

MAY 2020

INTERPRETING CONTRACTS: DETERMINING IF COVID-19 IS COVERED BY FORCE MAJEURE

Legal practitioners traveling with no proper permits during lockdown may face possible criminal prosecution

Court dismisses application for man to attend family funeral to curb the spread of COVID-19

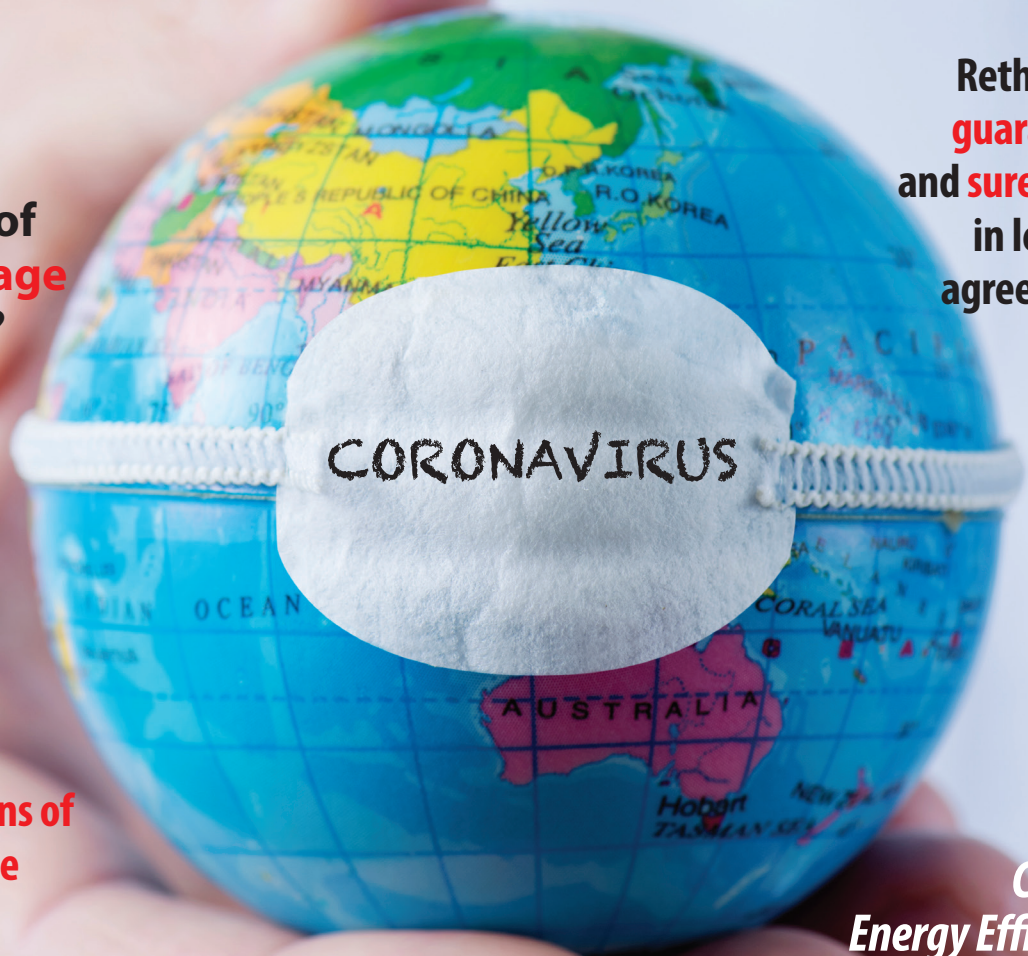
Does the non-registration of Customary Marriage affect its validity?

Rethinking guarantees and suretyship in lending agreements

Unpacking the provisions of s 112(1)(a) and (b) of the Criminal Procedure Act

Cash threshold reporting to the Financial Intelligence Centre

Can the Energy Efficiency Programme be an obstacle to renewable energy transition?



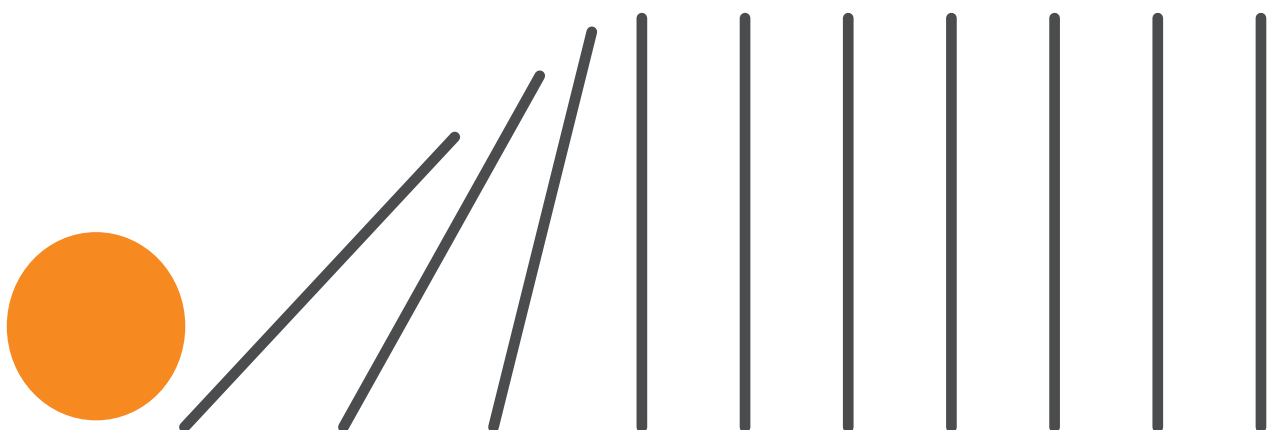
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FEATURES

Interpreting contracts: Determining if COVID-19 is covered by *force majeure*

In this month's issue, *De Rebus* features two articles pertaining to COVID-19 and the *force majeure* clause in contracts, including the interpretation thereof.

10 COVID-19, a viral pathogen, has swept through the globe threatening various economies and challenging several governments. After the pandemic dawned on South Africa, President Cyril Ramaphosa announced a National State of Disaster on 15 March and then a national lockdown beginning midnight on 26 March. As a result, schools, churches and businesses have closed down, until further notice. Candidate legal practitioner, **Sherianne Pillay** writes that these closures will challenge several contractual rights and obligations. Commercial enterprises will seek to rely on the enforcement of *force majeure* clauses to relieve their performance of certain obligations resulting from the COVID-19 outbreak.

11 COVID-19 (coronavirus) has spread rapidly around the globe. The effects of the coronavirus are slowly unravelling and will eventually take a toll on the global gross domestic product (GDP). Bloomberg Economics estimates a total of US\$ 2,7 trillion loss in output as the most extreme result. To put it differently, this equals the entire GDP of the United Kingdom. Parties may be able to rely on the doctrine of *force majeure*. Associate Director of Studies, **Byron Titmas** writes that under common law, *force majeure* provisions are generally interpreted by focusing on the actual language used in a contract, so each case is based on its own merits. An objective test is used in order to determine if the event in question constitutes *force majeure*. This test is found either in relevant law or it is written in the contract.

14 Does the non-registration of customary marriage affect its validity?



The Recognition of Customary Marriages Act 120 of 1998 (the Act) brought about fundamental changes to the legal position of a customary marriage in South African law. Legal practitioner, **Dineo Caroline Machedi** writes that the Act ensured that a customary marriage is – for all purposes

of South African law – recognised as a valid marriage whether it is registered or not, considering the compliance of the requirement for validity thereof.

16 Rethinking guarantees and suretyship in lending agreements

The Land and Agricultural Development Bank of South Africa is a government owned development finance institution tasked with, among others, the facilitation and support of equitable ownership of agricultural land through the increase of ownership of agricultural land by historically disadvantaged persons. Legal practitioners, **Nobathembu Dlamini** and **Sandanathi Gwina** discuss the case of *Shabangu v Land and Agricultural Development Bank of South Africa* 2020 (1) SA 305 (CC), as well as guarantees and suretyships in lending agreements.

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Level 4: What does this mean for the legal profession?

On 23 April President Cyril Ramaphosa addressed South Africa (SA) on the response to the COVID-19 (coronavirus) pandemic. In his speech, President Ramaphosa noted that because the coronavirus can spread rapidly through the population, it can overwhelm even the best-resourced health system within a matter of weeks, which is what SA has gone to great lengths to prevent. He added that the World Health Organisation has commended SA for acting swiftly and following scientific advice to delay the spread of the virus.

Because the nationwide lockdown cannot be sustained indefinitely, some economic activity in the country has to be resumed. Government has accordingly decided that beyond 30 April, the country should begin a gradual and phased recovery of economic activity. The easing of the lockdown restrictions will be implemented through a Risk Adjusted Strategy. The risk adjusted approach is guided by advice from scientists who have warned that an abrupt and uncontrolled lifting of the restrictions can cause a massive resurgence in infections.

President Ramaphosa announced that there will be five Risk Adjusted Strategy alert levels, namely:

- Level 5: Drastic measures are required to contain the spread of the virus to save lives.
- Level 4: Some activity can be allowed to resume, subject to extreme precautions required to limit community transmission and outbreaks.
- Level 3: The easing of some restrictions, including work and social activities, to address a high risk of transmission.
- Level 2: The further easing of restrictions, but the maintenance of physical distancing and restrictions on some leisure and social activities to prevent a resurgence of the virus.
- Level 1: Most normal activity can

resume, with precautions and health guidelines followed at all times.

There will be a national alert level and separate alert levels for each province, district and metro in the country. The National Coronavirus Command Council will determine the alert level based on an assessment of the infection rate and the capacity of the health system.

The country will move to level 4 from 1 May, but what does this mean for the legal profession? Clause H7 of level 4 of the Risk Adjusted Strategy states that: 'Other professional services may operate only where work-from-home is not possible, and only to support other Level Four services.' Since clause O2 lists the courts and the deeds office under permitted level 4 services, legal practitioners fall under the professional services, which may operate that are referred to in clause H7.

Before the country can move to level 4, regulations, in this regard, will have to be gazetted. Various sectors and business organisations/trade unions, including members of the public were invited to submit comments on the schedule of services to be phased in. Keep a look out for these regulations in the case that the regulations are different from the Risk Adjusted Strategy.

Legal practitioners who resume operations will have to adhere to



Mapula Sedutla - Editor

detailed health and safety protocols and workplace plans must be put in place to enable disease surveillance and prevent the spread of infection. It is important to note that those who resume operations must do so in a phased manner by first preparing the workplace for a return to operations followed by the return of the workforce in batches of no more than one-third of employees. To view the full Risk Adjusted Strategy see: <https://sacoronavirus.co.za>.



Would you like to write for *De Rebus*?

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

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

- Please note that the word limit is 2000 words.
- Upcoming deadlines for article submissions: 18 May, 22 June and 20 July 2020.

