COVID-19 AND THE POSSIBLE PRICE GOUGING EFFECT: DOES SOUTH AFRICA HAVE THE LEGISLATIVE FRAMEWORK TO COPE?

Can victims of revenge pornography rely on POPI’s protection?

Is there a material difference between a person’s gender and their status as a parent?

Has the summary judgment remedy lost its purpose following the amendments to Uniform r 32?

The correct route to follow when dealing with pension fund adjudicator’s determinations

Revisiting the psychological well-being of legal practitioners and their staff

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## Contents

**April 2020 | Issue 605**

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### Regular columns

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Editorial</td>
<td>3</td>
</tr>
<tr>
<td>Practice management</td>
<td>4</td>
</tr>
<tr>
<td>Practice notes</td>
<td>6</td>
</tr>
<tr>
<td>Books for lawyers</td>
<td>9</td>
</tr>
<tr>
<td>The law reports</td>
<td>22</td>
</tr>
<tr>
<td>Case notes</td>
<td></td>
</tr>
<tr>
<td>New legislation</td>
<td>30</td>
</tr>
<tr>
<td>Employment law update</td>
<td></td>
</tr>
<tr>
<td>Opinion</td>
<td></td>
</tr>
</tbody>
</table>

### Articles on the *De Rebus* website:

- Judiciary outlines measures to curb the spread of COVID-19 at courts
- Migrants share challenges they face in SA through a short film
- Law student becomes the youngest to obtain a law doctorate at UP
- Cliffe Dekker Hofmeyr features in the Chambers Global 2020 rankings
- NADEL welcomes changes to the Judicial Service Commission

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**DE REBUS | APRIL 2020**

- 1 -
FEATURES

10 COVID-19 and the possible price gouging effect: Does South Africa have the legislative framework to cope?

The outbreak of coronavirus has witnessed the death of up to 7,529 people (as on 17 March 2020) across the globe. In a panic of the looming pandemic, people are buying basic food supplies and sanitary products at an alarming rate. In response to the high demand for goods, some manufacturing companies and retailers have drastically hiked their prices, which is known as ‘price gouging’. Lecturer, Simbarashe Tavuyanago and Research Assistant and Doctoral Candidate, Kudzai Mpofu, investigates whether the South African legislative framework is sufficient to rebuff attempts by unscrupulous businesses to capitalise on the coronavirus crisis.

12 Has the summary judgment remedy lost its purpose following the amendments to Uniform r 32?

The summary judgment procedure is set to give a plaintiff, with an unanswerable case, a speedy judgment, against a defendant who does not have a defence, without the delay and expense of a trial. This procedure is set out in the Rules Regulating the Conduct of the Proceedings of the several provincial and local divisions of the High Court of South Africa (Uniform Rules). However, Uniform r 32 has been amended. Legal practitioner, Audacious Tawanda Dzinouya, asks if the change serves the purpose intended by a summary judgment remedy, which is to get a speedy judgment.

14 Can victims of revenge pornography rely on POPI’s protection?

Revenge pornography is the act of distributing intimate photography without the consent of the individual being depicted. The problem with many of the remedies currently available to victims of revenge pornography is the time, costs and complexity involved in court proceedings, by which time a victim’s reputation may be irrevocably destroyed. Advocate, Paula Gabriel, examines the nature and extent to which the Protection of Personal Information Act 4 of 2013 affords victims of revenge pornography with alternative and more immediate relief.

17 The correct route to follow when dealing with pension fund adjudicator’s determinations

The Pension Funds Act 24 of 1956 (the Act) regulates all retirement funds that are operating in the private sector and selected funds that the state is associated with. Some retirement funds, such as the Government Employees Pension Fund, are regulated by their own legislation. In terms of s 30A of the Act, any person who has a complaint may ‘lodge a written complaint with the retirement fund for consideration by the board, which must be properly considered and responded to within 30 days’. However, if the fund fails to reply or the complainant is not happy with the response of the fund, the complainant may lodge the complaint with the office of the adjudicator. In this article legal consultant and senior lecturer, Clement Marumoaga, examines the correct process to follow when dealing with pension fund adjudicator determinations.

19 Is there a material difference between a person’s gender and their status as a parent?

This article by legal practitioner, Tshepo Mashile, discusses the United Kingdom judgment of TT and Y (2019) EWHC 2384 (Fam), where the court was required to define the term ‘mother’ under the laws of England and Wales, where an individual, who was born female, underwent gender transition and become legally recognised as male before going on to conceive, carry and give birth to a child. The question that confronted the court was: Is that man the ‘mother’ or the ‘father’ of his child?
South Africa under lockdown

On 23 March, President Cyril Ramaphosa, delivered a statement on escalation of measures to combat the COVID-19 epidemic. In this statement, President Ramaphosa detailed how South Africa will be on a nationwide lockdown for 21 days with effect from midnight on 26 March.

How does this lockdown affect the legal profession?

During the statement, President Ramaphosa reiterated the fact that the most effective way to prevent infection and the spread of the virus is through basic changes in individual behaviour and hygiene. This includes –

- washing hands frequently with hand sanitizers and soap for at least 20 seconds;
- covering the nose and mouth when coughing and sneezing with tissue or flexed elbow; and
- avoiding contact with anyone with cold or flu-like symptoms.

President Ramaphosa noted that: ‘Everyone must do everything within their means to avoid contact with other people. Staying at home, avoiding public places and cancelling all social activities is the preferred best defense against the virus. … Our fundamental task at this moment is to contain the spread of the disease. I am concerned that a rapid rise in infections will stretch our health services beyond what we can manage, and many people will not be able to access the care they need.’

The nationwide lockdown will be enacted in terms of the Disaster Management Act 57 of 2002 and will entail the following:

From midnight on Thursday 26 March until midnight on Thursday 16 April, all South Africans will have to stay at home. The categories of people who will be exempted from this lockdown are the following: Health workers in the public and private sectors, emergency personnel, those in security services – such as the police, traffic officers, military medical personnel, soldiers – and other persons necessary for our response to the pandemic. It will also include those involved in the production, distribution and supply of food and basic goods, essential banking services, the maintenance of power, water and telecommunications services, laboratory services, and the provision of medical and hygiene products (to view the rest of the speech, visit www.derebus.org.za).

On 17 March Chief Justice Mogoeng Mogoeng, issued a Directive in terms s 8(3)(b) of the Superior Courts Act 10 of 2013 on how the courts will operate in view of the COVID-19 epidemic. Courts are to remain open as they are an essential service.

On 24 March Chief Justice Mogoeng issued another Directive for the delegation of authority in terms s 8(3) of the Superior Court Act. In this Directive the Chief Justice stated that the lockdown of the republic made it necessary to revisit the Directives that were issued. Chief Justice Mogoeng delegated his authority to all heads of court in the Superior Courts and magistrate’s/lower courts to issue Directives as this would enable access to courts in relation to any urgent matter, bail applications, maintenance and domestic violence related matters and cases involving children issues.

The Chief Justice noted that even in the case of the state of emergency, s 37(3) of the Constitution empowers the courts to pronounce on the validity of the declaration of the state of emergency and related matters. He added: ‘Courts, therefore, have to stay open in case members of the public want to bring one challenge or another in relation to the constitutionality or the validity of the measures being implemented.’

Keep a look out for up-to-date information on the De Rebus website and the Law Society of South Africa’s website during the lockdown period.

Would you like to write for De Rebus?

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

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

- Please note that the word limit is 2000 words.
- Upcoming deadlines for article submissions: 20 April, 18 May and 22 June 2020.
Revisiting the psychological well-being of legal practitioners and their staff

By Thomas Harban

The growth in professional indemnity (PI) claims against legal practitioners in South Africa (SA) in the last decade has been attributed to several factors, including:

- The sharp growth in the number of legal practitioners not being met by a corresponding growth in the need for legal services by existing and potential clients.
- An unequal distribution of legal work.
- A failure by some legal practitioners to implement adequate risk management systems in their practices, including the internal controls prescribed by the Legal Practice Council (LPC) Final rules as per ss 95(1), 95(3) and 109(2) of the Legal Practice Act 28 of 2014 (the rules) and the standards of professional conduct expected of legal practitioners.
- The problems faced in the conveyancing market, including the emergence of the bridging finance phenomenon.
- The emergence of new risks such as cybersecurity.
- The failure to properly supervise staff.

Several measures have been suggested to mitigate the risk of PI claims. The suggested mitigation and risk transfer measures will have little, if any, impact if one other important consideration is not taken into account, namely the psychological well-being of legal practitioners and their staff. At the end of the day, a legal practice is made of human beings and one of the reasons that people take their ‘eye off the ball’, so to speak, is where there are underlying psychological issues they are facing, whether related to the legal practice or not. The often repeated adage that ‘lawyers are meant to think and not feel’ is neither true nor helpful to someone facing psychological challenges. Facing a PI claim or disciplinary action by the LPC could, in itself, have adverse psychological effects on the parties concerned.

Some aspects of this topic were addressed in the article: Thomas Harban, ‘Personal stressors and legal practice: Your firm needs a plan’ 2017 (Dec) DR 24. The purpose of the present article is not to cover what was previously published, but to alert legal practitioners to this important risk, which does not always receive the coverage that it deserves.

The stresses of legal practice

Legal practitioners and their staff are, first and foremost, human beings. The stresses and stressors associated with legal practice are well documented. These are compounded by the various other personal factors, which a legal practitioner needs to deal with outside of practising law. The result is that, at one point or another, the competing interests and pressures on a legal practitioner may have a negative effect on the psychological well-being of the legal practitioner (or the member of staff, as the case may be). The need to meet financial targets in order to run a profitable and financially viable legal practice is one potential stressor, particularly in the current challenging economic climate. At times the demands of the professional environment are elevated above the other priorities in the life of the person concerned. In some instances, the effect of the stressors may seem all consuming for the person concerned.

The South African Anxiety and Depression Group (SADAG) puts the level of depression in South Africa at 9.7% (4.5 million) of the population (see www.sadag.co.za accessed 17-2-2020).

Many legal practitioners have made remarks about the constant ‘pressure-cooker’ type of environment they find themselves in, the fractious nature of practice and the demands that legal practice places on them personally. As with many other professional service industries, chasing the proverbial bottom line, meeting income targets and meeting client needs and expectations in an increasingly competitive world leaves little, if any, time for legal practitioners to take care of their own psychological well-being. The pressures do not affect the legal practitioners alone, but also affect their professional and administrative staff and the family and other relationships they have outside of the practising law. At times the expectation is that the legal practitioner will play a role over and above that of legal adviser and is expected to play the role of mediator or even lay-psychologist to their clients. These result, in many instances, in the legal practitioner taking their eye off the proverbial ball, which can have devastating effects on the legal practitioner concerned and those around them. Many legal practitioners may not have the knowledge and skills to identify the symptoms of a possible psychological...
cal breakdown in themselves or in a colleague. The skills required to avoid this are, in the best of times, acquired over time in practice and from the lessons gleaned from human behaviour. Even this will not make a legal practitioner an expert in the assessment of mental health issues.

In some instances, the drastic change in the personality of the person concerned is noted by those around them but no interventions are implemented, and no enquiries made with the affected person of their state of well-being.

Some suggested interventions

One suggestion is to manage your workload and learn to say no in appropriate circumstances, whether to clients or colleagues. IM Hoffman Lewis and Kyrou's Handy Hints on Legal Practice 2ed (Durban: LexisNexis 2011) at p 423 writes that:

‘In considering the claims statistics published in respect of professional indemnity insurance policies each year or the number of defalcations, which have been committed by lawyers during the past decade, I can only wonder how many of them would have been avoided if the lawyer in question had shaken his or her head and sadly walked away.

The inability to refuse instructions or avoid making outlandish promises is a prime cause of trouble, both in the area of professional negligence and defalcations.’

I agree with the observation made by Ms Hoffman. One of the suggestions I often make to legal practitioners is that before accepting an instruction, they should consider whether they have the skills, appetite, resources and required time to properly attend to the matter. The continuous management of the client’s expectations is an essential aspect of the relationship between the legal practitioner and the client. Accepting an instruction – no matter how lucrative – from a client with unrealistic expectations will most likely end in discontent and possibly a claim against the legal practitioner or even a complaint to the LPC if the unrealistic expectations are not met. The need to say no and to manage the expectations of the client also extends to instances where the initial mandate was to attend to a limited part of a matter, but then there is incremental scope creep and the mandate becomes wider and wider over time as a result of the client’s unilateral expectations.

Ms Hoffman also writes of what she terms ‘professional paralysis’, which is the situation some practitioners find themselves in when they are no longer able to cope with the demands of practice and choose to avoid, rather than deal with, the challenges they are facing. Ms Hoffman describes it as ‘a form of professional breakdown; a bewildering, mind-blurring condition that is illogical, inexplicable and sometimes untreatable’ (p 419). Some of the possible causes are listed at p 420 to 421, as -

- genuine overwork;
- incompetence in some areas;
- fear of losing clients;
- lack of assistance;
- failure to come to grips with basic economics;
- psychological breakdown; or
- the ego of the practitioner concerned.

The need for intervention

I am not aware of any published South African study on the effect of stress on the profession. I am also not aware of a dedicated confidential reporting line available to the profession for this type of challenge. SADAG is one of a number of organisations that offer a helpline to all members of the public. The unfortunate stigma attached to depression and other psychological challenges are another stumbling block to effectively dealing with these challenges. The silence by some legal practitioners on this subject may be compounded by an ungrounded fear that the disclosure of depression or another psychological challenge could be seen as a potential trigger for action being taken against them by the LPC. This is an unhelpful approach as the person concerned may be sinking deeper and deeper into a dark hole with each passing day and becoming a greater risk to themselves, their clients and their families. There is a need to change the attitude and responses to this risk.

In some other jurisdictions, the effects of stress on legal practitioners have been recognised and some regulators have gone so far as to develop diversion programmes for legal practitioners in appropriate circumstances. Other jurisdictions have recognised the effects of psychological and mental illness that may lead to the abuse of drugs (prescription or otherwise) and alcohol. For example, writing on the launch of a diversion programme by the Office of Enrolment and Discipline (OED) of the United States Patent and Trademark Office (USPTO), Michael E McCabe Jr notes that:

‘Several years ago, the [American Bar Association’s (ABA)] Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation commissioned a study of 15 000 attorneys across 19 states. Their research found that between 21% and 36% of lawyers drink at levels consistent with an alcohol use disorder. For comparison, those numbers are roughly [three to five] times higher than the government estimates for alcohol use disorders in the general population. A report summarising the research was published in the Journal of the American Medical Association.’

Some of the possible causes are:

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- psychological breakdown; or
- the ego of the practitioner concerned.
Many of the other diversion programmes have similar requirements. The effect is that diversion is not a path for legal practitioners to avoid criminal or regulatory accountability for serious misconduct but rather a programme aimed at rehabilitation. Only time will tell whether the LPC will consider and develop a diversion programme for appropriate cases in SA.

Some suggestions for legal practitioners

The steps that practitioners could consider implementing in order to address psychological and mental health issues include:

- Education on mental health issues.
- Creating a supportive environment.
- Seeking appropriate professional help, where there are several organisations, which provide psychological assistance.
- Employing additional resources where there is an increase in the workload.
- Ensuring that there is an equitable distribution of the workload, do not hog clients and/or instructions.
- Having an open and frank chat with clients and agree that their matters may be referred to another legal practitioner where necessary.
- Taking time off from practice.
- Considering other options, such as the closure or sale of the practice in appropriate circumstances.

As aptly put by Ms Hoffman, '[t]he inability of a lawyer to refuse instructions when unable to cope with work on hand is a symptom of a major problem: the failure of lawyers to recognise when it is time to quit' (p 427).

Conclusion

It is hoped that readers will, to a greater extent, appreciate the importance of mental health issues and take steps to ensure that their own mental health and that of their colleagues is adequately protected.

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

A fly in the ointment: The headaches caused by s 59(3) of the Medical Schemes Act

It is often stated that the medical aid industry is prone to abuse by members and health practitioners because payments for services rendered are made in good faith. In recent times there has been a concerted effort by administrators of medical aids to limit the losses occasioned by such abuse. In doing so, the administrators have directed their efforts to reduce any losses directly towards health practitioners. The administrators have relied in large part on s 59(3) of the Medical Schemes Act 131 of 1998 (the Act) to deduct their alleged losses from the amounts owed to health practitioners for services rendered to the medical aid’s members.

Section 59(3) of the Act states: ‘Notwithstanding anything to the contrary contained in any other law a medical scheme may, in that use of:

(a) any amount which has been paid to the health practitioner to deliver the service to the member patient and deliver its account to the medical aid. The medical aid should then either pay the supplier or the member within 30 days. Should the member not have benefits available, the claim will be rejected by the medical aid and the health practitioner will have to pursue the patient for the costs of the services rendered. The alternative is for the patient to pay the health practitioner cash upfront at the consultation, then deliver the account to the medical aid for reimbursement.

The far-reaching powers granted to medical schemes in terms of s 59 of the Act are counterbalanced by reg 6(2) – (4) of the Act. Briefly set out, these regulations provide that if a medical scheme is of the opinion that a claim submitted is erroneous or unacceptable for payment, the scheme must notify the supplier within 30 days and state the reasons for such an opinion; thereafter the supplier must be afforded an opportunity...
to correct and resubmit the claim within 60 days. If this process is not followed, the medical scheme will bear the onus of proving that the claim is erroneous or unacceptable for payment. As mentioned, the purpose of reg 6(2) – (4) is to reign in, or at least temper the medical schemes’ powers in terms of s 59 of the Act. These regulations and the procedure and time-periods set out therein are peremptory and cannot be disregarded by an administrator of a scheme.

In general, the process is initiated with a s 59(3) letter sent by the administrator of the scheme to the supplier stating that it has detected certain anomalies in relation to the claims submitted by the health practitioner. The administrators of the schemes also rely on reg 15(2)(c) of the Act, which entitles a medical scheme to access any treatment record held by a managed health care organisation or health care provider and other information pertaining to the diagnosis, treatment and health status of the beneficiary. Thus, the administrators rely on this regulation to conduct desktop audits on practices or to threaten these practices with the possibility of a full-scale audit.

The modus operandi of the administrator is to withhold payment of money owed to health practitioners for services rendered; then after the health practitioner has provided verification documents, the scheme nonetheless holds the withheld money owed to the health practitioner as a sword over the health practitioner’s head. A serious concern is that some of the schemes investigate claims stretching back as far as three years. Once the scheme has done their calculations (often using a flawed audit process), they quantify a substantial amount over an extended period, thus siphoning the health practitioner and often forcing them to agree to a settlement with the scheme that is detrimental to their practice.

The above actions are not in line with the Act and specifically reg 6(2) – (4) as set out above. The purpose of these regulations is to obligate a medical scheme to take prompt action within the time-periods stated in the regulations when it deems a claim to be ‘erroneous or unacceptable’ for payment. Instead many of the medical schemes embark on a large-scale retrospective audit, severely disrupting the practices of these health suppliers. Moreover, in many instances the administrators are simply using the provisions of the Act to conduct a Kafkaesque cost-saving exercise without affording the health practitioner a fair opportunity to clarify any suspected irregularities.

Therefore, health practitioners should hold the administrators and medical schemes accountable and inform them that if they are of the opinion that a claim is erroneous or unacceptable for payment, the administrator or medical scheme must do the following in terms of reg 6(2) – (4) of the Act –

• the medical scheme must notify the supplier within 30 days and state the reasons for such an opinion; and
• thereafter the supplier must be afforded an opportunity to correct and resubmit the claim within 60 days.

If this process is not followed, the medical scheme will bear the onus of proving that the claim is erroneous or unacceptable for payment. Thus, the medical scheme cannot engage in a large-scale retrospective audit and instead must act proactively and within the stated time-periods. This will prevent severe disruptions to the practices of health practitioners.

Lastly, s 59(3)(b) of the Act authorises an administrator to deduct bona fide payments that a health practitioner is not entitled to or if the medical scheme has suffered a loss. Administrators will rely on minor discrepancies to deduct or withhold payments due to practitioners. Moreover, s 59(3)(b) requires that a loss should have been sustained by the medical scheme. For example, if the allegation by the administrator is that the treatment date and the invoice date differ, it cannot be said that the scheme has suffered a loss and, therefore, the administrator should not be allowed to deduct the claim amount from any payment due to the health practitioner. It is understandable that medical scheme administrators have a duty to protect the interests of the members of the medical scheme to prevent abuse, however, administrators should still act within the parameters of the Act.

The recent s 59 investigation launched by the Council for Medical Schemes is an indication that s 59 of the Act and the way the administrators utilise the provisions of the Act is a cause for concern.

