPC.

On 27 May the legal practitioners for the business rescue practitioners called for a copy of the liquidation application, which neither they nor the directors of KPMM were aware of, and the return of service. A copy of the liquidation application was duly sent to the legal practitioners of the business rescue practitioners on 27 May, but the return of service was only sent to the legal practitioners on 28 May, the same day that the Sheriff served the liquidation application on KPMM. Pursuant to learning that the application had not been served on KPMM prior to 15 May, the business rescue practitioners disputed Tjeka's contention that KPMM was not lawfully entitled to pass and file a s 129(1) resolution when it did and, as such, refused to comply with Tjeka's demand. As threatened, a few days later Tjeka launched its urgent application. The urgent application was opposed by the business rescue practitioners.

As appears in Sutherland J's judgment, Tjeka raised two principal arguments in support of its position on the matter. First, it argued that the word 'initiate' is the necessary point of departure and that it ought to be given its ordinary dictionary meaning – that is to say to get something started. Tjeka then submitted that the word 'commence' is a synonym of 'initiate'. On the back of this line of argument, Tjeka raised the case of *Marine and*

Picture source: Gallo Images/Getty

Trade Insurance Co Ltd v Reddinger 1966 (2) SA 407 (A) in which Wessels JA held that: 'Although an action is commenced when the summons is issued the defendant is not involved in litigation until service has been effected' and submitted that it is necessary and correct to distinguish between the 'phenomenon of "litigation"' and the 'juridically cognisable event of the "issue"' of a matter.

Secondly, Tjeka relied on the decision in *FirstRand Bank Ltd v Imperial Crown Trading 143 (Pty) Ltd* 2012 (4) SA 266 (KZD) submitting that the wording of s 348 of the Companies Act 61 of 1973 (the 1973 Act), namely that: 'A winding-up of a company by the court shall be deemed to commence at the time of the presentation to the court of the application for the winding-up', ought to be attributed to the relevant portion of s 129(2) of the Companies Act.

Sutherland J disagreed with both of Tjeka's submissions. First, he was of the view that s 129(2)(*a*) must be read as a whole and that: 'Whatever "initiated" means, it must be understood to be "… by or against the company". To omit this aspect is to not do justice to this part of the sentence. It is plain that the liquidation proceedings which are initiated, must be cognisable by reference to its effect upon the company, otherwise the notion of it being "by" or "against" the company is mere verbiage. Thus, it can be asked: If a deed (ie, the issue of an application), which is juridically cognisable occurs, but without the company being in the least aware of its existence, can that deed be said to be an example of a deed initiated against the company? At the levels of both grammar and logic this seems doubtful.'

Secondly, in response to that said by Swain J's reasoning in the *FirstRand Bank* case, Sutherland J referred to the *dictum* in the case of *Standard Bank of South Africa v A-Team Trading CC* 2016 (1) SA 503 (KZP) and on complete reading of the *Reddinger* case (both of which were relied on by KPMM). In this regard Sutherland J held that 'the function of section 348 is different to the function of section 129(2)' and that the 'eliding of "commenced" with "initiated" is shown to be inappropriate.' Sutherland J pointed out, that: 'The device utilised in section 348 is a fiction triggered by a public formal act that has retrospective effect … . The policy choice that informed that provision in the statute is that a protection was needed against nefarious manipulation after the fact of the application becomes known between the time of presentment and the date of the grant of the order. It cannot be said that a similar problem arises pursuant to a resolution contemplated in section 129(2) in the 2008 Act when unknown to the company a liquidation application has been issued but remains a secret. …Thus the work that section 348 does and the work that section 129(2) does is different'.

In respect of the *Reddinger* case, Sutherland J also pointed out that in that matter Wessels J stated that: 'Although an action is commenced when the summons is issued the defendant is not involved in litigation until service has been effected, because it is only at that stage that a formal claim is made upon him' concluding that 'a litigant remains unaffected in law until made formally aware of the steps being taken against that litigant.'

On the above basis, Sutherland J dismissed Tjeka's urgent application, finding that the liquidation proceedings contemplated in s 129(2) of the Companies Act must be served on the company, and not merely issued to meet the requirements of the section. Sutherland J further held that the resolution of 15 May trumps the liquidation proceedings served on 28 May.

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GOING OUT OF BUSINESS

Winding-up a company – *who benefits?*

Picture source: Gallo Images/Getty

By
Keith
Braatvedt

Professor Anneli Loubser, in her lecture on being conferred the honour of professorship in law, stated that in the future it is likely that liquidations will be conducted under the guise of business rescue. Prof Loubser's words accurately forecasted and predicted what is currently happening, namely that in many cases, companies are placed in business rescue and business rescue practitioners dispose of the company's assets and eventually the company is liquidated. What normally happens is that a company is liquidated, and a provisional liquidator or liquidator takes charge of the assets before business rescue proceedings are instituted.

The aim of this article is to suggest that in a situation like this, there should be communication and cooperation between liquidators and the business rescue practitioner (BRP).

Proper communication needs to take place provided that both the liquidator and the business rescue practitioner care about the best interests of the general body of creditors.

A further reason for encouraging communication is to prevent a situation that often occurs, where a business rescue application is brought in order to avoid inquiries in terms of the Companies Act 61 of 1973 (the Companies Act) to pin personal liability on the directors. It is all good and well to suggest that the liquidator communicates with the BRP. The real issue with this statement is: Who is in control of the assets of a company in liquidation when a s 131 application for business rescue is launched?

Another fundamental question to this article is: Who controls the assets of the company when a liquidation order is obtained and, thereafter, a business rescue application is brought?

There is a *lacuna* in the legislation in this regard. It is my view that the reluctance or uncertainty by the liquidators and by the BRPs to meaningfully discuss the situation in respect of company assets is as a result of the absence of a provision in the Companies Act that deals with the situation.

The courts have made it clear that liquidators are still in charge until a BRP is appointed. However, the real problem area is the lack of clarity as to what the liquidators can do and what they are allowed to do in order to preserve the assets? The BRP has not yet been appointed so they cannot give permission or consent to the liquidator. Obviously the directors also cannot give this consent. The result, of course, is that the liquidator is in a difficult and untenable position.

A typical example will be where a company deals in products that need to be marketed and sold immediately after the manufacturing and production thereof. Another example is where the product is classifieds as a deteriorating product (for example seeds or fertilizer) or the product has been made for a specific project.

If, after liquidation, these products are stored, the damage caused is irreparable because the value of these products will rapidly diminish.

The liquidator then asks the question as to whether they are entitled to sell the products in the face of the pending business rescue application. The obvious problem is that the business rescue application can be delayed for an extremely long time and clearly the liquidator cannot – in any way – sell the assets until the business rescue application is adjudicated on.

There are a number of questions in the back of a legal practitioner's mind when instituting a business rescue application when a company is in provisional or final liquidation, some examples include:

- What will be suspended by the launching of the business rescue application?
- What steps can be taken to ensure that the distressed company does not become rudderless?
- Can the distressed company continue to trade with suppliers, customers and creditors in the period when the business rescue application is opposed?
- How can the stock or assets of the business, which require immediate marketing and sale be best utilised knowing that if they are not utilised, their value will plunge and effectively they become valueless?

The position can be ascertained and better understood by an analysis of the judgments that have up to now given some clarity in the matter.

In the matter of *Jansen Van Rensburg NO and Another v Cardio-Fitness Proper-*

ties (Pty) Ltd and Others (GJ) (unreported case no 46194/13, 4-3-2019) (Kgomo J), it was decided by Kgomo J that once a provisional winding-up order is granted, the directors no longer have any control over the company's property.

The judge held at para 55:

'[U]ntil the business rescue application is finalised or a final liquidator is appointed, the [provisional liquidators] are liable for everything. As such, it should only be prudent that they remain in charge until the court pronounces on the business rescue application'.

In *Maroos and Others v GCC Engineering (Pty) Ltd and Others* (GP) (unreported case no 36777/2017, 15-6-2017) (Fabricius J), Fabricius J expressed that the judgment of Kgomo J in the *Jansen van Rensburg* case was incorrect, as was the judgment in *Knipe and Another v Noordman NO and Others* 2015 (4) SA 338 (NCK). Accordingly, Fabricius J decided it was incorrect to conclude that the provisional liquidator is under a continuing obligation to secure and preserve the assets pending the outcome of the business rescue application. As a consequence, Fabricius J decided that the directors of the distressed company were re-vested with the assets of the company.

The court, in finding that the directors were re-vested with control, decided to appoint an independent manager with the powers of a director to manage the business affairs of the distressed company until termination of business rescue. It is my view that Fabricius J tried to create a workable and business-like answer. There are serious difficulties to the suggestion by Fabricius J because what the judge was suggesting, was that a business manager can do what a BRP should be doing.

The *Maroos* judgment went on appeal to the Supreme Court of Appeal (SCA) and the judgment was delivered on 3 December 2018.

Seriti JA handed down the judgment in the SCA in *GCC Engineering (Pty) Ltd and Others v Maroos and Others* 2019 (2) SA 379 (SCA). Seriti JA said that the main issue to be considered was whether the appointment and powers of the duly appointed joint provisional liquidators are suspended in terms of s 131(6) of the Act.

The two subsidiary issues were whether the control and management of the property – of a company already placed in liquidation by a court order – can validly and legally be re-vested in the directors of that company and whether the Master has any role to play in business rescue proceedings.

In para 11 of the SCA judgment, Seriti JA stated that the functions of a provisional liquidator are essentially to take physical control and to manage the administration of the property and affairs of the company pending the appointment of a liquidator. The judge referred to the judgment of Kgomo J in *Jansen van Rensburg* and said that Kgomo J correctly remarked that the responsibilities of the provisional liquidators are to take physical control and to supervise the administration of the company's property and affairs pending the appointment of a permanent liquidator.

Importantly, in para 15, Seriti J said that s 131(6) of the Companies Act does not change the status of the company in liquidation nor does it suspend the court order that placed the company under liquidation and that the appointed provisional joint liquidators must proceed with their duties and functions to protect the assets of the company for the benefit of all the creditors of the company.

In para 17, Seriti J said, in terms of s 131(6), it is the liquidation proceedings and not the winding-up order that is suspended. What is suspended is the process of continuing with the realisation of the assets of the company in liquidation with the aim of ultimately distributing the proceeds to the various creditors.

The winding-up order is still in place and prior to the granting or refusal of the business rescue application, the provisional liquidator secures the assets of the company in liquidation for the benefit of the general body of creditors.

Importantly, the court said that the appointment, office and powers of the provisional liquidators are not suspended and that the word 'suspend' does not mean termination of the office of the liquidator. Simply put, the SCA decided that what is suspended by s 131(6), is the process of winding-up and not the legal consequences of a winding-up.

In a subsequent SCA case, namely *Van Staden NO and Others v Pro-Wiz Group (Pty) Ltd* 2019 (4) SA 532 (SCA), Wallis JA held that the liquidators of the close corporation in liquidation were entitled to oppose the s 131 business rescue application. The important part of this judgment is para 9, which states: 'If correct, the High Court's view of the legal position of liquidators, when confronted with an application to place a company in liquidation under business rescue, would have had the consequence that those with perhaps the greatest knowledge of the affairs of the company would have had no *locus standi* to participate in the application for business rescue'.

In my view, the critically important point made by Wallis J is that the liquidators themselves have the 'greatest knowledge of the affairs of the company'. The judge emphasised the fact that on the compulsory winding-up of a company, its directors are deprived of their control of the company, which is then deemed to be in the custody or control of the Master until the appointment of liquidators and, thereafter, it is in the custody or control of the liquidators.

In so doing, the judge concluded that the *Maroos* case was incorrectly decided. It is important to note that Wallis J ordered that the costs of the liquidators be paid on a punitive scale and in para 22 of the judgment, the judge held:

'It has repeatedly been stressed that business rescue exists for the sake of rehabilitating companies that have fallen on hard times but are capable of being restored to profitability or, if that is impossible, to be employed where it will lead to creditors receiving an enhanced dividend. Its use to delay a winding-up, or to afford an opportunity to those who were behind its business operations not to account for their stewardship, should not be permitted'.

I think these words are extremely appropriate in that the SCA emphasised in this judgment delivered on 8 March 2019 that business rescue must not be used to delay a winding-up.

It is often overlooked that the liquidators who were looking after the distressed company, before the s 131 application, have the greatest knowledge of the affairs of the company and are fully aware of the strengths and weaknesses of the distressed company.

It is my thinking that before a s 131 application is drawn, there should be detailed and in-depth discussions with the liquidators in control of the company so that the court hearing the business rescue application will have the benefit of a factual foundation setting out the reasons for the demise of the company and the factual (not speculative) reasons for a future possible successful turnaround.

I think everybody must recognise that Prof Loubser was correct and what is currently happening in many cases is that the assets of the distressed company are being sold in business rescue and, thereafter, the companies are liquidated. It would be in the best interest of creditors if the assets were sold much earlier. This can only be achieved if there are meaningful and proper discussions as I have suggested in this article.

I think it is clear and makes legal and common sense that if a business rescue order is granted, the BRP has to consult with the liquidators, who were in control, in order to discharge the BRPs' fiduciary duties to act in the best interests of the company. However, it is hoped that the process of consultation can take place well in advance of the order, placing the company into business rescue.

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Picture source: Gallo Images/Getty

By Michael Kabai

Where to start when licencing your own stock exchange?

The stock exchange or exchange is a place where people buy and sell securities. Securities, for example, include –

- bonds;
- shares;
- derivative instruments;
- notes;
- debentures; and
- instruments based on an index.