LETTERS

TO THE EDITOR

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

Lack of conveyancing apprenticeships

I have noticed recently, a degree of alarm among certain parties at the high failure rate in the conveyancing and notarial examinations. So much so that I understand that an inquiry has been established to try to understand the reasons and find solutions. May I be permitted to 'paint a few portraits' by comparison of what I believe to be the case in a high percentage of cases, which may throw some light on the situation?

First, let us look at what a specialist doctor does. Having completed their internship, they may decide to specialise as a trauma surgeon. The candidate obtains a position as a registrar or assistant registrar in the trauma department at a hospital. They then do nothing else but trauma work for a few years, while studying and passing examinations until they are qualified. It is similar with candidate legal practitioners. Having obtained articles, a young candidate should begin work as a legal practitioner. They could do simple court motions, some basic 'crash/bang' or other litigation, pleadings, perhaps some contracts and other work legal practitioners do to teach them about the profession. The point I am making is that candidate legal practitioners should for at least a year, if not more, work in the profession they have chosen.

I believe this is not the case in the

fields of conveyancing and notarial practice, at least in a very large percentage of cases. The candidate legal practitioners cast around for some course or other to attend, gets hold of some past examination papers, does some swotting and then fails the examination. With respect, I do not believe it is possible to pass these examinations without spending a substantial amount of time doing the work – serving the apprenticeship – as it were. How many of the candidate legal practitioners who fail have actually spent time doing practical conveyancing work, every day for a significant period?

I do appreciate that in some of the larger firms, the candidate legal practitioners may be required to spend a few months in the conveyancing department, but I believe that is the exception rather than the rule.

John Brogan is a legal practitioner in Mtunzini.

Briefing medico-legal 'experts' – Road Accident Fund information

I have provided reports as an orthopaedic 'expert' for many years. Recently legal practitioners acting for claimants have begun to demand that these 'experts' give estimates of future treatment costs.

This is, of course, impossible. Not only

are those (surgical) 'experts' unqualified by training to do so, but such predictions cannot be made. The time of a hospital stay varies considerably, as will the costs.

However, those legal practitioners will brief 'experts' who are prepared to 'guesstimate', a reflection of legal lethargy and avarice.

Since the surgical 'expert' recognises their limitations, a figure will be proposed, which is inordinately high (the 'expert' will – or should – realise that if an underestimate is made, that 'expert' could be liable for the excess).

The fairest approach would be for the Road Accident Fund to routinely offer an 'undertaking' to pay future treatment costs as and when (or if) these arise.

The legal practitioners acting for claimants will not like this as it will reduce the 'quantum' of the claim.

Jon Driver-Jowitt MB BCh FRCS (Wits) is a Consultant Orthopaedic Surgeon in Cape Town.

Where should we go? Outcry by ex-offenders of minor offences

Every wrongful act deserves a punishment, which is profoundly aimed at restitution, rehabilitating, reforming, and deterring such conduct. The morality of this theory is to justify society's



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'imposition of punishment on offenders and try to provide an adequate ethical rationale for inflicting harm. Deterrence maintains that people are deterred from crime because they are concerned about the possible consequences of their actions' (Cyndi Banks *Criminal Justice Ethics – Theory and Practice* 2ed (SAGE Publications 2009) at 123).

The history books would show that punishment is justified because it is deserved and becomes a question of responsibility and accountability for acts that harm society. The Criminal Procedure Act 51 of 1977 (the Act) allows perpetrators to apply for expungement of the criminal records in terms of s 271B(1) of the Act. In reg 2(1), the application procedure form for the expungement of a criminal record states:

'A person may apply if:

- [Ten] years has lapsed after the date of the conviction for that offence.
- The person has not been convicted of any other offence and sentenced to a period of imprisonment without the option of a fine during those [ten] years.
- The person was sentenced to any of the sentences set out in Part II of this Form.

A person will not qualify if:

- He or she was convicted of a sexual offence against a child or a person who is mentally disabled or of an offence, where he or she was found to be unsuitable to work with children.
- His or her name is included in the National Register for Sex Offenders or the National Child Protection Register but may qualify if his or her name has been removed from the National Register for Sex Offenders or the National Child Protection Register.

Note:

- Before submitting the application for expungement of a conviction, a clearance certificate showing that a period of [ten] years has lapsed after the conviction(s) and sentence(s), must be obtained from the Criminal Record Centre of the South African Police Service. The clearance certificate must be attached to the application.
- If the person's name has been included in the National Register for Sex Offenders, a confirmation must be obtained from the Registrar that his or her name has been removed from the Register.'

It is common cause that the Act mostly includes expungement on serious offences as listed above, but what about other excluded acts not meriting this punishment?

Yes, many have made poor choices growing up and have had a hard time trying to overcome the choices that they made, some have even served the sentence imposed on them.

Currently, South Africa (SA) is facing a high a rate of unemployment and the scarcity of jobs, which includes a number of youthful ex-offenders who are still haunted by their previous records committed during their younger days, for example, theft, shoplifting etcetera, to which they have to wait for the period of ten years without employment because of this Act.

One would argue if this waiting period is justifiable – even in this new era where SA is captured by economical downfall – these young people are supposed to be contributing to SA's economy in the name of trying to bring them back to society.

I submit that an interim Bill is needed, which will serve as a critical step to ensuring that a pathway to employment for youthful ex-offenders exists, which serves a direct benefit to both the youth, as well as employers throughout the state looking to fill vacancies.

Tumelo Mdhuli LLB (*University of Limpopo*) is a legal practitioner at Lekhu Pilson Attorneys in Middelburg.

The judiciary in a modern-day South Africa: A practitioner's perspective

Retired practitioner, Marcel Strigberger asks an important question: Can judges get nasty and difficult? Based on his experience of some forty odd years in the courts, he identifies the problem that 'some judges, not all of course, develop a severe case of "judgitis", which in short is Greek for "Move over Louis XIV, [I am] on the bench now"'. He laments that 'judgitis' can get to some judges' heads and they can get nasty (see M Strigberger 'Judging the judges: With all due respect, of course' (2019) *ABA Journal* (www.abajournal.com, accessed 1-3-2020)).

The fact of the matter is that judges wield immense power. Some judicial officers adopt a change in attitude after ascending to the Bench by becoming indifferent to the day-to-day struggles that their former colleagues in private practice are facing, and they do tend to treat legal practitioners with disdain. It is a reality encountered by many legal practitioners.

This begs the question as to traits a model member of the judiciary should have in a modern-day South Africa (SA).

'The job of a judge is very isolated, very demanding – very difficult' said Juanita Bing Newton, a judge of the New York Court of Claims (W Davis 'Bullying from the Bench: A wave of high-profile bad behaviour has put scrutiny on judges' (2019) *ABA Journal* (www.abajournal.com, accessed 1-3-2020)).

Therefore, in my view a paradigmatic member of the judiciary is robust and patient, sensitive and thick-skinned, enthusiastic and cautious, a committed legal practitioner and someone who does not spend their time exclusively with the law. An independent thinker who works well with others, someone who can decide the most complex point of law, but also deal efficiently with paper applications/motions and administer a court or another impartial tribunal (including commissions of inquiry).

It is imperative for a judicial officer to command the confidence of the public. Each member of the judiciary requires a working knowledge of everyday life. It does not instil confidence of a judicial officer sitting at the Gauteng Divisions of the High Court to ask who *Mafikizolo* are, or what a crossword puzzle is and/or to be unaware in football, of the most famous rivalry (derby) in SA, more substantively, to be unaware of the conditions in which the majority of the people who are regularly before the court live and work.

A judicial officer also requires a good temperament. The work demands calmness. In most instances those who appear in court are ordinary citizens. When they attend court, parties and witnesses are often anxious and frequently upset. Further, cases may be badly prepared/presented or otherwise frustrating. Legal practitioners may be inexperienced or simply lacking in insight.

Any member of the judiciary should be able to work constructively with others. This includes working with and certainly learning from other judicial officers but also to work well with other court personnel.

Now, to satisfy the purist, it goes without saying that a judicial officer must have the highest integrity, be honest and upstanding and have a good work ethic.

E Herbert Ludick BProc LLB (UWC) is a legal practitioner at EHL Attorneys in Durban. Mr Ludick is admitted to the Roll of Solicitors of England and Wales.



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By
Simthandile
Kholelwa
Myemane

Cash threshold reporting to the Financial Intelligence Centre

The Financial Intelligence Centre (the FIC) was established in terms of the Financial Intelligence Centre Act 38 of 2001 (FICA). The FIC is South Africa's financial intelligence unit, which is a government agency created to collect, analyse and interpret information disclosed to and obtained by it.

South Africa criminalises activities that constitute money laundering. Money laundering refers to the concealment of the nature of proceeds of criminal activities. Proceeds of criminal activities are referred to as 'dirty money'. This dirty money is, therefore, taken through a process of cleaning (laundering) by being pushed through the financial system for its origin to be concealed. Apart from criminalising these activities, FICA contains control measures, which are based on three principles:

- Intermediaries in the financial system must know with whom they are doing business.
- The paper trail of transactions through the financial system must be preserved.
- Possible money laundering transactions must be brought to the attention of the FIC and investigating authorities.

In dealing with the third principle, one of the control measures introduced by FICA is the cash threshold reporting to the FIC. Section 28 of FICA requires, of an accountable institution and a reporting institution to, within the prescribed period, report to the FIC the prescribed particulars concerning a transaction concluded with a client if in terms of the transaction an amount of cash in excess of the prescribed amount –

'(a) is paid by the accountable institution or reporting institution to the client, or to a person acting on behalf of the client, or to a person on whose behalf the client is acting; or

(b) is received by the accountable institution or reporting institution from the client, or from a person acting on behalf of the client, or from a person on whose behalf the client is acting.'

Readers should take note that payment or receipt of cash includes cash received or paid in person, as well as via third parties (see 'Anti-Money Laundering and Counter-Terrorism Financing

Legislation' www.fic.gov.za, accessed 3-3-2020).

This article will address the cash threshold reporting to the FIC as a requirement on accountable and reporting institutions. For the purpose of this article, when I refer to a 'payment', it also applies to a 'receipt' and *vice versa*.

Schedule 1 of FICA lists attorneys as defined in the Attorneys Act 53 of 1979 as accountable institutions. On 25 March 2020, the FIC issued Public Compliance Communication 47 on Practising Attorneys as Accountable Institutions setting out guidance on the interpretation of item 1 of sch 1 to FICA in line with changes brought by the Legal Practice Act 28 of 2014. This communication effectively clarifies the position that the attorneys, notaries and conveyancers continue to be classified as accountable institutions under FICA. In terms of a notice issued by the Legal Practice Council on 8 January, FICA does not yet deal with trust account advocates, but there is no doubt that it will be amended to cover them as well. Advocates with trust accounts are, therefore, urged to acquaint themselves with the relevant provisions of FICA.