The Madrid High Court of Justice found that Glovo’s gig (contract) workers are not independent contractors but employees

The Madrid High Court of Justice found that riders (drivers) of Glovo – a Spanish on-demand courier service that purchases, collects and delivers products ordered by consumers through its mobile application system, which includes food deliveries – are not independent contractors but employees of the operator (see Tribunal Supremo de Justicia de Madrid – Sección no 01 de lo Social- Recurso de Suplicación 388/2019). Looking at the reasoning, and whether this can be considered as guiding principles for South African courts in relation to our own contract workers, I do not see this as a risk inhibiting the sanctity of contract working conditions in South Africa. In fact, I think the finding of the court can and should be appealed.

On 19 September 2019, the court ruled that the riders (drivers in our context) were independent contractors with no employment relationship to Glovo. On 27 November 2019 and in a plenary session, the court ruled that Glovo riders are employees and not independent contractors. The factors informing this finding were as follows –

• their invoices are drafted by Glovo, which revealed the riders’ lack of infrastructure to organise themselves with their own means;
• their remuneration for each service is unilaterally fixed by Glovo – riders cannot negotiate it;
• they are unable to decide the price that clients should pay for the service;
Can this equally be applied to the South African contract workers?

Where contract workers earn below the annual earning threshold of R 205 433.30, promulgated under the provisions of the Basic Conditions of Employment Act 75 of 1997 (BCEA), they can rely on the deeming presumptions of employment under s 200A of the Labour Relations Act 66 of 1995 (LRA), which largely mirrors the criteria of the Madrid High Court of Justice. Section 200A of the LRA states that, unless the contrary is proven and regardless of the form of the contract, a person is deemed to be an employee if any one of the following circumstances exist:

- the manner in which the person works or their hours of work are subject to the direction or control of another person;
- the person forms part of the organisation;
- the person has worked for the other person for an average of at least 40 hours per month for the last three months;
- the person is economically dependent on the other person;
- the person is provided with tools of trade by the other person; and
- the person only provides services to one person.

This deeming presumption of employment can only be invoked where the contract worker/alleged employee in question earns below the BCEA annual earning threshold. This means that contract workers seeking to claim protection under s 200A of the LRA would need to earn less than the annual earning threshold. Where they ‘earn’ in excess of this amount, they would need to rely on the Code of Good Practice.

A clarity question would be autonomy and agency of the contract worker/independent contract in availing their time because that would impact their ‘earning’ and thus being able to seek the protection of s 200A or the code as the case may be. This creates a preliminary hurdle to protect the gig economy.

How can any person who elects what quantity of time to place at the disposal of their platform now claim vulnerability and thus seek protection under the purview of s 200A of the LRA? The independence, autonomy and agency of the independent contractor cannot be undermined in this equation.

The criteria relied on by the Madrid High Court appears to assume that the Glovo riders lacked the capacity to contract and negotiate the terms of the contractual arrangements altogether. It is equally concerning that in an increasingly app based and platform serviced society, the underlying app is seen to be the mode of production lending to a presumption of employment.

In our space and to date our courts have respected the sanctity of the individual’s contractual capacity. That being said, I have often found guidance in international jurisprudence, which is why these findings and outcomes are of concern to a country in need of work and employment opportunities (as distinct opportunities). Should any contract worker seek protection under s 200A of the LRA or the code, looking at this judgment in its current form, it would need to be considered against precedent on these points.

Termination of employment

Termination of employment at the instance of a party to the contract may be terminated only on a notice of not less than:

- One week, if the employee has been employed for six months or less.
- Two weeks, if the employee has been employed for more than six months but not more than one year.
- Four weeks, if the employee has been employed for one year or more or, in the case of a farmworker or domestic worker, employed for more than six months.

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Cadastre: Principles and Practice

By Roger Fisher and Jennifer Whittal
Cape Town: South African Geomatics Institute (SAGI)
2020 1st edition
Price R 660 (including VAT)
860 pages (soft cover)

A book to equip property lawyers for the new land information system

Cadastre: Principles and Practice could not be timelier for conveyancers, surveyors and all land administration professionals. In 2019 the Presidential Advisory Panel on Land Reform and Agriculture recommended immediate action for an integrated planning and land information system for all land data. At the time of writing this article, it is uncertain which aspects of this recommendation will be acted on, but it is inevitable that land reform system issues will become increasingly important. As we enter the fourth industrial revolution the way the big data for the new cadastre is structured will be critical for our future as a nation. Fisher and Whittal cover a wide range of interdisciplinary issues not yet correlated in any other publication. It will be of great value for all stakeholders influencing land information and administration debates, as well as for those considering new applications under the Electronic Deeds Registration Systems Act 19 of 2019.

As explained in the book, a cadastre is the official record of landowners and the quantity and value of that land, which is used to calculate taxes and prove land rights and extents. In South Africa (SA) this has been achieved through the deeds registry and the offices of the surveyors-general, with conveyancers and surveyors the gatekeepers for the accuracy of these records in the past. This is unlikely to be the case for the broader functions of an integrated land information system. This makes it very important for both professions to contribute now to debates about potential changes. This book will prepare them to do so. The book has been written from the perspective of surveyors and interprets cadastral surveying law for the practice environment. However, it could be of even greater value for conveyancers and other land professionals, as it comprehensively covers all three of the essential elements of a cadastre, being the judicial system, land demarcation and boundaries, as well as professional land administration.

Since SA’s history is central to understanding current land reform measures, the book explains the historical roots of land tenure, ownership and rights in land, as well as how the cadastral system developed in SA to what it is today. Notably the book does not confine itself to the well-established environment of the deeds registry alone, it also covers the challenges and responsibilities of delivery of land rights based on customary law, de facto norms and practices, and other diverse forms of land tenure. This makes it highly relevant to new forms of tenure rights any integrated system will need to devise. This book explains current South African registry and surveying practices for title deeds, mineral and petroleum resources, coastal, offshore and underground areas, as well as the importance of accurate cadastral surveys and boundaries. The principles of land law and cadastral practice are all discussed in the light of contemporary land policy, land reform and land administration. Any land practitioner wishing to understand the key principles speaking into a national data portal and integrated land information system will find the book an extremely helpful overview.

At the launch of the Stellenbosch University School for Data Science and Computational Thinking Stellenbosch Rector and Vice-Chancellor, Professor Wim de Villiers, commented: ‘The validation of data quality is very important, which can be a huge task in the age of “big data”, where information becomes difficult to handle because of sheer quantity’ (‘Big data a game-changer for universities’ Mail & Guardian 25-7-2019, https://mg.co.za, accessed 5-3-2020). In the lingo of computer science, the effect of ‘gigo’ – or ‘garbage in, garbage out’ – must be remembered: If your input is flawed, so will your output be. Any new data portal for land information will inevitably be used to analyse SA’s land relations. It is critical that the data on which this analysis is based is accurate. Land professionals are urged to read this book to equip themselves to speak into the successes and failures of past practices. It will prepare them to participate in debates about the advantages and disadvantages of an integrated and consolidated land information system.

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COVID-19 and the possible price gouging effect:

Does South Africa have the legislative framework to cope?

The outbreak of COVID-19 (coronavirus) in Wuhan, China has witnessed the death of up to 16 362 people (as on 24-3-2020) across the globe, and without a vaccine, it seems this is only the beginning (see Centers for Disease Control and Prevention www.cdc.gov accessed 11-3-2020). The mortality rate is increasing every single day and in a panic of the looming pandemic, people are buying basic food supplies and sanitary products at an alarming rate. In Singapore for example, the high demand for rice and instant noodles prompted Prime Minister Lee Hsien Loong to address the public on the availability of these supplies. Supermarket spending in New Zealand increased by 40% from the beginning of March 2020. While in Malaysia, hand sanitiser sales increased by up to 800%.

By Simbarashe Tavuyanago and Kudzai Mpofu pledged to investigate price gouging on its platform (Nick Statt 'Amazon warns sellers against price gouging face masks amid coronavirus concerns' www.theverge.com, accessed 25-2-2020). In the US, there are numerous pieces of legislation on excessive pricing during natural disasters. For instance, in terms of 5 445.903 of the Michigan Compiled Laws (Michigan Consumer Protection Act 3 of 1976) it is an offence to charge the consumer a price that is grossly in excess of the price at which similar property or services are sold – regardless of whether there is a declared emergency. The offence attracts a penalty of up to US$ 25 000 per violation. The New York Consolidated Laws, General Business Law s 396-R regulating price gouging, prohibits the sale of ‘goods and services vital and necessary for the health, safety and welfare of consumers’ at an ‘unconscionably excessive price’ during a declared state of emergency (see www.nysenate.gov, accessed 11-3-2020). Contravening this section also attracts a penalty of up to US$ 25 000.

Is SA ready?

With SA declaring a diagnosis of its first case on 5 March 2020, the question is whether we are prepared generally in terms of disaster management to handle such an outbreak and specifically with regard to legal responses to the hiking of prices of basic sanitary products. This article investigates whether the South African legislative framework is

In response to the high demand for goods and services, manufacturing companies and retailers have hiked their prices. Reports of ‘price gouging’ or excessive pricing on eBay, Etsy and South Africa’s Takealot (Qama Qukula ‘Takealot pulls surgical masks after backlash over R2,500 price tag’ www.capetalk.co.za, accessed 11-3-2020) have left consumers vulnerable to unfair trade practices. For example, a pack of face masks costs more than US$ 100 in the United States (US) and R 2 500 in South Africa (SA) on e-commerce sites. Amazon announced it removed over a million basic-needs products for misleading claims and price gouging (Nick Statt 'Senator slams Amazon over coronavirus price gouging on hand sanitiser and face masks' www.theverge.com, accessed 4-3-2020).
sufficient to rebuff attempts by unscrupulous businesses to capitalise on the coronavirus crisis and any other future crises.

In the event of a natural or man-made disaster, the first point of reference would be the Disaster Management Act 57 of 2002 (the Act). The Act defines ‘disaster’ as ‘a progressive or sudden, widespread or localised, natural or human-caused occurrence which -

(a) causes or threatens to cause -
(i) death, injury or disease; or
(ii) damage to property, infrastructure or the environment; or
(iii) significant disruption of the life of a community; and
(b) is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources.’

The coronavirus would fall squarely within the definition of a disaster as it is a communicable disease that poses the threat of death. The Act makes provision for the establishment of a disaster management centre and provides general powers and duties of the centre in s 15, which among others include -

• making recommendations regarding funding of disaster management;
• promoting recruitment, training and participation of volunteers;
• making recommendations on whether a national state of disaster should be declared in terms of s 27;
• promoting research into all aspects of disaster management; and
• liaising and coordinating its activities with the provincial and municipal disaster management centre.

However, the Act does not contain any provision with reference to the regulation of commodity pricing during a disaster. To this end, SA lacks laws specifically dedicated to or providing for protection of consumers against price gouging in a state of emergency. There are, however, several sections in the Consumer Protection Act 68 of 2008 (CPA) and Competition Act 89 of 1998 (the Competition Act) that may be used to challenge, alternatively lay complaints against firms that attempt to take advantage of a crisis and hike commodity prices. This article suggests two avenues of dealing with price gouging.

The CPA

The CPA aims to promote fair business practices, as well as to protect consumers from unfair, unreasonable or other improper trade practices, deceptive, misleading or other fraudulent conduct. In the wake of the coronavirus and the possibility of price gouging in response to panic buying or high demand for sanitary goods and services, consumers may find redress in the CPA. Part F of the CPA provides for the right to honest and fair dealing. Section 40(1) of the CPA prohibits a supplier from using force, coercion, undue influence, duress, unfair tactics or any other similar conduct concerning the supply of goods or services to the consumer. While the section does not specifically speak to excessive pricing, we are of the opinion that price gouging in times of crises amounts to ‘unfair tactics’ by the supplier. This is due to the fact that the consumer is in a vulnerable position and the supplier obtains an unfair advantage such as is the case with the coronavirus. Where suppliers hike prices due to increased demand necessitated by a disaster, natural or otherwise, such conduct may be deemed unconscionable under s 40(2) of the CPA. This is because the supplier would have knowingly taken advantage of the fact that the consumer was substantially unable to protect their interests because of the urgency of the need to obtain sanitary goods or services.

Consumers may also find refuge under the auspices of s 48(1) of the CPA. In terms of the section, a supplier must not offer to supply goods or services at a price that is unfair, unreasonable or unjust (s 48(1)(a)). If one considers the price hike of face masks on Takealot, a consumer could conclude that R 2 500 for a pack of 50 surgical face masks is an unfair and unreasonable price. In that case, a consumer could rely on Part G of the CPA.

The Competition Act

The purpose of the Competition Act is to promote and maintain competition in SA in order to provide consumers with competitive prices and product choices (s 2(b) of the Competition Act). Some argue that the true goal of competition is ‘consumer welfare’ (see M Brasseys (ed) Competition Law (Cape Town: Juta 2002)). If this viewpoint is accepted, then consumers may find a remedy against price gouging through the provisions of the Competition Act.

While the Competition Act does not specifically provide for prohibition of excessive pricing by all suppliers, recourse may be found under Part B of ch 2 of the Competition Act, relating to abuse by a dominant firm. Section 8(a) provides that a dominant firm is prohibited from charging excessive prices to the detriment of consumers.

In as much as the section specifically makes the provision applicable to dominant firms, it is widely understood and accepted that in a crisis such as the one we are facing due to the advent of the coronavirus, dominant firms are usually the ones to engage in price gouging as they have the means of production and manufacturing to meet the high demand as compared to smaller firms. In the case of Takealot, one could argue that it is a dominant firm in the e-commerce space. The price of R 2 500 for surgical face masks, which is excessive could, there-fore, be prohibited by the Competition Act. The major stumbling block to accessing recourse under s 8 of the Competition Act is that one would need to establish dominance on the part of the firm engaging in price gouging before an allegation can be made that the firm is abusing said dominance (see s 7 of the Competition Act on how dominance is determined).

Conclusion

This article noted that SA lacks specific legislation or policy regulating the issue of price hikes during disasters. While some sections of the CPA and the Competition Act may be interpreted to give recourse to the consumer against excessive pricing, the nature of the recourse is usually lengthy due to the administrative and litigious nature of remedies in terms of the Acts. By the time a consumer is vindicated in their quest to challenge the unscrupulous practice of price gouging, the effects would have long been felt by millions of consumers. We, therefore, argue that as a nation, we are not prepared enough as we do not have a ‘go-to’ law or policy regarding price maintenance during a state of emergency brought about by a natural disaster.

Due to the frequency of disease outbreaks in Africa generally (for example, H1N1, meningitis, ebola, malaria) (see ‘Worst natural disasters in South Africa’ https://briefly.co.za, accessed 11-3-2020), as well as other natural disasters (such as hurricanes, flooding, drought, etcetera) (see ‘Worst natural disasters in South Africa’ https://briefly.co.za, accessed 11-3-2020), we propose that the government establish a clear cut policy on disaster management that would automatically place a moratorium on prices for basic and necessary commodities during times of crises. Alternatively, we propose that the legislature insert a section either within the CPA or the Competition Act to specifically provide for the regulation of markets in times of crisis by prohibiting price gouging and providing a penalty for contravention of the prohibition, such as the model available in the US.

DE REBUS – APRIL 2020

FEATURE – CONSUMER LAW

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If you think that you have been exposed to the COVID-19 virus, please call the 24-hour hotline at 0800 029 999.
Has the summary judgment remedy lost its purpose following the amendments to Uniform r 32?

By Audacious Tawanda Dzinouya

The summary judgment procedure is set to give a plaintiff, with an unanswerable case, a speedy judgment, against a defendant who does not have a defence, without the delay and expense of a trial. This procedure is set out in the Rules Regulating the Conduct of the Proceedings of the several provincial and local divisions of the High Court of South Africa (Uniform Rules). Uniform r 32 has been amended and these amendments merely applies to summary judgment applications initiated after 1 July 2019 (see Standard Bank of SA v Rahme and Another (unreported case no 17/46904; 27740/2018; 27741/2018; 3765/2019; 11912/2018, 3-9-2019) (Siwendu J) at para 31). The crux of the matter is to consider whether the change - brought about by the said amendments - serves the purpose intended by summary judgment remedy, which is to get a speedy judgment.

Procedure prior to Uniform r 32 amendments

In terms of the old rule, a plaintiff could apply for a summary judgment after the defendant had delivered a notice of intention to defend. The old Uniform r 32(2) required that a notice of the summary judgment proceedings be served within 15 days of receipt of a notice of intention to defend. The founding affidavit in support of a summary judgment application was, and still is, a technical document and the content thereof is strictly prescribed by the rules. It was required by Uniform r 32(2) that the deponent merely verify the cause of action and the amount, if any is being claimed, state that there is no bona fide defence to the action and...
that the notice of intention to defend has been delivered for the purpose of delaying judgment.

Procedure post Uniform r 32 amendments
The circumstances in which a summary judgment remedy is appropriate have not been affected by the amendments, but the procedure has seen some major changes.

Firstly, Uniform r 32(1) read with Uniform r 32(2)(a) now provides that the plaintiff cannot bring a summary judgment application until the defendant has delivered a plea. The trigger has shifted from delivery of a notice of intention to defend to delivery of a plea. A plaintiff, with an unanswerable case against a defendant who does not have a *bona fide* defence, now has to wait for delivery of a plea to be able to issue a summary judgment application.

Secondly, Uniform r 32(2)(b) has added an additional requirement to the content prescribed for supporting founding affidavits. In the affidavit it is required to ‘identify any point of law relied upon and the facts upon, which the plaintiff’s claim is based, and explain briefly why the defence pleaded does not raise any issue for trial’. It will not be enough to merely state that the defendant has no *bona fide* defence, the affidavit must prove the lack of a defence and basically attack the plea.

Lastly, Uniform r 32(2)(c) departed from the ten-day period set down for summary judgment applications. The plaintiff can set the application for summary judgment down for hearing on a stated day not being less than 15 court days from the delivery thereof.

The effects of the amendments in practise
The amendments have caused for more time to lapse before the summary judgment remedy is available to a plaintiff. Furthermore, various avenues that may be used to delay a matter have been opened for elusive defendants. For one, the defendant may wait for the 20 days to lapse and, thereafter, wait for the plaintiff to file a notice of bar before it delivers a plea.

Alternatively, on the last day of the five days’ time period set by a notice of bar, the elusive defendant may further delay delivering a plea by requesting, from the plaintiff, discovery of certain documents in terms of Uniform r 35(14). The defendant may allege that the documents are required for purposes of pleading. The more the plea is delayed, the longer it will take for the plaintiff to initiate a summary judgment application. This defies the purpose and objective intended to be achieved by a summary judgment remedy.

Was there any need to further certainty?
There are some legal practitioners who have welcomed the amendments to the procedure and the commonly held sentiment being that the amendment promotes greater certainty before a judgment is granted. This greater certainty outweighs the lesser time and saving of costs achieved by the summary judgment application procedure prior to the amendments. This makes one wonder whether there was a need for further certainty.

The courts in South Africa have always promoted the spirit of fairness and justice when considering summary judgment applications. The summary judgment remedy is only available in certain circumstances and these conditions seem to guarantee certainty of both the existence of a claim and the absence of a defence.

The first circumstance that avails the summary judgment remedy is where the claim is based on a ‘liquid document’. A ‘liquid document’ for purposes of the summary judgment remedy has been considered to be the same as the meaning of a ‘liquid document’ for purposes of provisional sentence proceedings set out in Uniform r 8 (see *Van Wyngaardt, NO v Knox* 1977 (2) SA 636 (T)). This is a document that ‘evidences by its terms and without resort to evidence extrinsic thereto, is an unconditional acknowledgement of indebtedness in an ascertained amount of money, the payment of which is due to the creditor’ (*Rich and Others v Lagerwey* 1974 (4) SA 748 (A) at 754H).

The second circumstance is if the cause of action is based on a ‘liquid amount of money.’ In general, a ‘liquidated amount of money’ bears the same meaning with ‘debt or liquidated demand’. There has to be evidence of an existing due debt and its certainty is found on the same premises as described above for a liquid document in provisional sentence proceedings. It has to be an amount, which was agreed on between the parties or easy to calculate.

The third circumstance is when the plaintiff is seeking delivery of a specific movables, property. This is a situation where, for example, a contract specifically provides that the defendant must deliver something to the plaintiff. There is clearly a right to receive and an obligation to deliver a specific property.

Lastly, the summary judgment remedy is available in evictions from an immovable property. A judgment for eviction is sensitive and has far reaching consequences. Therefore, an application for summary judgment for eviction must comply with the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act). The court in *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) in para 20 ruled that the PIE Act does not apply to ejection from a commercial property or a property owned by juristic persons. Nevertheless, when seeking the summary judgment remedy one must comply with the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act).

Conclusion
The summary judgment remedy has not lost its purpose, but it has certainly moved two steps backwards. The new procedure is open to a lot of abuse, by elusive defendants, that may result in more time and costs being wasted. The benefit remains that the plaintiff will attain a judgment without trial, but the journey to obtaining that judgment has been extended.