Exchanges play a role of intermediary or facilitator between buyers and sellers of securities. Hence exchanges must develop their own listing requirements and rules that must be approved by the regulator or the Financial Sector Conduct Authority (FSCA) (which on 1 April 2018 replaced the Financial Services Board) in terms of ss 11 and 71 of the Financial Markets Act 19 of 2012 (the Act). In South Africa there are currently five licensed exchanges –

- Johannesburg Stock Exchange Limited (JSE) (the oldest and largest exchange on the African continent);
- A2X (Pty) Ltd (A2X) (granted an exchange licence on 6 April 2017);
- 4 Africa Exchange (Pty) Ltd (4AX) (granted an exchange licence on 31 August 2016);
- ZAR X (Pty) Ltd (ZARX) (granted an exchange licence on 31 August 2016); and
- Equity Express Securities Exchange (Pty) Ltd (EESE) (granted an exchange licence on 11 September 2017).

The Act defines an 'exchange' as 'a person who constitutes, maintains and provides an infrastructure –

(*a*) for bringing together buyers and sellers of securities;

(*b*) for matching bids and offers for securities of multiple buyers and sellers; and

(*c*) whereby a matched bid and offer for securities constitutes a transaction.'

Accordingly, any person who maintains or provides an infrastructure, which meets the three requirements set out in the definition, operates an exchange, notwithstanding whether the infrastructure is provided for transactions in only one security.

Requirements for licensing an exchange

A person who wishes to operate an exchange must apply for an exchange licence in terms of s 7 of the Act. Section 7(1) of the Act provides that all exchanges must be licensed. In terms of s 109 of the Act:

'A person who –

(*a*) commits an offence referred to in section 78, 80 or 81, is liable on conviction to a fine not exceeding R 50 million or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment;

(*b*) commits an offence referred to in section 93(2), is liable on conviction to a fine not exceeding R 10 million or to imprisonment for a period not exceeding five years, or to both such fine and such imprisonment;

(*c*) contravenes or fails to comply with the provisions of sections 4, 7(1), 24, 25(1), 27(1), 47(1), 49A(1), 54(1), 56A(1) or a prohibition by the Authority referred to in terms of section 6(7) commits to both such fine and such imprisonment;

(*d*) contravenes or fails to comply with the provisions of section 73(1) commits an offence and is liable on conviction to a fine not exceeding R 1 million or to imprisonment for a period not exceeding five years or to both the fine and such imprisonment.'

Chapter III, particularly ss 7 to 17 of the Act set out the requirements that an applicant for an exchange licence must meet. The requirements include, among other the following –

- a person applying for an exchange must be a juristic person (providing a proof that the company is registered);
- governance arrangements by the applicant must be clear and transparent, promote the safety and efficiency of an exchange, and support the stability of a broader financial system, other relevant interest considerations, and the objectives of relevant stakeholders (for example that the applicant has a board and subcommittees such as a risk committee, audit committee and/or regulatory and supervisory committee);
- an applicant and its directors and senior management must demonstrate that they meet the proper requirements prescribed by the regulator (also comply with Board Notice 97 of 2013, which sets out fit and proper requirements for market infrastructures);
- an applicant must have made arrangements for efficient and effective surveillance of all transactions effected through the exchange and for supervision of authorised users (or stock brokers or traders) so as to identify possible market abuse and ensure compliance with the exchange rules and exchange directives and the Act;
- an applicant must have made arrangements for the efficient and effective monitoring of compliance by issuers of securities (companies offering sale of their securities) listed on the exchange with exchange's listing requirements; and
- an applicant must have insurance, a guarantee, compensation fund or other warranty in place to enable it to provide compensation – subject to the exchange rules – to clients.

Furthermore, the applicant must also comply with the requirements as contained in Board Notice 104 of 2013. These requirements include providing the following –

- the founding documents of the applicant;
- information to demonstrate that the applicant has adequate financial resources;
- a demonstration that the applicant has adequate management and human resources;
- the business plan of the applicant; and
- the details of a compensation funds (as required by s 8(1)(*h*) of the Act).

Concurrence of regulators on licensing matters

Since the advent of the Financial Sector Regulation Act 9 of 2017 (the FSR Act) (came into effect on 1 April 2018), the FSCA – as a regulator – may not in terms of s 126 of the FSR Act issue an exchange licence without the Prudential Authority's concurrence. The Prudential Authority was created in terms of the FSR Act and its objectives include the promotion and enhancement of safety and soundness of financial institutions that provide financial products and securities services and assistance in maintaining financial stability. The Prudential Authority currently operates within the administration of the South African Reserve Bank.

As a consequence, in September 2018 the FSCA and the Prudential Authority concluded a Memorandum of Understanding to address, among other things, concurrence and areas where there are regulatory and supervisory overlap and to enable the resolution of conflicts. The copy of the Memorandum of Understanding between the Prudential Authority and the FSCA is obtainable from www.fsca.co.za.

Annexure 3 of the Memorandum of Understanding between the authorities deals specifically with licensing, para 2 thereof deals particularly with the process where concurrence is required. The process includes the timelines on which the FSCA must share the application with the Prudential Authority on receipt of such an application. For example, within ten business days of receipt of an application the FSCA must share the application with the Prudential Authority.

The Prudential Authority must within 30 business days of receiving the application from the FSCA, do the following –

- must consider the prudential issues of the application and inform the FSCA in writing of its decision and where necessary with reasons;
- may request a meeting with the FSCA to discuss the application; or
- may request additional information relating to the application from the FSCA.

Thus in the event that the Prudential Authority is requesting additional information relating to the exchange application, the FSCA shall within five business days of receiving such a request from the Prudential Authority, request such additional information from the applicant.

The FSCA is required within five business days of receipt of such additional information from the applicant to submit it to the Prudential Authority. The Prudential Authority shall then within seven business days of receipt of such additional information revert to the FSCA. The Prudential Authority is thus required to make a decision within 30 days from the date of receipt of the additional information.

How long does it take to determine a licence for an exchange?

Section 116 of the FSR Act specifically deals with the determination of applications. Section 116(3)(*a*) stipulates that the responsible authority must determine an application and notify the applicant within three months after the application is made. The FSCA is the responsible authority for licensing of exchanges and must adhere to this period.

However, s 116(*b*) of the FSR Act provides the FSCA with a possibility to extend the period of three months by giving a notice to the applicant. The extension by the FSCA, however, may not be more than nine months.

Conclusion

The requirements for licensing an exchange as contained in Chapter III of the Act must also be read with the provisions of s 115 of the FSR Act, which also deals with matters to be taken into account in relation to an application.

The FSCA may, after consideration of any objection received, after the publication of an application for an exchange, grant an exchange licence in terms of s 9 of the FMA (subject to any conditions the regulator may deem appropriate).

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Picture source: Gallo Images/Getty

Superannuation – a common law remedy

By Marius van Staden and Stephen Leinberger

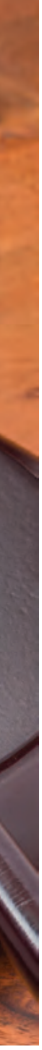
Superannuation is the dismissal of a matter due to a delay in prosecuting the matter. It differs from prescription in that proceedings, which interrupt prescription, have indeed been instituted. The claim is dismissed not because summons has not been issued, but rather because of inordinate delay in prosecuting the matter after the issue of summons.

It is important to note that unlike prescription there is no fixed time period involved. This is so in a large part because prescription is governed by various statutes, whereas superannuation is a remedy developed by the common law. Furthermore, not only a delay, but also whether the delay is inexcusable and whether serious prejudice has been caused to the defendant, are relevant factors for a special plea of superannuation (*Cassimjee v Minister of Finance* 2014 (3) SA 198 (SCA)).

The source of dismissing a matter due to superannuation

Roman law made provision for the superannuation of civil proceedings three years after *litis contestatio* (*Sanford v Haley NO* 2004 (3) SA 296 (C) at para 7). This provision has not been adopted either in the Roman-Dutch law or in our common law. Rule 10 of the old Rules of Court provided that a claim could lapse if no steps were taken for more than 12 months after the issuing of summons. At this stage there are no specific Rules of Court or practice that provide that an action becomes superannuated because of effluxion of time for want of prosecution (*Sanford* at para 6).

In terms of s 173 of the Constitution, the High Court has the inherent power to protect and regulate its own process and to develop the common law, taking into account the interests of justice. This includes the right to prevent an abuse of its process, one of the High Court's



inherent powers. Abuse of process can come in the form of frivolous or vexatious litigation, but also in the form of inordinate delay.

Section 34 of the Constitution provides that: ‘Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.’ How then should superannuation be viewed in the context of s 34?

The Constitutional Court (CC) has already resolved, in *Beinash and Another v Ernst & Young and Others* 1999 (2) SA 116 (CC), that restricting access to vexatious litigants was indispensable to protect and secure the rights of those with meritorious disputes, and necessary to protect *bona fide* litigants, the processes of the courts and the administration of justice.

Claims that are instituted, but not prosecuted, can clog the court system and thus prejudice the administration of justice. Such claims also inhibit the court’s powers to decide a matter fairly, due to the inevitable unavailability or unreliability of evidence with the passage of time. ‘[T]he court’s task to discover and recognise the true facts is made more difficult and more inaccurate’ (see *Molala v Minister of Law and Order and Another* 1993 (1) SA 673 (W) at 677).

Dismissing superannuated claims is, therefore, required to ensure a fair hearing and protect the administration of justice. Dismissing superannuated claims is a reasonable and justifiable limitation of the right of access to courts in terms of s 34 of the Constitution (*Cassimjee* at paras 8 – 10).

Furthermore, and it has been considered by the CC in *Road Accident Fund and Another v Mdeyide* 2011 (1) BCLR 1 (CC), that prescriptive processes, which limit a litigant’s access to courts are not unconstitutional. Prescription, in particular, promotes legal certainty and protects the rights of litigants, specifically debtors.

Relevant legal principles

In *Cassimjee*, at para 11, the Supreme Court of Appeal (SCA) provided the following requirements for a successful defence of superannuation:

- There should be a delay in the prosecution of an action.
- The delay must be inexcusable.
- The defendant must be seriously prejudiced by the delay.

As to whether or not the delay is excusable, ‘[a]s a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable’ (see *Gopaul v Subbamah* 2002 (6) SA 551 (D) at 559, quoting Diplock LJ in *Allen v Sir Alfred McAlpine & Sons Ltd; Bostik v Bermondsey and Southwark Group Hospital Management Committee; Sternberg and Another v Hammond and Another* [1968] 1 All ER 543 (CA)). Further, as to whether serious prejudice has been caused to the defendant, as a rule the longer the delay the greater the likelihood of serious prejudice at a trial (*Gopaul* (*op cit*)).

> ***‘Section 34 of the Constitution provides that: ‘Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.’***
>
> ***How then should superannuation be viewed in the context of s 34?’***

Ultimately the inquiry will involve a close and careful examination of all the relevant circumstances on the basis of fairness to both parties (*Cassimjee* at para 11 and *Sanford* at para 9).

A court will also bear in mind the reasons, if any, ‘for the defendant’s inactivity and failure to avail itself of remedies which it might reasonably have been expected to use in order to bring the action … to trial’ (*Cassimjee* at para 11).

What is reasonable – as far as the defendant’s inactivity is concerned – depends on all the circumstances. A defendant might be justified in believing that the plaintiff has lost interest and that it might be better to let the proverbial sleeping dogs lie. In the instance of a department or of state, the police, or an insurance company, handling a multiplicity of actions throughout the country at any given time, the failure to enforce procedural steps might be more excusable than in the instance of an ordinary member of public (*Gopaul* at 559).

It may also be that a defendant is responsible for the delay (*Gopaul* (*op cit*)), which ameliorates the plaintiff’s position. A court may also consider the merits of a claim, which could in principle play a role in informing whether the defence of superannuation should be upheld (*Golden International Navigation SA v Zeba Maritime Co Ltd; Zeba Maritime Co Ltd v MV Visvliet* 2008 (3) SA 10 (C) at para 27).

The influence of the passage of time on the availability of witnesses, the memory of witnesses, their ability to refresh their memories and the availability of real evidence (such as, for example, if a road is altered or where tankers, which gave rise to a claim, are not available for inspection) will play a strong role in determining the merits of the defence (*Cassimjee* at para 20, *Molala* at 678 and *Sanford* at para 17). This is all the more so in circumstances where witnesses are deceased or where many documents or a number of witnesses are involved, because it has the practical effect of increasing the chances of the unavailability of the required evidence and consequential prejudice (*Ibid*).

Whether a defendant has suffered financial prejudice because of the delay, which cannot be compensated for in terms of the proceedings, will also play a role in the inquiry. In *Sanford*, in order to found jurisdiction, the plaintiff attached an amount of approximately R 3 million in January 1989; when the case was heard during 2003, the defendant was seriously prejudiced by the fluctuation in foreign currency rates since the attachment of that money.

The test for superannuation is a stringent one and the relief will not easily be granted (*Sanford* at para 9); a court will exercise the power to dismiss a summons or an action on account of the delay for want of prosecution sparingly and only in exceptional circumstances.

Superannuation manifested in case law

In *Molala* the court upheld the special plea where a delay of more than four years was encountered after the delivery of further particulars. Various police officers could have been in the area of the incident and the difficulty of the defendant to establish which police officers were in the area, after a long period of time, played a substantial role in the court upholding the special plea.