The threshold for cash transactions reporting is currently set at R 24 999,99 with an amount of R 25 000 and above reportable to the FIC. Cash transactions reporting should be done as soon as possible, but within two days of becoming aware of the cash transaction that bridged the threshold. Becoming aware of the transaction is not limited to the legal practitioner, but extends to the legal practitioner's employees, requiring that the legal practitioner defines internal processes to detect, aggregate and report to the FIC and that employees are trained as such.

Reporting is also not limited to cash received at the legal practitioner's offices, or physically by the legal practitioner in the process of rendering legal services, but extends to cash paid in by the legal practitioner's client into the legal practitioner's bank account. In the latter instance, both the legal practitioner and the financial institution where the bank account, into which the funds were paid is held, are required to file a cash transaction report with the FIC.

The legal practitioner and their em-

ployees may in some instance become aware of a cash transaction on receipt of a bank statement from the bank, and are, therefore, expected to file a cash threshold report, where necessary, within two days of receiving the bank statement.

I invite readers to read this article, together with the article 'How FICA affects you and your legal practice' 2019 (Oct) *DR* 6 for more enlightenment.

How to determine when the cash transaction reporting is required

Cash transaction reporting is not limited to lump sums, but includes aggregated amounts, which are small amounts adding up to R 25 000 and above. Lump sums are easy to identify and to report, but it could be tricky to aggregate smaller amounts for purposes of reporting. It, therefore, becomes important that legal practitioners assign references to their clients' matters when receiving mandates from their clients. These matter references must be quoted in each payment made to the legal practitioner. The references will aid the legal practitioner to determine whose cash has been received and for which matter, thus enabling the legal practitioner to aggregate the received cash. Paragraph 4.13 of the Guidance Note 5 on s 28 of FICA issued by the FIC requests legal practitioners to assign an alpha numeric reference to each client and advise the clients to use such references when making deposits into the legal practitioners' accounts.

As per the guide issued by the FIC, cash received for a specific matter within a 24-hour period, irrespective of who paid in the cash, must be aggregated. Should the aggregated cash amounts exceed the threshold amount, that full amount then becomes reportable to the FIC as a composite transaction. Of note is that at times a cash transactions reporting may give rise to a suspicious and unusual transaction reporting.

Scenario 1 below illustrates a situation where the reporting duty arose, and aggregated amounts were involved:

Scenario 1

Mr Smarties approaches SKM Attorneys for legal representation. SKM

Attorneys goes through the verification process of the client, gets to know the client and opens a file for the client, assigns reference SMA001 and requires a deposit of R 85 000 to be paid into the trust bank account of the legal practice. Mr Smarties proceeds to pay into the trust bank account of the legal practice.

He pays a cash amount of R 40 000 at 10:00 with reference SMA001. Two hours later another cash deposit is made into the trust bank account for an amount of R 10 000 also referencing SMA001. Another amount of R 25 000 is paid into the trust bank account via an electronic funds transfer (EFT) at 14:00 on the same day, also referencing SMA001. The final amount of R 10 000 is paid into the trust bank account in cash the next morning at 09:15 with reference SMA001.

The R 85 000 required as deposit by the legal practitioner is, therefore, paid in full, and the legal practitioner, can now carry out the client's mandate. What is important to note is that the various cash transactions happened within a period of 24-hours from the first transaction.

In terms of s 28 of FICA, the duty to report a cash transaction is triggered. The amount that the legal practitioner must report to the FIC is R 60 000 (R 40 000 + R 10 000 + R 10 000), this being the cash portion of the amount paid into the trust bank account of the legal practice. In this case the legal practitioner need not report the R 40 000 separately but the aggregated amount as it relates to the same matter. However, if the R 40 000 was the only cash transaction, then the amount would be reported as is since it exceeds the threshold of R 24 999,99.

The legal practitioner must consider filing a further report to the FIC in terms of s 29 of FICA, this being the reporting of a suspicious and unusual transaction for the full amount of R 85 000.

In this scenario, the bank where the trust bank account is held also has a duty to file reports with the FIC.

Where a legal practitioner deals with a matter where the client pays in foreign currency, the legal practitioner must convert the foreign currency into Rands to determine the Rand equivalent using the foreign currency exchange rate applicable at the time of the transaction. Should the threshold be triggered in Rand terms, a reporting obligation arises.

How to file a cash transactions report

In terms of reg 22(1) of the Regulations to FICA, reporting a cash transaction must be filed with the FIC electronically by making use of the Internet-based reporting portal specifically provided for this purpose at www.fic.gov.za. Other means of filing are acceptable only in exceptional cases, by facsimile or hand delivery. No cash transactions reporting may be posted to the FIC.

In order for the accountable and reporting institutions to file their cash transactions reporting electronically as required, they should acquire their login credentials through the FIC's website at www.fic.gov.za.

There are two report types available on the reporting portal for accountable and reporting institutions, namely -

- cash threshold report; and
- cash threshold report aggregation.

The cash threshold report is used to report a single cash transaction that is above the threshold, while the cash threshold report aggregation report is used to report aggregated amounts.

When reporting aggregated amounts, the total figure being reported will be detected by the FIC's reporting system, but the individual amounts making up the aggregated amount, thus forming a composite transaction, must be reflected individually. Using scenario 1 above, the amounts of R 40 000, R 10 000 and R 10 000 that make up the R 60 000 must be individually reported as follows:

- Transaction 1: Cash deposit R 40 000.
- Transaction 2: Cash deposit R 10 000.
- Transaction 3: Cash deposit R 10 000.

The FIC's reporting system will then detect that the amount reported is R 60 000.

It is important that the accountable or reporting institution saves the web reports as they move between various sessions of the report form before the report is submitted. This ensures that should a time-out error occur while busy filing, the report can be retrieved from the drafted menu on the FIC's registration and reporting platform.

What to do once a cash transactions report is submitted

On submitting a cash transactions report or a cash transactions report aggregation, the legal practitioner must monitor the filing to ensure that it is successfully processed, and where rejected remedy the situation. It is also important to keep records of all reports filed with the FIC. This can assist the accountable institution when it later transpires that the accountable institution's client was involved in money laundering, and

perhaps being investigated, as the filed reports can be used as a defence to the effect that a filing was done as required.

Offences and penalties

In terms of s 51 of ch 4 of FICA, an accountable institution that fails to submit a cash threshold report or cash threshold report aggregation when required to do so is guilty of an offence. Failure to submit the required reports results in non-compliance and is subject to an administrative sanction.

Section 68 of FICA deals with penalties and states that any person convicted of an offence mentioned in ch 4 of FICA, other than an offence mentioned in ss 55, 62A, 62B, 62C or 62D, is liable to imprisonment for a period not exceeding 15 years or to a fine not exceeding R 100 million.

Conclusion

In conclusion, I urge legal practitioners to be on the lookout for clients who could potentially use the bank accounts of the legal practices to launder money. I also urge legal practitioners to carefully consider cash received and paid, and to be cognisant of the possibility of aggregating money, and to report as such.

Legal practitioners are encouraged to read Guidance Note 5, and 5B issued by the FIC and the notice to attorneys issued in September 2011, also issued by the FIC, for more information.

Simthandile Kholelwa Myemane
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Did you know?

The primary purpose of the Legal Practitioners Fidelity Fund is to reimburse clients of legal practitioners who may suffer pecuniary loss due to the theft of money or property entrusted to a legal practitioner in the course of their practice as such, or where a legal practitioner acts as executor or administrator in a deceased estate, or as a trustee in an insolvent estate.

E-learning in legal services sector



By Prof Jonathan Klaaren and Derek Moore

In an interview, Professor of Law at the University of the Witwatersrand, Jonathan Klaaren, sat down with Instructional Designer at Derek Moore and Associates, Derek Moore, to discuss e-learning in the legal services sector.

Jonathan Klaaren (JK): Do I recall correctly that you have recently completed one or two e-learning projects? Projects that use digital and education technologies for legal education? Is that right?

Derek Moore (DM): Yes. I ran a blended learning pilot for vocational level legal educators and introduced a learning management system to support remote continuous professional development of their legal colleagues.

JK: I see, both projects in the legal sector. So, given the urgent demand for online learning caused by COVID-19, we better cover some background to help folks understand things in this space. Why did these projects warrant e-learning? What was the rationale for using this digital approach?

DM: Reading between the lines, I think that it was the combination of growing learning and development needs, and shrinking budgets that pushed them along this route.

JK: Both push and pull factors, then. Can you explain further? Any 'access to justice' here?

DM: E-learning is often framed by management as a remedy to address a short-term problem. A set of vitamin pills to address an informational deficiency. I prefer to see e-learning as an opportunity to improve the teaching and learning process. EdTech can be used as a means to build better feedback loops for individuals, teachers, and administrators within a system. It is not a simple remedy. There are no silver bullets here.

JK: It must be right that there are no silver bullets, institutions (and perhaps especially legal institutions) take time

to build. (They may be quicker to tear down.) So, what are the actual realistic expectations for e-learning?

DM: Technologies are often sold because they address admin blockages within current systems. They do improve efficiency, manage costs, reduce workloads, and allow for better reporting. I like to take it a bit further and look at the opportunity to revisit current learning and development practices and consider what is now enabled or enhanced with digitisation.

JK: Expressed that way, the introduction of e-learning can be seen as part of monitoring and evaluation. Indeed, it is great that these managers were open to exploring new modes of legal education. What did they want to achieve?

DM: Monitoring and evaluation data can be used to engage a range of people in the organisation. This can lead to insights that will assist students, teachers, subject matter experts (and not only administrators) make better decisions and effect change.

Our first client wanted to standardise the delivery of their vocational training programme nationally. They have schools all over the country and have deployed Sakai, a learning management system (LMS), to support their schools. They wanted to take the next step and blend their training programme with digital materials.

The second client was a central unit of seconded (and seasoned) judicial educators, charged with professional development of colleagues who were distributed right across the country. They wanted assistance with making better use of technology for legal teaching, learning and training.

JK: Sakai, I know that programme well, I have used it in teaching numerous undergraduate and postgraduate courses. How did the pilot go with this first project?

DM: This pilot shifted attention from

'what tools should we be using?' to 'how can we use a digital modality?' to encourage learning outcomes. Feedback from pilot participants (staff and students) was positive. Data from monitoring and evaluations was used to identify issues. Recommendations were made about the need for a clear course production workflow and ongoing communication about blended learning among all staff. Probably the biggest issue was student readiness for this new approach. Measures to ensure access, computer literacy, digital competency so that the learning experience became more participative were flagged.

JK: What did the second project aim to achieve?

DM: The current judicial educator's professional development programme is long established and valued, but the mechanics of the existing programme required absence from home and the courts for long periods of time. Senior management had identified e-learning as a strategic priority. They wanted to see whether their educator team could use Moodle, another LMS, to support learning at a distance.

JK: That project seems well-suited for e-learning, as a solution to the problem of nationwide distribution of our magistrates' courts. Beyond the specifics of these projects, do you think that there is any scope for using digital technologies in legal education?