**FEATURE – JURISPRUDENCE**

South African courts adopted the summary judgment remedy form the United Kingdom (UK). In the UK, the remedy may only be brought after pleadings have been closed. This is why the Rules Board in South Africa considered the position in the UK as assurance and indication of merit for these amendments (see Memorandum to role-players in respect of proposed changes to the summary judgment rule (Uniform rule 32) July 2016).

There is a difference between South African law and UK law on the circumstances that the summary judgment is available. In terms of the Civil Procedure Rules (CPR) in the UK, unlike in South Africa, the summary judgment remedy is available in most proceedings – except for those for possession of residential premises; and proceedings for an admiralty in rem claim. The scope of circumstances that one can pursue the summary judgment remedy is broader in the UK, hence it is understandable why the remedy is only available after pleadings have been closed. In South Africa, as discussed above, the remedy is limited to a few circumstances and the few circumstances guarantee certainty of not being defensible.

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Revenge pornography is the act of distributing intimate photography without the consent of the individual being depicted (S Hinduja 'Social Media, Cyberbullying, and Online Safety Glossary' https://cyberbullying.org, accessed 2-3-2020). This term would theoretically include the instance where someone accidentally uploads a sexually explicit image onto a social media platform without the subject’s consent, even where no harm was intended.

The term ‘revenge pornography’, however, suggests an element of personal vengeance, which is misleading, since perpetrators may in fact be motivated by other factors, such as the desire for profit or entertainment (MA Franks, “Revenge Porn” Reform: A view from the front lines’ (2017) 69 Florida Law Review 1251 at 1257 – 1258). The alternative term ‘non-consensual pornography’ is more accurate (this article uses the terms interchangeably). The problem with many of the remedies currently available to victims of revenge pornography is the time, costs and complexity involved in court proceedings, by which time a victim’s reputation may be irrevocably destroyed.

Existing criminal law remedies include a charge of crimen injuria, criminal defamation, or even extortion, while civil remedies include damages for defamation or an interdict based on a breach of copyright (where the victim took the photograph themselves). The Protection from Harassment Act 17 of 2011 also entitles a victim of revenge pornography to apply for a protection order, which is coupled with a suspended warrant of arrest.

The Films and Publications Amendment Act 11 of 2019 (the FPAA) - which has yet to come into effect - makes it a criminal offence to expose private sexual photographs and films in any medium, where such distribution is done with the intention to cause the said individual harm. While the criminalisation of the distribution of revenge pornography is certainly a positive development, any remedies in terms of the FPAA remain dependant on the efficacy of the criminal justice system.

This article examines the nature and extent to which the Protection of Personal Information Act 4 of 2013 (POPI) affords victims of revenge pornography with alternative and more immediate relief, which may be sought in addition to existing remedies.

The scope and application of POPI

The 1995 EU Data Protection Directive 95/46/EC has had a profound impact on data privacy laws around the world. It was replaced in 2016 by the General Data Protection Regulation (EU) 2016/679 (GDPR), which attempts to harmonise data privacy laws across Europe and pro-
vides for a useful comparison when analysing the provisions of POPI.

Definitions
POPI defines ‘personal information’ as information ‘relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person’. While a photograph or video is not specifically listed in the definition, the Court of Justice of the European Union held, in Frantisek Rynes v Úrad Pro ochranu osobních údajů (C-212/13, 11-12-2014) that ‘personal data’ as defined in the 1995 Data Protection Directive also referred to the image of a person by a camera because it makes it possible to identify the person concerned.

‘Processing’ is defined in POPI to mean ‘any operation or activity or any set of operations, whether or not by automatic means, concerning personal information, including –

(a) the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use;
(b) dissemination by means of transmission, distribution or making available in any other form; or
(c) merging, linking, as well as restriction, degradation, erasure or destruction of information’.

A ‘responsible party’ is defined as a ‘public or private body or any other person which, alone or in conjunction with others, determines the purpose of and means for processing personal information’.

I submit that the distribution of revenge pornography on the Internet would classify as processing of personal information where the perpetrator is the responsible party as defined in POPI.

The processing of personal information is excluded from the ambit of POPI in certain instances, but I submit that none of these exemptions apply to the distribution of revenge pornography and that POPI will, therefore, find application.

A complaint to the regulator
In terms of s 74(1) of POPI any person may lodge a complaint with the Information Regulator where their personal information has been processed in a manner that is –

• not lawful;
• not reasonable; or
• in a manner which infringes on their privacy.

For purposes of investigating the matter the Regulator will have the same powers as a High Court and may summon and enforce the appearance of persons and compel them to give evidence on oath and to produce any records necessary to investigate the complaint (s 81).

Section 81(d) of POPI empowers the Regulator for purposes of an investigation, at any reasonable time, to enter and search any premises occupied by a responsible party. Where access is unreasonably refused, or where the occupier unreasonably refuses to comply with a request by the Regulator, the Regulator may apply to a judge or a magistrate for a search warrant.

A warrant issued under s 82(1) authorises any of the Regulator’s members or staff to enter the premises identified in the warrant and to search, inspect, examine, test and seize any equipment, which was used for the processing of personal information, and to seize any evidence found there. The judge or magistrate, before granting a warrant, must be satisfied that the Regulator has given seven days’ notice to the occupier of the premises demanding access and that access was unreasonably refused, or that the occupier refused to cooperate with the Regulator.

The seven-day notice period will not apply, however, if the judge or magistrate is satisfied that the case is one of urgency, or that compliance with that subsection would defeat the object of the search. The seven-day notice period will hopefully be waived in cases involving revenge pornography.

Issuing an enforcement notice
After completing an investigation, the Regulator may refer the complaint to the Enforcement Committee (s 92), which is an independent body not subject to control by the Regulator. The Enforcement Committee must consider all matters referred to it by the Regulator and may make a recommendation to the Regulator (s 93). After having considered a recommendation made by the Enforcement Committee the Regulator may serve the responsible party with an enforcement notice requiring them to take specified steps and to stop processing personal information (s 95). Where the Regulator considers that an enforcement notice should be complied with as a matter of urgency the compliance notice may stipulate a period of three days within which to comply.

I suggest that a perpetrator – who has distributed revenge pornography – could be required, in terms of an enforcement notice issued by the Regulator, to remove the pornographic material from the website or social media platform in question.

It is unclear how long it will take from lodging a complaint with the Regulator until an enforcement notice is issued. POPI and the regulations in terms thereof also do not stipulate any fees involved in lodging a complaint with the regula-
tor. Nevertheless, the process is likely to be cheaper than obtaining an interdict on an urgent basis, and it remains to be seen which remedy will be faster and more effective.

An administrative fine or criminal charges?
Sections 100 and 103, read with s 107 of POPI make it an offence for a responsible party not to comply with an enforcement notice or to obstruct the Regulator in the performance of its functions. These offences carry a penalty of imprisonment of up to ten years or a fine and remain governed by the principles of criminal law.

However, s 109 provides for the imposition of an administrative fine by the Regulator as an alternative to criminal prosecution. The responsible party can elect either to pay the administrative fine or to be tried in court. Where the responsible party elects to be tried in court on a charge of having committed the offence, the Regulator must hand the matter over to the South African Police Service (s 109(4)). The Regulator may not impose an administrative fine if the responsible party has been charged with an offence on the same set of facts, and where the offender has paid an administrative fine no prosecution may be instituted against them (s 109(7)).

Section 109(5) provides that where an infringer fails to pay the administrative fine, the Regulator may file – with the Registrar or Clerk of the Court – a statement setting out the amount of the fine, which statement shall have the effects of a civil judgment granted in favour of the Regulator for a liquid debt.

Effectively, a person who is guilty of spreading revenge pornography can be required, in terms of an enforcement notice, to take the footage down. If they comply the victim is still entitled to pursue a claim of civil damages in terms of s 99. However, where the perpetrator does not comply they could find themselves facing criminal prosecution or having to pay a fine. While this fine itself is not payable to the victim, the perpetrator has not gone unpunished and the victim may still pursue a civil claim for damages.

Civil damages
Section 99(1) of POPI provides that a data subject may institute a civil action for damages against a responsible party for breach of any conditions for the lawful processing of personal information, whether or not there is intent or negligence on the part of the responsible party. Section 99 thus provides for liability without fault, where ordinary common law remedies would require at least negligence.
The right to be forgotten

The above remedies are contingent on the victim knowing the identity of the perpetrator. In the event that the perpetrator’s identity is unknown, the victim could potentially rely on s 24 of POPI, which provides that a data subject may request a responsible party to delete personal information that is inaccurate, irrelevant, excessive, incomplete or misleading.

The right to be forgotten, which is contained in art 17 of the GDPR, was first recognised in Google Spain SL and Google Inc v Agencia Española de Protección de Datos (AEPD) and Mario Costeja Gonzalez (C-131/12, 13-5-2014) in which the European Court of Justice (the ECJ) ruled that search engines are controllers of personal data. The court held that even if the physical server of a company processing data is located outside of the EU, European rules still apply to the search engine operators if they have a branch or a subsidiary in a Member State. An individual thus has the right, where the information is inaccurate, inadequate, irrelevant, or excessive for purposes of the data processing, to ask a search engine to remove links with personal information about them (at para 93 of the ruling).

The right to be forgotten may serve as a valuable remedy for victims of revenge pornography on the grounds that such ‘information’ is irrelevant, inaccurate, or excessive, subject to three considerations.

The ECJ ruling does not mean that information must be deleted off the Internet completely, only that links to information about an individual should be removed from search results. Secondly, it is not clear whether the Google Spain decision also applies to the search feature on social media platforms. Third is the fact that the ECJ subsequently ruled that the right to be forgotten only applies within the EU (Google LLC, Successor in law to Google Inc v Commission Nationale de l’informatique et des Libertés (CNIL) (C-507/17, 24-9-2019).

Nevertheless, if a South African court were to apply the principles applied by the ECJ in Google Spain, it is possible that South Africans would also be able to request a search engine, in terms of s 24 of POPI, to remove links to offensive footage from their search results.

Conclusion

The efficacy of any potential remedies in terms of POPI would depend on the speed and capacity of the Regulator and the Enforcement Committee. Nevertheless, there is the potential for POPI to function as an effective tool in combating revenge pornography, whether used instead of, or in addition to other civil and criminal remedies.

POPI may also provide a solution in terms of the right to be forgotten where the perpetrator’s identity is unknown. One can only hope that by lodging a complaint with the Regulator the victim may be able to obtain more immediate relief in order to limit the damage to their reputation.

POPI defines ‘personal information’ as information ‘relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person’.

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The correct route to follow when dealing with pension fund adjudicator’s determinations

By Clement Marumoagae

The law regulating the South African retirement fund industry is fragmented with different retirement funds being regulated by different pieces of legislation (MC Marumoagae “The need for effective management of pension fund schemes in South Africa in order to protect members’ benefits” (2016) 79 THRHR 614). Nonetheless, the Pension Funds Act 24 of 1956 (the Act) regulates all retirement funds that are operating in the private sector and selected funds that the state is associated with. Some retirement funds, such as the Government Employees Pension Fund, are regulated by their own legislation.

In terms of s 30A of the Act, any person who has a complaint, which meets the definition of a complaint provided for in s 1 of the Act, may ‘lodge a written complaint with the retirement fund for consideration by the board, which must be properly considered and responded to within 30 days’. However, if the fund fails to reply or the complainant is not happy with the response of the fund, the complainant may lodge the complaint with the office of the adjudicator. In terms of s 30D(2)(d) of the Act, the adjudicator must dispose of the complaint ‘in a procedurally fair, economical and expeditious manner’. Pursuant to the amendments brought by the Financial Sector Regulation Act 9 of 2017 (the FSRA), s 30D(2)(a) of the Act now provides the adjudicator an equitable jurisdiction in that ‘[i]n disposing of complaints … the adjudicator must – (a) apply, where appropriate, principles of equity’.

Section 30E of the Act mandates the adjudicator to ‘investigate any complaint and … make the order which any court of law may make’. In terms of s 300(1) of the Act, an order made by the adjudicator is regarded as a civil judgment and is the same as any order made by a court of law. Section 300(2) of the Act, provides an avenue for the enforcement of the adjudicator’s determinations sounding in money through usual civil procedure mechanisms, by making it possible for those who have been awarded a sum of money to approach either a magistrate court or High Court to issue a writ of execution on the strength of the adjudicator’s determination.

Most importantly, the Act provides a remedy for those who are not happy with the outcome of the adjudicator’s processes. In terms of s 30P(1) of the Act, those who are aggrieved by the adjudicator’s determination may apply to the High Court for relief. It is clear from the wording of the Act that this application is an appeal as opposed to a review. Section 30P(2) of the Act specifically provides that once the application for relief is made, the High Court may consider the merits of the complaint and the grounds on which the determination was based and make any order it deems fit. In interpreting this provision, the Supreme Court of Appeal has held that the High Court is not confined to the information that the adjudicator relied on when making its determination.

In Meyer v Iscor Pension Fund [2003] 1 All SA 40 (SCA) at para 8, the court held that: ‘From the wording of section 30P(2) it is clear that the appeal to the High Court contemplated is an appeal in the wide sense. The High Court is therefore not limited to a decision whether the adjudicator’s determination was right or wrong. Neither is it confined to the evidence or the grounds upon which the adjudicator’s determination was based. The court can consider the matter afresh and make any order it deems fit. At the same time, however, the High Court’s jurisdiction is limited by section 30P(2) to a consideration of “the merits of the complaint in question”’.

However, this does not mean that the complaint can be reformulated. According to the SCA “[t]he dispute submitted to the High Court for adjudication must, therefore, still be a “complaint” as defined. Moreover, it must be substantially the same “complaint” as the one determined by the adjudicator”. Should the High Court find the adjudicator’s decision to be wrong in law, it has the power to set aside the adjudicator’s decision and replace it with its own decision (see Iscor Pension Fund v Murphy NO and Another 2002 (2) SA 742 (T) at 748). The fact that the High Court can replace the adjudicator’s decision with its own and not return the matter back to the adjudicator for reconsideration leads to speedy finalisation of retirement fund related disputes. This also save costs for those who have contracted legal representatives.

Until 2017, when the legislature promulgated the FSRA, those dissatisfied with the adjudicator’s determination could only approach the High Court for relief. Currently, s 1 of the FSRA, contains the
word ‘ombud’ and the phrase ‘statutory ombud’, both of which are defined among others to mean ‘[t]he adjudicator as defined in section 1(1) of the Pension Funds Act’. The adjudicator as ombud and statutory ombud is a ‘decision maker’ in terms of FSRA, and her determination is therefore treated as a ‘decision’. In terms of s 218(e) of the FSRA, a decision maker is a statutory ombud who, in terms of s 218(d), makes a decision ‘in terms of a financial sector law in relation to a specific complainant by a person’. Without interfering with s 30P(1) of the Act through an amendment, s 230 of the FSRA provides that ‘a person aggrieved by a decision may apply to the Financial Services Tribunal for a reconsideration of the decision by the Tribunal’.

The word ‘reconsideration’ can be defined as a process that requires that a decision that has already been taken be looked at afresh. While an issue can be reconsidered by the same person who first decided it, it appears, however, that in the context of s 230 of the FSRA, it means that the issue must be looked at by another person, namely a member of the Financial Services Tribunal. This is clearly another legislative appeal avenue for those who are aggrieved by the adjudicator’s determination. There is no legislative clarity as to whether those who are aggrieved should first pursue the Financial Services Tribunal or whether they can go directly to the High Court on the strength of s 30P(1) of the Act. It is not clear why the legislature did not explicitly state whether or not an aggrieved person can bypass the Financial Services Tribunal and go directly to the High Court. This is an undesirable state of affairs and requires legislative amendments that will provide clarity as to where the aggrieved persons should first go.

However, it must be noted that s 230(b) of the FSRA provides that ‘[a] reconsideration of a decision ... constitutes an internal remedy as contemplated in section 7(2) of the Promotion of Administrative Justice Act [3 of 2000 (PAJA)].’ Section 7(2) of PAJA provides that:

‘(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review of the action.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice’.

In terms of s 230(b) of the FSRA, the Financial Services Tribunal is an internal remedy that must be exhausted in relation to disputes that this forum has jurisdiction over, such as dissatisfaction over the adjudicator’s determination.

In ‘Bester v The Financial Services Adjudicator and Others (GP) (unreported case no 61311/2017, 18-12-2018) (Molopate-Sethosa J) at para 39, the court held that

‘[u]nder the common law, the existence of an internal remedy was not in itself sufficient to defer access to judicial review until it had been exhausted. However, PAJA significantly transformed the relationship between internal administrative remedies and the judicial review of administrative decisions’.

In ‘Nichol and Another v Registrar of Pension Funds and Others 2008 (1) SA 383 (SCA) at para 15, the SCA held that

‘It is now compulsory for the aggrieved party in all cases to exhaust the relevant internal remedy as contemplated in s 230 of the FSRA before it is done so by way of a successful application under s 7(2)(c). Moreover, the person seeking exemption must satisfy the court of two matters: first, that there are exceptional circumstances, and second, that it is in the interest of justice that the exemption be given’.

Does this entail that there is no longer a direct appeal from the adjudicator’s office to the High Court? Is it compulsory for those who are dissatisfied with the adjudicator’s determination to first take the matter to be reconsidered by the Financial Services Tribunal unless there are exceptional circumstances that justify bypassing the Financial Services Tribunal? One is tempted to argue that the answer to both these questions is in the affirmative. However, it is not as simple as that. First, s 7(2)(c) of PAJA is specifically designed to deal with the review of institutions that make administrative decisions. Can the adjudicator’s determination be deemed an administrative decision? There is conflicting judicial opinion on this point. On the one hand, several judgments including Otis (South Africa) Pension Fund and Another v Hinton and Another [2005] 1 BPLR 17 (PFA), recognises that the adjudicator performs a judicial function in line with s 300(1) of the Act. On the other hand, Beasley AJ in ‘Altron Group Pension Fund v Thompson CSF South African Pension Fund (GJ) (unreported case no 2008/25327, 15-4-2010) (Beasley AJ) at para 25 incorrectly held that ‘the adjudicators functions are administrative and not judicial’. Beasley AJ further incorrectly observed that:

‘A pension fund adjudicator does not function as a court nor is he or she a judicial officer of any court referred to. I am unable to understand how he or she can ever be “deemed” to be such a court or officer. Further, the adjudicator per se is not so deemed under s 300 of the Act; it merely provided that the decision shall be equivalent to that of a court. The intention of this section appears to me to be designed at facilitating the process of executory, following upon any such decision’.

This statement is unfortunate and appears to be either a judicial misunderstanding of s 300 of the Act or total misunderstanding of the intention behind this provision. This provision recognises that the adjudicator is an independent umpire between a complainant and the person the complaint is against. The adjudicator is tasked with finding the relevant evidence that would assist them to decide the matter in favour of one of the parties, in the same way a court of law will do. Hence, the adjudicator’s office is deemed to deliver ‘judgments’ similar to those of the court of law. The adjudicator performs judicial functions that the Act specifically prescribe and that they should be taken on appeal not review when parties are dissatisfied with them (M Mhango ‘Does the South African Pension Funds Adjudicator perform an administrative or a judicial function?’ (2016) 20 Law, Democracy & Development 20 at p 45). On this reasoning, it appears that it is not compulsory for those who are dissatisfied with the adjudicator’s determination to send them to the Financial Services Tribunal before they can appeal to the High Court.

Conclusion

In conclusion, I submit that if it was the legislature’s intention to make it compulsory for those who are dissatisfied with the adjudicator’s determinations to not bypass the Financial Services Tribunal, there must be legislative amendment to the FSRA and the Act. These amendments must make it clear that the adjudicator’s determinations must be sent to the Financial Services Tribunal for reconsideration before they can be appealed to the High Court. I submit that the power to remit matters to the adjudicator for further consideration should be limited. In order to save time and not unnecessarily burden the adjudicator’s office, I submit that the Financial Services Tribunal should be empowered to not only reconsider the evidence provided to the adjudicator but also be empowered to hear new evidence, in order for it to substitute the decision of the adjudicator with its own decision.

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Is there a material difference between a person’s gender and their status as a parent?

In the South African television (TV) world, a reality show exists and the primary objective of the TV show is to resolve issues of paternity by using DNA testing. It is a ‘docu-reality’ series where the presenter journeys with individuals on their path to find their biological fathers. The presenter then assists the individual in dealing with the joy and pain that comes with unraveling their genetic background. The show is called *uTatakho*, an isiXhosa word which loosely translates to ‘your father’.

This article is about a judgment that was handed down on 25 September 2019 by the President of the Family Division of the High Court of Justice, Sir Andrew McFarlance, in the division of the Royal Courts of Justice, in London, United Kingdom. In *TT and YY* [2019] EWHC 2384 (Fam), the court was required to define the term ‘mother’ under the laws of England and Wales. An individual, who was born female, undergoes gender transition and becomes legally recognised as male before going on to conceive, carry and give birth to a child, with the result that the parent who has given birth is legally a man rather than a woman. The question that confronted the court was: Is that man the ‘mother’ or the ‘father’ of his child?