In *Gopaul* the special plea was dismissed where two periods of delay were encountered; a first period of four years and a second period of five years. The defendant failed to file her plea during the first period of delay and the court held it hardly becomes her to complain of dilatoriness on the plaintiff’s behalf. In the second period the defendant disappeared and the plaintiff averred that he could not set the matter down. In response the defendant stated that the plaintiff could have made use of substituted service. Although the court agreed with the defendant, it also found that the defendant herself had been guilty of dilatoriness. Ultimately the court dismissed the special plea as no real prejudice was proved and the defendant was in some degree to blame for the state of affairs.

In *Sanford*, a provisional sentence matter, the deceased deposed to an answer-

'Nothing happened for approximately four years after the filing of the answering affidavit, when there was a flurry of activity and, thereafter, the matter again went dormant, this time for six years.'

ing affidavit and the plaintiff did not file a replying affidavit or set the matter down for hearing. Nothing happened for approximately four years after the filing of the answering affidavit, when there was a flurry of activity and, thereafter, the matter again went dormant, this time for six years. The deceased then passed away, and was substituted by his executor, whereafter the plaintiff resuscitated the matter. The court upheld the special plea and found that the extraordinary delay in prosecuting the action for provisional sentence was not only self-defeating, but also destroyed the very basis of these proceedings, which were meant to be extraordinary proceedings for a speedy remedy.

Golden International Navigation SA involved proceedings under the Admiralty Rules. The plaintiff did not set the matter down for a period of five years after the filing of the plea. The court upheld the special plea and took into consideration the perceived lack of merits in the claim, the lack of a credible explanation for the inactivity and the inordinate delay.

In *Cassimjee* an astonishing 32 years passed between the date of the institution of the action and the delivery of judgment, including which a period of 20 years in which no steps were taken by either party to advance the action. The court upheld the special plea, finding that the plaintiff's failure to expeditiously prosecute the matter is the primary cause of the defendant's prejudice. The court found that there was a substantial risk that a fair trial of the issues would not be possible if the special plea was not upheld.

Conclusion

Our roles as officers of the court in a broad sense is not only to defend the interests of our litigating clients, but also to assist the court to come to a fair conclusion, while at the same time advancing the Constitution. That role is severely hampered in circumstances where our forensic ability is prejudiced by the insouciance of a litigating party, in failing to prosecute a case.

Defendants may believe that it is convenient to let the plaintiff's sleeping dogs lie. However, they do so at the ultimate peril of evidence becoming unavailable.

It is accordingly not only to the prejudice of a defendant, that matters be delayed, but also to the prejudice of the court. It is in the interests of justice that all parties be given an opportunity to have a fair hearing.

It is, furthermore, in line with s 34 of the Constitution, that abusive proceedings be disposed of, (delayed litigation constituting an abuse of process). Superannuation as a defence to delayed litigation is not only a reasonable and justifiable limitation of a litigant's s 34 rights, but also a remedy to enforce a fair trial.

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THE LAW REPORTS

By Merilyn Rowena Kader

October [2019] 4 All South African Law Reports (pp 1-325); 2019 (9) Butterworths Constitutional Law Reports; 2019 (10) Butterworths Constitutional Law Reports

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:

CAC: Competition Appeal Court
CC: Constitutional Court
ECL: Eastern Cape Local Division, East London
EqC: Equality Court
GP: Gauteng Division, Pretoria
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Administrative law

Power of court to review findings of a commission of inquiry: The Commission of Inquiry into the Strategic Defence Procurement Package (the Commission) found that the role players had acted with a high level of professionalism, dedication and integrity and that allegations of criminal conduct were unfounded and that there was no evidence that the contracts were tainted by fraud or corruption.

In *Corruption Watch and Another v Arms Procurement Commission and Others* 2019 (10) BCLR 1218 (GP); [2019] 4 All SA 53 (GP) the court considered whether it had the power to review the findings of a judicial commission of inquiry. In the absence of any reported judgment of a South African court, the court examined significant comparative material. Authority emanating from New Zealand held that a report of a commission of inquiry could be reviewed if it had exceeded its terms of reference, had breached the principles of natural justice, or was vitiated by error of law. Canadian authority had distinguished between commissions of inquiry dealing with policy matters and those where the investigation could lead to a criminal prosecution.

A commission of inquiry's findings could be challenged on the basis that it acted beyond its terms of reference, breached principles of procedural fairness or was perceived to be biased against certain witnesses. These principles were equally applicable in South Africa because the rule of law required that the exercise of public power should not be arbitrary.

The court, per Davis JP, Leeuw JP and Mlambo JP, found that the Commission had failed to inquire fully into the issues which it was required to investigate. Witnesses before the Commission – against whom serious allegations of corruption and wrongdoing emerged from other material in the possession of the Commission – were not approached critically and their versions were not tested rigorously.

The court accepted that courts had to be cautious in exercising their power to review the proceedings of a commission of inquiry. However, in this case, where the uncontested evidence revealed so manifest a set of errors of law and a refusal to take account of documentary evidence, which contained the most serious allegations that were relevant to its inquiry, the principle of legality dictated that the findings of the Commission had to be set aside.

Constitutionality of lease agreement: In *BW Bright Water Way Props (Pty) Ltd v Eastern Cape Development Corporation* [2019] 4 All SA 27 (ECL) the applicant contended that the respondent failed to provide them with vacant and undisturbed possession of the property, as part of the property was occupied by a third party. The respondent also launched a counter application calling on the court to review and set aside its decision to conclude the agreement. *Ex facie* the agreement was signed by the respondent's chief financial officer, whom the respondent maintained had no authority to enter into the agreement and to sign the lease. It was, therefore, contended that the lease agreement fell to be set aside as unlawful and invalid. The applicant argued that the review application was brought out of time.

The respondent relied on the *exceptio non adempleti contractus*, claiming that because the applicant was in breach of certain obligations in terms of the contract, it was entitled to an order setting aside the decision to lease the property to the applicant. The *exceptio* defence can only apply where the applicant's performance has to precede that of the defendant or where both parties have to perform simultaneously. A lessor of property, as in the present case, must usually perform before rental may be demanded. The court, per Stretch J, found that the applicant had in fact complied with its contractual obligations.

In the claim in reconvention, the respondent applied for the review and setting aside of its own decision to conclude the lease agreement. The 180-day time limit imposed by the Promotion of Administrative Justice Act 3 of 2000 for bringing the review application did not apply as the review application was based on the principle of legality. The application nevertheless had to be brought within a reasonable period of time. The explanation advanced by the respondent was found to be inadequate, and the court held the delay to be unreasonable.

That raised the second question as to whether the court should not, in any event, in the exercise of its discretion overlook the delay. The respondents placed reliance on the imperatives set out in s 217 of the Constitution. The section specifies that procurement must be in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. The court held that once it was found that the agreement entered into between the parties was not transparent and competitive, the agreement could not be regarded as constitutionally valid. The main application was dismissed, and the counter application succeeded only to the extent that the lease agreement was declared constitutionally invalid.

Business rescue

Property development: In *Mouton v Park 2000 Development 11 (Pty) Ltd and Others and a related matter* [2019] 4 All SA 133 (WCC), Park 2000 (formerly the owner of two properties) offered debentures, which were linked to proposed erven for the purpose of raising finance for a development. Mouton, a subscriber for the debentures sought to redeem the debentures and failed. He obtained default judgment against Park 2000 and then a writ of execution for the attachment and sale of the company's immovable properties. It was subsequently discovered that a third party had applied for the liquidation and winding-up of Park 2000. Park 2000 had on the same day, made application to be placed under business rescue.

The court, per Sher J, held that the principal questions for determination were whether or not the business rescue proceedings were defective because they were launched at a time when liquidation proceedings had already been initiated against Park 2000, or whether the resolution by means of which the business rescue proceedings were launched was null and void because it was not taken by the requisite majority.

The court concluded that the liquidation proceedings against Park 2000 were initiated when the resolution to launch them was taken, and not when the liquidation application was filed with the court. That occurred before the subsequent resolution, which was adopted to place the company under business rescue. Consequently, the business rescue resolution was adopted in breach of the provisions of s 129(2)(*a*) of the Companies Act 71 of 2008. Section 129(1) provides that the voluntary placement of a company under business rescue 'begins' when its board takes a resolution to such effect, if it has reasonable grounds to believe that the company is financially distressed and there appears to be a reasonable prospect of rescuing it. But in terms of s 129(2)(*a*) such a resolution may not be adopted if liquidation proceedings have (already) been 'initiated'. Mouton was thus entitled to an order setting the resolution aside.

- See also p 14 and 16.

Competition

Predatory pricing: Predatory pricing is prohibited in two provisions contained in the Competition Act 89 of 1998. Section 8(*d*)(iv) creates a specific prohibition against pricing below two specific cost standards. It prohibits a dominant firm from engaging in an exclusionary act of 'selling goods or services below their marginal or average variable cost' unless it can show technological, efficiency or other pro-competitive gains, which outweigh the anti-competitive effect of that act. Section 8(*c*) contains a general prohibition against anti-competitive behaviour. It provides that: 'It is prohibited for a dominant firm to engage in an exclusionary act, other than an act listed in paragraph (*d*), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive, gain'.

In *Competition Commission of South Africa v Media 24 (Pty) Limited* 2019 (9) BCLR 1049 (CC), the Competition Tribunal found Media 24 guilty of predatory pricing in terms of s 8(*c*). Media 24 appealed to the CAC, which held that it could not be established that Media 24 had violated s 8(*d*)(iv) or 8(*c*). The Competition Commission sought leave to appeal to the CC against the CAC's judgment.

There are different cost standards that can be used to determine whether prices are predatory. What the appropriate standard would be in a particular case was an issue both in the court *a quo* and in the CC hearing.

Four different judgments were written by members of the CC. The effect of the four judgments was that six members of the court considered that the application raised an arguable point of law of general public importance within the court's jurisdiction and that leave to appeal against the judgment and order of the CAC should be granted; and six members of the court did not consider that the appeal should be upheld. There was thus effectively a majority decision that leave to appeal should be granted and that the appeal must be dismissed with costs.

Predatory pricing: In *National Energy Regulator of South Africa and Another v PG Group (Pty) Limited and Others* 2019 (10) BCLR 1185 (CC), the facts were as follows: One of the objects of the Gas Act 48 of 2001 is to promote the development of competitive markets for gas and gas services. The National Energy Regulator (NERSA) must regulate prices, monitor and approve, and if necessary regulate, transmission and storage tariffs.

In 2012 NERSA determined that there was inadequate competition in the piped-gas market. Sasol Gas (Pty) Ltd applied for a determination of its maximum gas prices (Maximum Price Application) and also for the determination of its transmission tariffs (Tariff Application). NERSA approved these applications. As a result, the seven respondents, all large-scale consumers of piped gas, experienced a substantial increase in the prices they had to pay. The respondents brought an application in the High Court to review and set aside NERSA's maximum gas price and tariff decisions on the basis that both decisions were irrational and unreasonable. They also sought an order reviewing and setting aside the Maximum Pricing Methodology, or alternatively, an order declaring the methodology to be invalid for the purposes of NERSA's consideration of Sasol's Maximum Price Application. The review was brought in terms s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), or alternatively, the principle of legality. The High Court declined to entertain the review because it considered that it was brought outside the 180-day limit provided for by s 7 of PAJA. The High Court identified the determination of the method as the decision to be reviewed and, therefore, found that the review had been instituted out of time.

On appeal, the SCA overturned the order of the High Court and substituted it with an order reviewing and setting aside the Maximum Price Decision and the Tariff Decision. The SCA held that the High Court had erred in not recognising that the administrative action, which fell to be reviewed, was NERSA's decision on Sasol's applications and not the underlying methodology. Accordingly, the review application was timeously brought. The SCA held that NERSA's Maximum Price Decision was irrational and unreasonable and fell to be set aside. As the Tariff Decision was inextricably linked with the Maximum Price Decision, the Tariff Decision also fell to be set aside.

NERSA and Sasol then approached the CC seeking leave to appeal against the judgment of the SCA.

Two judgments were written: A main judgment (per Khampepe J concurred by all the other judges of the CC) and a separate concurring judgment of Jafta J.

The main judgment held that the Maximum Price Decision was an independent instance of administrative action separate from the methodology employed. Accordingly, the review application had been brought within the time period required by PAJA. In determining the rationality of a decision, the process involved in making the decision could not be ignored. The relevant question was whether the means (including the process of making a decision) were linked to the purpose or ends. A rationality scrutiny had to include an evaluation of the process. The court set out reasons for finding that NERSA's decision on Sasol's maximum prices was irrational and had to be set aside. The Tariff Decision was, however, independent of the Maximum Price Decision. The appeal had to be upheld in so far as it related to the Tariff Decision. In the result, leave to appeal was granted and the appeal was upheld in part.

Constitutional practice

Urgency: In *New Nation Movement NPC and Others v President of the Republic of*

South Africa and Others 2019 (9) BCLR 1104 (CC) applicants, involved with the rights of the Khoi and San people, approached the High Court seeking orders declaring s 57A of and sch 1A to the Electoral Act 73 of 1998 to be unconstitutional and invalid for omitting to allow independent candidates to contest the elections. South Africans could thus become members of Parliament only if they belonged to a particular party. This, they argued, violated s 19(3)(*b*) of the Constitution: 'Every citizen has the right to stand for public office and, if elected, to hold office'.

The High Court dismissed the application and the applicants brought an urgent application for direct leave to appeal to the CC.

The applicants contended that if the relief they sought was not granted, it may result in an application to review the 2019 national and provincial elections after they had been held. The court pointed out that this was not a reason justifying an urgent decision. The existence of alternative relief demonstrated that a refusal by the CC to determine the matter on an urgent basis would be remediable. The parties would still be able to challenge the elections and if they succeeded, they could ensure that the electoral system could be appropriately amended 'as soon as possible'.