DM: An unequivocal yes. Digital platforms, such as Sakai and Moodle, allow for knowledge to work across different boundaries. Anytime, anyplace learning allows the student to bridge temporal and spatial boundaries. Students enrolled in vocational training do not have to drive across town to attend night classes. The materials development team (subject matter experts, instructional developers, graphic designers and videographers) could create, edit, manage and publish a coherent body of learning resources and activities and collaborate in new ways. Educators could interact around the creation, management and publishing and presentation from their own offices through a portal. Course administrators could see immediate administration benefits like maintenance of attendance records, quicker and cheaper distribution and collection of course content, and wider range of options to assess for and of learning.

Probably the biggest boundary that digital [learning] offers to bridge is the knowledge/learning boundary. And it is in this area where I think that there is a lot of scope for further exploration.

JK: The 'knowledge/known boundary', just remind me what that is?

DM: I am speaking about the boundary between 'knowing how' and 'knowing that'. Maybe I should use the terms procedural/declarative knowledge to describe the knowledge/known boundary. Procedural knowledge involves knowing how to do something, for example, drive a car. Declarative knowledge involves knowing that something is the case, for example, that the letter 'z' is the 26th letter of the alphabet. Procedural knowledge is hard to express verbally. These skills are best shown by means of performance. Declarative knowledge is conscious; it can often be verbalised. It is easy to use EdTech to measure declarative knowledge.

JK: There is, however, lots of hype with digital going on at the moment, with the fourth industrial revolution and so on and I am not even talking about COVID-19 yet. What are the specific innovations that can result and be used when digital and legal education are combined?

DM: The information technologies as-

sociated with law are shifting. Whether it be legal informatics, disruptive innovations or artificial intelligence. I am not sure that innovation is an automatic result of combining legal education and digital, or if this should even be the focus. I prefer to focus on quality improvement, access or agency and how digital can foster this.

Digital replaces, augments or transforms education practices. I call it the RAT acronym. Replace, augment and transform.

Sometimes, when the focus is on the communication of 'declarative knowledge', technology can be used to put 'text-under-glass'. Course participants click their way through pre-arranged interactions. When course participants are allowed to use technologies that allow for mindful engagement with course content and each other, then digital can be used to augment teaching. When course participants can combine technology and knowledge to perform and demonstrate their skills, then digital can be used to transform teaching and learning practices.

JK: Thanks, sounds like I will need another digital coffee chat with you soon. What is the next topic? Could we look at the law firm space? Or shall we tackle the COVID-19 effect?

DM: Let us see what *De Rebus* readers think. I am pleased that management at legal education institutions (broadly defined) have recognised a need to revisit their current legal education programmes. The challenge is for legal education initiatives to address 'quality' challenges that accompany innovations in legal information technologies and do so while also addressing the accessibility needs of their students.

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THE SA ATTORNEYS' JOURNAL

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Interpreting contracts: Determining if COVID-19 is covered by *force majeure*

In this month's issue, *De Rebus* features two articles pertaining to COVID-19 and the *force majeure* clause in contracts, including the interpretation thereof.



By
Sherianne
Pillay

COVID-19, a viral pathogen, has swept through the globe threatening various economies and challenging several governments. After the pandemic dawned on South Africa (SA), President Cyril Ramaphosa announced a National State of Disaster on 15 March 2020 and then a national lockdown beginning midnight on 26 March 2020. As a result, schools, churches and businesses have closed down, until further notice. Imminent from the spread of the financial contagion and the uncertainty surrounding the pandemic, these closures will challenge several contractual rights and obligations. Commercial enterprises will seek to rely on the enforcement of *force majeure* clauses to relieve their performance of certain obligations resulting from the COVID-19 outbreak.

Force majeure clauses

The term *force majeure* is of French origin and refers to an event or occurrence, which renders contractual performance impossible. The term *force majeure* is synonymous with *vis maior* or *casus fortuitus*.

Force majeure clauses are often found in commercial contracts. These clauses allow a contracting party to escape the normal consequences of non-performance or late performance of contractual obligations because of an unavoidable and unforeseeable event. *Force majeure* may include acts of God, acts of government, natural disasters, epidemics, pandemics and even war and terrorism. The invocation of a *force majeure* clause will suspend a party's obligation to fulfil their performance for the duration of which the *force majeure* event occurs.

COVID-19 and *force majeure* clauses

Owing to the global pandemic and the lockdown status of various countries, such as SA, several commercial enterprises are bearing the brunt of *force majeure* clauses being enforced by contracting parties.

The case of *Bischofberger v Vaneyk* [1981] 4 All SA 54 (W) stated that the general rule in South African law is that if contractual performance becomes impossible at no fault of the debtor, the contractual performance will be extinguished. However, this general rule is not absolute and consideration will still be given to the particular contract between the parties, the nature of the contract, relationship of the parties, circumstances of the case, as well as the nature of the impossibility.

The possibility of parties relying on the COVID-19 outbreak and implications thereof, namely to suspend their contractual obligations, will also depend on the interpretation of the contract concerned.

A *force majeure* clause may include a closed list of specific events or cover a broad criteria of events, in that, having a catch-all provision to include those unusual events not specifically listed.

Specific events listed in a contract may include war and terrorism, natural disasters, acts of government, pandemics and/or epidemics. If the term pandemic and/or epidemic is expressly incorpo-

rated in the *force majeure* clause of a contract, any delay or failure to perform resulting from COVID-19 may excuse the contracting party from their liability.

Moreover, the term 'act of government' in a *force majeure* clause could be applied where the government has closed its borders, imposed quarantine or isolation, banned or restricted travel and/or announced a lockdown.

However, where the term 'epidemic' or 'pandemic' is not expressly listed, parties will have to interpret the contract to determine whether the parties intended for COVID-19 to be covered by the *force majeure* clause. This involves considering whether the list of events agreed to was intended to be exhaustive or non-exhaustive and in so considering, whether the pandemic is to be included in any broad catch-all provision.

Sometimes, a contract may list specific events and then following from this list, incorporate a term such as 'or any other causes beyond the control of the party'. Dependent on the words used, such a clause could be interpreted extensively as opposed to being restricted to the scope of events similar to those expressly listed.

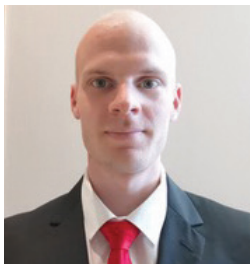
In the unique circumstances that SA and the world finds itself in, courts will most probably be cognisant of the impact thereof and be accommodating in interpreting clauses when faced with a contractual dispute on this basis. However, parties will still need to show that

their failure to, or delay in performance, transcended their control and could not have been avoided or even mitigated.

However, not all contracts have *force majeure* clauses. In such a circumstance, the common law principle of supervening impossibility of performance will apply. As explained in Dale Hutchison and Chris-James Pretorius (eds) in *The Law of Contract in South Africa* 2ed (Oxford University Press 2012), this principle requires a party to prove that its contractual performance is objectively impossible, that is, it would be impossible for any person in its position to perform and that the occurrence or event relied on was neither foreseen nor foreseeable at the time of entering into the contract.

To avoid unnecessary disputes, it is recommended that parties are advised to include a sufficiently detailed *force majeure* clause to regulate certain occurrences should a *force majeure* event occur. In times such as these, *force majeure* clauses should be carefully drafted, considered and reviewed so the clause can be successfully enforced. The lack of such, a clause in a contract or the vagueness thereof may result in further damages at the expense of an unforeseeable event that fell beyond the scope of a contracting party's control.

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By
Byron
Titmas

C OVID-19 (coronavirus) has spread rapidly around the globe. The effects of the coronavirus are slowly unravelling and will eventually take a toll on the global gross domestic product (GDP). Bloomberg Economics estimates a total of US\$ 2,7 trillion loss in output as the most extreme result. To put it differently, this equals the entire GDP of the

United Kingdom (Tom Orlik, Jamie Rush, Maeva Cousin and Jinshan Hong 'Coronavirus Could Cost the Global Economy \$2.7 Trillion. Here's How' www.bloomberg.com, accessed 6-4-2020).

BusinessInsider US states that a group of Australian experts estimate, as a best case scenario, the coronavirus could result in a US\$ 2,4 trillion loss in global GDP (Rosie Perper 'As the coronavirus spreads, one study predicts that even the best-case scenario is millions dead' www.businessinsider.co.za, accessed 6-4-2020).

In an effort to curb the spread, countless countries have recently placed quarantine restrictions and some have even gone as far as to restrict local movement. This begs the question as to what implications this may have on the non-performance of contractual duties due to the coronavirus.

Parties may be able to rely on the doctrine of *force majeure*. *Force majeure* alludes to conditions outside the control of the parties that are meant to deal with, among others, acts of God, government orders, changes in law and war. Contracting parties usually agree to

a non-exhaustive list of events under a *force majeure* clause. If a civil law framework is the underlying basis for a contract, which grants *force majeure* remedies, regardless if they are written into the contract, they may also be the subject of the claim ('Coronavirus Outbreak: Global Guide to Force Majeure and International Commercial Contracts' www.bakermckenzie.com, accessed 6-4-2020).

Under common law, *force majeure* provisions are generally interpreted by focusing on the actual language used in a contract, so each case is based on its own merits. An objective test is used in order to determine if the event in question constitutes *force majeure*. This test is found either in relevant law or it is written in the contract.

If parties to a contract did not include *force majeure* provisions in their contract, they may be able to rely on the doctrine of supervening impossibility. A contracting party would not be held liable for non-performance if that performance becomes objectively impossible. Under South African common law, this position was outlined in *Unibank Savings and Loans Ltd (formerly Com-*

munity Bank) v *Absa Bank Ltd* 2000 (4) SA 191 (W) at 198, where it was stated that should performance of a contract become impossible as a result of unforeseen events – that are not caused by the parties themselves – then parties are excused from contractual performance. The court went on to say that the impossibility must not be relative or subjective, but rather absolute or objective.

Parties may rely on *force majeure* if the performance becomes impossible due to *vis maior*, an irresistible force, or *casus fortuitus*, an unforeseeable accident. According to Francois du Bois (ed) in *Wille's Principles of South African Law* 9ed ((Cape Town: Juta 2007) at 850) *casus fortuitus* is defined as 'a species of *vis maior* which imports something exceptional and unforeseen and which human foresight cannot be expected to anticipate, or, if it can be foreseen, it cannot be avoided by the exercise of reasonable care or caution.' These clauses are generally discernible from hardship clauses.

If the *force majeure* clause stipulates that a *force majeure* event must 'prevent' performance, the non-performing party must generally show that its performance has become legally or physically impossible and not merely more difficult or more expensive (www.bakermckenzie.com, (*op cit*)). This was evident in *Hersman v Shapiro & Co* 1926 TPD 367.