The factual context

A decade ago, TT, who had been registered as female at birth and who was then aged 22 years, transitioned to live in the male gender. He began the medical transition with testosterone therapy in 2013, and in 2014, he underwent a double mastectomy. His passport and National Health Services records were amended to show his gender as male. TT stated that his family came to accept the
In September 2016 TT, under medical guidance, suspended testosterone treatment and later commenced fertility treatment in England and Wales at a clinic, which is registered for the provision of such treatment under the relevant laws. The aim of the treatment was to achieve the fertilisation of one or more of TT’s eggs in his womb. Records from the clinic show that TT’s gender was registered as ‘M’ for male. In order to maximise the prospects of success, testosterone therapy was suspended.

In January 2017 TT issued an application under the Gender Recognition Act 2004 (GRA) in order to obtain a ‘gender recognition certificate’ confirming that he was male. Determination of an application for a gender recognition certificate was made by a panel constituted under the GRA. The panel evaluated the applications on paper and without a hearing. In addition to the application form and historical medical reports confirming diagnosis of gender dysphoria, TT submitted a pro-forma declaration stating that he ‘intends to continue to live in the acquired gender until death’. The panel granted TT’s application. A gender recognition certificate confirming his gender as male was issued on 11 April 2017. The legal effect of a gender recognition certificate is that the person to whom the certificate relates ‘becomes for all purposes the acquired gender’.

On 21 April 2017, TT underwent intrauterine insemination fertility treatment at the clinic during which donor sperm was placed inside his uterus. The process was successful, and conception occurred with the result that TT, a registered male, became pregnant. TT carried the pregnancy to full-term and, in January 2018, TT gave birth to a son, YY. The issue in the proceedings related to the registration of YY’s birth. On communication with the Registry Office, TT was informed that he would have to be registered as the child’s ‘mother’, although the registration could be in his current (male) name. TT wished to be registered as ‘father’ or, if not ‘father’, then ‘parent’ and thus on 3 April 2018 he brought a claim in Judicial Review to quash the decision of the Registrar General. In addition, if contrary to his main contention, the court held that as a matter of domestic law, TT must be registered as YY’s ‘mother’, that outcome would represent a breach of his and YY’s rights under the European Convention on Human Rights to the extent that the court should issue a Declaration of Incompatibility under s 4 of the Human Rights Act 1998 (HRA). In addition to the judicial review proceedings and declaration of incompatibility application, on 14 August 2018 an application for a Declaration of Parentage was issued on behalf of YY in terms of s 55A of the Family Law Act 1986. That application was heard alongside TT’s applications in the proceedings. This article only focuses on TT’s case.

**Submissions made on the law**

TT’s primary submission was that if ss 9 and 12 of the GRA are correctly interpreted, the Registrar General is obliged to register him as ‘father’ on YY’s birth certificate.

Sections 9 and 12 make provision as follows:

- **9 General**
  (1) Where a full gender recognition certificate is issued to a person, the person’s gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person’s sex becomes that of a man and, if it is the female gender, the person’s sex becomes that of a woman).
  (2) Subsection (1) does not affect things done, or events occurring, before the certificate is issued; but it does operate for the interpretation of enactments passed, and instruments and other documents made, before the certificate is issued (as well as those passed or made afterwards).
  (3) Subsection (1) is subject to provision made by this Act or any other enactment or any subordinate legislation.

- **12 Parenthood**
  The fact that a person’s gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child.

TT submitted that s 9(1) of the GRA was unequivocal in stipulating that following the issue of a gender recognition certificate the relevant individual is to be regarded as having the acquired gender ‘for all purposes’ and that, therefore, for the purpose of determining his status as parent to his child, TT is a male parent and, therefore, YY’s ‘father’. It was further submitted that, as s 9(2) of the
in providing that s 9(1) ‘does not affect things done, or events occurring, before the certificate is issued’, it can safely be assumed that the recognition of the new gender will affect all things occurring after the issue of the gender recognition certificate. It was submitted to the court that s 9(2) is entirely prospective in its focus and in no manner retrospective.

Regulation 7(2) of the Registration of Births and Deaths Regulations 1987 requires ‘the particulars to be recorded in respect of the parents of a child shall be those appropriate as at the date of its birth’. In this case it provided that a child’s birth occurs after the issue of a gender recognition certificate, s 12 of the GRA does not restrict or modify the effect of s 9 as, by the time of birth, the parent will have become the acquired gender and, by reason of s 9, their status as ‘mother’ or ‘father’ will be determined by reference to that acquired gender. TT’s case, in this regard, was therefore based on the assumption that, for all purposes, the gender of a parent determines whether that parent is a ‘mother’ or a ‘father’, without exception, so that the terms ‘male parent’ and ‘father’ are entirely synonymous.

In the secondary submission, TT held that if he must, under English law be registered as YY’s ‘mother’, that result is a clear breach of his private and family life rights under art 8 of the European Convention on Human Rights. In those circumstances, TT would be regarded, under the law, as living in ‘an intermediate zone’, being regarded as male for all purposes save for parenthood when, as a ‘mother’, he would be regarded as female. That outcome would place TT, and those like him in similar circumstances, in an impossible dilemma of having to choose between either having a family or remaining childless but recognised fully in law and for all purposes in their acquired gender.

In the context of art 8 of the European Convention on Human Rights, TT’s case was that the government’s interpretation was unnecessary, disproportionate and failed to strike a fair balance between the competing interests of the individuals concerned and the wider community. Insofar as it is argued that the European Court of Human Rights would afford the UK a ‘margin of appreciation’, that argument is not sustainable. It is now medically and legally possible for an individual, whose gender is recognised in law as male, to become pregnant and give birth to their child. While their parent’s gender is ‘male’, their parental status, which derives from their biological role in giving birth, is that of ‘mother’.

At common law a person whose egg is inseminated in their womb and who then becomes pregnant and gives birth to a child is that child’s ‘mother’. The status of being a ‘mother’ arises from the role that a person has undertaken in the biological process of conception, pregnancy and giving birth. Being a ‘mother’ or a ‘father’ with respect to the conception, pregnancy and birth of a child is not necessarily gender specific, although until recent decades it invariably was so. It is now possible, and recognised by the law, for a ‘mother’ to have acquired the gender of male, and for a ‘father’ to have acquired the gender of female. Section 12 of the GRA is both retrospective and prospective. The status of a person as the father or mother of a child is not affected by the acquisition of gender under the Act, even where the relevant birth has taken place after the issue of a gender recognition certificate.

The state should reasonably be expected to accept the consequences and take all the measures needed to enable TT to live a normal life, free from discrimination in any circumstances, under his new identity and with respect for his right to private and family life.

**Registrar General**

The Registrar General invited the court to dismiss the claim for the following reasons:

‘(i) The [Registrar General’s] duty in law is to register the claimant (TT) as YY’s mother. Specifically, the [Registrar General] does not have a power to register the claimant as YY’s father or as his parent. Pursuant to section 12 of the GRA 2004, a GRC does not affect the status of a trans-parent as a mother or father to a child, even if the child is born after the issue of a GRC.

(ii) As to the claim under the HRA 1998, the case raises complex issues of public policy about how best to protect the rights and interests of trans-people and their families in legislation. It is an area in which the European Court of Human Rights recognises that the United Kingdom should have a wide margin of appreciation, and one in which the decisions of the legislature should be accorded considerable respect.

(iii) The [Registrar General] and the secretaries of state accept (for the purpose of the hearing of this claim only) that the legislative scheme interferes with the rights of the claimant and YY under Article 8(1) of the [European Convention on Human Rights] and therefore requires justification under Article 8(2).

(iv) The interference is justified by the need to (i) have an administratively coherent and certain scheme for the registration of births, and (ii) the rights and interests of others, notably but not exclusively, the right of a child to know - and have properly recognised - the identity of the person who carried and gave birth to him or her. This is an important and consistent principle that applies throughout birth registration legislation, including in relation to surrogacy, adoption and in relation to the children born by donor conception. The interference is proportionate, particularly having regard to the respect to be given to the legislature in this context, the measures introduced by legislation to protect against discrimination and harassment and maintain confidentiality, the absence of workable alternatives and given that there is no decision of the [European Court of Human Rights] requiring a trans-parent to be recorded as the parent of his or her child in his or her acquired gender’ (my italics).

Findings and conclusion

The court found that there is a material difference between a person’s gender and their status as a parent. Being a ‘mother’, until recent decades, has always been associated with being female, it is the status afforded to a person who undergoes the physical and biological process of carrying a pregnancy and giving birth. It is now medically and legally possible for an individual, whose gender is recognised in law as male, to become pregnant and give birth to their child. While that person’s gender is ‘male’, their parental status, which derives from their biological role in giving birth, is that of ‘mother’.

At common law a person whose egg is inseminated in their womb and who then becomes pregnant and gives birth to a child is that child’s ‘mother’. The status of being a ‘mother’ arises from the role that a person has undertaken in the biological process of conception, pregnancy and giving birth. Being a ‘mother’ or a ‘father’ with respect to the conception, pregnancy and birth of a child is not necessarily gender specific, although until recent decades it invariably was so. It is now possible, and recognised by the law, for a ‘mother’ to have acquired the gender of male, and for a ‘father’ to have acquired the gender of female. Section 12 of the GRA is both retrospective and prospective. The status of a person as the father or mother of a child is not affected by the acquisition of gender under the Act, even where the relevant birth has taken place after the issue of a gender recognition certificate.

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THE LAW REPORTS


By Merilyn Rowena Kader

Abbreviations
CC: Constitutional Court
G: Gauteng Local Division, Johannesburg
KZP: KwaZulu-Natal Division, Pietermaritzburg
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Civil procedure

Video evidence from abroad: In Randgold and Exploration Company Ltd and Another v Goldfields Operations Ltd and Others, In re: Randgold and Exploration Company Ltd and Another v Goldfields Operations Ltd and Others [2020] 1 All SA 491 (GJ) the applicants sought an order authorising the issue by the court of the letters of request directed at obtaining evidence from foreign witnesses by video-link. The applicants sought the court’s approval to permit testimony to be given abroad and to be relaid to the court through the use of video-link technology. They asked that the court invoke the assistance of, and the tools of compulsion, available to the foreign judicial authorities in question, to compel the witnesses to testify abroad and to provide documents to the applicants.

The court, per Opperman J, held that the South African Foreign Courts Evidence Act 80 of 1962 does not empower a South African court to provide to a foreign court ‘the assistance’ or any commitments that the applicants sought the court, reciprocally, to request from the foreign judicial authorities. The South African Foreign Courts Evidence Act, the Protection of Business Act 99 of 1978 and s 40(1) of the Superior Courts Act 10 of 2013 empower a South African court to assist a foreign court to obtain evidence from a witness in South Africa (SA). None of those statutes empowers a South African court to require a foreign court to assist it to obtain evidence from a witness who is outside SA. On the contrary, the court was prohibited from extending reciprocity to a foreign court in the form requested.

The court considered the position in each of the four foreign jurisdictions cited by the applicants and found that compulsion-based requests was not competent within any of these jurisdictions.

The right to procure examination by interrogatories is expressly catered for in the Superior Courts Act. The Uniform Rules of Court, which derive their validity from s 30 of the Superior Courts Act, provides for the right to procure evidence by commission de bene esse. The applicants opted not to use that option, stating that this was exceptionally costly. The application was dismissed.

Company law

Liquidators: In the case of Van der Merwe NO and Others v Moodiisar NO and Another and Related Matters [2020] 1 All SA 558 (WCC), the facts were as follows:

In September 2018, a bank obtained an order for the provisional winding-up of Zonnekus Mansion (Pty) Ltd (the company) on the basis that it was unable to pay its debts. The bank was a secured creditor of the company. The provisional order was confirmed and a final order for the winding-up of the company was granted and final liquidators were appointed.

Various business rescue applications were then brought, having the effect of suspending the liquidation proceedings.

Three applications were subsequently brought, and were before the court, namely –

• the first was for the removal of the liquidators;
• the second was for the re-opening of the first liquidation and distribution account and the institution of an inquiry into the conduct of the liquidators; and
• the third was for reconsideration of an order granted more than four years earlier extending the powers of the liquidators under s 386(5) of the Companies Act 61 of 1973.

It was held that the order extending the powers of the liquidators was followed by a series of acts by the liquidators, which could not be easily undone. No basis for reconsideration had been established and the application was an abuse of process on the part of those interests. The application was dismissed with a punitive costs order.

The application for the re-opening of the first liquidation and distribution account and the institution of an inquiry as to the conduct of the liquidators was based on allegations of fraud and theft, which were vaguely pleaded. The court was unimpressed with the allegations levelled against the liquidators and refused the relief, again with a punitive costs order.

The court, per Gamble J, found that no basis whatsoever had been established for the removal of the liquidators. The removal application was also brought at an advanced stage of the liquidation and it would not be in the interests of the general body of creditors (none of whom had lodged any complaints about the liquidators’ conduct) to order a removal and reappointment of new liquidators at this stage. The application was dismissed.

Criminal law – jurisdiction

Appeals under the Superior Courts Act: In the wake of the hacking of the network of a leading mobile cellular company (Cell C), the appellant was charged in the Specialised Commercial Crimes Court (the SCCC) with various contraventions of s 86 of the Electronic Communications and Transactions Act 25 of 2002. Almost ten years later, he was convicted on two charges. It was found that he had contravened s 86(1) by having unlawfully accessed Cell C’s computer network without permission, and he was convicted of having contravened s 86(5) by unlawfully causing data on Cell C’s system to be altered or rendered ineffective, which resulted in a partial network failure to the legitimate users of the system. On 17 August 2015, the appellant was sentenced to a fine or 12 months’ imprisonment on the first count and to three years’ imprisonment on the second count.
He appealed against his conviction and sentence to the High Court, which dismissed the appeal. He then applied to the SCA for special leave to appeal against his conviction and sentence. Two issues arose in *Salesmann v S [2020] 1 All SA 361 (SCA)* whether leave to appeal to the SCA was properly granted; and whether the appeal against conviction and sentence should be granted.

The appellant’s trial in the SCCC was still proceeding when the Superior Courts Act 10 of 2013 came into operation. Up until then, a High Court hearing an appeal from a lower court (such as the SCCC) was competent to grant leave to appeal further to the SCA if it dismissed the appeal – and if it refused such leave, the appellant could then apply to the SCA for leave. However, s 52 of the Superior Courts Act provides that proceedings pending in any court at the commencement of the Act, must be continued and concluded as if the Act had not been passed. Proceedings must, for the purposes of the section, be deemed to be pending if, at the commencement of the Superior Courts Act, a summons had been issued but judgment had not been passed. The High Court did not have the jurisdiction to grant special leave to appeal to the present court. The proceedings pending when the Superior Courts Act came into effect was the appellant’s trial itself. Those proceedings terminated when the appellant was convicted and sentenced. The deeming provision in s 52(2) of the Superior Courts Act, therefore, had no relevance to the appellant’s subsequent appeal to this court following the dismissal of his appeal in the High Court. The latter accordingly had no jurisdiction to grant leave to appeal to this court. Without this court giving leave, the appeal was not properly before it and the court had no jurisdiction to hear it.

Having determined that leave to appeal was required and accepting that the failure to apply in time to the present court for leave to be condoned, the court turned to consider whether leave should be granted. The Superior Courts Act applied, and s 16(1)(b) thereof prescribed that an appeal against a decision of a Division of the High Court heard on appeal, lies to this court with its special jurisdiction to grant leave for leave to appeal further to this court, if the appeal was not properly before it and the court had no jurisdiction to hear it.

Evidence

Parol evidence rule: In *Mike Ness Agencies CC v/a Promech Boreholes v Lourens ford Fruit Company (Pty) Ltd* [2020] 1 All SA 314 (SCA) the appellant undertook to drill a borehole for the respondent on a farm and guaranteed that if no water was found at 70m it would drill from 70m to 100m, free of charge. That led to the appellant drilling a borehole on the respondent’s farm, to a depth of a little more than 70m. The borehole yielded approximately 4 000 litres of water per hour. When the respondent refused to pay the appellant for its services, the latter successfully sued in the magistrate’s court.

On appeal, however, the High Court found for the respondent, stating that the appellant had not discharged the onus of proving it had provided sufficient water to comply with its contractual obligations and was, therefore, not entitled to receive any payment at all. The appeal against that decision was with the special leave of the present court.

The respondent’s case closed during the course of the proceedings. It finally contended that the appellant had guaranteed to provide a minimum water supply of 10 000 litres and that, as it had not done so, the respondent was excused from paying any sum at all. It was held this was not borne out by the evidence and to find so would breach the parol evidence rule. The trial court was correct in concluding that the respondent’s defence to the appellant’s claim, namely that the appellant had guaranteed a yield of 10 000 litres per hour, could safely be dismissed. The High Court’s decision was clearly wrong, and it had no reason to interfere with the trial magistrate’s careful analysis of the evidence and the conclusion that the court reached. The appeal was upheld, with costs.

Hate speech

Promotion of Equality and Prevention of Unfair Discrimination Act: The appellant penned an article directed against the gay community, which was published in a newspaper. The South African Human Rights Commission (the HRC) instituted proceedings against the owner of the newspaper (Media24) and the appellant in the Equality Court, alleging that the article contravened s 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Act). Media24 and the appellant launched an application in the High Court seeking to have s 10(1), read with ss 12 and 11 of the Act declared unconstitutional for being inconsistent with the provisions of s 16 of the Constitution. The proceedings in the High Court and the Equality Court were consolidated. The court upheld the complaint against the appellant, finding that the offending statements against homosexuals were hurtful, incited harm and propagated hatred, and that they accordingly amounted to hate speech for purposes of s 10(1). The present appeal was then brought.

The SCA in *Qweleni v South African Human Rights Commission and Another (Freedom of Expression Institute and Another as amici curiae) [2020] 1 All SA 325 (SCA)* held that s 10(1) states that no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be hurtful; be harmful or to incite harm; or promote or propagate hatred. In examining the scope of s 10(1), the court found that the legislature sought to provide protection as broadly as possible, by imposing liability for expressions in any of the forms set out in the lead-in part of s 10(1). While the provisions certainly restricted the right to freedom of expression (guaranteed in s 16 of the Constitution), the question was whether they extended beyond the provisions of s 16(2)(c) of the Constitution and, if so, whether they were justifiable. The court held that s 10(1) was indeed a limitation of the freedom of expression wider than s 16(2)(c) of the Constitution, and that it could not be saved by any interpretive exercise. The appeal was upheld with costs.

Section 10 of the Act was declared to be inconsistent with the provisions of s 16 of the Constitution and, therefore, unconstitutional and invalid. The order was referred to the CC for confirmation of the order of constitutional invalidity.

- See Heinrich Schulze ‘Constitutional law – Right to freedom of expression’ 2018 (May) DR 33 for the GJ judgment on intellectual property

**Plant breeders’ rights** In *Special New Fruit Licensing Limited and Others v Colors Fruit (South Africa) (Pty) Limited and Others* [2020] 1 All SA 523 (WCC) the plaintiffs claimed ownership and plant breeders’ rights in respect of certain plant materials, which they contended belonged to a company (Vitis) registered in the United Kingdom and subsequently liquidated. The first plaintiff (NPL) acquired the rights to the disputed plant materials from Vitis in terms of an asset sale agreement concluded with the second and third plaintiffs, the liquidators of Vitis.

According to the defendants, the disputed plant materials were not created in terms of an agreement between Vitis and first defendant (Colors SA) but were created by Colors SA for its own account and benefit since the service agreement with Vitis was non-exclusive and was varied during January 2011. The court, per Hendricks AJ, held that the issues for determination were whether the disputed plant materials were pro-
duced in terms of a Vitis breeding programme and for the benefit of Vitis or whether it was produced for Colors SA’s own account and benefit with the knowledge of Vitis and SNFL, and secondly, the ownership of the disputed plant materials and all intellectual property rights attached to them. 

Vitis and Colors SA concluded a sublicence agreement in terms of which Colors SA would render table-grape breeding and related services to Vitis. In terms of the agreement Colors SA conducted breeding projects for the benefit of Vitis. In evaluating the main witnesses, the court found that the defendant’s witness struggled to reconcile his evidence with the pleaded case, leading him to give contradictory and highly unsatisfactory evidence.

The plaintiffs’ case was that a tacit agreement existed between Vitis and Colors SA in terms of which Colors SA agreed material, to rendering table-grape and related services in South Africa on behalf of Vitis. In the event of the tacit agreement’s termination or of Colors SA no longer providing services to Vitis for the purposes of the South African breeding programme, Colors SA would return all the South African plant materials and breeding records to Vitis. The test to be applied in determining the existence of a tacit contract is whether the party alleging the existence of the tacit contract has shown a balance of probabilities unequivocal conduct on the part of the other party that proves that it intended to enter into a contract with it. The court found that the plaintiffs had shown, on a balance of probabilities, unequivocal conduct on the part Colors SA proving the existence of a contract on the terms and conditions pleaded by plaintiffs.