Before the CC, the applicants asked for new ballot papers (to include independent candidates) to be printed for the elections. They submitted that should this printing not be possible before the scheduled date for the 2019 elections, then the elections would have had to be postponed. In terms of s 49(3) of the Constitution, if the CC were to set aside an election, another election would have to be held within 90 days.

The CC concluded that applicants had failed to make out a case for an urgent hearing. The instant application raised the issue of whether the Electoral Act was unconstitutional to the extent that it prohibited South African citizens from contesting elections and holding national or provincial public office as independent candidates. This issue was not one that could be considered hurriedly or superficially.

Costs

Test for personal liability for costs: In *Democratic Alliance v Public Protector and a related matter* [2019] 4 All SA 79 (GP) at para 5 Tolmay J quoted Innes CJ '[the] conduct in connection with the litigation in question must have been *mala fide*, negligent or unreasonable.' In this judgment, costs had been reserved pending the CC's judgment in another case *Public Protector v South African Reserve Bank* 2019 (9) BCLR 1113 (CC) also involving the respondent (the Public Protector). That case dealt, *inter alia*, with the award of a punitive costs order awarded by the High Court against the Public Protector in her official and personal capacity. The Public Protector opposed the personal costs order on the grounds –

- that it had far reaching and serious implications on the administration of justice and the rule of law;
- that it was incompetent because she was not cited in her personal capacity; and
- because such an order against her would be an interference with the functioning of the Public Protector and, therefore, in contradiction of s 181(4) of the Constitution and the Public Protector Act 23 of 1994 and such interference constituted a criminal offence.

The court held that the Public Protector is enjoined by the Constitution to observe the highest standards of conduct in litigation. The notion that the independence of her office and proper performance of her functions demanded the exclusion of the possibility of a personal costs order was rejected by the court in the previous litigation. The Public Protector's position must be seen against the backdrop of South Africa's constitutional dispensation, where equality of all is central, and accountability to the rule of law and the Constitution is not negotiable. It is, therefore, unthinkable that any one person, irrespective of the importance of their position, will ever be able to claim total immunity when they blatantly transgress their statutory and constitutional duties. Accordingly, *de bonis propriis* costs orders can be granted against public officials in their personal capacities, where their conduct showed a gross disregard for their professional responsibilities and where they acted inappropriately and in an egregious manner. The court has a discretion to grant a personal costs order against the Public Protector and must assess the gravity of the conduct complained of. Thus, an assessment must be made of the facts and the discretion must be exercised objectively.

Despite the fact that the Public Protector was not personally cited, she was made aware that a personal and punitive costs order would be sought against her from the inception of the litigation. The failures and dereliction of duty by her in the case complained of by the applicant were manifold. They related to her failure to execute her duties in terms of the Constitution and the Public Protector Act, and her conduct in the matter was far worse than that set out in the *Reserve Bank* case.

The court was satisfied that the requirements for a personal and punitive costs order were met and that the Public Protector should be liable personally for at least a percentage of the costs incurred.

Freedom of expression

The old flag and hate speech: In *Nelson Mandela Foundation Trust and Another v AfriForum NPC and Others (Johannesburg Pride NPC and Another as* amicus curiae*)* [2019] 4 All SA 237 (EqC); 2019 (10) BCLR 1245 (EqC) the facts were as follows: In October 2017, nationwide protests took place in South Africa, against farm murders and violent attacks against farmers. The first respondent, Afriforum, played a central role in the protests against farm attacks, during which, certain protestors displayed the old national flag of South Africa. The applicant approached the Equality Court for an order declaring that any display of the old flag not serving any genuine journalistic, academic or artistic purpose in the public interest (ie, gratuitous display) constituted, as against Black people, hate speech, unfair discrimination and harassment, under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act).

Opposing the relief sought, Afriforum contended that displaying the old flag was constitutionally protected expression under s 16(1) of the Constitution.

The court, per Mojapelo DJP, found that to the majority of South Africans, and undoubtedly, to the majority of Black South Africans, a gratuitous display of the old flag has, as its dominant meaning, an endorsement of the system of Apartheid, which has been declared a crime against humanity.

Section 10(1) of the Equality Act prohibits hate speech and the court found reasonable to interpret 'words' in s 10(1) of the Equality Act to include non-verbal expressions of ideas.

The next question was whether the gratuitous display of the old flag could reasonably be construed to demonstrate the clear intent required in s 10(1). The test is whether the speech (or display) objectively demonstrates a hurtful, harmful or hateful meaning. The court was satisfied that the displaying of the old flag, with its segregationist connotations demonstrated a clear intention to be harmful, hurtful, and to incite and propagate hateful feelings to victims of Apartheid and to our non-racial democracy. It was concluded that the gratuitous display of the old flag constitutes prohibited hate speech, unfair discrimination and harassment.

Maintenance facilitator

Third party lacks the powers to vary maintenance order: In *Mrs M v Bruwer and Another* [2019] 4 All SA 165 (WCC) a final divorce order incorporated a consent paper and parenting plan recording that Mr and Mrs M would remain co-holders of parental responsibilities and rights of care and contact with the children, as referred to in s 18(2)(*a*) and (*b*) of the Children's Act 38 of 2005, subject to the provisions of the parenting plan, and, that Mr M would pay maintenance and other expenses. The plan made provision for mediation and facilitation and appointment of a facilitator.

The parents concluded a Facilitation Agreement, in terms of which Mrs Bruwer was appointed as facilitator to make recommendations in respect of any issue concerning the welfare and matters affecting the best interests of the children. It was agreed that, if Mrs Bruwer was unable to resolve any dispute by way of mediation, she could resolve the issue by issuing a directive, which would be binding on the parties unless overridden by a court.

Mr M later sought a reduction of maintenance payable and Mrs Bruwer then assumed the role of judicial officer, declaring that she would review the maintenance payable in respect of the children, which led to the present review application.

Mrs Bruwer and Mr M contended that the directive was lawfully issued and was binding, and that the variation of the High Court maintenance order was thus valid. In support of their contentions, they relied on the relevant clause of the parenting plan in terms of which the facilitator was authorised to 'regulate, facilitate and review issues relating to the children's maintenance'.

Section 30(3) of the Children's Act prohibits the transfer of that parental right and responsibility to a third party. As the determination of maintenance is primarily a parental responsibility and right, the transfer of parental responsibilities and rights involving the determination of maintenance to Mrs Bruwer constituted an infringement of s 30(3). The objective effect of the directive was that the maintenance order, contained in the consent paper, was varied. The decision to vary was not taken by co-holders of parental responsibilities and rights, but by a third party (Mrs Bruwer). She acted as a judicial officer and exercised a judicial power that falls within the preserve of courts. Section 28(2) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning the child. The court, per Vos AJ, stated that it was not in the best interest of a child that a social worker be granted the judicial authority to vary a maintenance order of the High Court. By issuing the directive, Mrs Bruwer impermissibly purported to exercise judicial authority, contrary to the provisions of s 165 of the Constitution. Her conduct was unlawful and invalid, and the directive, therefore, fell to be set aside.

The invalid act of delegating judicial authority could not be cured by a High Court by *ex post facto* considering whether the conduct of Mrs Bruwer was right or wrong. Attempting to review conduct which is inherently invalid, involves further legal proceedings, which would be highly prejudicial to Mrs M.

Next, the court considered whether the directive stood to be set aside on the separate ground that Mrs Bruwer failed to ensure that the parties were afforded a fair hearing. In terms of s 34 of the Constitution, Mrs M was entitled to a fair hearing. The evidence clearly established that a fair hearing was not held. That constituted a further ground why the directive could not stand and had to be set aside.

The final issue for determination by the court was whether Mrs M was entitled to an order whereby Mrs Bruwer was removed as facilitator. The manner in which Mrs Bruwer handled the matter, her apparent bias, and Mrs M's loss of confidence and trust in her justified her being removed as facilitator.

Medical negligence

Factual causation: The appellant's baby was born with brain damage caused during labour. The High Court held that the appellant did not prove that the negligent failure to monitor her and the foetus had caused the damage. On appeal in *AN obo EN v Member of the Executive Council for Health, Eastern Cape* [2019] 4 All SA 1 (SCA) it was common cause that the hospital staff did not properly monitor the labour, and were in breach of their legal duty to care for mother and foetus during the birth process, rendering their conduct wrongful.

Wrongfulness should not be conflated with factual causation. The test for factual causation is whether the act or omission of the defendant has been proved to have caused or materially contributed to the harm suffered. Where the defendant has negligently breached a legal duty and the plaintiff has suffered harm, it must still be proved that the breach is what caused the harm suffered.

The critical question was whether the brain damage would have been avoided if the hospital staff had properly monitored the mother and foetus and had acted appropriately on the results. The expert witnesses agreed that a sudden interruption to the blood supply, caused by cord compression (sentinel event), had occurred. There being no warning, the issue was whether there would have been sufficient time to avoid the damage by expediting the delivery. It was not proved that there would have been sufficient time in which to deliver the baby so as to avoid damage, with the result that the appeal had to be dismissed. The court expressed its displeasure at the prevalence of sub-standard care administered to patients at hospital in the respondent's care. In light thereof, even though the respondent had succeeded in resisting the appeal, no costs award was made against the appellant. In addition, it was directed that the present judgment be forwarded to the respondent, and the National Minister.

A minority judgment in the case expressed agreement with the majority finding on wrongfulness but disagreed with the reasoning and conclusion in relation to causation.

Pleadings

Main arguments not in founding affidavit: In *National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs and Others* [2019] 4 All SA 193 (GP), the National Council of the Society for Prevention of Cruelty to Animals (NSPCA) sought to review the minister's decisions determining quotas for the exportation of lion bone in. The National Environmental Management: Biodiversity Act 10 of 2004 required the minister to set an annual export quota after consulting with the scientific authority established under the Act.

The applicant's case was that the determination of the quotas fell to be reviewed in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) because relevant considerations, such as animal welfare were not taken into account. It was also contended that the exclusion of the applicant from the decision-making process was irrational.

The respondents averred mootness, because the export quotas had been operationalised, permits issued, and export processes completed. Despite the historical nature of the setting of the export quotas, the setting of quotas would continue. To that extent, the dispute giving rise to the litigation was still alive, and the court could deal with the matter.

Although the main arguments relative to animal welfare considerations, advanced in support of the relief, were not advanced in the founding affidavit but in the replying affidavit, the relief sought had not substantially changed. As the respondents had not been prejudiced and were able to deal comprehensively with the case based on animal welfare considerations, and as the issues had a significant public and constitutional interest, the court held that even though the replying affidavit introduced a new matter, it would allow the introduction of such new matter.

According to the respondents, the annual setting of the export quota constituted executive action and not administrative action and was, therefore, not subject to review under PAJA. When the minister set the quotas, she acted in terms of the provisions of the National Environmental Management: Biodiversity Act and its Regulations and was, therefore, taking administrative action.

The facts did not establish that the applicant was excluded from the determination process, so grounds of irrationality could not be sustained. Finally, the court confirmed the relevance of the welfare considerations of captive lions in the determination of an export quota. The exclusion of those considerations, which were relevant, rendered the decisions susceptible to review.

Practice

Attachment to found jurisdiction: Janse van Rensburg (Van Rensburg) did business in Equatorial Guinea with one Obiang, the eldest son of the President. The business deals went sour and that had led to Van Rensburg's repeated arrests and detention over a period of two years, in arduous conditions, until he was able to return to South Africa.

The court *a quo* issued an order attaching certain immovable property of Obiang in Cape Town, to found jurisdiction for his claim for damages, because Obiang was a foreign litigant (a *peregrinus*) of the court, who had not consented to its jurisdiction. The present appeal reported in *Obiang v Janse van Rensburg and Another* [2019] 4 All SA 287 (WCC) was against the granting of the order of attachment.

In deciding whether an order is final in effect and, therefore, appealable, the nature and effect of the order must be considered. The decision must be final in effect and not susceptible of alteration by the court of first instance; it must be definitive of the rights of the parties; and it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. Those requirements were met in this case, and the order was held to be appealable.

The court, per Gamble J (Allie and Boqwana JJ concurring) addressed the allegation of non-disclosure of material facts in the *ex parte* application and found no merit in these.

The appellant's counsel accepted that a *prima facie* case had been made out establishing damages and causation. In issue was whether a case had been made out against Obiang personally and, further, whether his alleged conduct (or his alleged failure to act) was wrongful.

Van Rensburg's evidence *prima facie* contained sufficient allegations to establish both acts and omissions on the part of Obiang for which, if proved, he might ultimately be held personally liable.

While confirming that the act of state doctrine is applicable in our law, which entailed immunity from attachment for Obiang's property, the court declined to finally determine the dispute through the application of the act of state doctrine at the present stage, given that proceedings for attachment were essentially interlocutory in nature.

A case for the attachment of Obiang's property to found jurisdiction was found to have been established and the *rule nisi* was correctly confirmed by the court *a quo*. In the circumstances, the appeal was dismissed.

Other cases

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

- costs – personal liability of state functionaries;
- criminal law – risk of election to remain silent;
- jurisdiction of High Court and magistrates' court for National Credit Act matters; and
- application for bail pending appeal – murder conviction and sentence.

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By
Stephens
Molekwa

Restraint of trade – duress

Thomas NO and Others v Christians and Another (FB) (unreported case no 2177/2019, 28-6-2019) (Mhlambi J)

In the case of *Thomas*, the respondent raised the defence of duress when the applicant sought the enforcement of a restraint of trade agreement.