In this case, the defendant entered into a contract, under which he had to deliver a certain quantity and quality of corn to the applicant. At the time of delivery, there was no corn available in the surrounding area and the defendant relied on supervening impossibility

to discharge his liability. The defendant had not looked outside the surrounding area for corn and, because he had not, it was not an absolute objective impossibility. The defendant's contractual performance only became more difficult and expensive and under the principle of supervening impossibility, the court held that this did not discharge his contractual obligation. The court held that impossibility arising from *vis maior* or *casus fortuitus* will not always excuse performance and added requirements that should be met on a case-by-case basis.

This position was further confirmed by the Supreme Court of Appeal (SCA) in *MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA).

The SCA quoted Stratford J from the *Herman* case at 28:

'As a general rule impossibility of performance brought about by *vis maior* or *casus fortuitus* will excuse performance of a contract. But it will not always do so. In each case it is necessary to "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 the general rule ought, in the particular circumstances of the case, to be applied." The rule will not avail a defendant if the impossibility is self-created; nor will it avail the defendant if the impossibility is due to his or her fault.'

According to Andrew Hutchison ('The doctrine of frustration: A solution to the problem of changed circumstances in South African contract law?' (2010) 127.1 *SALJ* 84), the *Hersman* case implies that there is a rigorous standard

for determining impossibility; the impossibility must be absolute. This was also seen in *Peters, Flamman & Co v Kokstad Municipality* 1919 AD 427. Further, both parties must act without any fault and the event must be regarded as being unforeseen and unavoidable. The court in the *Peters, Flamman & Co* case went further to state that ultimately, the consequence of this doctrine is that the contract becomes void *ab initio*. Hutchison states that should a claim based on supervening impossibility succeed, any performance made before it was instituted may be claimed back under the doctrine of unjustified enrichment.

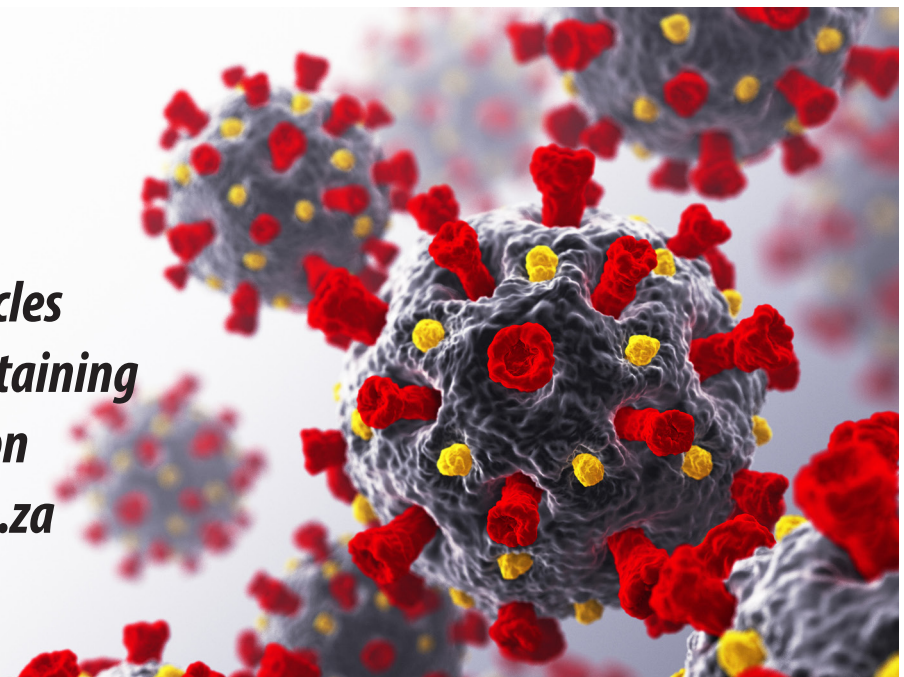
In determining whether or not a *force majeure* clause makes provision for the coronavirus, wording such as 'pandemic' or 'epidemic' may be relevant in this regard. If governments have placed restrictions that could affect supply or logistics, parties need to ensure that they have taken all measures reasonably possible, even if there is an added expense. This is to ensure that the impossibility is absolute, keeping in line with the *Hersman* case.

Ultimately, whether a party may succeed in a claim of *force majeure* or supervening impossibility will be met on a case-by-case basis as the principles of contractual interpretation will be used to analyse the wording of their contracts. Public policy and equity considerations may also be contributing factors when instituting a claim.

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By
Dineo
Caroline
Machedi



Does the non-registration of customary marriage affect its validity?

The Recognition of Customary Marriages Act 120 of 1998 (the Act) brought about fundamental changes to the legal position of a customary marriage in South African law. The Act ensured that a customary marriage is – for all purposes of South African law – recognised as a valid marriage whether it is registered or not, considering the compliance of the requirement for validity thereof.

Before dealing with the main issue at hand, it is important to understand the meaning of key words.

Section 1 of the Act defines ‘customary law’ as ‘the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples’. ‘Customary marriage’ is defined as ‘a marriage concluded in accordance with customary law’.

The requirements for the validity of a customary marriage

Section 3(1) of the Act states the requirement for validity as follows:

‘For a customary marriage entered into after the commencement of this Act to be valid –

- (a) the prospective spouses –
 - (i) must both be above the age of 18 years; and
 - (ii) must both consent to be married to each other under customary law; and
- (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law’.

The registration of customary marriage in terms of s 4 of the Act

‘(1) The spouses of a customary marriage have a duty to ensure that their marriage is registered.

(2) Either spouse may apply to the registering officer in the prescribed form for the registration of his or her customary marriage and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence of the marriage.

- (3) A customary marriage –
 - (a) entered into before the commencement of this Act, and which is not registered in terms of any other law, must

be registered within a period of 12 months after that commencement or within such longer period as the Minister may from time to time prescribe by notice in the Gazette; or

(b) entered into after the commencement of this Act, must be registered within a period of three months after the conclusion of the marriage or within such longer period as the Minister may from time to time prescribe by notice in the Gazette.

(4) (a) A registering officer must, if satisfied that the spouses concluded a valid customary marriage, register the marriage by recording the identity of the spouses, the date of the marriage, any *lobolo* agreed to and any other particulars prescribed.

(b) The registering officer must issue to the spouses a certificate of registration, bearing the prescribed particulars.

(5) (a) If for any reason a customary marriage is not registered, any person who satisfies a registering officer that he or she has a sufficient interest in the matter may apply to the registering officer in the prescribed manner to enquire into the existence of the marriage.

(b) If the registering officer is satisfied that a valid customary marriage exists or existed between the spouses, he or she must register the marriage and issue a certificate of registration as contemplated in subsection (4).

(6) If a registering officer is not satisfied that a valid customary marriage was entered into by the spouses, he or she must refuse to register the marriage.

(7) A court may, upon application made to that court and upon investigation instituted by that court, order –

(a) the registration of any customary marriage; or

(b) the cancellation or rectification of any registration of a customary marriage effected by a registering officer.

(8) A certificate of registration of a customary marriage issued under this section or any other law providing for the registration of customary marriages constitutes *prima facie* proof of the existence of the customary marriage and of the particulars contained in the certificate.

(9) Failure to register a customary marriage does not affect the validity of that marriage’.

In *Thembisile and Another v Thembisile and Another* 2002 (2) SA 209 (T) it was held, that, as it was not disputed that the deceased had entered into a valid customary union with the first applicant, it was unnecessary to consider whether the customary marriage had been properly registered. In any event s 4(9) of the Act provided that failure to register a customary marriage did not affect the validity of that marriage. The court further held that the customary union between the deceased and the first applicant being common cause, the first respondent bore the onus of persuading the court that that union had been dissolved. A customary union was not against public policy and could not lightly be assumed to have been terminated by divorce. Proof on a balance of probabilities had to be adduced to support the contention of dissolution.

The Act recognises a marriage, which is valid at customary law and existed at the commencement of this Act, and further stipulates that a customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage.

It is clear from the wording of the *provisio* that the requirements for the validity of the marriage stipulated in terms

of the Act do not apply retrospectively. They only apply to customary marriages entered into on or after 15 November 2000 unless the parties have registered their marriage within a period of 12 months after the commencement of the Act or within such a longer period as the minister may from time to time prescribe by notice in the *Government Gazette* to be effected or that they had applied to change the regime of their marriage as envisaged in terms of the provisions of Matrimonial Property Act 88 of 1984. In terms of s 4(3)(a) and (b) of the Act (GN1045 GG42622/8-8-2019) the minister recently prescribed the time period for registration up to 30 June 2024 for both customary marriage entered into on or after the commencement of the Act.

In conclusion, the non-registration of a customary marriage does not affect the validity of such marriage, thus such marriage is not null and void.

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Rethinking guarantees and suretyship in lending agreements



By Nobathembu Dlamini and Sandanathi Gwina

The Land and Agricultural Development Bank of South Africa (Land Bank) is a government owned development finance institution tasked with, among others, the facilitation and support of equitable ownership of agricultural land through the increase of ownership of agricultural land by historically disadvantaged persons (s 3(1)(a) of the Land and Agricultural Development Bank Act 15 of 2002 (the Act)). It achieves these objectives through, *inter alia*, the provision of financial services to historically disadvantaged persons with the aim of promoting access to ownership of land for the development of farming enterprises and for agricultural purposes (s 3(2)(a)).

In the case of *Shabangu v Land and Agricultural Development Bank of South Africa* 2020 (1) SA 305 (CC), the Land Bank lent and advanced funds to Westside Trading 570 Pty Ltd (Westside Trading) in terms of a written loan agreement for the purposes of developing

urban property. Included in the security package for the loan were signed suretyships by Mr Shabangu and eight others (sureties). Following the conclusion of this transaction, it became known by the Land Bank that the loan agreement was invalid as it did not meet the developmental objectives contemplated in s 3 of the Act.

On learning of the invalidity, the Land Bank ceased advancing further funds to Westside Trading and sought to reclaim funds already advanced, plus interest accumulated thereon and fees incurred. Westside Trading disputed the amount so claimed, and accepted liability of a lesser amount in terms of a written acknowledgment of debt for payment in full and final settlement of its indebtedness to the Land Bank.

Unfortunately, Westside Trading failed to make repayments under the signed acknowledgment of debt thus resulting in the Land Bank instituting legal proceedings against it. Westside Trading was liquidated shortly thereafter thus

necessitating the Land Bank to amend its claim and sue the sureties under the acknowledgment of debt instead.

The sureties disputed the claim on the grounds that the original debt had been declared invalid, which thus invalidated any further claims under the acknowledgment of debt.

The High Court

The High Court dealt with the validity of a suretyship where the principal debt has been extinguished. Defined, a suretyship is an agreement whereby a third party undertakes to assume liability for the debt obligations of a debtor to a creditor (whether in part or full) in the event of the debtor failing to fulfil its debt obligations. By its very nature, a suretyship is an accessory obligation and there can be no surety if there is no valid principal obligation.