Colors SA raised further defences alleging lack of exclusivity in its relationship with Vitis and variation of the agreement so that it no longer bred on behalf of Vitis but was only co-responsible for the maintenance of the existing Vitis assets and plant material. The court rejected both submissions. An allegation that Colors SA undertook the breeding programme for its own benefit with the knowledge and approval of Vitis and SNFL was also unsustainable as no disclosure was made to the effect that Colors SA was breeding for its own account.

A further contention by Colors SA was acquisition of ownership of the plant materials through specification. That argument was neither pleaded nor substantiated by the evidence. On the facts, nothing had happened to the disputed plant material to allow out breeding and reproduction to identify as the plant material provided by Vitis and no evidence of a nova species was presented. Acquisition of ownership through specification, therefore, did not take place. SNFL was thus held to be the lawful owner of all the plant materials. A counterclaim by Colors SA was found to be unsupported by sufficient evidence and was dismissed.

**Labour law**

**Jurisdiction of Labour Court (LC): In Ananalugero Workers’ Union and Others v Philip Morris South Africa (Pty) Limited and Another 2020 (2) BCLR 125 (CC) the applicants were a trade union and 75 of its members who were employed by the first and second respondents. They alleged that the respondents had been in contravention of s 34 of the Basic Conditions of Employment Act 75 of 1997 (the BCEA) as they had deducted from the salaries of the employee applicants amounts of tax in respect of company cars. They instituted proceedings in the LC for an order compelling the respondents to refund the amounts so deducted, and for an order restraining the respondents from continuing to make such deductions in the future. The LC held that it lacked jurisdiction. The LC reasoned that it lacked competence to directly enforce provisions of the BCEO in the absence of an assertion that those provisions formed part of contractual terms contemplated by s 77(3) of the BCEO.

The LC dismissed an application for leave to appeal against its order. A petition to the Labour Appeal Court (LAC) also failed. The applicants then approached the CC seeking leave to appeal. The CC, in a unanimous judgment, per Jaffa J, granted leave to appeal and upheld the appeal. It set aside the order of the LC in respect of the claims in question and remitted the matter to the LC.

The court observed that s 77 of the BCEO was designed to promote access to the LC in relation to claims based on the BCEO. Because s 77 facilitates access to the LC, it must be construed in a manner that complies with s 39(2) of the Constitution, which requires courts to interpret legislation through the prism of the Constitution. A proper interpretation of s 77 reveals that the LC has exclusive jurisdiction over matters arising from the BCEO. The only exception is in respect of situations where the BCEO itself provides otherwise. All claims to which the BCEO applies fall within the exclusive jurisdiction of the LC. Section 77(1) confers jurisdiction on the LC in the widest of terms. It declares that the LC has jurisdiction in ‘respect of all matters arising from the BCEO. Section 77(3) expands the LC’s jurisdiction to cover disputes arising from contracts of employment even where the employment is not regulated by the Act. In that event, the jurisdiction is not exclusive. It is shared with the civil courts.

A question had arisen as to whether, barring claims based on contracts, jurisdiction under the BCEO is deferred until a matter has been resolved by a labour inspector appointed in terms of s 63 of the BCEO. The court pointed out that there was no provision in the BCEO expressly requiring that disputes be submitted first to labour inspectors before the LC can entertain them. At the time when the claim in question arose, none of the functions of labour inspectors covered dispute resolution. Although the BCEO has since been amended and now authorises labour inspectors to refer disputes to the Commission for Conciliation, Mediation and Arbitration, that amendment came into effect only recently and did not apply to the present case. Litigants are not obliged to submit their disputes to labour inspectors before they may approach the LC.

**Maritime law**

**Jurisdiction of magistrate’s court: In World Net Logistics (Pty) Ltd v Donsantel 133 CC and Another [2020] 1 All SA 593 (KZP), the appellant and first respondent concluded a service agreement for freight forwarding services. At the same time, the second respondent bound himself as surety and co-principal debtor for all debts due by the first respondent to the appellant. The service agreement contained the consent by the first respondent to the jurisdiction of the magistrate’s courts.

The first special plea that was raised was that the court a quo did not have jurisdiction to entertain the suit on the basis that the claim was a maritime claim as defined in s 1 of the Admiralty Jurisdiction Regulation Act 105 of 1983 and that only the High Court exercising its admiralty jurisdiction could determine the dispute. A second special plea related to the National Credit Act 34 of 2005. The first special plea was upheld, leading to the present appeal.

It was held that the magistrate’s courts have no jurisdiction to decide maritime claims. The Magistrate’s Courts Act 32 of 1944, which prescribes the jurisdiction of the magistrate’s courts makes no express or implied provision for the exercise of admiralty jurisdiction. The court, per Lopes J, referred to the various aspects of admiralty practice, which are not available in the ordinary jurisdiction of the magistrate’s courts.

As the claim was a maritime claim, the magistrate could not have referred the matter to the admiralty court and was obliged to hear the action or dismiss the action. Once his jurisdiction was challenged, he was compelled to decide whether the matter was a maritime claim. Having found that it was, it fell to be dealt with in terms of the Admiralty Jurisdiction Regulation Act, which he could not do. The magistrate’s courts have no jurisdiction to apply the provisions of the Act, and there is no provi-
sion in the Magistrates’ Courts Act to transfer the matter to the High Court exercising its admiralty jurisdiction. The magistrate, therefore, had no option but to dismiss the action as he did. The appeal was accordingly dismissed with costs.

**National Credit Act**

*Motor vehicle repossession and sale in execution:* After confirming the cancellation of an instalment sale agreement in respect of a motor vehicle (vehicle) and ordering the return of the vehicle purchased in terms thereof, the court *a quo* made an additional order requiring Wesbank, within ten business days after receiving the vehicle, to provide the respondent with a written notice in which it set out the estimated value of the vehicle, and informed the respondent that the vehicle would not be sold at a price less than an estimated value unless so sanctioned by the court, and then after a notice had been provided to the respondent. That order was the subject of the present appeal, reported as *FirstRand Bank Limited v a Wesbank* y *Davel* (University of the Free State Law Clinic as Amicus Curiae) [2020] 1 All SA 403 (SCA). The court *a quo* accepted that the bank, in the face of default, was entitled to cancel the instalment sale agreement and obtain the return of the vehicle but expressed concern about the price at which the vehicle would later be resold by the bank. The SCA, per Navsa JA, found that the concerns of the court were legitimate, but the order was made without a proper appreciation of the architecture of the National Credit Act 34 of 2005 (NCA) and was not in accordance with its provisions. The NCA provides mechanisms for a consumer to challenge the estimated values and the price realised on a sale of goods after either a surrender of the goods by a consumer or the repossession of the goods after action has been taken by the credit provider. Sellers in instalment sale agreements are entitled, on default by purchasers, to claim the amount they would have received had the purchasers fulfilled their contractual obligations. The proceeds of the sale of the motor vehicles concerned would ultimately have to be brought into account in determining how much was still owing or, depending on the amount recovered, the surplus amount that accrued to the purchaser. The court *a quo* did not give sufficient regard to the provisions of s 128, which allows for a contestation in relation to a disputed sale of goods. That contestation can take place by direct engagement with the credit provider, after referral of the dispute to the Tribunal, or after the submission of a complaint in terms of s 136 with the National Credit Regulator. The appeal was upheld to the extent reflected in the substitution order.

**Other cases**

Apart from the cases and material dealt with or referred to above, the material under review also contained cases dealing with –
- company law and the validity of special resolutions on shares;
- costs in unopposed applications;
- discovery and the defence of litigation privilege;
- dispute of fact and referral for oral evidence;
- State Attorney’s authority to settle claims;
- the effect of a voluntary winding-up application on a compulsory winding-up; and
- whether utterances that vilify a certain person are hate speech.

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Has the time come to amend the Children’s Act to specifically include relocation provisions?

P v P (WCC) (unreported case no 6743/2019, 19-12-2019) (Rogers J (Savage and Nuku JJ concurring))

In P v P the topic of relocation of children received the attention of the Full Bench of the Western Cape Division of the High Court in Cape Town. The parties’ marriage was dissolved in 2013 by a decree of divorce, which incorporated the terms of the consent papers. The parties agreed to remain co-guardians and co-holders of their parental responsibilities. In terms of the decree, the mother was held as the primary care giver of all three children. In this matter, the court was tasked with determining whether the three children, being a son who had just turned 14 years old and two daughters aged 11 and 8 respectively, should be allowed to relocate to Alaska with their father.

The father of the children thereafter sought a variation order of the divorce decree.

In such cases a parent who wishes to relocate with their children must establish on a balance of probabilities that the variation should be granted, however, the court may take an inquisitorial approach in order to establish the facts.

The court a quo granted an order to allow the father to relocate to Alaska with the three children. The court a quo refused the leave to appeal, but leave was granted on petition by the Supreme Court of Appeal (SCA). It should be noted that the father was aware of the fact that an appeal was pending but nevertheless decided to unlawfully remove the children from South Africa (SA). This complicated the determination of the current case as the children were uprooted by their father’s unlawful actions.

What makes this case quite interesting is that the father was not the primary caregiver at the time of the application and did not fulfil the role of primary caregiver while in SA. Therefore, the determination of the court was twofold:

- Whether the father should be awarded primary residence; and
- Whether to grant permission for the relocation.

It is clear that the Children’s Act 38 of 2005 (the Act) does not set out certain requirements, which a court should consider before granting the permission to relocate. Over the years the courts have established criteria, which they take into account when determining whether the relocation will be in the best interests of the child. Firstly, the courts will have to determine whether it is in the best interests of the child to relocate, and secondly, whether the relocation is bona fide. The best interests of the child is always of paramount importance in each case concerning the care, protection and well-being of a child.

Factors, inter alia, which a court considers before granting permission for relocation are:

- The best interests of the child as provided for in s 28(2) of the Constitution and ss 7 and 9 of the Act.
- Whether the relocation request made is on reasonable and bona fide grounds.
- The practicalities of the relocation - availability of schools, financial expenditure, employment opportunities etcetera. The court once again highlighted the importance of providing sufficient particulars regarding the relocation before the court will permit such relocation.

- Whether there will be sufficient direct and indirect contact opportunities between the child and the other parent (and extended family) who still resides in SA.
- In the event that the child is mature enough to express their views, their views should be taken into account. After careful consideration of the numerous reports the court received, the court ordered that the son shall reside primarily with the father and relocate to Alaska whereas the two daughters will reside primarily with their mother in SA. The court emphasised child participation as envisaged in s 10 of the Act and respected the wishes of the son to relocate and enjoy primary care by his father. It was clear that the daughters were influenced by their older brother and father and thus completely unaware of their own needs. The court found that even though splitting of siblings is not the ideal option, it is based on the evidence presented, in the best interests of the children concerned.

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DE REBUS – APRIL 2020
Creditor agreements feature quite prominently in mainstream litigation. Of much relevance is the current legal position relating to the registration as a credit provider. The Supreme Court of Appeal (SCA) confirmed that where a credit agreement exceeds the threshold set out in s 42(1) of the National Credit Act 34 of 2005 (the NCA), a person is required to register as a credit provider by virtue of the unambiguous text of s 40 of the NCA. The current threshold prescribed for the registration as a credit provider is ‘nil’. Consequently, where credit is advanced in terms of an agreement – by a person who is not registered as a credit provider – such an agreement stands to be declared unlawful and unenforceable, regardless of the amount advanced.

The current legal position relating to registration as a credit provider played out in the recent case of Fourie v Geyer (NWM) (unreported case no MKP27/2018, 22-8-2019) (Petersen AJ). The applicant in this case launched an application for payment of approximately R 1,3 million in respect of commission amounts that may found, constitute a credit agreement within the meaning ascribed in the NCA. The underlying cause of the claim was an acknowledgment of debt concluded in favour of the applicant by the respondent, in August 2015, in respect of three amounts:

- R 461 000 for outstanding rentals;
- R 270 000 for the respondent’s indebtedness to the bank, which was settled on his behalf by the applicant;
- R 100 000 in respect of commission due to the applicant arising from the sale of an immovable property.

The respondent raised a point in limine wherein he contended that the acknowledgment of debt is tantamount to a credit agreement, which renders it subject to the NCA. The reasoning adopted is that payment under the acknowledgment of debt was deferred for 60 days from date of signature with interest levied at the rate of 18%. The respondent also submitted that notwithstanding the rental and commission amounts, two previous loans made to him by the applicant, for amounts of R 143 000 and R 344 000 respectively, when considered with the bank loan amount, exceeded the then threshold of R 500 000. It was, therefore, argued that the applicant was obliged to register as a credit provider. His non-compliance rendered the agreements unlawful in terms of the NCA.

The applicant submitted that the acknowledgment of debt was not an arm’s length transaction due to the applicant’s 18-year relationship with the respondent and previous loans made to the respondent’s wife and daughter. It was further submitted that even if the acknowledgment of debt was found to be a credit agreement, none of the capital amounts exceeded the then applicable threshold of R 500 000, at any given time.

In deciding whether the transaction was concluded at arm’s length, the court held that the acknowledgment of debt has salient features of a credit agreement in that it identifies a capital amount, which attracts interest, payments are deferred, collection fees are levied, and non-payment could trigger litigation accompanied by litigation costs on the punitive attorney and client scale. Consequently, it was held that the relationship between the parties, which underpins the acknowledgment of debt, overwhelmingly demonstrates anything but a familial relationship. The agreements, which gave rise to the acknowledgment of debt were clear business transactions, which were advantageous to the applicant and clearly concluded at arm’s length.

The next issue before the court was whether the three transactions in the acknowledgment of debt exceeded the then threshold of R 500 000, which would have required the applicant to register as a credit provider. The court formulated a three-fold inquiry to answer this question:

- Do the three amounts in the acknowledgment of debt constitute credit agreements within the meaning ascribed in the NCA?
- Do the two previously settled loan agreements, considered in conjunction with the three amounts in the acknowledgment of debt, or any of such amounts that may found, constitute credit agreements?
- Does the acknowledgment of debt constitute a credit agreement within the ambit of the meaning of a credit agreement in the NCA?

The court found that the rental and commission amounts can be safely discounted as not being due as a result of credit agreements and while the bank loan amount falls squarely within the ambit of the meaning of a credit agreement, it does not meet the then threshold of R 500 000. The previous loans, having been settled cannot be considered for the purposes of s 40(1).

In addressing the final inquiry as to whether the acknowledgment of debt constitutes a credit agreement, the court held that s 8(4)(f), which defines a credit agreement, is clear and unambiguous. Section 8(4)(f) provides that a credit agreement is any agreement in terms of which payment of an amount, owed by one person to another, is deferred and any charge, fee or interest is payable to the credit provider.

The court held that the only requirement under s 8(4)(f) is that payment owed to another is deferred with charges, fees or interest. As the acknowledgment of debt was concluded for the capital sum of R 831 000, this amount exceeded the then threshold of R 500 000. The court ruled that the point in limine must be answered in favour of the respondent. As the applicant was not registered as a credit provider, the court held that the acknowledgment of debt, as a credit agreement, stands to be declared unlawful.

While the court pronounced that the applicant may find a remedy by claiming under the law of unjustified enrichment, it is noteworthy that to prove such a claim would be a more onerous exercise than to rely on a credit agreement. The fact that a credit agreement is declared invalid and unenforceable simply because a credit provider was not registered at the time of the loan leaves much room for abuse by persons seeking to evade their obligations under the credit agreement. This creates the unintended consequence of going against the very purpose of the NCA, which is to promote equity in the credit market, by balancing the respective rights and responsibilities of credit providers and consumers.

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No execution or attachment for satisfaction of final court order sounding in money may be issued in any action or legal proceedings against the state

Department of Agriculture, Forestry and Fisheries and Another v B Xulu and Partners Incorporated and Others (WCC) (unreported case no 6189/2019, 30-1-2020) (Rogers J)

In the case of the Department of Agriculture, Forestry and Fisheries and Another v B Xulu and Partners Incorporated and Others (WCC) (unreported case no 6189/2019, 30-1-2020) (Rogers J), the Western Cape High Court ordered the law firm B Xulu and Partners Inc (Xulu and Partners) to refund an amount of R 20 242 472.90 to the applicants the Department of Agriculture, Forestry and Fisheries (the department) and the Department of Environmental Affairs, Forestry and Fisheries, after the applicants launched an urgent application on 5 August 2019 wherein the applicants sought to have the writs and attachments of monies suspended.

On 25 October 2016 a Memorandum of Understanding (MoU) was concluded between the department and Emanqabazi Legal and Forensic Services Pty Ltd (EBL) in terms of which, EBL was engaged to provide legal advisory services. The applicant further stated that this was part of a move by the former minister of the department, Senzeni Zokwana’s faction to get rid of the State Attorney in Cape Town so as to enable private law firms to extract excessive fees from the department.

On 6 January 2017 EBL wrote to Xulu and Partners stating that EBL had been instructed by the department to appoint Xulu and Partners as attorneys to assist in pending litigation in which Viking Inshore Fishing (Pty) Ltd was suing the department. According to Xulu and Partners, the department recommended that Xulu and Partners apply to be added to the Marine Living Resources Fund’s supplier database. It was former minister Zokwana who had contested the validity of EBL’s appointment, rendering the contract invalid. He wrote this letter after conferring with (among others) Ms Nagiah. Xulu and Partners said that it continued working on the Viking case because it was unaware of the termination of EBL’s services. Mr Mlengana complained that despite the termination, the Deputy Director-General: Fisheries Management, Siphokazi Nduvane continued to use EBL’s services and to approve payments to it.

On 3 April 2017 former minister Zokwana wrote to the Deputy Minister in the Department of International Relations and Cooperation (DIRCO) to say that the department had mandated Xulu and Partners, working with advocate Nomazotsho Memani, to initiate and facilitate the restitution of money due to the South African government in the Bengis case (Benjis and Others v Government of South Africa and Others [2016] 2 All SA 459 (WCC)). Former minister Zokwana asked DIRCO to assist Xulu and Partners in meeting with various foreign authorities and provided DIRCO with Xulu And Partners’ contact details. According to Xulu And Partners, Ms Memani was a legal adviser to former minister Zokwana. On 14 April 2017 Xulu and Partners was registered on the Marine Living Resources Fund’s supplier database.

Slightly more than a month later the service-level agreement was purportedly concluded. The preamble recorded that the department had already appointed Xulu and Partners in the Bengis case, an appointment said to stem from a mandate former minister Zokwana had given to Xulu and Partners, and that the service-level agreement was being concluded to regulate the relationship between the parties and to ensure the achievement of high-quality performance and standards. The service-level agreement defined ‘Delegated Authority’ as meaning the Deputy Director-General of the department, namely, Ms Nduvane. The court said the significance of this lies in the fact that clause 2.2 recorded that Xulu and Partners had accepted appointment on the understanding that, for the purpose of the service-level agreement, the department would be presented by the Delegated Authority, who would be the ‘first point of interface’ in all matters pertaining to the services.

Clauses 4.3 and 4.4 stipulated that Xulu and Partners would only accept instructions from the Delegated Authority and was prohibited from accepting instructions from any officials or employees from the department. In terms of clause 14 disputes were to be referred to the Delegated Authority for resolution. The draftsman was careful to bypass Mr Mlengana. Clause 10.1 stated that because of the wide geographical spread of the ‘project’ (defined in the preamble as meaning the Bengis project), all service providers were required to bill the department in US dollars, “as this was the currency in which restitution was being claimed”. Remarkably, this applied to Xulu and Partners itself. Annexure B to the service-level agreement set out hourly rates in US dollars for counsel and for an attorney of different seniority within Xulu and Partners. Payment was to be made within 30 days of receipt of the invoices.

The first ground of attack on the service-level agreement was that it was not duly signed on behalf of the department. It was purported to have been signed by Mr Mlengana in Cape Town. Although he did not dispute that the signature was his, he denied that he knowingly signed it. According to his diary, he was in Cape Town on 23 May 2017 and met with former minister Zokwana. He surmises that the last page of the document (p 19, which contained no contractual terms) was placed before him as part of a document of a different character. The court referred to the circumstances, which supported Mr Mlengana’s allegations, were as follows:

- A few months previously, Mr Mlengana had contested the validity of EBL’s appointment on the basis that the supply chain management processes had not been observed. This was equally true of Xulu and Partners’ appointment.
- It was former minister Zokwana who
was promoting Xulu and Partners' appointment and had already given mandate.