Mrs Christians, an employee of Bloemsec Trust, worked as a salesperson. The business was a service provider in the security industry. Mrs Christian's employment with Bloemsec commenced on 3 February 2014. As at that date, and until 9 May 2018, there was no written contract of employment in place between the parties. At the latter date, due to 'a change in management' a written contract of employment, backdated to 2014, was given to Mrs Christians by a human resource manager of Bloemsec. She refused to sign it on the spot as she wished to read through it. The contract contained a restraint of trade clause. Broadly stated, it stipulated that Mrs Christians would not, during the period of her employment and, thereafter, for a period of 12 months, be engaged in/or concern herself in activities that would compete with Bloemsec and/or make use of confidential information of Bloemsec's prescribed customers, clients, suppliers etcetera, within the area of Bloemfontein. The restraint would operate against her at the termination of her employment regardless of the cause of such termination.

She was told that failure to sign the contract would lead to the loss of her employment. She signed the contract on the following day under protest. In so doing, she was moved by the threat of unemployment. On 24 April 2019 she gave a notice to terminate her services with Bloemsec, her reason being that she accepted employment from another company. In consequence of this, Bloemsec sought enforcement of the restraint.

Mrs Christians pleaded that she signed the contract under duress. In the alternative, she pleaded that the restraint was unreasonable and unconstitutional due to its scope of operation in relation to the period and area covered by it.

The court, per Mhlambi J, stated that duress is a recognised ground that vitiates a contract that is otherwise valid. The court stated the requirements for the remedy –

- the fear must be reasonable;
- it must be caused by a threat of some considerable evil to the person or his family;
- it must be a threat of an imminent or inevitable evil;
- the threat or intimidation must be unlawful or *contra bonos mores*; and
- the moral pressure must have caused damage (see also *Experian South Africa (Pty) Ltd v Haynes and Another* 2013 (1) SA 135 (GSJ)).

The court referred to *Paragon Business Forms (Pty) Ltd v Du Preez* 1994 (1) SA 434 (SE). This case dealt with a scenario where a former employee had alleged that he felt that he had no option but to sign an agreement containing a restraint of trade. The threat of dismissal was not expressed. The court there was of the opinion that there was no threat of dismissal and that the alleged fear by the respondent was illogical and unreasonable.

Mhlambi J concluded that, in the present case, the coercion was not real. The court then dealt with the law on the enforcement of restraints of trade and concluded that there was an increased risk of harm to the applicant's commercial interests.

As a remedy, duress has presented difficulties in the scenario of duress of goods and economic duress. This may be attributable to the stated elements of the remedy. Moreover, historically, this remedy has not enjoyed success in the courts. However, the Supreme Court of Appeal (SCA) has stated that the threat of economic ruin, in appropriate circumstances, may form grounds for a valid defence of duress (*Medscheme Holdings (Pty) Ltd and Another v Bhamjee* 2005 (5) SA 339 (SCA)). In the present case, Mrs Christians stood to suffer economic harm: The loss of her employment in the event of her not signing the written contract presented to her. In other words, her economic well-being was at stake. It can be said with some certainty that had the employer not made a threat of dismissal, Mrs Christians would have been at liberty to elect whether to sign the contract on the proffered terms or not.

In *Bhamjee*, the SCA held that, in general, it is not unlawful to cause economic harm. The courts continue to state the requirements of duress in the traditional framework that refers to 'a fear of some considerable evil to the person or his family.' In *Thomas* the court's discussion of the principles of duress did not include any discussion of economic duress. In the *Paragon Business Forms* case the court stated that, depending on the circumstances, a threat of dismissal from employment might well constitute a threat of considerable evil.

The question of what needs to be proved in order to successfully invoke the remedy of duress is still determined by an outmoded 20th century test. On the question of what should be regarded as duress, G Glover has submitted that the 'exercise requires making normative judgments about the conduct of both the party exerting the pressure and the party who chose to succumb to the pressure and contract' (G Glover 'The test for duress in the South African law of contract' (2006) 123 *SALJ* 98 at 108)). To avoid this issue, I submit that the current test is inadequate particularly in cases of economic duress.

One is then left with the feeling that the employer's conduct in *Thomas* amounted to an illegitimate use of their superior bargaining position to extract a benefit they did not have prior to the existence of the written contract.

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By
Kgomotso
Ramotsho

The primary purpose of s 41 of the Attorneys Act is to protect the public

NW Civil Contractors CC v Anton Ramaano Inc and Another (SCA) (unreported case no 1076/2018 and 1024/2018, 14-10-2019) (Ponnan JA (Swain, Zondi, and Mocumie JJA and Dolamo AJA concurring))

In the case of *NW Civil Contractors CC*, the Supreme Court of Appeal (SCA) had to look at two judgments of the Limpopo Local Division of the High Court, Thohoyandou involving the same parties, namely, NW Civil Contractors CC (appellant), Anton Ramaano Inc (first respondent), Sheriff Thohoyandou (second respondent). The first, under case number 1024/2018, was an appeal against a judgment, which set aside three orders previously granted in that division, on the basis that the legal practitioner acting for the appellant in those matters was not in possession of a Fidelity Fund Certificate (FFC). The second, under case number 1076/2018, was an appeal against the dismissal of an application by the appellant for the rescission of a judgment, granted by default against it by Mushasha AJ on 11 August 2016.

The litigation stems from a dispute over legal fees that the first respondent – a practising legal practitioner – maintained was owed to him by the appellant. The first respondent had represented the appellant in litigation against a local municipality. The matter was eventually settled on 7 March 2015, when the municipality agreed to pay the appellant the sum of R 14 million. When the first respondent's fees for the rendition of those services remained unpaid, it issued summons against the appellant for payment of its taxed cost in the sum of R 1 395 459,06.

After services of the summons, the appellant entered an appearance to defend the action, but failed to timeously file their plea, with the result that it was subsequently *ipso facto* barred from pleading. On 11 August 2016 default judgment was granted against the appellant. On 30 August 2016 the appellant applied to have the judgment rescinded on the basis that it did not owe any money to the first respondent and that the latter's bill of costs had been erroneously taxed in the absence of the appellant (the rescission application). In the SCA the court said that the appellant denied being indebted to the first respondent. It asserted that it had an agreement with the first respondent that, in return for the legal services rendered, it would undertake certain construction work at the first respondent's property.

The SCA said while the rescission application was pending, the parties became embroiled in further litigation in respect of a number of interlocutory matters. First, on 23 August 2016, the second respondent, had attached and removed some of the appellants goods, pursuant to a writ of attachment, which had been obtained by the first respondent some four days earlier. The appellant accordingly sought urgent interim relief pending finalisation of the rescission application (the first application). The first application succeeded before Kganyago AJ on 22 September 2016.

It was ordered that, pending finalisation of the rescission application, the execution of the default judgment be suspended. The warrant of execution against the property of the appellant stayed and the goods of the appellant that had been attached and removed had to be returned to the appellant (the first order). Meanwhile on 14 September 2016, the first respondent brought an application for the recusal of Kganyago AJ (the second application). The application was dismissed (the second order). The SCA added that aggrieved at the failure of the recusal application, the first respondent applied for leave to appeal the dismissal of the recusal application (the third application). This application was also refused on 22 September 2016 (the third order).

The SCA said that on 28 September the first respondent filed what was described as a 'Notice of application for rescission and/or settings aside of judgment/rulings in terms of the common law and/or appropriate relief in terms of s 38 and/or 173 of the Constitution of the Republic of South Africa Act 108 of 1996'. The basis of the application was that, unbeknown to the parties and the court, the appellant's attorney of record in all three applications, Vhutshilo Nange, was not in possession of a valid FFC. The first respondent thus contended that, because Mr Nange did not have a valid certificate, the three orders granted were void *ab initio* or invalid.

It was further contended that each of the orders granted fell to be rescinded on the basis that, in as much as Mr Nange had represented the appellant without being in possession of such a certificate, they were obtained fraudulently or by misrepresentation. The SCA said it was difficult to discern precisely on what case the appellant was being called on to answer. The SCA added that it seemed that what passed for the motion in the matter was so vague as to render any relief sought thereunder incompetent.

The SCA said insofar as prayers were concerned, it was unclear how the mere setting aside of the second and third orders would advantage the first respondent. If those orders were set aside, without more, would it mean that Kganyago AJ was obliged to re-adjudicate the second and third applications and rule on them afresh? In the ordinary course, what avails a litigant, aggrieved by a dismissal of an application for leave to appeal by the High Court was a petition to the SCA in terms of s 17(2)(*b*) of the Superior Courts Act 10 of 2013, not an application such as the one brought to the SCA, the novelty of which appeared to be surpassed only by its lack of substance.

The SCA said none of this, however, occasioned Phatudi J any difficulty. The courts said he did not content himself with merely setting aside the three orders granted by Kganyago AJ. He went much further and granted an order in the following terms:

'20.1 The first respondent's application is upheld.

20.2 The proceedings initiated and executed by Vhutshilo Licollin Nange who practiced or purported to have practiced as such under the name and style Vhutshilo Nange Attorney are declared null and void *ab initio* and are set aside.

20.3 All rulings and judgments handed down occasioned by the proceedings set aside in the order 20.2 above are declared null and void and set aside.

20.4 The applicant is ordered to pay the costs of this application including all reserved costs.

20.5 The applicant's legal representatives of record including Counsel are precluded from levying and claiming any fees including Counsel Fees incurred from 24 April 2018 from the applicant.'

The SCA pointed out that self-evidently, the relief granted by Phatudi J was never sought by the first respondent. Nor was it foreshadowed in the papers. The court added what is more, para 20.2, facially at least purports to extend to all 'the proceedings initiated and executed' by Mr Nange, not just those that served before Kganyago AJ. The court added 'precisely what those proceedings are, one does not know'. The SCA added that the same holds true for para 20.3 namely, the declaratory orders granted by Phatudi J were far reaching. They purport to put a red line, not just through all proceedings 'initiated or executed' by Mr Nange, but also, and more importantly, 'all rulings and judgments'. Leaving aside the terminological and conceptual difficulties that the employment of words 'initiated' or 'executed' engender there remains the scope and extent of the order, namely when Mr Nange 'practiced' or 'purported' to do so.

The SCA added that assuming that the absence of an FFC, could legitimately ground such far-reaching relief, the orders granted are in no ways defined or limited by the absence of such a certificate. Moreover, interrogating the orders leads one ineluctably to the conclusion that they are indeterminate, open ended and irredeemably vague. The court said it seemed that it would be well-nigh impossible for any litigant to know with any measure of confidence what the order obliges them to do. At the risk of being in contempt of court, litigants are required to comply with court orders and are thus obliged to know, with clarity, what is required of them. It follows that the litigant has to know where its obligation starts and ends.

The SCA further said that the judgment of Phatudi J fails at yet a further leg. He reasoned: 'Seeing that the attorney *in casu* confirmed that he practiced as such without the [FFC] notwithstanding being barred as provided for in terms of section 41(1) of the Attorneys Act [53 of 1979], the attorney's work done in executing or purporting to execute the applicants mandated, was rendered a nullity *ab initio*. Put differently, all that which was done or performed or executed or purported to have been done or performed or executed by the practitioner is in my view, a nullity. The notice of motion drawn and signed by the attorney (Mr Nange) initiating the proceedings forming the subject matter included the ruling(s) and judgments handed down must, in my view, be regarded as *pro non scripto*. In short, all that which the attorney did in the execution or performance of the mandate in this matter must be regarded as not having been done. This translates in the notice of motion, the court's ruling and judgments handed down pursuant thereto being set aside.'

The SCA held that it was not controversial in this case that in terms of s 41(1) of the Attorneys Act. 'A practitioner shall not practise or act as a practitioner on his [or her] own account or in partnership unless he [or she] is in possession of [an FFC].' The SCA added that what was controversial is the consequences that flows from such non-compliance. The SCA noted that in one of the earliest cases to consider the consequences for the validity of an act in conflict with statutory prohibition was *Schierhout v Minister of Justice* 1926 AD 99 at 109 in which Innes CJ said: 'It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect.' But that will not always be so. Whether that is so, as later cases have made clear, will depend on a proper construction of the legislation in question.

The SCA said as it was explained by Solomon JA is *Standard Bank v Estate Van Rhyn* 1925 AD 266 at 274: 'The contention on behalf of the respondent is that when the Legislature penalises an act it impliedly prohibits it, and that the effect of the prohibition is to render the [act] null and void, even if no declaration of nullity is attached to the law. That, as a general proposition, may be accepted, but it is not a hard and fast rule universally applicable. After all, what we have to get at is the intention of the Legislature, and, if we are satisfied in any case that the Legislature did not intend to render the [act] invalid, we should not be justified in holding that it was.'

The court said the legislature expressly provides for two consequences for the conduct complained of. First, s 41(2) provides that '[a]ny practitioner who practices or acts in contravention of subsection (1) shall not be entitled to any fee, reward or disbursement in respect of anything done by him [or her] while so practising or acting'. And s 83(10) of the Act provides: 'Any person who directly or indirectly purports to act as a practitioner or to practice on his [or her] own account or in partnership without being in possession of [an FFC], shall be guilty of an offence and on conviction liable to a fine not exceeding R 2 000 or to imprisonment for a period not exceeding [six] months or to both such fine and such imprisonment.'