In its arguments, the Land Bank differentiated between the legal terms 'novation' (an agreement substituting a new obligation for an existing one, thus extinguishing the old debt entirely) and 'compromise' (an agreement in terms of which parties agree to settle a dispute with the effect of discharging the original obligation) arguing that the acknowledgment of debt amounted to a compromise rather than a novation and that the invalidity of the loan agreement did not automatically invalidate the acknowledgment of debt. In arriving at its conclusion, the High Court relied on the findings in *Panamo Properties 103 (Pty) Ltd v Land and Agricultural Development Bank of South Africa* 2016 (1) SA 202 (SCA) where a loan agreement was subsequently declared invalid and an enrichment claim

was instituted against the debtor relying on a covering mortgage bond in place. The court in the *Panamo* case dealt with a question of whether or not the bond given as security for the loan agreement covered an enrichment claim against the debtor. The court in *Panamo* found that the scope of the bond extended to debt obligations beyond those outlined in the loan agreement and, therefore, could be extended to include a claim for enrichment. Relying on this, the High Court through Basson J reasoned that ‘the fact that the loan agreement is invalid, does not mean that it necessarily follows that the deed of suretyship, being an ancillary agreement, is likewise invalid’ (*Land and Agricultural Development Bank of South Africa v Meisel NO and Others* (GP) (unreported case no 23733/12, 6-10-2017) (AC Basson J)). The High Court found that the suretyships granted in favour of the Land Bank in the loan agreement, covered the debt so validly acknowledged under the acknowledgment of debt. The applicants were thus ordered to pay amounts claimed under the acknowledgment of debt.

Constitutional Court (CC)

• Validity of the acknowledgement of debt

The CC noted with concern that the High Court’s analysis of the *Panamo* case and its finding that the invalidity of the loan agreement did not invalidate the acknowledgment of debt and missed a crucial step, namely, whether the debt so acknowledged was not tainted by the original loan. This is the crucial difference between the claim under the *Panamo* case and the present case. The court stated that, as was seen in *Panamo*, a valid debt is not necessary for an enrichment claim to arise. In *Panamo*, the court iterated that a mortgage bond can secure more than the obligations contained in a loan agreement, but that it could contain primary obligations (as opposed to accessory obligations) and such primary obligations could, therefore, not be extinguished by the invalidity or voidness of the obligations contained in the loan it secured.

In the present case, however, it was common cause that the acknowledgment of debt only arose as a result of the existing debt and the two could not be separated. Froneman J remarked at para 20 of *Shabangu* that: ‘At best [the acknowledgment of debt] was about payment of a reduced amount still owing under the invalid loan agreement’. Proceeding with the claim under the acknowledgment of debt would be tantamount to resuscitating an invalid agreement.

The court noted the Land Bank’s comparison of a novation and a compromise in law and remarked that even if the ac-

knowledge of debt had to be characterised as a compromise, the acknowledgment of debt remained tainted by the invalidity of the original agreement thus resulting in an invalid arrangement.

• Creating a principal obligation

The court noted that if the acknowledgment of debt had been premised in a way that established a principal obligation such as an enrichment claim or a claim based on a ‘no profit principle’, the acknowledgment of debt could have been valid and enforceable.

Furthermore, the terms of the suretyships were clear and exclusively limited to the extinguishing of the debt obligations as contemplated in the invalid loan agreement. The scope of the suretyships did not extend beyond the loan agreement and could not be said to cover the subsequent acknowledgment of debt.

The court found the acknowledgment of debt to be tainted with the original invalidity of the loan agreement. The applicants appeal succeeded with costs.

Conclusion

There are important issues, which arise from this judgment (for both debtors and creditors) in the structuring of financing deals.

At the outset, it is important for the parties to a financing transaction such as this matter, to ensure that all requisite corporate and statutory requirements for the conclusion of the transaction have been complied with not only in terms of procedural approvals, but also in terms of the power to assume stated rights and/or obligations. This eliminates potential *ultra vires* acts and the legal and financial implications that could ensue. More importantly where a government institution is involved, the constitutional invalidity of the loan agreement adds a different and riskier dimension to the powers of the parties to act.

The parties ought to exhaustively consider the nature of the rights they wish to regulate in the security documents. Different rights arise from different forms of security, namely, suretyships, covering mortgage bonds. It is no use to conclude security documents that will not be of much assistance in the event of a default, or worse, a declaration of invalidity of the underlying contract. This case also raises usefulness of capacity, authority, validity and enforceability opinions for transactions of this nature. Usually these related to a borrower, but is it time for lenders to be covered by this too – for their benefit.

Another important issue is the significance of creating primary obligations in security agreements. It is for this reason that in most cases, guarantees are preferred to suretyships. As a general principle, guarantees create principal

obligations while suretyships create accessory obligations. It should be noted, however, that it is not what you call your agreement, but rather the nature of the obligations created thereunder. Lenders should be careful in this regard. For example, in *Basil Read (Pty) Ltd v Beta Hotels (Pty) Ltd* 2001 (2) SA 760 (C) the Cape Provincial Division held that a document that was referred to as a ‘demand construction guarantee’ issued by the Joint Building Contracts Committee was in the nature of a suretyship and that any obligation of the guarantor was accessory to the obligation of the debtor to the creditor. This is because the substance of some guarantees is often worded as suretyships.

On the other hand, in *Peter Cooper & Company (Previously Cooper and Ferreira) v De Vos* [1998] 2 All SA 237 (E) the court rejected the defendant’s argument that a bank guarantee constituted a suretyship. It is stated in the *Peter Cooper* case that ‘it is true that the ordinary and usual meaning of the word “guarantee” connotes a surety who promises to saddle himself with an obligation if the principal obligor defaults.’ The court held that ‘the word [guarantee] has several meanings and the sense in which it is used in a particular document would depend on the contents and tenor of that document’.

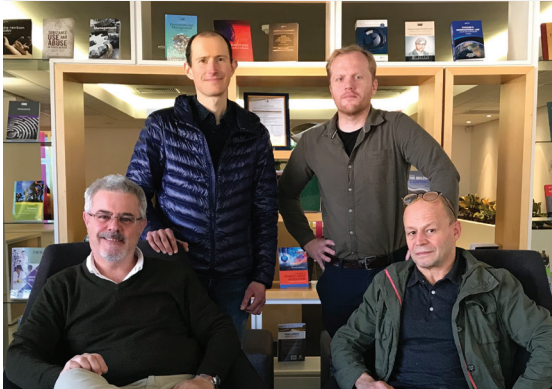
If one intends to create a guarantee in terms of which the guarantor assumes the principal obligation, then one should consider using language that demonstrates this intention clearly. For example, one may word the agreement to the effect that –

- the guarantor undertakes as a principal obligation to pay to the lender on the occurrence of specified events, and that the guarantee is not a suretyship or any other form of accessory obligation;
- the guarantor must waive any defence or reliance on any defect or dispute in the underlying agreement; and
- any invalidity of the underlying agreement, or any dispute thereunder shall not absolve the guarantor from performing under the guarantee.

Finally, where agreements have been found after the fact to be unenforceable, settlement agreements, be it in the form of acknowledgements of debt or otherwise, should be carefully considered lest they are tainted with the unenforceability that applies to the original agreement.

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THE LAW REPORTS



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

March 2020 (2) South African Law Reports
(pp 1 – 323); March 2020 (1) South African
Criminal Law Reports (pp 227 – 338)

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

Abbreviations

ECG: Eastern Cape Division, Grahamstown

GJ: Gauteng Local Division, Johannesburg

GP: Gauteng Division, Pretoria

MN: Mpumalanga Division, Nelspruit

SCA: Supreme Court of Appeal

Company law

Arbitration – finality of an award and the rule against ‘hybrid orders’: Termico (Pty) Ltd (Termico) and SPX Technologies (Pty) Ltd (SPXT) were shareholders in the company DBT Technologies (Pty) Ltd (DBT). Clause 19 of the shareholders’ agreement governing Termico and SPXT’s relationship granted Termico the right to sell to SPXT its shares, after the expiry of the requisite ‘lock-in period’. This option to sell was subject to certain terms and conditions, which included the following: Subsequent to the notice to sell having been given, and the ‘put price’ calculated in accordance with the formula set out in the agreement, the parties had to meet to conclude the put option (clause 19.3). Further, the put price was first to be applied in repayment of the loan that had previously been given by SPXT to Termico, and then the balance paid over (clause 19.4). When Termico eventually sought to exercise its put option by delivering the required notice, SPXT’s response, for various purported reasons, was to reject the notice as being ineffective, to refute Termico’s calculations as to price, and to claim that no valid put option had been exercised. The matter went to arbitration.

The arbitral panel decided in favour

of Termico, finding, *inter alia*, that the put option had been validly exercised, and that the put price was an amount of R 287 337 807. Importantly for present purposes, it did not grant a judgment in money, considering itself precluded from doing so given that those events required in terms of the shareholders’ agreement to take place prior to payment, namely the meeting envisioned by clause 19.3 and the set-off of the loan in terms of clause 19.4, had not yet taken place. Consequently, SPXT sued in the GJ for the review and setting-aside of the award. Termico brought a counter-application seeking an order making the arbitration award an order of court in terms of s 31(1) of the Arbitration Act 42 of 1965, as well as – and crucially for present purposes – a money judgment in the sum of R 250 million, being the put price less the balance owing to SPXT on the loan. The court granted the review application, and refused the counterclaim, finding that, in failing to grant a monetary judgment, the arbitral panel had not delivered a final award, in breach of s 33(1)(b) of the Arbitration Act. It added that, to grant the relief sought would fall foul of the prohibition in law against so-called ‘hybrid orders’, namely, partially the findings of a court and partially those of an arbitrator.

In the case of *Termico (Pty) Ltd v SPX Technologies (Pty) Ltd and Others* 2020 (2) SA 295 (SCA) an appeal was brought to the SCA by Termico with regard to the correctness of the High Court’s reasoning.

The SCA, per Ponnan JA (Leach JA, Swain JA, Molemela JA and Mbatha JA concurring), held that the rule requiring

finality of arbitration awards was to the effect that all issues submitted had to be determined. In other words, an award might not necessarily result in a final resolution of a dispute between parties. The SCA further stressed that the rule against hybrid orders covered determinations by a court in respect of matters, which were still the subject of an arbitration that had not finally run its course. Here, the court held, all issues that had actually been submitted to the arbitrators for decision had been decided by them; and the court was not being asked to deal with ‘live’ issues in a pending arbitration. In this regard, the court stated that the question of the granting of the money judgment could not be dealt with by the arbitral panel, as the events necessary for its determination had not yet occurred, namely, the meeting and the calculation of the loan, both of which were not issues before it. The SCA accordingly concluded that the arbitral award had met the requirement of finality, and that there had been no contravention of any rule against hybrid orders. It held that Termico’s counter-application ought to have succeeded, and that it was, on the facts, entitled to the money judgment claimed. The SCA accordingly upheld the appeal.