- The relationship between Mr Mlengana and the former minister was frayed (shortly after the purported execution of the agreement, the former minister placed Mlengana on suspension).
- Mr Mlengana's signature was purported to have been witnessed by Ms Memani, the advocate who was a legal adviser to the minister. Mr Mlengana says that she was not present when he met with the minister and could not have witnessed his signature. He alleged that she had orally confirmed that but refused to give an affidavit.
- Although Ms Memani's initials appeared on each page of the agreement, including the attachments, Mr Mlengana's did not.
- Mr Mlengana alleged that he became aware of his signature on the service-level agreement and reported this to the Hawks as fraud.

On 5 October 2018 Mr Mlengana wrote to former minister Zokwana regarding the latter's request that the department engage private law firms. He set out what he saw as the advantages of using a State Attorney, saying that its performance rivalled that of private firms 'whose fees are exorbitant'. Where the State Attorney briefed counsel, they usually negotiated special rates. The Auditor-General (AG) had made findings about the department's use of private law firms. He said such use could not be justified, and he requested the former minister to reconsider his instruction.

Former minister Zokwana did not heed the request. On the contrary, he issued a directive that the department settles Xulu and Partners' fees. When Xulu and Partners sought Ms Ndudane's assistance in giving effect to this directive, Mr Mlengana on 13 February 2019 notified Ms Ndudane that, as the Marine Living Resources Fund's accounting officer, he had asked the State Attorney to verify Xulu and Partners' invoices and no payment would be made until this was done.

The court said that provision was made on the same page for Xulu and Partners to sign. Nevertheless, in the absence of contrary evidence from the two persons who would have been able to refuse Mr Mlengana's version was false, namely, former minister Zokwana and Ms Memani; the courts pointed out it could not reject it.

The second ground of attack was that Xulu and Partners was not appointed pursuant to a fair public procurement process. Authority was scarcely needed for the obligations imposed in that regard on public bodies pursuant to s 217 of the Constitution. On the assumption that there were rational grounds to engage private attorneys to handle the Bengås and other cases, such appointments require a competitive bidding process. None was followed.

The court said that is a common cause and added that item 16A of Treasury Regulations, promulgated in terms of section 76(4)(c) of the Public Finance Management Act 1 of 1999 (the Finance Act), requires an accounting officer to develop and implement a supply chain management system that is, inter alia, fair, equitable, transparent, competitive, cost effective and consistent with the Preferential Procurement Policy Framework Act 5 of 2000. Various requirements with which such a system must comply are set out. In terms of item 16A.6.4, the accounting officer may deviate from the system where it is 'impractical to invite competitive bids', but then the reason must be recorded.

The court pointed out that item 16A.6.4 must be read in the light of National Treasury Instruction SCM Instruction Note 3 of 2016/17, issued in terms of ss 6(2) and 18(2) of the Finance Act, and which took effect on 1 May 2016. Paragraph 8.1, therefore, states that an accounting officer must only deviate from a competitive bidding process 'in cases of emergency and sole supplier status'. The former is defined as occurring 'when there is a serious and unexpected situation that poses an immediate risk to health, life, property or environment which calls an agency to action and there is insufficient time to invite competitive bids'.

'Sole source procurement' may occur 'when there is evidence that only one supplier possesses the unique and singularly available capacity to meet the requirements of the institution'. Paragraph 8.5 provides that any other deviation 'will be allowed in exceptional cases subject to the prior written approval from the relevant treasury'. The court said that there was no emergency requiring Xulu and Partners to be appointed, that there was no evidence that Xulu and Partners possessed the 'unique and singularly available capacity' to deal with Bengås case or any other cases on which it worked for the department. The applicant challenged Xulu and Partners to provide evidence that it had any track record in dealing with fishery matters. Xulu and Partners did not rise to the challenge.

Rogers J said on 6 June 2019 the Western Cape High Court, per Steyn J, made a purported settlement agreement concluded between Xulu and Partners and the first applicant, an order of court. The purported settlement agreement was concluded on 12 April 2019. Rogers J referred to the document as the settlement agreement though he said its validity is contested. When the department failed to make payment in accordance with settlement agreement, Xulu and Partners levied execution.

The court, however, declared the settlement by agreement invalid, and it was reviewed and set aside. The court pointed out that there are grounds of attack, which stand independently of the rescission of Steyn J's order and one of those was non-compliance with the State Liability Act 20 of 1957. In terms of s 3(1), and subject to the further provisions of s 3 of the State Liability Act, no execution or attachment for satisfaction of final court order sounding in money may be issued against a defendant or respondent in any action or legal proceedings against the state or against any property of the state.

The court added that it was concerning that writs were issued in this case without an inquiry into compliance with the State Liability Act. Rogers J said he consulted with the court's chief registrar, and it seemed that the registrars in the division of that court may not be alert to the provisions of the Act. He pointed out that there is no standard form for written request contemplated in s 3(6) of the Act. He said that attorneys who seek writs against national or provincial government departments must not make such requests unless there has been compliance with the Act, and registrars should not issue writs unless so satisfied. He noted that in practice, it seems that to require the attorney, in the written request, to state-

- when the period contemplated in s 3(3) expired;
- that after expiry of that period, due services were affected on each of the person contemplated in s 3(4), and the dates of such service; and
- that 14 days have expired from such service without payment having been affected and without acceptable arrangements for satisfaction of debt having been reached.

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

Legislation published from 1 – 28 February 2020

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

Bills

Division of Revenue Bill B3 of 2020.
Appropriation Bill B4 of 2020.

Commencement of Acts

Competition Amendment Act 18 of 2018, s 5 (insofar as it relates to s 8(4) of the Competition Act 89 of 1998, ss 6, 27, 28 and s 33(a) (insofar as it relates to ss 8(4) and 9(1A) of the Competition Act 89 of 1998). Commencement: 13 February 2020. Proc10 GG43018/13-2-2020 (also available in Afrikaans).

Selected list of delegated legislation

Agricultural Pests Act 36 of 1983
Agricultural Product Standards Act 119 of 1990
Amendment of regulations regarding departmental fees. GN R179 GG43033/21-2-2020.
Commissions Act 8 of 1947
Amendment of the regulations relating to the judicial commission of inquiry into allegations of state capture, corruption and fraud in the public sector including organs of state. Proc8 GG42994/4-2-2020 (also available in Afrikaans).

Competition Act 89 of 1998
Cross-Border Road Transport Act 4 of 1998
Amended of sch 1 and 2 to the regulations (fee adjustment). GN R235 GG43059/28-2-2020 (also available in Afrikaans).
Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972
Amendment of the regulations governing the maximum limits for pesticide residues that may be present in foodstuffs. GN119 GG43008/10-2-2020.
Health Professions Act 56 of 1974
Rules relating to fees payable to the Health Professions Council of South Africa. BN10 GG43024/17-2-2020.
Labour Relations Act 66 of 1995
Long-Term Insurance Act 52 of 1998
Penalty for failure to furnish authority with returns. GN121 GG43013/12-2-2020 and GN205 GG43050/28-2-2020.
Medicines and Related Substances Act 101 of 1965
Exclusion of certain waste streams or portions of waste streams from the definition of 'waste' for beneficial use. GN85 GG42990/3-2-2020.
National Minimum Wage Act 9 of 2018
Natural Scientific Professions Act 27 of 2000
Plant Improvement Act 53 of 1976
Amendment of the regulations relating to establishments, varieties, plants and propagating material (fees). GN125 GG43015/14-2-2020.
Project and Construction Management Professions Act 48 of 2000
Public Finance Management Act 1 of 1999
Remuneration of Public Office Bearers Act 20 of 1998
Determination of salaries and allowances of members of the National Assembly and permanent delegates to the National Council of Provinces. GenN112 GG43043/21-2-2020.
Short-Term Insurance Act 53 of 1998
Penalty for failure to furnish authority with returns. GN122 GG43013/12-2-2020 and GN206 GG43050/28-2-2020.
South African Reserve Bank Act 90 of 1989
Superior Courts Act 10 of 2013
Amendment of the Eastern Circuit District of the Western Cape Division of the High Court of South Africa (Thebault, George). GenN62 GG43015/14-2-2020.
Unemployment Insurance Act 63 of 2001
Amendment of the Unemployment Insurance Act Regulations. GN R173 GG43023/14-2-2020 (also available in Tshwane).

Draft delegated legislation

• Draft regulations in respect of the limitations of control and equity own-

• Proposed amendments to the code of professional conduct for registered auditors in terms of the Auditing Profession Act 26 of 2005 for comment. BN9 GG43015/14-2-2020.

Draft Bills


Employment law update

Monique Jefferson BA (Wits) LLB (Rhodes) is a legal practitioner at DLA Piper in Johannesburg.

Dismissal for racist social media post

In Edcon Ltd v Cantamessa and Others [2020] 2 BLLR 186 (LC), an employee was dismissed for making a racist comment on Facebook. In this case, the employee had posted a message on Facebook referring to the government as monkeys shortly after watching an episode of Carte Blanche regarding the reshuffling of Cabinet. Her Facebook page identified her as an employee of Edcon. Initially the post went largely undetected, but a few weeks later in the aftermath of Penny Sparrow posting a racist tweet, Twitter users started to mention her post and a newspaper referred to the post in an article titled ‘Racist monkey slur strikes again’. A complaint was then made to her employer about the post and the employee was called to a disciplinary inquiry and charged with making an inappropriate racist comment. She was summarily dismissed.

The employee referred an unfair dismissal claim to the Commission for Conciliation, Mediation and Arbitration (CCMA) and the arbitrator found that the dismissal was substantively unfair and awarded 12 months’ compensation. The arbitrator considered the fact that the employee posted the message while on leave and was of the view that no reasonable reader would associate the comment with her employer simply because she mentioned who her employer was on her Facebook profile. Furthermore, she was charged with breaching the employer’s social media policy and yet that policy only applied to employees accessing the Internet through the company’s resources and during working hours.

The employee used her personal computer and it was not during working hours. Subsequently the policy was amended to include private conduct. The CCMA found that the employee did not breach the employer’s social media policy and did not bring the employer’s name into disrepute as there was no proof that Edcon suffered any loss. Furthermore, it was found that the employer had acted inconsistently as the employees who had liked the post were only issued with a final written warning.

Edcon then took the decision on review. The Labour Court (LC) per Cele J first considered whether Edcon was entitled to discipline the employee notwithstanding that the comment had nothing to do with her work duties. It was found that the CCMA was correct that Edcon’s policies did not apply to her conduct outside of working hours and outside of the workplace. However, an employer may still discipline employees for conduct outside of the workplace if there is a connection between the employer’s conduct and the employer’s business. It was held that in this case the employee’s comment could be linked to Edcon because she identified herself as an Edcon employee.

The employee’s defence was that she had been referring to the government alone and Edcon had not suffered any damage. The LC held that the comment had exposed Edcon to reputational harm. In this regard, it was read by customers and the public at large and attracted negative media attention, as well as negative social media attention, which placed Edcon’s reputation at risk. There were also a number of customers who threatened to take their business away. The arbitrator had placed emphasis on the fact that Edcon did not prove the financial loss suffered but the LC found that the commissioner had failed to appreciate that the employee was not charged with causing loss.

The LC also found that the CCMA had not properly appreciated the use of the word ‘monkey’ in the context of South Africa where such a word is rooted in racism. The LC emphasised that the use of the word had to be considered in light of the context and history of the country in which it was used. The employee had conceded that her comment could have caused offence. Her post was found to be racist and not in accordance with Edcon’s values. It was also held that the right to free speech does not extend to statements calculated to cause offence and harm and her frustration at government did not give her the right to express racist sentiments. Furthermore, she was a senior employee who was expected to have known better. As regards the argument about inconsistent discipline, it was held that co-perpetrators can be treated differently depending on the extent of their participation in the misconduct.

It was held that the commissioner failed to consider all the evidence before him and reached an unreasonable decision. The award was set aside, and the dismissal was found to be substantively fair.

Unfair dismissal for sexual harassment

In Adcock Ingram Healthcare (Pty) Ltd v General Industries Workers Union of South Africa obo Khumalo and Others [2020] 2 BLLR 162 (LC), a manager was dismissed for sexual harassment. In this case, the employee received complaints from a service provider that some of its employees were being sexually harassed. An investigation was conducted, and three employees were suspended. The employee was called to a disciplinary
inquiry and dismissed. The complainant said that she and the employee had always been friendly towards each other and would greet each other with a hug. She said that the hugs eventually began to feel too intimate and she asked him to stop hugging her because she did not feel comfortable. She also said that she had pushed him away and confirmed that hugs were unwelcome.

The employee referred an unfair dismissal dispute. At the arbitration the employer called only one complainant as a witness and the employee denied that he did anything other than occasionally hug the complainant. Under cross-examination the complainant said that the employee had made her feel disrespected and she had asked him to stop hugging her because she had a boyfriend. She also said that she had requested to have sexual intercourse with her, at which point she had pushed him away. She said that he also smacked her on the buttocks and told her that he ‘wanted her’.

The employee denied that he ever touched the complainant inappropriately. He said that when she asked him to stop hugging her because she had a boyfriend he acceded to that request. The arbitrator applied the cautionary rule because there was only one witness in the case. The arbitrator preferred the employee’s version that the complainant was a willing participant in a ‘hugging affair’, which ceased when the complainant asked him to stop because she had a boyfriend. It was held that the employer did not discharge the onus to prove that the sexual harassment occurred. Reinstatement was ordered.

The employer took the decision on review on the basis that the commissioner had misdirected himself in applying the cautionary rule, demonstrated gender bias and had reached an unreasonable decision. The Labour Court (LC) found that the arbitrator did not base the decision solely on the application of the cautionary rule. It was held that the arbitrator assessed the evidence of the complainant and the employee and preferred the employee’s version. The LC took the view that it would not be fair to interfere with the arbitrator’s reasoning for preferring one version over another when there were conflicting versions unless the version is implausible as the arbitrator has the advantage of being present at the proceedings and observing the conduct of the witnesses. The employer also took issue with the fact that the arbitrator adopted an inquisitorial approach, but the LC found that this did not deny a fair trial. There was also no evidence of gender bias and the application for review was accordingly dismissed.

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How and when to file an application to be absolved from paying security while reviewing an award

Panorama Park Retirement Village v CCMA and Others (LC) (unreported case no JR2472/2015, 21-1-2020) (Tlhotlalemaje J). Subsequent to the Labour Court (LC) handing down an interim order, interdicting employees from participating in strike action and picketing within a certain distance from the employer’s premises; in this matter the employee was dismissed for being in ‘contempt’ of the interim order.

At arbitration the employer, in an attempt to justify the fairness of the dismissal, argued that the court order established a rule in the workplace, which the employee breached. This, as suggested by the employer, amounted to insubordination in that the employee refused to carry out the instruction of the LC. He was, therefore, in contempt of the order.

The commissioner found that only a court of law can pronounce on whether a person is in contempt of a court order and if so, what sanction to impose. The commissioner further found that the interim order did not transform into a workplace rule as it had been an instruction issued by the employer and hence the employee could not be guilty of insubordination.

The employee’s dismissal was found to be both procedurally and substantively unfair and he was awarded reinstatement with backpay of R 9 160.

The award was issued on 11 November 2015, whereafter the employer filed its review application on 9 February 2016 together with an application for condonation. The employer further filed the transcribed record some eight months after the record had been available.

At the hearing of the matter the court was satisfied with the explanation for the late filing of the record and revived the employer’s review application. Before addressing the condonation application, the court made certain observations regarding s 145(7) and (8) of the Labour Relations Act 66 of 1995 (the LRA).

In terms of s 145(7), a review application does not stay the enforcement of an arbitration award. Section 145(8) states that an award is stayed pending a review application if security is furnished or unless the court directs otherwise. Thus, an award is automatically stayed if security, as contemplated in s 145(8)(a) or (b) is furnished, or at the instance of the court pursuant to the employer bringing an application on why it should be absolved from furnishing security or providing a reduced amount.

The court noted - with grave concern - that the employer in this instance, there was a growing trend among applicants not to furnish any security and to include a prayer in their review application that they be absolved from paying security. Some applicants attempt to make out a case in their founding affidavit for the review application, as to why they should be absolved from providing security while others merely make the request in their notice of motion. This point is generally heard as a preliminary point when the review application is set down for hearing.

However, by that time, and in the absence of the employee seeking to enforce the award, the employer has been absolved from paying in security by default.

This practice, according to the court, defeats the very purpose of s 145(7) and (8), which was to dissuade employers from bringing frivolous review applications with no prospects of success. The court went further to state:

‘For reasons that are obvious, reviewing parties have taken advantage [of] the lacuna created by the provisions of section 145(7) of the LRA, as it is not specified as to how the payment of security should be made, when and to whom. Furthermore, the provisions of section 145(8) of the LRA do not indicate how and when a reviewing party may approach the Court in order to be absolved from furnishing security’.

Referring to the judgment in City of Johannesburg v SA Municipal Workers Union on behalf of Monareng and Another (2019) 40 ILJ 1753 (LAC), the court held:

‘To the extent that the LAC’s decision as above requires a reviewing party to make an application to the Labour Court, either in terms of section 145(3) for the stay of the enforcement of the arbitration award pending its decision in the re-
view application, or to be absolved from payment of security, a proper case in that regards needs to be made out. This in my view implies that a separate application from the review application ought to be made. It is not uncommon for parties to bring separate applications to stay enforcement of arbitration awards, even though this often happens when writs have been obtained. Ordinarily, the provisions of Rule 11 of the Rules of this Court will be best suited for applications to be absolved from payment of security, so that they can be treated as interlocutory, and be placed on special court rolls, so that they can be dealt with before it can be said that the review application is ripe for a hearing.’

Returning to the facts at hand, the court found that it would serve no purpose for it to consider whether the employer ought to be absolved from payment of security – the employee was dismissed over three years ago and if the court were to find the employer had not made out a case to be absolved from furnishing security, the matter would have to be postponed until such time as the employer meets its obligation thereby causing a further delay.

Turning to the condonation application the court was not satisfied with the employer’s reasons for filing its review application outside the prescribed time period. Likewise, the court found that the employer had no merits in its review application; the commissioner correctly found that only a court of law, by way of its supervisory and enforcement powers, could pronounce on whether a person is in contempt of a court order. The interim order furthermore did not transform into a workplace rule for purposes of the charge of insubordination.

The court dismissed the condonation application, as well as the review application with no order as to costs.

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**Seen on social media**

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

The Law Society of South Africa’s Acting Communication Manager, Nomfundo Jele, gives us an update on issues pertaining to the Conveyancing field.

There is a need for mentors in this field. I recently wrote the exam and successfully passed. My experience is very limited because I have not had much exposure to conveyancing. I asked a senior attorney if he could mentor me and received no response from him. Perhaps he thought I was looking for a job which is clearly not the case. There is a serious need for skills transfer otherwise there will not be any transformation in this field.

Mujahid Adams, Director at Mujahid Adam’s Attorneys

Is what is said on WhatsApp legally binding? Read legal practitioner, Nonhlalhla Mtsahlí’s case note on the matter.

Can a WhatsApp message be held as an enforceable contract? Some considerations before you make all those promises via texts.

Yamani Selana @Yamani_Selana

Thanks for the report about the Court case but a WhatsApp message if worded correctly and accepted correctly, possibly printed out, could be a binding contract? Thanks.

Anton Van den Bout Dr and advocate at Dr Anton van den Bout Ingelyf

The University of Pretoria is ‘beaming with pride’ after law student, Marko Svicevic obtained an LLD at the age of 25.

Well done Marko Svicevic @UPTuks. And here I am at 40 still thinking about completing my LLD! Procrastination is a thief of time, let us not wait for the things we wish to do but rather MAKE IT HAPPEN!

Ally Brittain @Ally_Brittain

President Cyril Ramaphosa has appointed new Senior Counsels.

Congrats to all the new SCs. Pheladi Maletjatji Moagi, Manager: Specialised Support & Litigation at MFC

Give your views on our social media pages and keep up to date with the latest news.

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

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DE REBUS – APRIL 2020
Recent articles and research

By Kathleen Kriel

Please note that the below abbreviations are to be found in italics at the end of the title of articles and are there to give reference to the title of the journal the article is published in. To access the article, please contact the publisher directly. Where articles are available on an open access platform, articles will be hyperlinked on the De Rebus website at www.derebus.org.za

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Abbreviation | Title | Publisher | Volume/issue
--- | --- | --- | ---
AHRLJ | African Human Rights Law Journal | Centre for Human Rights, Department of Law, University of Pretoria | (2019) 19.2
EL | Employment Law Journal | LexisNexis | (2020) 36.1
ILJ | Industrial Law Journal | Juta | (2020) 41
LitNet | LitNet Akademies (Regte) | Trust vir Afrikaanse Onderwys | (2019) 17.1
PER | Potchefstroom Electronic Law Journal | North West University, Faculty of Law | (2019) 23
TSAR | Tydskrif vir die Suid-Afrikaanse Reg | Juta | (2020) 1

Administrative law


Moloka, TC 'Recent developments regarding costs awards in constitutional and public interest litigation' (2019) 34.2 SAPL.