The SCA added that the Act, therefore, prescribed two consequences for practicing without an FFC, namely, disentitlement to a fee for the work done and criminal conviction. It does not contemplate a visitation of nullity. In *Oilwell (Pty) Ltd v Protec International Ltd and Others* 2011 (4) SA 394 (SCA), Harms DP referred to J Voet *Commentarius ad Pandectas* 1.3.16 (Gane's translation), who said: 'Nay indeed there is no lack of laws which forbid, and yet do not invalidate things to the contrary, nor impose any penalty upon them. Hence came into vogue the famous maxim "Many things are forbidden in law to be done which yet when done hold good."'

The SCA said it found it difficult to conceive that the legislature had any intention in enacting s 41 other than of punishing the attorney who did not comply therewith. The SCA alluded to the 'greater inconvenience and impropriety' that would follow if the setting aside of orders of Kganyago AJ were allowed to stand. The court noted that it does not seem that, in addition, the legislature also intends that nullity should follow. The SCA followed that judgment and order issued by Phatudi J under case number 1024/2018 cannot stand. That to uphold the approach of Phatudi J would undermine the primary purpose of the Attorneys Act, which is to protect the public and would have grave consequences for the administration of justice, the rule of law and legal certainty.

The SCA said in this matter it remains to be said that the

Legal Practitioners' Indemnity Insurance Fund NPC sought and despite opposition from the first respondent, obtained the leave of the court to be admitted as an *amicus curiae*. The *amicus* provides professional indemnity insurance cover to all attorneys practising in South Africa. On the second appeal the SCA added that after orders were issued, the subject of the first appeal, Phatudi J heard the appellants application for rescission of the default judgment granted by Mushasha AJ on 11 August 2016 and summarily dismissed it.

The SCA said Phatudi J's reason to dismiss the appeal was that the appellant failed to give responsible explanation for the delay, did not advance any *bona fide* defence and that the defences raised enjoyed no prospects of success. The SCA added that in entering into the substantive merits of the rescission application, Phatudi J did not consider himself bound by his reasoning under the case number 1024/2018, that 'the attorney's work done in executing or purporting to execute the applicant's mandate, was rendered a nullity *ab initio'* or that '[t]he notice of motion drawn and signed by the attorney (Mr Nange) initiating the proceedings … must … be regarded as *pro non scripto'*.

The SCA said it is common cause that the appellants plea was filed a day late. The court added that according to the appellant, the notice of the bar in the matter was received by E Munzhedzi, a legal secretary. She, however, did not bring it to the attention of the appellant's legal practitioner but filed it away. When the notice of bar was fortuitously discovered later, on that very day the appellant's legal practitioner hastily drafted, served and filed a plea. Thereafter, despite the appellant's legal practitioner indicating that the application would be launched to uplift the bar, the first respondent proceeded, despite opposition, to obtain a judgment by default. The SCA said there is simply nothing to gainsay the version advanced by the appellant, which must be accepted.

The SCA pointed out that in substantiation of the defence the appellant pointed out that the first respondent had never rendered an invoice for legal fees since first being instructed in 2009. The appellant further asserted that what was owed to it for work done at the first respondent's property exceeded the amount now claimed by the first respondent as legal fees. It followed on the evidence that not only was there no wilful delay, but also that *bona fide* defence had been established. The SCA said the application for rescission ought to, therefore, have succeeded. In the result:

'Both appeals are upheld with costs.

The order of the court *a quo* in each instance is set aside and substituted with the following:

Under case no 1024/2018 –

"The application is dismissed with costs."

Under case no 1076/2018 –

The application succeeds with costs.

The judgment of Mushasha AJ granted by default on 11 August 2016 is rescinded.'

Kgomotso Ramotsho *Cert Journ (Boston) Cert Photography (Vega)* is the news reporter at *De Rebus*.

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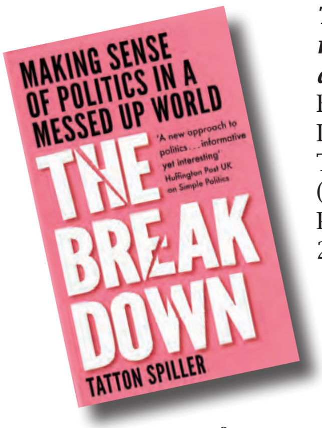
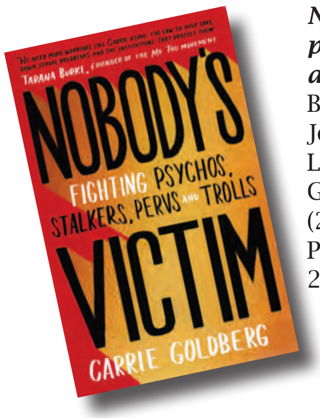
Book announcements



The Break Down – making sense of politics in a messed up world
By Tatton Spiller
London: Elliot and Thompson
(2019) 1st edition
Price R 305 (incl VAT)
232 pages (hard cover)

We are in a time of enormous political engagement, but most of us are ill equipped to truly understand and debate the issues currently rocking our world. With sections including – how it all works; how different people think; and making change happen, this superbly clear-sighted, light-hearted and judgement-free book will equip readers with the tools they need to understand the different arguments, to work out what is happening and why – and then to do something about it.



Nobody's victim – fighting psychos, stalkers, pervs and trolls
By Carrie Goldberg with Jeannine Amber
London: Little Brown Book Group
(2019) 1st edition
Price R 325 (incl VAT)
295 pages (soft cover)

This book takes an unflinching look at a hidden world most people do not know exists – one of stalking, blackmail, and sexual violence, online and off – and the incredible story of how one lawyer, determined to fight back, turned her own hell into a revolution. It is a bold and timely analysis of victim protection in the era of the Internet and an urgent warning of a coming crisis, a predictor of imminent danger, and a weapon to take back control and protect ourselves – both online and off.

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New legislation

Legislation published from 1 – 30 October 2019

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

Promulgation of Acts

Electronic Deeds Registration Systems Act 19 of 2019. *Commencement:* To be proclaimed. GN1293 *GG*42744/3-10-2019 (also available in Afrikaans).

Films and Publications Amendment Act 11 of 2019. *Commencement:* To be proclaimed. GN1292 *GG*42743/3-10-2019 (also available in Afrikaans).

Overvaal Resorts Limited Act Repeal Act 23 of 2019. *Commencement:* To be proclaimed. GN1296 *GG*42745/3-10-2019 (also available in Afrikaans).

Property Practitioners Act 22 of 2019. *Commencement:* To be proclaimed. GN1295 *GG*42746/3-10-2019 (also available in Tshivenda).

Public Service Commission Amendment Act 10 of 2019. *Commencement:* 3 October 2019. GN1291 *GG*42742/3-10-2019 (also available in Afrikaans).

Commencement of Acts

Labour Laws Amendment Act 10 of 2018, ss 8(a), (cA), 11, 15 and 16. *Commencement:* 1 November 2019. Proc R56 *GG*42805/29-10-2019.

Selected list of delegated legislation

Agricultural Product Standards Act 119 of 1990

Prohibition on the removal of imported regulated agricultural products intended for sale in South Africa from specified ports of entry. GN1269 *GG*42739/4-10-2019 and GN1326 *GG*42775/18-10-2019.

Regulations relating to the classification, packing and marking of processed meat products intended for sale in South Africa. GN R1283 *GG*42740/4-10-2019.

Broad-Based Black Economic Empowerment Act 53 of 2003

Market access permits for import of certain agricultural products in terms of the World Trade Organisation agreement. GN1301 *GG*42754/9-10-2019.

Procedures for the application, administration and allocation of export quotas under the economic partnership agreement between the European Union and Southern African Development Community (SADC) for 2020. GN1314 *GG*42758/10-10-2019.

Council for the Built Environment Act 43 of 2000

Scope of work for categories of registration for the profession regulated by South African Council for the Architectural Profession. GN1274 *GG*42739/4-10-2019.

Child Justice Act 75 of 2008

Accreditation of diversion programmes and diversion service providers. GenN541 *GG*42756/11-10-2019.

Companies Act 71 of 2008

New electronic filing channel by way of the World Wide Web for company and close corporation forms. GN1339 *GG*42775/18-10-2019.

Electricity Regulation Act 4 of 2006

Integrated Resource Plan (IRP2019). GN1359 *GG*42778/18-10-2019.

Financial and Fiscal Commission Act 99 of 1997

Determination of remuneration of members of the Financial and Fiscal Commission. Proc R52 *GG*42734/1-10-2019 (also available in Afrikaans).

International Trade Administration Commission of South Africa

Guidelines and conditions pertaining to the imposition of an agricultural safeguard measure in terms of article 35 of the Economic Partnership Agreement (EPA) between the European Union and its member states and the SADC-EPA States. GenN560 *GG*42775/18-10-2019.

Justices of the Peace and Commissioners of Oaths Act 16 of 1963

Additional designation of Commissioners of Oaths: Master Tax Practitioner (SA), General Tax Practitioner (SA); and Tax Technician (SA). GN1321 *GG*42769/16-10-2019.

National Environmental Management Act 107 of 1998

Establishing of an advisory committee to review policies, legislation and practices on matters related to the management, breeding, hunting, trade and handling of elephant, lion, leopard and rhinoceros. GN1317 *GG*42761/10-10-2019.

National Forests Act 84 of 1998

Declaration of particular groups of trees as 'Champion Trees'. GenN553 *GG*42775/18-10-2019.

National Road Traffic Act 93 of 1996

Approved dangerous goods training bodies in terms of the National Road Traffic Regulations, 2000. GN1387 *GG*42799/25-10-2019.

Nursing Act 33 of 2005

Regulations relating to the approval and the minimum requirements for the education and training of a learner or student leading to the registration of a nurse specialist or midwife specialist. GN1322 *GG*42770/16-10-2019.

Occupational Diseases in Mines and Works Act 78 of 1973

Amendment of amounts to increase benefits. GN1385 *GG*42793/24-10-2019 (also available in Afrikaans).

Promotion of National Unity and Reconciliation Act 34 of 1995

Amendment of the regulations relating to the assistance to victims in respect of basic education. GN R1286 *GG*42740/4-10-2019.

Promotion of Access to Information Act 2 of 2000

Rules Board for Courts of Law: Rules of procedure for an application to court in terms of the Act. GN R1284 *GG*42740/4-10-2019 (also available in isiXhosa).

Public Finance Management Act 1 of 1999

Statement of national revenue, expenditure and borrowings as at 30 September 2019. GenN584 *GG*42806/30-10-2019.

Road Accident Fund Act 56 of 1996

Adjustment of the statutory limit in respect of claims for loss of income and loss of support with effect from 31 October 2019 to R 288 935. BN179 *GG*42788/25-10-2019 (also available in Afrikaans).

Rules Board for Courts of Law Act 107 of 1985

Amendment of rules: Conduct of proceedings of provincial and local divisions of the High Court and the magistrate's courts of South Africa with effect from 22 November 2019. GN R1343 *GG*42773/18-10-2019 (also available in Afrikaans).

Special Investigating Units and Special Tribunals Act 74 of 1996

Rules for the conduct of proceedings in the Special Tribunals. GenN569 *GG*42783/18-10-2019.

Water Research Act 34 of 1971

Water Research Levy: Rates and charges: Increase of 10% with effect from 1 July 2019. GN1297 *GG*42747/4-10-2019.

Draft delegated legislation

- South African Sign Language Charter in terms of the Pan South African Language Board Act 59 of 1995 for comment. GN1273 *GG*42739/4-10-2019 and GN1362 *GG*42788/25-10-2019.
- Amendment of rules made by the Legal Practice Council in terms of s 6 of Contingency Fees Act 66 of 1997 and proposed amendments to r 4 in terms of the Legal Practice Act 28 of 2014 for comment. GenN525 *GG*42739/4-10-2019.
- Amendment of the regulations under the Unemployment Insurance Act 63 of 2001 for comment. GN R1298 *GG*42749/8-10-2019.
- Price Discrimination Regulations and Buyer Power Regulations in terms of the Competition Act 89 of 1998 for comment. GN1316 *GG*42760/10-10-2019.
- Amendment of the Administrative Adjudication of Road Traffic Offences Regulations, 2008 in terms of the Administrative Adjudication of Road Traffic Offences Act 46 of 1998 for comment. GN1319 *GG*42765/11-10-2019
- Proposed amendment of rules of the South African Council for Architectural Profession in terms of the Architectural Profession Act 44 of 2000 for comment. BN176 *GG*42756/11-10-2019.
- Draft biodiversity management plan for the African Penguin in terms of the National Environmental Management: Biodiversity Act 10 of 2004 for comment. GN1328/18-10-2019.
- Amendment of the Civil Aviation Regulations, 2011 in terms of the Civil Aviation Act 13 of 2009 for comment. GN R1389 *GG*42801/28-10-2019.
  Amendment of the policy and criteria for recognition of professional bodies and the registration of professional designations in terms of the National Qualifications Framework Act 67 of 2008 for comment. GN1391 *GG*42803/29-10-2019.
- Amendment of the policy and criteria for the registration of qualifications and part-time qualifications in terms of the National Qualifications Framework Act for comment. GN1392 *GG*42803/29-10-2019.

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Employment law update

Nadine Mather *BA LLB (cum laude) (Rhodes)* is a legal practitioner at Bowmans in Johannesburg.

Departing from a codified sanction

In *Mushi v Exxaro Coal (Pty) Ltd Grootegeluk Coal Mine* [2019] 10 BLLR 1134 (LAC), the employee, while driving an oversized coal haul truck, reported to his foreman that the shovel operator was loading the truck in an unsafe manner. His foreman nevertheless instructed him to continue loading and undertook to observe the loading process and informed the employee that he would board the truck at the loading area. The employee refused to obey his foreman's instructions and as the foreman walked towards the loading area to board the truck, the employee maneuvered the truck towards his foreman, causing him to move out of the way.