Availability of business rescue proceedings to external companies registered in South Africa: Cooperativa Muratori & Cementisti, CMC Di Ravenna Società Cooperativa a Responsabilità Limitada (CMC) was a company incorporated in Italy, with branches throughout the world, operating primarily in the construction industry. It also did business in South

Africa (SA), where it had been awarded a contract for the reconstruction of the port of Durban and work on toll roads. As a company incorporated outside of SA, but doing business here, CMC qualified as 'an external company' as defined in the Companies Act 71 of 2008 (the 2008 Act). It had further registered as such with the Companies and Intellectual Property Commission (the Commission) under s 23(1) of the Act. What gave rise to the matter in *CMC di Ravenna SC and Others v Companies and Intellectual Property Commission and Others* 2020 (2) SA 109 (GP), was the decision of the board of directors of CMC to pass a resolution to place the company under voluntary business rescue in SA. CMC filed the necessary documentation, gave the required notices, and appointed business rescue practitioners. However, the Commission withdrew proceedings, explaining that external companies, like CMC, could not be placed under business rescue under s 129 of the 2008 Act. Consequently, CMC sought an application – supported by its two business rescue practitioners, but opposed by the Commission – for an order declaring that it was in fact validly under business rescue in accordance with s 129 of the 2008 Act.

Section 129 made business rescue proceedings available to 'the company'. The key issue in dispute, then, was whether CMC, as an 'external company' registered in SA under s 23 of the 2008 Act, qualified as a 'company', as was submitted by the applicants. The court's view was that it did not.

The court, per Potterill J, held when one considered the fact that the 'company' definition did not expressly include 'external companies' in circumstances in which the Companies Act 61 of 1973 (the 1973 Act) had a catch-all provision, which provided that the sections of the 1973 Act would apply to every company, including external companies, one was driven to conclude that the legislator intended to exclude external companies from the definition of 'company'. Such an interpretation, the court added, was fortified by the fact that there was a specific legislative intent in the 2008 Act to reduce the regulation of external companies to promote investment in the South African markets. The court further rejected the argument raised by the applicants that an external company, when registered under the 2008 Act, was incorporated thereunder and, therefore, met the definition of 'company'. Incorporation and registration, it held, had always been two distinct processes. There was simply no 'notional' incorporation, as was suggested by the applicants, when an external company was registered in SA. The court stressed further that s 1(a) (i) of the definition specifically excluded an external company as defined in the 2008 Act.

The court concluded that business rescue proceedings under s 129 of the 2008 Act were not available to CMC, and that it was, therefore, not validly under business rescue. The court dismissed the application.

Creditors' voluntary winding-up and High Court jurisdiction: In *Murray NO and Others v African Global Holdings (Pty) Ltd and Others* 2020 (2) SA 93 (SCA) the SCA had to grapple with various matters arising from a creditors' voluntary winding-up (CVW) of the African Global Group (the Group).

The Group found itself in trouble when banking facilities were withdrawn from its operational wing (Operations) following revelations at the Zondo Commission of Inquiry about the conduct of its predecessor, Bosasa.

As a result, the Group and its holding company (Holdings), acting under s 351 of the Companies Act 61 of 1973 (the 1973 Act), on 12 February 2019 resolved to place Operations and its subsidiaries in a creditors' voluntary winding-up. But, soon thereafter, Holdings had a change of heart and sought to reverse the CVW by having it declared void in the GJ. Its case was that, since Operations and its subsidiaries were solvent when the resolutions to wind them up were taken, ss 79 and 80 of the Companies Act 71 of 2008 (the 2008 Act) should have been used for their liquidation instead of s 351 of the 1973 Act.

Therefore, argued Holdings, the resolutions to wind up and subsequent appointment of the liquidators were null and void. Holdings also argued that since the companies had their registered addresses in Johannesburg, the liquidators were wrongly appointed by the Pretoria Master, and that they, therefore, lacked *locus standi*.

Section 351 of the 1973 Act forms part of its ch 14, which is preserved, in respect of insolvent companies, under item 9(1) of sch 5 to the 2008 Act. Solvent companies, however, must be wound up under ss 79 and 80 of the 2008 Act. The Administration of Estates Act 66 of 1965, ss 2(1)(a)(ii) and 3 provide that 'the Minister ... shall, in respect of the area of jurisdiction of each High Court, appoint a Master of the High Court' and that each Master shall have an office at the seat of the High Court 'in respect of whose area of jurisdiction he or she has been appointed'. The 1973 Act in s 1 under 'Master', then provides that the Master who appoints provisional liquidators is 'the Master having jurisdiction in the area in which the registered office of that company is situated'.

The application, though opposed by the liquidators, was granted on the solvency issue. In an appeal by the liquidators the SCA, per Wallis JA (Mokgohloa JA, Plasket JA, Nicholls JA and Gorven

AJA concurring), held in respect of the appointment of the liquidators, that a 2012 amendment to the Constitution created a single High Court for SA, and in 2013 the Superior Courts Act 10 of 2013 abolished local divisions and created a High Court with nine divisions, corresponding to the nine provinces, with main seats in all of them and local seats in some. The local seats are not separate courts and it is no longer appropriate to refer to them as 'local divisions'. The area of jurisdiction of the Masters at the main seats overlap that of the Masters at the local seats situated in their provinces. Since the area of jurisdiction of the Master in Pretoria includes the entire area of jurisdiction of the Master in Johannesburg, Holdings' objection to the appointment of the liquidators by the Pretoria Master was without merit.

The SCA then moved to the issue of solvency, pointing out that a solvent company may be wound up only under the 2008 Act, and that, for the purposes of the 2008 Act, a solvent company is a commercially solvent company. Commercially insolvent companies are liable to be wound up only under the 1973 Act and cannot be wound up under the 2008 Act.

Assessing commercial insolvency requires an examination of the financial position of the company at present and in the immediate future to determine whether it will be able in the ordinary course to pay its debts, existing as well as contingent and prospective, and still continue trading. And when a company is prevented from accessing liquid assets, it will be unable to pay its debts as they fall due.

The SCA went on to point out that the Group's inability to pay became imminent once the Group's access to banking facilities was terminated. In the case of the Group the answer was clearly that it could not – substantial sums of VAT, provisional tax and pension fund contributions due primarily by Operations had fallen due for payment on 28 February 2019 and were not paid.

The commercial insolvency of the Group was also highlighted by its inability to afford the security it would have had to pay had there been a members' voluntary winding-up or proceedings under s 80(3) of the 2008 Act, instead of the CVW.

Operations and the other companies in the Group were, therefore, commercially insolvent when the resolutions for their voluntary winding-up were taken. Since this conclusion removed the underpinnings of Holdings' case, the High Court application should have been dismissed.

Criminal law

Man convicted of murdering wife released on bail after being granted leave

to appeal: *S v Rohde* 2020 (1) SACR 329 (SCA) concerned the release of a convicted murderer on bail by the SCA, pending appeal to that court.

The appellant had been convicted in the High Court of murdering his wife and obstructing the administration of justice, in that he had concealed her murder to look like a suicide. A substantial sentence of 20 years' imprisonment had been imposed. His application for leave to appeal against his conviction and sentence had been dismissed, but he was later successful on petition when the SCA granted him leave to appeal against his conviction and sentence. He had then applied in the High Court for bail pending appeal but that was refused.

In the SCA his main contentions were that since he had been granted leave to appeal there were reasonable prospects of his appeal being successful, and, since he was unlikely to abscond, bail ought to have been granted.

The court was divided on the matter. The majority, per Van der Merwe JA (Maya P concurring), agreed with the appellant. They held that leave to appeal could only have been granted on the merits and that they, therefore, had to accept that their colleagues, who had considered the petition and specifically applied their minds to the question, had concluded that there were reasonable prospects that the conviction may be overturned on appeal. Furthermore, in circumstances where all the appellant's emotional and financial ties were with SA, his three other passports had expired and were with the police, and the appellant had fully complied with his bail conditions – apart from one excusable occasion – there was little likelihood that he would abscond. In the result the court *a quo* ought to have released him on bail, subject to appropriate conditions.

In a minority judgment, Nicholls JA, emphasising the seriousness of the crimes of which the appellant had been convicted, found that he had not discharged the onus of showing that it was in the interests of justice that he be released on bail, or that there was no likelihood of him evading his trial.

The appeal was thus upheld.

Environmental law

Meaning of 'dispute' when referred by court to conciliation: Section 17(3) of the National Environmental Management Act 107 of 1998 provides that: 'A court or tribunal hearing a dispute regarding the protection of the environment may order the parties to submit the dispute to a conciliator ... and suspend the proceedings pending the outcome of the conciliation'.

In *Long Beach Homeowners Association v MEC for Economic Development, Environmental Affairs and Tourism*,

Eastern Cape 2020 (2) SA 257 (ECG) the issue was whether a dispute between the appellant, the homeowners' association, and the respondent, the MEC, over the latter's handling of an internal appeal against the granting of an environmental authorisation, was a dispute the court was entitled to refer to conciliation under s 17(3).

The court *a quo* found that, as there was no dispute concerning the protection of the environment before it, s 17(3) was of no assistance to the homeowners' association. The matter before the Full Bench of the ECG concerned the homeowners' association's appeal to the Full Bench.

Dismissing the appeal, the court, per Pickering J (Robertson J and Tokota J concurring) agreed with the MEC that, even accepting that s 17(3) must be given a wide and purposeful interpretation, as argued for by the homeowners' association, the dispute between the homeowners' association and the MEC was not a 'dispute' as contemplated by that provision.

Section 17(3) only empowered a court to refer a dispute regarding the protection of the environment to conciliation; it did not empower the court to do so when the dispute is one concerning the exercise by an MEC of his functions. The dispute directly concerning the protection of the environment was the one between the homeowners' association and the internal appellants, not the one between the homeowners' association and the MEC, which was only tangentially connected to it. Furthermore, the court's power under s 17(3) to 'suspend the proceedings pending the outcome of the conciliation' meant a suspension of the actual dispute regarding the protection of the environment before the court.

The ECG pointed out that this conclusion did not mean that the homeowners' association was remediless: It could, under s 17(2), request the MEC to appoint a facilitator for the purpose of reaching an agreement to refer the matter to conciliation.

Law of delict

Will an employee injured by fellow employees during an employment related protest have suffered an 'occupational injury', and so be barred claiming against their employer in delict? The case of *Churchill v Premier, Mpumalanga and Another* 2020 (2) SA 309 (MN) concerned an employment related protest during which protesting employees of the provincial government assaulted a senior employee. The employee was psychiatrically injured and sued the provincial government for its alleged omission – contra its alleged duty to protect its employees – to ensure the employee's safety. The government's defence to the

delictual claim was that it was barred by the Compensation for Occupational Injuries and Diseases Act 130 of 1993 because the injury was an 'occupational injury'.

Section 35 of the Act debars an employee from recovering damages from its employer for an 'occupational injury'. An 'occupational injury' is defined as 'a personal injury sustained as a result of an accident' (s 1); and an 'accident' is defined as 'an accident arising out of and in the course of an employee's employment and resulting in a personal injury' (s 1).