Muller, G 'Restoring electricity use with the spoliation remedy: A critical comment on Eskom Holdings Soc Ltd v Masindi' (2019) 13 PS LR 1.


Banking law – FICA

Spruyt, W 'A legal analysis of the duty on banks to comply with targeted financial sanctions' (2020) 1 TSAR 1.

Banking law – foreign investments

Mhlongo, L 'A critical analysis of the Protection of Investment Act 22 of 2015' (2019) 34.1 SAPL.

Civil law and procedure


Company law


Constitutional law

Sindane, N 'Contested legacies of the South African Constitution: An engagement with Albie Sachs’s Oliver Tambo’s dream' (2019) 34.1 SAPL.
Constitutional law – expropriation of land
Muller, G and Marais, EJ 'Reconsidering counter-spoliation as a common-law remedy in the eviction context in view of the single-system-of-law principle' (2020) 1 TSAR 103.
Pienaar, J; Johnson E and du Plessis W 'Land matters and rural development: 2018' (2019) 34.1 SAPL.

Constitutional law – freedom of speech
Botha, L and Kok, A 'How to make sense of the civil prohibition of hate speech in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' (2019) 34.1 SAPL.

Delictual law
Neethling, J 'Extinctive prescription of delictual cause of action' (2020) 1 TSAR 182.
Scott, J 'Vicarious liability of the state for intentional police delicts: A noteworthy “concealed” deviation case' (2020) 1 TSAR 164.

Wessels, B 'Reconsidering the state’s liability for harm arising from crime: The potential development of the law of delict' (2019) 30.3 SLR 361.

Education law
Shandu, P 'Stepping in the right direction towards fully realising the constitutional promise of s 29(1)(a) of the Constitution – Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another 2016 (4) SA 546 (CC)' (2019) 13 PSLR 197.

Environmental law
Olufolajimi, O 'The role of law and governance in advancing climate resilience and climate justice' (2019) 13 PSLR 163.

Estate planning, wills and trusts
Gildenhuys, A 'Vonnisbespreking: Ar-
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International medical law

Ogendi, PO 'Pharmaceutical trade policies and access to medicines in Kenya' (2019) 10.2 AHRJL 698.

International medical negligence


International mining, mineral and petroleum law

Meyer, Y 'Initiatives aimed at ensuring transparency and accountability in the Nigerian Petroleum Industry: A critical appraisal of the Nigeria Extractive Industry Transparency Initiative (NEITI), the NEITI Act and the Petroleum Industry Governance Bill' (2019) 34.1 SAPL.

International trade law

Vinti, C 'A critical assessment of the Zimbabwe - South Africa import licensing dispute' (2019) 34.1 SAPL.

Jurisprudence

Ashton, C 'Towards a jurisprudence of corruption: Reformulating the contra fiscum principle for the purposive approach' (2019) 136.4 SALJ 749.

Jolwana, MS 'Transformation and the intrinsic value of a diversified Bench' (2019) 2.1 SAJEJ 1.

Mkhwanazi, SS 'Subaltern responses to epistemic violence: The legacy of colonisers' (2019) 13 PSLR 22.

Motlwana, B 'The feminist agenda – a fall of hierarchical redress or an attempt to establishing an “equal” society gone wrong: An internal critique to feminist theories' (2019) 13 PSLR 208.


Smith, JR 'The case for more accessible judgments' (2019) 2.1 SAJEJ 19.

Labour law

Benjamin, P and Cheadle, H 'South African labour law mapping the changes - part 2: The history of labour law and its institutions' (2020) 41 ILJ 1.

Fergus, E 'The right to union representation in individual workplace disputes: Whose right is it anyway? Thoughts on Solidarity v SA Police Service and Others (2019) 40 ILJ 448 (LC)’ (2020) 41 ILJ 104.


Grogan, J 'Unions reined in: Unruly strikers, secondary strikes and protest action' (2020) 36.1 EL.

Grogan, J and Govindjee, A 'The devil in the deemed: Novel takes on sections 198B and D’ (2020) 36.1 EL.

Khumalo, BB 'The application of s 197 of the Labour Relations Act to second-generation outsourcing' (2019) 34.2 SAPL.


Smit, DM 'Joining the “old boys” club: Equality for women in the South African judiciary and other male-dominated workplaces' (2020) 41 ILJ 48.

Legal education

Holness, D 'Improving access to justice through law graduate post-study community service in South Africa' (2020) 23 PER.

Muller, G 'Using a diagram as a teaching and learning tool for assessing the law of servitudes' (2019) 30.3 SLR 415.

Thomas, K 'Looking to literature for transformation' (2019) 13 PSLR 74.

Legal practice

Cameron, E 'The transition to democratic practice: Constitutional norms and constitutional reasoning in legal and judicial practice' (2019) 2.1 SAJEJ 1.

Goosen, G 'Ethics as a driver of transformation of the legal profession' (2019) 2.1 SAJEJ 61.

Van der Westhuizen, J 'Language and labels in law and life' (2019) 2.1 SAJEJ 37.

Persons and family law

Thaidar, D 'The in vitro embryo and the law: The ownership issue and a response to Robinson' (2020) 23 PER.

Property law

Fick, S 'Fischer v Unlawful Occupiers and Others (WCC): Difficulties in seeking damages for a failure by the police to prevent unlawful occupation' (2019) 136.4 SALJ 676.


Van der Merwe, CG 'Judicial redress against a body corporate of a sectional title scheme for failure to comply with its maintenance obligations before and after the new sectional title legislation came into operation: Discussion of Lyons v The Body Corporate of Skyways 2016 (6) SA 405 (WCC)' (2019) 30.3 SLR 434.

Van der Merwe, CG 'The first appeal on a question of law to the High Court of the Western Cape against an order by an adjudicator of the Cape Town Community Schemes Ombud Service' (2020) 1 TSAR 153.

Refugees

Alimohammadi, E and Muller, G 'The illegal eviction of undocumented foreigners from South Africa' (2019) 19.2 AHRJL 793.

Tax law

Burt, K 'Expatriate employees: To facilitate and pay for their tax compliance is a taxable benefit' (2019) 10.4 BTCLQ 25.


Open access law journals:
- African Public Procurement Law Journal (Faculty of Law, Stellenbosch University, South Africa): www-applj.journals.ac.za/pub
- Comparative and International Law Journal of Southern Africa full electronic copies of retrospective issues from 1968 up to and including 2006 can be found at: African Journal Archive.
- De Jure published by the University of Pretoria: www.dejure.up.ac.za/
- Journal for Juridical Science. www.journals.co.za/content/journal/juridic
- Law, Democracy & Development is the journal of the Faculty of Law at the University of the Western Cape: www.ldd.org.za/current-volume.html
- Potchefstroom Electronic Law Journal: www.law.nwu.ac.za/per
- Speculum Juris: Journal of the Nelson R Mandela School of Law, Fort Hare University: www.ufh.ac.za/spectumjuris/

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RECENT ARTICLES AND RESEARCH
N o person who has served the debt counselling industry would dispute the dire plight of consumers of credit. The remedy of debt counselling, as introduced by the National Credit Act 34 of 2005 (the NCA) (an exceptional measure crafted from the vestiges of the Usury Act and affording - as its sole purpose - respite to over-indebted consumers) does not offer a viable gateway to financial wellness.

The stated intention of Parliament’s Portfolio Committee on Trade and Industry in introducing the National Credit Amendment Bill B30 of 2018 was, specifically, to offer respite to those financially distressed consumers who were ineligible for the existing debt repayment remedies of administration, personal insolvency and debt counselling. It then fell to the Portfolio Committee to translate its intention into a law that gives effect to that intention in direct and unambiguous language. The result is the National Credit Amendment Act 7 of 2019 (the Act), which was assented on 15 August 2019.

Unfortunately, the debt counselling provisions of the NCA have drawn repeated criticism from the courts for the inconsistent quality of its drafting. This – according to those members of the judiciary – rendered the courts’ discernment of the legislature’s intention therein an unenviable task. In practice, this resulted in conflicting interpretations of the debt counselling provisions by and within various courts. The consequence, in practice, was numerous delays in finalising the debt counselling court application, which constituted a significant prejudice to the affected consumers.

The inability to readily ascertain the intention of the crafters of a statute – from the wording of its provisions – threatens the successful implementation and enforcement of that statute. In the case of debt counselling, this resulted in periodic regulations, as well as numerous resort to the judiciary for guidance and clarity.

This article will consider provisions of the Act, largely pertaining to debt intervention so as to gauge whether the wording of those provisions pose any impediment to the realisation of the legislature’s stated intention.

The definition of the term ‘debt intervention’ in s 1 of the Act does not expressly permit a consumer who is currently under debt counselling to apply for debt intervention. While the study on the socio-economic impact assessment of the Act with administering by the Department of Trade and Industry (www.thedti.gov.za, accessed 25-3-2020) (the study) found that 13 941 consumers who were under debt counselling at the time of the study met the requirements for debt intervention, this wording would place in question the eligibility of such a consumer for debt intervention.

Could it have been the intention of the lawmakers not to explicitly refer to the very category of consumers that debt intervention was designed to assist?

The requisite skill set and competencies of the ‘suitable employee of the National Credit Regulator’ or ‘suitable person employed by the State’ stipulated in s 15A have not been outlined in that section. Regulation 10(a)(ii) requires a debt counsellor to undergo a comprehensive training course prior to being registered with the National Credit Regulator (NCR). Section 15A(2)(b) deems a debt intervention officer to be a registered debt counsellor. However, the provision makes no mention of the nature and scope of the training that this functionary must undergo before they can be said to be sufficiently equipped to offer this service to the targeted consumers. It is anticipated that these matters will be clarified in the regulations and ironed out by the NCR.

A concerning consequence is that the provisions immure the NCR as an important functionary in a process it is charged with administering. As noted by the study, the NCR has been relegated to a role player in the debt intervention process, yet the Act is silent as to who will ensure compliance by the NCR itself. Put plainly, the regulator would essentially be unregulated.

Further, would the relegation of the NCR to that of a role player in a process ipso facto render it susceptible to offences in terms of the Act?

These could not have not been the intentions of the legislature. It would be of comfort to the NCR that it already possesses a software platform that will enable it to maintain a record of the debt intervention process as required by ss 69A, 70, 71(1A) and 71A of the Act, subject to the necessary enhancements.

The provisions position the NCR as a crucial role player in the process, thus arousing the identical concerns raised under s 15. Furthermore, would the NCR be guilty of an offence should it fail to submit proof of a debt intervention order to the credit bureau within two business days as required by s 71A(3A) read with s 157 of the Act?

These could have not been the intentions of the legislature.

The introduction by the legislature of mandatory reckless lending investigations by the debt counsellor in s 86(6)(b) and the subsequent mandatory referral to either the NCR or the magistrate’s court in s 82A are to be praised as an important antidote to which to alleviate the plight of the targeted consumers. Most debt counsellors willfully elected not to investigate reckless lending because, to their minds, the assessment was far too laborious and time-consuming to be a financially viable exercise. This significantly disadvantaged the affected consumers as it unilaterally deprived them of a statutory remedy afforded specifically by the legislature. It must be noted that neither s 86 of the NCA nor reg 24 makes the debt counsellor’s statutory responsibility to investigate reckless lending conditional on it being financially viable to the debt counsellor. An added disincentive to debt counsellors was the absence in the legislation of a clearly defined process that detailed the applicable time frames and reciprocal responsibilities pertaining to the reduction of the affordability assessment documentation by the credit provider and finalisation of the reckless lending assessment by the debt counsellor.

In an effort to ensure debt counsellors conducted the reckless lending assessment, the NCR through the Credit Industry Forum (CIF) – facilitated the
development of a reckless lending process document, which sought to bridge the statutory lacuna. The CIF decided, however, to shelve the process document pending the introduction of s 82A and the amended s 86(6)(b) of the Act. It may prove prudent to explore - in supplementing impact of s 82A(2) - particularly as regards the responsibilities of debt counsellors - the extent to which the foundational work already completed by the CIF could form the basis of regulations on the reckless lending assessment process. This appears to have been envisaged by the legislature in s 171(1)(b) of the Act, which is encouraging.

Debt counsellors could yet experience challenges in determining the scope of their mandate, as s 82A refers to 'reasonable grounds to suspect that a credit agreement [is reckless] whereas s 86(6)(b) refers to any of the credit agreements that 'appear to be reckless'. This could result in an abuse of the remedy by exploiting the hesitations of debt counsellors and, in regard, is not clear whether the credit provider would be entitled to costs for the unfounded referral by the debt counsellor. This would have an adverse effect on the legislature's intention. Immediately evident from the exposition of the debt intervention process in s 86A is the pivotal role played by the NCR in the functioning - not regulating - of the process. This elicits the same discomfort expressed earlier in reference to ss 15A, 69A, 70, 71(1A) and 71A.

The NCR is required to perform an adaptation of the Form 17.1 and 17.2 procedure staple to the debt counselling process and is responsible for negotiating with the consumer's credit providers (ss 86A(3), 86A(4), 86(4), (5) and (6)), yet the specifics of the adaptation have not been outlined in those provisions. Section 86A(6)(c) requires the NCR to assess whether credit agreements are unlawful or amount to prohibited conduct by the credit provider, which is not required of a debt counsellor under s 86(6)(b), and is a further important remedy for the targeted consumers introduced by the legislature. The section requires a referral to the National Consumer Tribunal (NCT) for an 'appropriate declaration', however, neither s 87 nor the new ss 87A(1A) and 87A specifically stipulate the NCT's power to make the 'appropriate declaration'. The result could be a bifurcation of referrals between the general debt intervention application procedure under ss 137(1A) and 142(3)(1A) of the Act and the separate referral to the NCT under ss 89(5) and 90(4) of the Act read with s 164(1). This could also have a significant impact on the internal operations of the NCR.

As stated earlier, ss 86(5) requires the parties to a debt counselling application to negotiate in good faith so as to arrive at a mutually acceptable repayment so...

lution. Yet, notwithstanding the express reference to this notification process in s 86A(4) of the Act, it is unclear from the wording of s 86A(8)(b) whether such negotiations would in fact take place as it appears to suggest that the NCR must refer the repayment proposal to the NCT as such as a credit provider does not accept the original proposal and before counter-proposals even could be exchanged. While fully-fledged negotiations may occur in practice, as much is not directly mandated by the wording of the provision.

Could these have been the intentions of the legislature?

Prescription is an important defence to a financially embattled consumer. The Act specifically ascribes it to a consumer under debt intervention whose debt repayment obligations to a credit provider have been suspended by an order of the NCT. The crucial issue is always whether prescription has already run its course. However, the framing of this defence in s 87A(4)(b) is sufficiently abstruse that an impatient debt intervention role player could find attaining the correct timeframe envisaged by the legislature a challenge.

Eight months after the granting of the debt repayment suspension order by the NCT, the NCR is required to assess whether the consumer's finances have improved to the extent that resumption of debt repayment via a reduced repayment plan is feasible. Should the NCR conclude that the consumer's situation has not improved to that degree, ss 87A(5)(b)(ii) and 87A(5)(c)(iii) authorise it to request the NCT to order an extension of the suspension period or, ultimately, to write-off 'the whole or a portion' of the total debt owed by the consumer. These orders will have a significant impact on credit providers. They would want to have sight of the NCR's assessment. As much is required by the audi alteram partem rule. However, s 87A(5)(b) makes specific reference to the process to be followed in s 86A(9), which requires the NCR to 'inform each credit provider ... of such referral and invite such credit providers to make representations' - it places no clear obligation on the NCR to make its assessment available to the credit providers. It could very well come to pass that, in practice, considerations of common sense and practicality would compel the NCR to attach its assessment to the notification and the legislature could very well assert that to have been its intention. It is merely the thesis of this article that much is not immediately apparent in the wording selected by the legislature.

In conclusion, this article has endeavoured to highlight, for consideration, certain disjunction between the legislature's intention and the actual wording of selected provisions of the Act as passed by it. Learning from the debt counselling experience, any disjunction should be resolved by regulations to ensure the much-needed recourse introduced by the legislation does not elude many targeted consumers. Fortunately, promulgation is not expected before 2021. It could yet fail to debt counsellors and credit providers once again to offer support to the NCR by co-operating to devise - under the guidance of the NCR - workable and practical solutions to the disjunction until such time as they are remedied or clarified by regulations or amendments and for it the targeted consumers and the credit industry as a whole would be indebted (just not over-indebted).

Fact corner

- A businesses that plan to list adverse information about a client at a credit bureau must give the client at least 20 business days' notice of its intention to do so.

- Credit bureaus must ensure that all information they hold about any person is accurate and up to date.

- The National Credit Act 34 of 2005 specifically prohibits any credit provider from harassing anyone to persuade them to apply for credit or enter into a credit agreement.

- ‘A consumer has the right to receive any document that is required in terms of the National Credit Act in an official language that the consumer reads or understands, to the extent that is reasonable having regard to usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population ordinarily served by the person required to deliver that document’
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Classified advertisements
and professional notices

Index                    Page

Vacancies.........................1
To Let/Share......................1
For sale/wanted to purchase...2
Services offered...............2
Smalls..............................4
Courses...........................5

Rates for classified advertisements:
A special tariff rate applies to practising attorneys and candidate attorneys.

2020 rates (including VAT):

<table>
<thead>
<tr>
<th>Size</th>
<th>Special advertisers</th>
<th>All other SA advertisers</th>
</tr>
</thead>
<tbody>
<tr>
<td>1p</td>
<td>R 11 219</td>
<td>R 16 104</td>
</tr>
<tr>
<td>1/2 p</td>
<td>R 5 612</td>
<td>R 8 048</td>
</tr>
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<td>R 2 818</td>
<td>R 4 038</td>
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<td>1/8 p</td>
<td>R 1 407</td>
<td>R 2 018</td>
</tr>
</tbody>
</table>

Small advertisements (including VAT):

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<tr>
<th>Size</th>
<th>Special advertisers</th>
<th>Other advertisers</th>
</tr>
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<td>1–30 words</td>
<td>R 567</td>
<td>R 827</td>
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<tr>
<td>every 10 words</td>
<td>R 190</td>
<td>R 286</td>
</tr>
</tbody>
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RISK ALERT

IN THIS EDITION

RISK MANAGEMENT COLUMN

● The coronavirus pandemic: Risk management considerations for South African legal practitioners

Introduction

In the first quarter of 2020, the unrivaled focal point of international interest, and the leading cause of worldwide fear and anxiety, has been the rapid spread of the coronavirus. The pandemic arises as the legal profession is still trying to grapple with the new risks – such as cybercrime – which have emerged in the past decade. In this article I will:

(i) attempt to show the potential risk that the pandemic poses for the legal profession in South Africa (SA);
(ii) highlight the measures that other jurisdictions have implemented in order to ensure that the administration of justice continues – even on a limited scale – in the face of the pandemic; and
(iii) suggest measures that legal practices can consider implementing in order to deal with this new risk.

On 11 March 2020 the Legal Practice Council (the LPC) issued an advisory which reads: ‘Coronavirus disease (COVID-19)’

In light of the Coronavirus outbreak, the Legal Practice Council (LPC) urges all legal practitioners planning to attend international conferences or workshops and also planning to welcome visitors from around the country and globally to ensure that they follow all the guidelines that have been set out by the Department of Health (DOH), the National Institute of Communicable
Diseases (NICD) and the World Health Organisation. The DOH has confirmed seven cases of Coronavirus in South Africa to date and it has given assurance that the country has adequate resources to deal with the outbreak and has called for calm.

Reliable, credible information on Coronavirus is available from the WHO website and social media pages, the NICD website and social media pages and the Department of Health website and Social Media Pages.’ (see https://lpc.org.za/ accessed 12-03-2020)

It is apposite to make a few general comments about the coronavirus before dealing with its potential risk impact on legal practices in SA.


The need to act

As the principal in your practice, like any other risk, the responsibility will fall on you to ensure that the practice has an appropriate risk management plan in place to deal with the effects of the pandemic. Apathy in the face of the pandemic is not an option. The required risk management plan will require leadership from the top.

The pandemic introduces risks for legal practices in a number of ways. A primary concern is that guarding against infection by practitioners, their staff, clients, their respective families and the public at large. Coronavirus is primarily a worldwide public health issue. Appropriate support will have to be given to those already infected or affected by the pandemic. A secondary concern is impact on the administration of justice and commercial activity, in general, face with the potential for significant disruption over an extended period. It cannot be business as usual. These risks must be addressed. The nature and extent of the risks will differ from one legal practice to another.

With the impact on the movement and the potential health risk to themselves, their staff, clients and other stakeholders, legal practitioners will need to take steps to assess and address the potential risks in their individual practices, as they will need to do in order to safeguard themselves from infection.

There may be individual SA law firms, and their risk advisors, who have been diligent in updating their business continuity management and risk response plans in order to manage the outbreak and spread of the pandemic.