At a disciplinary hearing, the employee admitted that he behaved improperly, but denied that he threatened the life of his foreman. The employer's disciplinary code, which was stated to be a guideline only, provided for a final written warning for this type of misconduct. Notwithstanding this, the employer dismissed the employee for –

- refusing to obey an instruction from his foreman;
- committing unsafe acts while driving the truck; and
- improper behaviour in operating the truck after his foreman was moving towards it. Aggrieved with his dismissal, the employee referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).

At the CCMA, the parties agreed that the misconduct committed by the employee was common cause. Accordingly, the issues the arbitrator was required to determine was whether the sanction of dismissal was appropriate and whether the employee had been inconsistently treated because his foreman had also not been disciplined. While the arbitrator held that there had been no inconsistency, it found that the three charges levelled against the employee were 'mutated' of one another to make the misconduct appear more serious. There was also no dispute of fact that the misconduct in question was not a dismissible offence in terms of the employer's disciplinary code. In the circumstances, and taking into account that the employee had been employed by the employer for a period of 24 years, the arbitrator found the sanction of dismissal to be inappropriate and awarded that the employee be reinstated retrospectively with a final written warning.

On review, the Labour Court took the view that the dismissal was fair and set aside the award on the basis that the employer had not been provided with an opportunity to address the issue raised by the arbitrator relating to the duplication of charges.

On appeal, the Labour Appeal Court noted that the parties had elected to approach the arbitration on the basis of two issues only, namely –

- the appropriateness of sanction; and
- whether there had been a consistent application of discipline. No oral evidence was led for the purpose of determining these issues and, as a result, the parties were limited to the documentary evidence placed before the arbitrator. The documentary evidence demonstrated that the employee had admitted to having behaved improperly in the manner he had operated the truck, but not to the other charges or that his conduct threatened the life of his foreman.

Having regard to the employer's disciplinary code, which code was expressly stated to be a guideline only, the court noted that the appropriate sanction in cases of insubordination, misuse of property or improper behaviour was a final written warning. The court held that disciplinary rules are intended to create a degree of certainty and consistency in the application of discipline in the workplace. It follows that departures from a disciplinary code should be justified. Even where the disciplinary code is expressed to be a guideline only, there must be a plausible and reasonable justification for the sanction imposed, having regard to the gravity of the misconduct and the relevant aggravating or mitigating factors.

In the present matter, for the employer to have imposed a more severe sanction than that provided for in its disciplinary code, it was required to prove that it was justified and fair. There was no evidence to demonstrate this. The arbitrator had correctly found that the three charges all arose from the same incident and had taken all relevant circumstances into account before determining that the sanction of dismissal was too harsh. The court held that the arbitrator could not be faulted for finding that reinstatement with a final warning was appropriate when there was no evidence that the misconduct was so serious that it made a continued employment relationship intolerable.

The appeal was upheld with costs.

‘Wielding’ weapons during a strike

In *Pailprint (Pty) Ltd v Lyster NO and Others* [2019] 10 BLLR 1139 (LAC), employees employed by Pailprint at its factory in KwaZulu-Natal took part in a national strike called for by the National Union of Metalworkers of South Africa (NUMSA). In response to the impending strike, Pailprint displayed its picketing policy on company notice boards, which policy was agreed to by NUMSA, and stated, among other things, that ‘no weapons of any kind are to be carried or wielded by the picketers’.

Notwithstanding the picketing policy, certain employees were found to be carrying sticks, a PVC pipe and a sjambok while picketing with a group of strikers outside Pailprint’s premises. The employees concerned were charged with ‘brandishing or wielding dangerous weapons during [the] strike’ and, following a disciplinary hearing, were dismissed. NUMSA referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) on behalf of the employees.

At the CCMA, photographs of the injuries sustained by two individuals during the course of the strike were admitted into evidence. While the arbitrator agreed that the objects carried by the employees were dangerous, he found that the employees had not been shown to have ‘brandished’ or ‘wielded’ the weapons as alleged in the charges, but rather that they had merely been carrying them. They were accordingly only in partial breach of a rule. Moreover, the policy did not indicate the consequences of a breach of the policy. Having regard to Pailprint’s disciplinary code, which provided for a sanction of a final written warning in respect of assault but dismissal for the brandishing or wielding of weapons, the arbitrator found the dismissals to be inappropriate and reinstated the employees with final written warnings.

Dissatisfied with the award, Pailprint took it on review. The Labour Court (LC) found no reason, however, to interfere with the award as it was of the view that it was not unreasonable.

On appeal, the Labour Appeal Court held that the main issue was whether the arbitrator had committed an irregularity that led him to a decision, which a reasonable decision-maker could not reach. It was common cause that the employees carried weapons in the forms of sticks, a PVC pipe and a sjambok while striking. This conduct was in contravention of an express rule, which barred weapons of any kind from being ‘carried or wielded’ by picketers. The purpose of the rule was clear, given the evidence of violent attacks carried out against other employees during the strike. Consequently, the court held that it was difficult to understand how the arbitrator could have concluded that the rule had only been partially breached when it expressly prohibited the conduct.

In assessing the sanction, the arbitrator was required to approach the dispute impartially with due regard to all the circumstances, including the reason for the imposition of the sanction and the basis of the employees’ challenge thereto. Having regard to the reasons advanced by the arbitrator, the court found that appropriate regard was not given to the importance of the rule breached or the reason Pailprint imposed the sanction of dismissal.

The court held that an unduly technical approach to the framing of charges of misconduct should be avoided. In finding that the employees were not ‘brandishing or wielding’ dangerous weapons as they had been charged but were carrying weapons in their hands, the arbitrator adopted precisely such an approach. The decision to have a sjmabok, a PVC Pipe and sticks at a protest was not only a clear breach of the rule but was aimed at sending a threatening message to others. Within the context of the nature of the strike violence committed, the court found that the seriousness of the breach was overlooked by the arbitrator.

Pailprint was entitled to prohibit weapons from the strike in order to preserve the safety of its employees and premises. Nothing put forward by the employees concerned justified a finding to the contrary. The constitutional right to strike does not encompass a right to carry dangerous weapons during a strike which, by their nature, not only exposes others to the risk of injury, but also serve to threaten and intimidate.

Consequently, the arbitrator had committed a reviewable irregularity and the LC erred in finding that the decision of the arbitrator fell within the bounds of reasonableness.

The appeal was upheld with costs.

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).

Employer held vicariously liable for the murder committed by its employee

Stallion Security (Pty) Ltd v Van Staden (SCA) (unreported case no 526/2018, 27-9-2019) (Van de Merwe JA (Leach, Mbha and Dambuza JJA and Hughes AJA concurring)).

The appeal before the Supreme Court of Appeal (SCA) was against the order of the Gauteng Division of the High Court, Pretoria, which found Stallion Security vicariously liable to Mrs van Staden for loss of support. This, after Stallion Security's employee, acting for his own interest and purpose, murdered van Staden's husband.

Stallion Security was contracted by Bidvest Panalpina Logistics to provide security for three of its sites, including its head office. Khumalo, employed by Stallion Security, was the site manager for the Bidvest contract and part of his duties entailed performing spot checks at each site, inspecting the interior of the buildings and ensuring emergency exit doors were locked. In order to perform his duties at Bidvest head office, Khumalo was given an override key to gain access to the offices, which no other security guard had access to. Khumalo was also registered on Bidvest's biometric system.

According to a statement to police, Khumalo said he was under pressure to pay back a loan to certain persons who had 'started hurting' him. On the understanding that Bidvest kept a petty cash box at its head office on 3 November 2014, Khumalo arrived at the head office, waited for the staff to leave knowing that van Staden worked late, entered the building via an emergency door and using his override key, gained access to the office area. At gun point Khumalo demanded that van Staden open the safe. Van Staden informed Khumalo that he did not have keys to the safe but could transfer R 35 000 from his personal account to Khumalo's account. It appeared that van Staden made the transfer after which Khumalo forced van Staden to open a door of the office area and then exit through another emergency exit door, escorted van Staden to the latter's car with his gun pinned against van Staden's back.

Khumalo ordered van Staden drive to a nearby shopping mall, however, before reaching the mall and on realising that van Staden could call the police, Khumalo shot and killed van Staden. Khumalo was later apprehended, managed to escape from custody but has since, through certain information, been presumed dead.

The sole issue before the SCA was whether Stallion Security could be held vicariously liable for the self-serving interest of its employee.

The court noted that unlike other instances where the application of vicarious liability was straight forward, '[d]ifficulties arise when the employee commits an intentional wrong entirely for their own purpose'.

In formulating the test to determine whether an act of an employee, done solely for their own interest and purpose, although occasioned by their employment, triggers vicarious liability of the employer the court in *Minister of Police v Rabie* 1986 (1) SA 117 (A) held that reference must first be had to the subjective intentions of the employee. Secondly and adjudged objectively, whether there is nevertheless a sufficiently close link between the employee's self-serving act and the business of the employer – if so, the employer may well be held liable.

This approach was endorsed and expanded on by the Constitutional Court in *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

What factors would a court consider to determine whether there is a sufficiently close link between the independent act of the employee and the enterprise or business of the employer?

In addressing this question the SCA held that such a link would not be established on the mere basis that the business of the employer provided the employee an opportunity to commit the wrong. Put otherwise, the test needs to be more stringent and cannot simply implore the 'but for' test.

Having examined international and local jurisprudence on whether, as a criterion to determine if a sufficiently close link existed between the act of the employee and the business of the employer a court could examine whether the employer created the risk of harm which the employee acted on, the SCA held:

'[O]ur law as developed in *Rabie* and *K*, should be further developed to recognise that the creation of risk of harm by an employer may, in an appropriate case, constitute a relevant consideration in giving rise to a sufficiently close link between the harm caused by the employee and the business of the employer. Whether the employer had created the risk of the harm that materialised, must be determined objectively.'

Applying the criterion to the facts, the court held:

'Stallion [Security] furnished Mr Khumalo with much more than a mere opportunity to commit the wrongs in question. It enabled him to enter into and exit from the office area without detection or concern on the part of Bidvest. He was so enabled by: the intimate knowledge of the layout and the security services at the premises; the instruction to make unannounced visits to the premises at any time; the knowledge that the deceased would be working late; and, most importantly, the possession of the override key to the office area. This special position created a material risk that Mr Khumalo might abuse his powers. This risk rendered the deceased vulnerable and produced the robbery and consequently the murder.'

While acknowledging that the matter before it was not free of difficulty, the SCA held that the court *a quo* had not erred in establishing a sufficiently close link between the business of Stallion Security and the murder committed by its employee, Khumalo. The appeal was dismissed with costs.

Fact corner

- A law in Britain to this day forbids you from not visiting church on Christmas day. And you cannot visit the church in a vehicle.
- It is technically illegal to eat mince pies on Christmas Day in England. In the 17th century, Oliver Cromwell banned Christmas pudding, mince pies and anything to do with gluttony. The law has never been rescinded.
- Christmas as a 'day off' is a recent innovation. As late as 1850, December 25 was not a legal holiday in New England, so stores were open, businesses were open, and children were expected to attend school.
- In 1647, after the English Civil War, Oliver Cromwell banned festivities. The law was not lifted until 1660.
- In Greece, Italy, Spain and Germany, workers get a Christmas bonus of one month's salary by law.

By Kathleen Kriel

Recent articles and research

Abbreviation	Title	Publisher	Volume/issue
BTCLQ	Business Tax and Company Law Quarterly	SiberInk	(2019) 10.3
EL	Employment Law Journal	LexisNexis	(2019) 35.5
ILJ	Industrial Law Journal	Juta	(2019) 40
LitNet	LitNet Akademies (Regte)	Trust vir Afrikaanse Onderwys	(2019) 16.3
PER	Potchefstroom Electronic Law Journal	North West University, Faculty of Law	(2019) 22
SAJCJ	South African Journal of Criminal Justice	Juta	(2019) 32.2
SLR	Stellenbosch Law Review	Juta	(2019) 30.2
TPCP	Tax Planning Corporate and Personal	LexisNexis	(2019) 33.6
TSAR	Tydskrif vir die Suid-Afrikaanse Reg	Juta	(2019) 3

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A step towards a sustainable future – introducing the Carbon Tax Act

By Gari Matarirano and Tanya Calitz

Former President of Ireland and United Nations High Commissioner for Human Rights, Mary Robinson, described climate change as the biggest and most dangerous threat to human rights and human existence. In the face of the dire effects of climate change, this has been interpreted as a global call to action for countries to implement strict policies and legislation in order to reduce greenhouse gas (GHG) emissions and related activities, which contribute to climate change. With South Africa (SA) warming at twice the global rate, the country has had to consider initiatives that are aimed at addressing this issue.

One such initiative is the recently introduced Carbon Tax Act 15 of 2019, which came into effect on 1 June and imposes a tax on the carbon dioxide equivalent of GHG emissions. The enactment of this piece of legislation represents SA's commitment to play its part in global efforts to mitigate GHG emissions as outlined in the National Climate Change Response White Paper (GenN 757 *GG*34695/19-10-2011) and the National Development Plan for 2030. South Africa subsequently set its own domestic targets as outlined in the Nationally Determined Contribution, which was incorporated as the South African commitment in the Paris Agreement (convened by the United Nations Framework Convention on Climate Change). South Africa ratified the Paris Agreement in November 2016. The carbon tax forms an integral part of ensuring that SA meets these targets.