The disruptions (actual and potential) that the coronavirus causes to commercial activity, travel and every other aspect of human activity will affect the legal profession as well. In developing a risk management framework, legal practitioners must take cognisance of the internal and external environments in which their practices are conducted. It submitted that the coronavirus pandemic is a risk that legal practitioners in SA must consider in the assessment of the risks facing their practices. The potential impact of the pandemic on legal practice may, in certain circumstances, be severe in the event that there is no appropriate risk response plan.

It is trite that the coronavirus pandemic will affect almost every facet of human activity in one way or another. Travel bans and/or restrictions are already in place in numerous jurisdictions and a number of major public gatherings and sporting events around the world have either been banned, cancelled, postponed or the attendance of spectators has been prohibited. This has extended to conferences aimed at the legal profession. For example, abroad, the International Bar Association (IBA) has postponed 8 conferences scheduled for 2020. (see www.ibanet.org, accessed 10-03-2020) and, domestically, the board of The International Association of Restructuring, Insolvency and Bankruptcy Professionals (Insol International) announced the cancellation of a conference scheduled for 17 to 19 March 2020 at the Cape Town International Convention Centre (see www.news24.com, accessed 10-03-2020) at which lawyers and accountants are reported to have been the expected delegates. The content of the advisory issued by the LPC speaks for itself.

Several reports give an analysis of the negative impact the coronavirus has had on the global economy. See, for example:


The potential impact on the legal profession

Though the full impact of the pandemic on the legal profession will only become known with time, a few general comments and observations can be made.

The vast majority of legal practitioners in South Africa are sole practitioners. Some of these practices operate in economically depressed geographical areas and do not have access to the resources and infrastructure required to deal with a pandemic of the magnitude of the coronavirus. In the unfortunate event that a sole practitioner is affected by the coronavirus and is thus unable to practice for an extended period, this will have major consequences for the continued existence of the legal practice, its employees and clients. Small practices may offer legal services in areas such as criminal law and litigation, which, by their nature, necessitate that there be regular face-to-face contact with clients and other practitioners and they also spend a lot of time in the courts. Small practices may also not have access to the resources to manage the risks posed by the pandemic or to survive after an extended period of disruption.

With the pandemic having had a significant impact on international organisations, governments, corporate entities of all sizes and locations, and private citizens, so are legal practices affected as part of the global community. After all, at the core of any legal practice are human beings who are part of the broader global community. The pandemic will, in some way or another, affect legal practices and all other stakeholders – including the legal practitioners, their staff, clients, service providers, the courts and all other aspects of the administration of justice and the civil service. In the same way that the general population cannot go about its social and economic activity in the way that it did prior to the outbreak of the pandemic, similarly legal practitioners cannot go
about the pursuit of legal practice as if they are immune to being infected or affected by it.

The areas of concern raised by practitioners globally are that the pandemic will affect how they conduct their legal practices on a day to day basis. There are a number of reports available in the internet on the closure by some firms of their offices in some jurisdictions, travel bans within firms as well as firms making provision for staff to work remotely. The firms which have reported on their contingency plans are mainly large commercial firms practising in advanced economies. Some of the areas of practice that legal practitioners are reported to have highlighted (see the checklist from the Law Firm Management Committee below) as being most affected by the outbreak of the pandemic are meeting the submission deadlines for the filing of documents with the courts and other regulatory bodies (such as the US Securities and Exchange Commission), merger and acquisition activities and criminal defence work. Failing to meet a deadline for the filing of documents can have serious consequences for the practitioners and their clients alike: the prescription of a claim in the hands of a practitioner or a fine imposed on a client for a failure by the legal practitioner to file documents on time can lead to damages in a substantial amount being claimed from the practitioner.

Lessons from other jurisdictions

In considering the development of appropriate response to the pandemic, the legal profession in SA can take some learnings from the measures developed in other jurisdictions to ensure that the judicial and administrative machinery still functions in the face of the pandemic. Admittedly, some of the other jurisdictions affected by the pandemic have more developed economies than SA, significant technological infrastructure and operate in a very different constitutional structure and administration of justice framework to that of SA. SA also has unique socio-economic challenges which may exacerbate the impact of the pandemic. This, however, does not detract from the fact that we can take some learnings from each of those jurisdictions and adapt them to the domestic conditions. I submit that it would be advisable for the SA government, in developing a comprehensive response plan to the pandemic, to take proactive steps to address the manner in which the administration of justice and other services – such as those provided by the respective offices of the Master of the High Court, the Registrar of Deeds and the magistrate’s courts – will continue to be provided in the event that the pandemic reaches the proportions that it has reached in other jurisdictions. Many citizens utilise these services daily and an extended closure will have a huge negative impact on them.

The administration of justice and the functioning of the court system is one area where the pandemic could potentially impact the public at large, in general, and, legal practitioners particularly. After all, it is in this area where members of the public and their legal practitioners rely on the state to provide the judicial and administrative machinery to have disputes adjudicated. Chapter 8 of the Constitution sets out the provisions relating to courts and the administration of justice. The constitutionally enshrined rights include those of access to courts, the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum (s 34 of the Constitution) and the right to just administrative action (s 33 of the Constitution). Alternate dispute resolution measures, arbitration and mediation may not be readily accessible, affordable or appropriate for certain disputes. The question regarding whether the pandemic could be regarded as a natural disaster (s 37(1)(a) of the Constitution) justifying the imposition of a state of emergency (s 37 of the Constitution) would, in my view, not arise in the current circumstances in SA. We also need to guard against being alarmist and/or speculative in our approach to the pandemic.

Other jurisdictions have ensured that judicial services – though on a limited scale in some instances – continue to be provided in the face of the pandemic. In China, the epicentre of the pandemic, for example, the manner in which litigation and court appearances are conducted has been adapted to allow the litigation process to proceed without face-to-face appearances in courts. The Supreme People’s Court of the People’s Republic of China has issued guidance for the court hearings and judgement enforcement amid the pandemic (see http://english.court.gov.cn, accessed 10-03-2020). The measures include appearance by the use of technology, including video channels, and the proactive guidance of litigants to settle their disputes through mediation (see ‘Chinese courts go on cloud amid virus epidemic’ http://english.court.gov.cn and ‘Courts make use of online platforms amid epidemic’ http://english.court.gov.cn, accessed 10-03-2020).

In Hong Kong, the judiciary announced a ‘General Adjourned Period’ (GAP) which is expected to cease on 22 March 2020. (The announcement by the judiciary was issued on 6 March 2020 and is accessible at www.judiciary.hk. See also the announcement issued on 27 February 2020 accessible at www.info.gov.hk.) The lifting of the GAP will see a staggered and progressive resumption of proceedings in courts and registries. Some measures, including access control and temperature screening, will remain in place while in the interests of public health. The reports on the measures taken in other jurisdictions include appearances by video link, firms temporarily closing their offices in some affected locations or allowing staff to work remotely (see www.law.com, accessed
10-03-2020). The COVID-19 Emergency Bill in the United Kingdom aims to allow court proceedings to be conducted via telephone or video links (see ‘Coronavirus: Emergency bill planned to extend court video links’ at www.lawgazette.co.uk, accessed 10/03/2020). Similar legislative, executive and judicial (court management) measures have been announced in other jurisdictions as well.

The absence of appropriate technology and resources in many parts of SA will create a challenge in respect of the implementation of remote participation in court proceedings. However, this should not deter the exploration of solutions to the potential disruption of the court system.

The role of the regulators

One of the most important stakeholders in the legal profession is the regulators. This is the LPC in the SA context. Members of the profession will increasingly look to the regulator for guidance on how to respond to the effects of the pandemic on the practice of law. The Department of Justice will also be required to play a key role in developing and implementing any solutions. The regulators of the legal profession in other jurisdictions have also had to take steps to deal with the impact of the pandemic on the administration of justice and also on the functions falling within their regulatory mandate. The Law Society of New South Wales has, for example, had to consider its responses to the pandemic, including postponing the 31 March 2020 due date for the completion of Mandatory Continuing Professional Development (CPD) as face-to-face interaction may not be possible. That Law Society has also announced that it is ‘considering what options are available and further information will be communicated to the profession as it comes to hand’ (see www.lawso- ciety.com.au, accessed 10/03/2020). We will learn in time whether the LPC will postpone the admission, conveyancing and notarial exams. The pandemic also has the potential to affect the training period of candidate legal practitioners. After all, we do not know how much longer the world is still going to be faced with the pandemic. Legal practitioners will have to keep a look out for communication, if any, from the LPC and/or the Department of Justice in this regard.

The Prudential Authority is located within the South African Reserve Bank structure and has certain regulatory functions over the insurance industry in terms of the Twin Peaks regulatory model (see ch 3 of the Financial Sector Conduct Act 9 of 2017). The Prudential Authority has issued a questionnaire that was distributed to insurers in relation to the coronavirus. In my view, with a few amendments, a similar questionnaire should form the basis of an assessment of the readiness of legal practices in SA to deal with the pandemic and to focus the attention of the legal practitioners on the potential risk within their practices. I suggest that, as part of the self-assessment of their readiness for the coronavirus risk, legal practitioners should complete the questions posed in the questionnaire (but not for submission to Prudential Authority!) and to assess the level of confidence they then have in their readiness to deal with this new risk. The questionnaire issued by the Prudential Authority is as follows:

<table>
<thead>
<tr>
<th>COVID-19 (CORONAVIRUS) QUESTIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Entity name:</strong></td>
</tr>
<tr>
<td>Has your institution [legal practice] conducted a review or put something in place in relation to COVID-19</td>
</tr>
<tr>
<td>Do you have a pandemic plan that has been developed and is in place?</td>
</tr>
<tr>
<td>Has your pandemic plan been tested?</td>
</tr>
<tr>
<td>Have any portions of your pandemic plan been triggered?</td>
</tr>
<tr>
<td>How does your pandemic plan fit in with your Business Continuity Planning?</td>
</tr>
<tr>
<td>At what level are you monitoring and how are you monitoring the situation at the moment?</td>
</tr>
<tr>
<td>Have you considered a possible step up process if this had to be reported in your environment, ie, have you reflected on scalability in terms of 1 reported case, versus more?</td>
</tr>
<tr>
<td>Consideration of geographical location, i.e. head office, [branch office/s], call centre or offices elsewhere in the country and the concentration of staff?</td>
</tr>
<tr>
<td>Third party reliance - interactions/engagements/critical discussions/material service/ outsource</td>
</tr>
</tbody>
</table>

In summary, the role of the regulator is to provide guidance and support to the profession in dealing with the pandemic. The Prudential Authority has taken the lead in this regard, and the LPC should follow suit. Legal practitioners should also be proactive in exploring solutions to the potential disruption of the court system and to focus on the potential risk within their practices.
The proactive approach taken by the Prudential Authority in assessing (even on a limited basis) the position of the insurers in respect of the coronavirus is commendable for several reasons, including that:

(i) the regulator of an industry (insurance) which plays a crucial role in the financial and risk transfer sectors is focusing the attention of the regulated entities (insurers) on the risk/s posed by the coronavirus; and

(ii) the questions posed will, it is hoped, lead to insurers who have not developed mature risk management plans to deal with the risk posed by the pandemic to take action urgently and put the necessary measures in place.

**International Bar Association (IBA) recommendations**

The Law Firm Management Committee of the IBA has published a coronavirus/COVID-19 Checklist for Law Firms (see www.ibanet.org, accessed 10/03/2020). This checklist is also very useful and is well worth quoting in full. It reads:

‘The following is a simple checklist to stimulate thought and action. All law firms will be affected differently and need to consider their own plan and strategy.

1 Take immediate action to determine whether any staff have been to an affected area or spent time with people from an affected area. In cases of doubt, any such individuals should be quarantined – probably for at least 14 days. This will probably mean working from home as a minimum. Review the advice from your local health authorities.

2 Consider the health and welfare of your staff both physically and mentally. What additional measures should be taken, for example, sanitisers within the office and the provision of masks. Lead on this issue to maintain the confidence of staff that the law firm is on top of the issue.

3 Develop a strategy around visitors (external and from other offices). Are you going to close to visitors? Are you going to interogate visitors to see where they have recently visited and/or people they have been in contact with? Are you going to take the temperature of visitors? It is also important to track visitors more carefully than usual in case they need to be contacted. Will you shake hands?

4 Immediately check your business continuity plan and in particular, make sure you have up to date contact details of all staff. If you urgently have to move to home working you need to know where your staff are. Is your IT system ready for this?

5 Events. Consider whether to postpone events or to hold them in a different manner, for example, switch to webinar. Show thought leadership on this. Do not wait for your guests simply not to turn up. Is there PR around this that needs managing?

6 Consider, and more importantly, talk to and listen to your clients. Approach to client meetings; do they want to meet? What are the issues they are facing given the virus and how can you help them? Issues might include:

   o Supply chain disruption
   o Force majeure events
   o M&A opportunity
   o Distressed situations being both a threat and an opportunity
   o Stock Exchange notifications
   o Employment issues, such as enforced ‘holidays’

7 Do you need to notify your insurers?

8 Initiate discussions with regulators/judiciary about court hearings and other procedures.

9 Urgently establish a travel policy. Are you going to permit people to continue travelling or impose restrictions on where they can travel?

10 How will you make home working work? Will you keep the office open? Can everyone work from home or do you need some people in the office? How are you going to persuade people to come into the office, for example, split teams on alternate days? Do you need to address any employment law issues? Communication and training. How to move to ‘business as usual’ as soon as possible – do you need additional measures, such as variable hours.

11 If schools close, will this mean your staff will stay at home to look after children? Are there alternatives?

12 Many people are concerned about public transport. Can you provide alternatives?

Any information that can empower legal practitioners to deal with the risk is welcomed. The issues raised in checklist above overlap with those raised in several articles published on the impact of the coronavirus on the legal profession.

**Suggested risk management measures**

A useful starting point for legal practitioners is to get as much credible information as possible on the virus and its potential impact. All members of the firm should also be educated on the pandemic, the risks it poses and the measures that can be taken to avoid or mitigate the risk of infection. The team at the Risk Management Monitor suggests that the following measures be implemented to protect the workforce and help ensure its continued productivity (see www.risk-managementmonitor.com, accessed 11/03/2020):

- ‘Establish a strategy that enables employees to continue to function without endangering them.
- Have a plan to isolate employees should the threat of possible infection arise.
- Ensure employees can effectively work from home.
- Verify that you have the tools, technology, capacity, and securi-
ty measures in place to support a large remote workforce.
• Review your HR policies to ensure employees will not be personally impacted if they must be quarantined for an extended period and modify any policies as appropriate to give greater flexibility to normal working arrangements.
• Determine your priorities and the minimum staffing requirements to support these priorities, in case you need to function with a significantly reduced workforce.
• Identify key employees and ensure other staff members have received appropriate training to comprehensively cover their absence.
• Create a communications plan that includes providing employees and other stakeholders with regular situation updates as well as actions taken.

Legal practitioners can also consider the following suggested measures:
• Reviewing their risk management plans in order to ensure that the risks associated with the coronavirus are properly considered and documented. The likelihood, potential impact and severity of the risk materialising must be taken into account. There are four risk treatment options – avoidance, reduction/mitigation, sharing/transferring the risk (such as the purchase of insurance – see below) or retaining the risk (and budgeting for it). Considering the nature of the pandemic, its rapid expansion and its widespread footprint, very strong controls will need to be put in place before a firm can confidently state that it has avoided the risk.
• Introducing a system where members of the firm can work remotely – this may require an investment in appropriate IT infrastructure (if such capabilities are not in place already). Where members of the firm are working remotely, it must be remembered that appropriate cyber security measures must be put in place as there may be additional vulnerability to cyber risks.
• Updating the business continuity management plan of the legal practice to include the effects of the pandemic as a risk. The members of the firm must be trained on the business continuity management plan, what appropriate steps to be taken are in the event that the plan has to be implemented, and to whom the occurrence of risk trigger events are to be reported.
• Updating their resource succession plans and empowering staff so that a resource is available to step in when any key person is not available. Implementing a system where the critical resources and functionaries in the firm are shadowed by another staff member will also assist with the transfer of critical skills and avoid the risk that there is a concentration of information (institutional memory, in particular) in a single person.
• Implementing measures to ensure the safety of their employees. What will the firm do in the event that an employee or the practitioner is infected by the virus? What measures are in place in respect of quarantining staff who may have been exposed to the virus?
• Developing and implementing an appropriate communication plan. All communication channels may need to be used, including social media. If deemed necessary (and with the necessary budget), the firm may procure the services of a professional public relations company.
• The procurement of appropriate insurance cover.

Insurance cover
The pandemic has the potential to cause a number of different losses resulting from different underlying causes. Until the claims are reported to insurers and the information analysed, we cannot say with certainty which risks will be triggered and which will be covered. There are a wide variety of potential risks that could materialise.
Consider all the insurance policies that you have in place, what is covered and the limits of such cover under each policy. Ensure that the policies are up-to-date and are readily accessible to more than one responsible person in the firm in case you are not available. Make sure that all the required people are made aware of the existence of the policies.
Obtain expert advice from a broker, underwriter or risk advisor to ensure that you have a proper understanding of what policies you have in place, which risks are covered by each policy and to what extent (the amount of cover). You must also familiarise yourself with all the policy wordings so that you are aware of the coverage afforded and also what your obligations are in respect of notifying the insurer of an actual or potential claim, when cover is triggered and what documents and information are required for a claim notification. Some policies may require that the insured mitigates any damages and/or that the insured meet certain standards, even where the insurer is still assessing the risk and policy coverage has not been confirmed as yet. Exclusions or penalties for late notification of claims may also apply.
The policy wording must be carefully studied so that the legal practitioner is aware of the circumstances where an aggregation of claims will apply. There may be more than one loss suffered and the insurer may argue that the losses arise out of the same cause of action.
The insurance policies to be considered in respect of the coronavirus related risks include:
(i) Business interruption (whether as a standalone policy or as part of the property insurance or...
business all risks insurance).

(ii) Public liability - this policy could be important in the unfortunate event the practice faces a claim where, for example, it is alleged that a member of the firm, in the course and scope of their duties, infects another with the coronavirus.

(iii) Credit/credit risk insurance - this insurance will cover the firm against the risk of non-payment by a party with whom the firm has entered into a contract. This type of insurance policy will be of importance where a counterparty is unable to pay a contractual debt due to disruption;

(iv) Key person insurance (known as key man insurance) - this policy will respond to some of the risks faced by the legal practice following on the death or extended unavailability of a key person due to illness or incapacity;

(v) Death and/or dread disease cover - the name of this type of policy speaks for itself;

(vi) Loss of documents;

(vii) Employment practices liability- in case a member of staff were to allege some or other liability on the part of the legal practice arising out of employment practices;

(viii) Events- this type of policy will be particularly important for legal practices which run events such as seminars and training. Third parties may seek to hold the firm liable for losses suffered as a result of the postponement or cancellation of the events; and

(ix) Travel insurance- travel insurance policies have been receiving increased media attention following on the disruption of flights, the imposition of travel restrictions and the quarantine of those with possible exposure to the coronavirus. Though it is advisable to restrict travel as much as possible in the current conditions, the amount of coverage available for international medical treatment on the policy should also be checked. Also check this with your medical aid.

Force Majeure

The legal practitioner also needs to assess whether force majeure (or vis major) will be applicable in respect of any of the contractual relationships. See also Andrew McDonald, ‘Coronavirus and Bushfires Rekindle Interest in “Force Majeure”’ (op cit). The wording of contracts must be considered in order to ascertain the circumstances under which force majeure can be declared. The event (the impossibility of performance) must not have been in contemplation of the parties when the contract was entered into. The party asserting force majeure will also have to show that it is not just a refusal to perform. In Hersman v Snapiro & Co 1926 TPD 367 at 372, Stratford J (with whom Tindall J concurred) said (at 373):

‘Indeed, it seems clear that it is impossible to disregard the nature not only of the contract, but of the causes of impossibility, because those causes might be in the contemplation of the parties; or, again, they might be such as no human foresight could have foreseen. That distinction between different kinds of causes of impossibility must be a feature to be regarded before applying this doctrine of impossibility of performance without qualification. Therefore, the rule that I propose to apply in the present case is the general rule that impossibility of performance does in general excuse the performance of a contract, but does not do so in all cases, and that we must look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether that general rule ought, in the particular circumstances of the case, to be applied.’

Conclusion

While closely monitoring the ongoing development and evolution of the pandemic, locally and globally, the effects on all aspects of legal practice will need to be noted accurately. In this way, it is hoped that the relevant risk information can be gleaned so that a comprehensive risk management plan can be developed. As this stage, there is no empirical data of which I am aware relating to the impact of the pandemic on the legal profession - this data will become available in time. I am not aware of any claims made, as yet, against any legal practitioner in SA related to the coronavirus pandemic.

Legal practitioners, and the public at large, are urged to take all reasonable care to ensure their safety in the face of the pandemic.

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