The premise of the carbon tax is that by charging a fee on the carbon emitted from fossil fuels, businesses will decrease the amount of energy harvested from fossil fuels in order to reduce fees. The tax aims to divert taxpayers' money to renewable projects, which in turn, will encourage businesses to transition to renewable energy. Furthermore, new alternative energy sources may increase construction jobs and development. The reduction of pollution from the introduction of renewables will also benefit the country from a health perspective. It is estimated that currently 20 000 people die per year from pollution in SA.

Such a behavioural change to the use of sustainable sources of energy should spawn an expansion of the country's growing renewable industry from an industrial, commercial and residential perspective.

The applicability of the Act extends to South African taxpayers, partnerships, trusts, municipal entities, and public entities that participate in or initiate activities resulting in GHG emissions. In this regard, the Act functions on the 'polluter pays principle', which means that whoever pollutes, must pay for the damage done or harm caused to the environment. Carbon tax will be regulated by the Commissioner for the South African Revenue Services in terms of s 15 of the Act. To this end, carbon tax will fall within the scope of a collectable environmental levy as defined in the Customs and Excise Act 91 of 1964.

Every person or entity will be liable to pay carbon tax in the event that any activities that result in GHG emissions above the relevant thresholds as envisaged in sch 2 of the Act. The relevant thresholds are determined by the National Greenhouse Gas Emission Reporting Regulations of 2017 to the National Environmental Management: Air Quality Act 39 of 2004. The current rate of carbon tax on GHG emissions amounts to R 120 per metric ton carbon dioxide equivalent of the GHG emissions and will increase yearly. Provision is made for certain percentages of tax-free allowances in sch 2 of the Act and these will hopefully prompt and encourage polluters to take action against and minimise activities that adversely affect climate change.

Notably, the Act has not been welcomed and endorsed by everyone and many have reservations about the practicalities and implementation of the Act. One of the critics, the Minerals Council South Africa, is of the opinion that the Act will create immense instability for the struggling mining sector in terms of employment opportunities and increased costs. The tax implications of the Act will impose a heavy financial burden on the mining sector, which it will most likely not be able to fulfil. Eskom reiterates this notion and states that the Act will have a remarkable impact on profitability. Non-governmental organisations, such as the World Wildlife Fund South Africa, view this Act as a victory and a step towards a sustainable future.

Some commentators have expressed concerns regarding the constitutional validity of the taxing measures bought about by the Act. The Act was passed as a money bill, and to fall under that category the dominant objective must be to raise revenue for the state. However, it has been argued that the legislation is essentially a regulatory tool aimed at changing public behaviour. The sector has also called for more clarity on the Act, as associated regulations have not yet been finalised, meaning that companies are not able to calculate their tax liabilities due to the lack of subordinate legislation. It remains to be seen if any interested parties will follow through such criticism with a constitutional challenge in the courts.

Since it is still early days and the Act will be implemented in two phases, the real impact of the Act will only be properly assessed in time. While the introduction of the Act will come at some short-term cost to the country, it is hoped that the long term envisaged benefits of addressing climate change will benefit several future generations.

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By Krish Govender

The case for a differentiated rate of payment of subscriptions by legal practitioners in SA to the LPC at the rate of 2% of taxable income (arising from the highest levels of income inequality in the world)

The Legal Practice Council (LPC) established in terms of ch 2 of the Legal Practice Act 28 of 2014 (LPA), came into being on 1 November 2018 and is the last regulatory body – of all the professions in South Africa (SA) – to be established post-1994. Why did it take more than 24 years for the regulatory body to be established after the advent of our new democracy?

The reasons are many and detailed, but the shortest and all-embracing reason finds its roots in a strategically powerful but deeply divided legal profession, based on race, class, gender and historical past oppression and exploitation. That, however, is a discussion for another occasion.

A quick look at the long title of the LPA indicates its broad intention, *viz*, '[t]o provide a legislative framework for the transformation and restructuring of the legal profession in line with constitutional imperatives so as to facilitate and enhance an independent legal profession …'. The second paragraph of the preamble to the LPA also reminds us that the legal profession is 'fragmented and divided', 'not broadly representative of the demographics of South Africa', 'access to legal services is not a reality for most South Africans' (I say, vast majority) and further that 'opportunities for entry into the legal profession are restricted'. These sad realities of society are mentioned in almost abstract political science jargon without any means or directives on how to reverse this. The LPC is, thereafter, exhorted to address these serious contradictions in the remaining parts of the preamble, the purpose (s 3), objects (s 5), and powers (s 6) in the LPA, again, without saying how and without added specific powers under the LPA to break down this historical mountainous headache of our past and painful history.

Before the LPC can embark on this seemingly impossible task, which only an inspired, honest and driven government can hope to achieve, it would need essential components, like financial aid (funds), united and committed people and a plan of action based on a clear vision. The LPC has just started along this long walk.

This article focuses on the funds, or the shortfall of funds.

As at May 2019, the LPC had a projected budget of approximately R 333 million. The appropriations that the LPC hoped to receive stands at about R 205 million. There is a shortfall of approximately R 120 million. The LPC will have to ensure that it gets the necessary funding from the Legal Practitioners' Fidelity Fund (LPFF). Save for its new name in terms of ch 6 of the LPA, the present LPFF still operates in terms of the previous and untransformed mandates of the Attorneys Fidelity Fund, through its previous and unelected board, which ought to have been elected by May 2019 in terms of the LPA, under the auspices of the LPC. As a result, without the overdue elections, the LPFF still exhibits all the signs of an unwilling partner in its marriage to the LPC.

While the LPC waits patiently, it must prepare for comprehensive negotiations with a new and refreshed LPFF, in order to address its present and future funding needs.

What are the remaining options facing the LPC to raise the necessary funding for its multitude of activities to effectively and efficiently regulate the legal profession of SA? The State is unable to fund itself and is in a serious financial crisis and will not be able to fund the LPC. The LPC in any event, will not wish to look to the State for funding in order to preserve its independence. After the impasse with the LPFF is resolved, some financial relief may be on offer from the LPFF. However, the new LPFF will have to still sustain and protect its funds based on sound corporate governance and economic principles for the future of the legal profession and the interests of the public.

The only enduring option rests with raising the additional necessary funds from the legal profession through the payment of subscriptions. The simple straightforward mechanical thinking that is prevalent these days, in almost all systems and structures in calculating payments of levies or subscriptions is an easy but a harsh and an unjust one, namely, the method of applying the formula of 'one size fits all'. For example, a budget of say R 300 million divided by a membership of 30 000 will equate to a subscription of R 10 000 per legal practitioner annually. This way of thinking is lazy and is a dangerous way of dealing with a legal profession that is seriously skewed in wealth and income differences, more specifically, a legal profession rooted in a country with a history of centuries of exploitation that has resulted in the greatest inequalities in income in the world.

The calculation of a fair and just system for the payment of annual subscriptions by legal practitioners in SA must be determined through a new paradigm. It should be through the prism that reflects the socio-economic realities of a greatly divided profession and society. This prism must give life to the imperatives in the LPA, namely, to 'transform and restructure' our legal profession. It must further give effect to the preamble of the LPA and the purpose and objectives of the LPC.

Before one starts with any mechanical or complex system of calculating annual subscriptions, one has to consider the material conditions prevailing in SA as legal practitioners do not live and work in a vacuum. Legal practitioners are all part and parcel of the terrible disparities in our society, from the few who enjoy the fruits of wealth to the many who face daily hardship and poverty, and everyone in between. Legal practitioners, wealthy and poor, come from the ranks of this unequal society. The poor and marginalised, mainly Black legal practitioners cannot be expected to contribute to the LPC's coffers at the same rate as wealthy legal practitioners (some Black as well) who have benefited from the unjust past and further seized the wonderful economic opportunities that post-democratic processes have gifted them, and further under our present Constitution, protects them and their privileges.

Critical factors to consider

It is almost common knowledge that the Gini coefficient is the measure of income inequality in a country. Simply put, if everyone earned the same in a country the coefficient would be zero, and if one person earned all the income, and the rest nothing, the coefficient would be one.

Global recession, ineffective economic and financial policies, climate change and the many failings of government and society at large, has seen SA emerge with the highest level of income inequality in the world, with a Gini coefficient reading of 0,67.

Wealth inequality in SA on the other hand is even worse and studies have shown that the Gini coefficient during 2014/15 was at 0,94. The legal profession cannot put its head in the sand and pretend that it is not a product of this iniquitous landscape. The wealthiest legal practitioners have accumulated hundreds of millions of Rands in assets and could accumulate more while the poor legal practitioners are experiencing greater hardships and face greater poverty challenges. Against this brief background, the LPC is expected to provide the same high quality regulatory services to both the rich and poor legal practitioners, at subscription rates that will not dent the wallet of a rich legal practitioner, but will definitely drive a poor legal practitioner to desperation.

Take a look at wealthy legal practitioners and the privileges that our new democracy has bestowed on them. They have international status as legal practitioners from democratic SA where the Constitution reigns supreme and the rule of law remains among the strongest in the world. These legal practitioners can brand themselves and commandeer work from the world's biggest markets, including Africa. The substantial amount of wealth that passes through SA, is transacted, *inter alia*, through litigation, agreements, industry and trade overseen by these legal practitioners in the largest firms in Sandton, Cape Town, Pretoria, Durban and other cities in the country. Matters relating to minerals and mining, petroleum and energy, intellectual property, land and property transactions, large deceased estates, trusts, matrimonial and even syndicates involved in white-collar crime and many high-profile mobsters turn to these wealthy legal practitioners. They appear in the highest courts not only in SA but also in international and national arbitrations as advocates and attorneys, senior counsel and senior attorneys and commandeer the highest fees. They also protect the rights of multi-nationals, such as Coca-Cola, Nike, Apple to the proverbial Orange.

What work does the poor and not so poor legal practitioner get to do? The proverbial crumbs. The traditional work as we know it from the Road Accident Fund is going to disappear. Legal aid work is long gone and has been moved to the national body of Legal Aid South Africa. Criminal work is highly overtraded, competitive and in a poverty driven environment is no longer a basic source of income. The future for the poor legal practitioner from largely disadvantaged backgrounds looks bleaker post our new democratic dispensation. The question arises, are we expecting disadvantaged legal practitioners to pay the same subscriptions to the LPC as those who are getting even wealthier than they already are?

Legal practitioners of big and small firms, need a national regulatory body for their national and international reputation, which allows them to market themselves accordingly. This, they are guaranteed, through the LPA via the LPC, which licenses them for this wealth accumulation. For the poor legal practitioner, the LPC is not just a financial burden but also a regulatory authority watching over their meagre income and audit reports. The LPC is a watchdog looking over their small business and professional transgressions, with all the prejudices that follow the small and the not powerful.

The Gini coefficient extrapolates this sad reality that SA has benefitted the privileged, powerful and wealthy legal practitioners, among other business people.

It follows, therefore, that these comfortable legal practitioners must pay proportionately more to sustain the LPC on a special scale as compared to the lesser fortunate legal practitioners.

It cannot be unjust in the economic climate in SA for a wealthy legal practitioner to pay R 40k as subscription if their taxable income for the year is R 20 million. This works out at the rate of 2% of taxable income. The benefit for all the legal practitioners is that this will be tax deductible.

Bearing in mind that income is private, my submission is that the only requirement for a legal practitioner is to furnish an affidavit verified by an auditor to the LPC that the taxable income of such a person is 'x' and, therefore, the subscription payable to the LPC would be calculated at 2% of the taxable income amount. Exemption from paying subscription in certain categories of legal practitioners, for example, those earning less than R 100k per annum should be allowed.

Adjustments can be made biannually depending on the LPC's budgetary requirements. The LPC can budget for high standards, good staff and provide excellent regulatory support services. The beneficiaries will be the people of SA, our constitutional democracy, the legal profession, both wealthy and the poor. This relief for the long-disadvantaged poor and not so poor legal practitioner will see some sense of justice dispensed by the LPC. It will also convey a positive message to many other structures in SA.

The two scientifically researched measures mentioned, together expose the greatest challenge to the future of our constitutional democracy and the attainment of the values underpinning our Constitution. Moreover, the realisation of the right to health, education, housing, food, employment, a clean and safe environment and social security is a vanishing dream in a crippled state that is struggling to stand upright again on the world stage as it fights the ravages of poverty, unemployment and inequality.

The LPC has a role to play in this difficult environment. It must not fail the historically disadvantaged legal practitioner.

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The *De Rebus* Editorial Committee and staff wish all of our readers compliments of the season and a prosperous new year.

De Rebus will be back in 2020 with its combined January/February edition, which will be available from the beginning of February 2020.

The University of KwaZulu-Natal is committed to meeting the objectives of Employment Equity to improve representivity within the Institution.

Preference will be given to applicants from designated groups in accordance with our Employment Equity Plan.

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Minimum Requirements:
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Communication will be limited to short-listed candidates. Short-listed candidates may be required to do a presentation at the interview.

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Anthony V. Elisio

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

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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).

De Rebus has launched a CV portal for prospective candidate legal practitioners who are seeking or ceding articles.

How it works?
As a free service to candidate legal practitioners, *De Rebus* will place your CV on its website. Prospective employers will then be able to contact you directly. The service will be free of charge and be based on a first-come, first-served basis for a period of two months, or until you have been appointed to start your articles.

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

Please include the following in your advert –

- name and surname;
- telephone number;
- e-mail address;
- age;
- province where you are seeking articles;
- when can you start your articles; and
- additional information, for example, are you currently completing PLT or do you have a driver's licence?
- Please remember that this is a public portal, therefore, **DO NOT include your physical address, your ID number or any certificates.**

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

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

Disclaimer:

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