The issue was whether the personal injury resulted from an accident 'arising out of' the employee's employment. The court, per Roelofse AJ, found that it did. It based its finding on the following factors:

- the 'accident' occurred at the employee's place of work, and while she was going about her work; and
- the employee's role ('design and implementation' of the employer's policies) and her non-participation in the protest increased the danger to the employee posed by protesting employees.

The court accordingly upheld the employer's defence and dismissed the employee's delictual claim.

Road Accident Fund claims – establishing identity of owner of insured vehicle: Section 17(1)(a) of the Road Accident Fund Act 56 of 1996 concerns claims where the identity of the owner or driver of the insured vehicle has been 'established'; and s 17(1)(b) where it has not. Under reg 2(1)(b) of the regulations promulgated under the Act, claims falling under s 17(1)(b) are subject to a two-year prescription period.

The case of *Jones v Road Accident Fund* 2020 (2) SA 83 (SCA) concerned an appeal to the SCA against a High Court judgment upholding the RAF's special plea that Mr Jones' claim had become prescribed because it fell under s 17(1)(b) but was not lodged within the prescribed two-year period.

Mr Jones was injured when a chunk of gold ore, forming part of a load being transported from a mine to a refinery, fell from a truck that he was driving behind, penetrated the windscreen of his car and struck him on the forehead. It was not in dispute that the identity of the driver had not been established. Mr Jones, however, purported to establish the identity of the owner of the truck by contending that it was probably one of the nine owners of 23 trucks, which could have been involved in the accident.

The question was whether this sufficed to establish the identity of the owner or driver of the insured vehicle for the purposes of s 17(1). The SCA held that it did not. The identification of a series

of vehicles and their owners, where one was probably involved in accident, did not amount to establishing the identity of owner as contemplated in s 17. The appeal was accordingly dismissed.

Property law: Sectional titles

Whether a special resolution increasing a unit owner's levy will 'adversely affect' the owner and so require their written consent: In *Body Corporate of Marine Sands v Extra Dimensions 121 (Pty) Ltd and Another* 2020 (2) SA 61 (SCA), the appellant was a body corporate of a sectional scheme that was both residential and non-residential. The first respondent was an owner of non-residential units. The body corporate adopted a special resolution, and made a change to the conduct rules, with the effect that the first respondent's levy doubled. There was no change in its participation quota.

This caused the first respondent to apply to the High Court for a declarator that the special resolution and change to the rules were invalid. It based its application on s 32(4) of the Sectional Titles Act 95 of 1986, which provides, *inter alia*, that: 'Members of the body corporate may by special resolution, make

rules ... by which ... the liability of the owner of any section to make contributions ... is modified: Provided that where an owner is adversely affected by such a decision ... his written consent must be obtained'.

The first respondent's assertion was that the special resolution modifying the levy and amending the rules adversely affected it, yet it did not give its written consent thereto. Thus it did not comply with s 32(4) and was invalid.

The High Court, following provincial authority, found to the effect that a special resolution increasing a levy contribution would not 'adversely affect', in the manner the Act intended, an owner struck thereby. It consequently dismissed the application.

The first respondent appealed to the Full Court, and it found that the special resolution was *ultra vires* the Act. It came to this conclusion on a basis other than the adverse effect ground.

The body corporate then applied to the SCA for its leave to appeal. The SCA, per Ponnann JA (Mocumie JA, Tsoka AJA, Koen AJA and Weiner AJA concurring), granted it and decided, interpreting the Act, that the legislature's intention was that a special resolution increasing a levy would adversely affect owners and require their written consent. Since there

had been no such consent, the special resolution and resultant amendment of the rules were *ultra vires* the Act and invalid. The SCA accordingly dismissed the body corporate's appeal.

Other cases

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


- access to information;
- company law;
- constitutional law;
- grounds for legality in a commission of inquiry;
- immigration;
- income tax deductions;
- local authority;
- motor vehicle accidents;
- pension benefits; and
- tax assessments.

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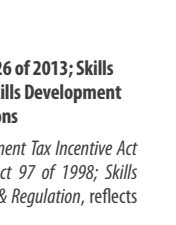
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The RAF to use new litigation model to reduce its litigation costs

Mabunda Inc and Others v Road Accident Fund (The Law Society of South Africa and Black Lawyers Association as amicus curiae); Diale Mogashoa Inc v Road Accident Fund (GP) (unreported case no 15876/2020, 18239/2020, 27-3-2020) (David J)

The Road Accident Fund (RAF) is a statutory body liable for payment of compensation for damages or loss wrongfully caused by the driving of motor vehicles. For the past five years the RAF has utilised a panel of attorneys to represent it in respect of actions instituted for the recovery of such compensation (the panel attorneys). The Service Legal Agreement(s) (SLA) and, indeed, the previous tender under which the panel attorneys were appointed, terminated due to the effluxion of time on 29 November 2019. The SLA was, thereafter, extended by way of a 'second amendment' with those panel attorneys who chose to do so until 31 May 2020. The RAF has also revised its 'litigation model' due to the unaffordability thereof, and cancelled its invitation to tender in respect of a 'new' set of panel attorneys. The RAF intends to no longer utilise such panel.

The majority of the 'old' panel attorneys, intended to review the RAF's decision and sought interim relief in the urgent applications. The 'old' panel wanted to be allowed to continue to operate as before, while the application was being dealt with. The court said that interdicts, which applicants seek in Part A of their respective notices of motion are all interim interdicts, although some of the practical consequences may be irreversible. The court pointed out that for more than a century the law has authoritatively required an applicant seeking a final interdict to -

- demonstrate a clear right;
 - show an injury in the form of irreparable harm actually committed or reasonably apprehended; and
 - the absence of an alternative remedy.
- The court added that when an applicant seeks an interim interdict, two further qualifications are added -
- the right need not be clear provided it is *prima facie* established, even if open to some doubt; and
 - the balance of convenience must favour the relief claimed.

In 2014, by way of a Request for Bids Ref RAF/2014/00023, the RAF invited bids from attorneys to tender to render services for representation of the RAF in respect of claims instituted against it in the various district, regional and High Courts in South Africa, so-called 'third party claims'. Pursuant to a successful tender process, 103 firms of attorneys were appointed, constituting the RAF 'panel attorneys'.

They all entered into SLA's with the RAF. The SLA's all had 29 November 2019 as their expiry date. During the existence of the SLA's, the High Courts, at various stages and in numerous judgments, expressed dissatisfaction and concern at how the 'litigation model' of the RAF, which, particularly in the Gauteng Division of the High Court in Pretoria, clogs the civil trial roll, has been handled over the years. In his answering affidavit, the Acting Chief Executive Officer (CEO) of the RAF referred to the cases of *Modise obo a minor v Road Accident Fund* 2020 (1) SA 221 (GP) and *Mncube v RAF* (MN) (unreported case no 2606/2018) (Legodi JP). In the *Mncube* judgment, the court, *inter alia*, held:

'[14] It is not in the interest of justice or proper conduct towards an attorney's client to settle on the date of trial at a huge legal cost to client or public purse. By completion of a case management form, the parties' legal representatives undertook to settle much earlier to avoid cost occasioned by attendance at court on the date of trial. Had the matter been settled in time, there would not have been a need for any of the parties to appear.

[18] To have settled in time and remove the matter from the roll without an appearance would have been in the interest of their clients because unnecessary legal costs would have been spared. On the other hand, to come to court on the date of trial and with a blink of an eye settle the matter without any blame on the part of the clients, can only have been driven by the desire to escalate le-

gal costs to the prejudice of client and public purse. In this case, the Road Accident Fund funded through the public purse, is involved.

[24] More than 90% of matters on our trial roll are Road Accident Fund which is funded through public purse. One would have thought the parties and or legal practitioners in dealing with these matters, will be more expedient and professional. However, the contrary appears to be the case. This is despite continuous financial woes the Funds finds itself in.

[25] Things can be done much better by the legal practitioners who are practicing in his field instead of seeing the Funds as an easy quick money making machine. That amounts to an abuse and unprofessional conduct'.

The court said the judgment of *Ntombela v Road Accident Fund* 2018 (4) SA 486 (GJ), *Kleinhans v Road Accident Fund* [2016] 3 All SA 850 (GP) and many others, can be added as reference. The court added that on average, the value of the claims settled by the RAF per month amounts to approximately R 4,1 billion. The fixed operational expenses for the fund are approximately R 800 million per month whereas it receives approximately R 3,5 billion per month from the fuel levy. The monthly shortfall is immediately apparent. The RAF's current outstanding (unpaid) amount due to claimants approximates R 19 billion.

The court said the above tendency at one stage resulted in a situation, *albeit* before the commencement of the panel attorneys' SLA referred to above, where the RAF attempted to manage its cash flow by delaying concession of merits in litigation against it. On 1 March 2019 in *De Rebus*, an article ('Is the Road Accident Fund's litigation in urgent need of review?') appeared by the Department of Private Law at the University of Pretoria, Emeritus Professor Hennie Klopper (see www.derebus.org.za). The article gives alarming statistics. The court said as an example, in 2005 there were 185 773 claims lodged, which resulted in legal

costs of R 941 million. In 2018, when there were only 92 101 claims, the legal costs had ballooned to R 8,8 million. In 2019 the legal costs had increased to R 10,6 million. The court added that Prof Klopper's conclusion was, that, should the RAF change its litigation model and properly deal with and settle all meritorious claims expeditiously, it could save up to R 10 billion of public funds.

The RAF's 'new model' consists of the intention to settle as many meritorious claims as possible within 120 days. The aim is to achieve a 98% settlement rate. The immediate aim is to target those claims already on the civil rolls from 1 June 2020 onwards. For this purpose, the RAF intends capacitating itself with an integrated claims assessment system, an additional approximately 255 employees ranging from legally qualified to other skills, which may be needed, to insource the assessment and settlement process and to mediate matters where settlement appears difficult to attain.

To achieve the last-mentioned process, the RAF has already approached the South African Medico-Legal Association (SAML) whereby medico-legal experts from SAML will assist the RAF in settling the majority of its quantum claims. A confirmatory affidavit of a well-known expert, Dr Edeling was also provided, which confirmed this. In the immediate future, the RAF will be sending teams of staff from its outlying offices to the busiest High Court Divisions to cope with the influx of files in respect of matters already set down on the trial rolls.

The RAF also recognised that not all matters can or will be settled, either at all or within the 120 days. To cater for the scenario where the RAF would still need representation in court in defence of those matters with real triable issues, the RAF will either *ad hoc* instruct attorneys or utilise some of the attorneys on its corporate panel (of which there are some 20, some which are also panel attorneys such as the eight applicants in the *Mabunda* case currently before court). As a further resource, the RAF has approached the State Attorney, who has in principle agreed to employ attorneys dedicated to handling RAF matters at the RAF's costs but operating within the State Attorney Act 56 of 1957 and the Legal Practice Act 28 of 2014.

Of the 84 remaining attorneys acting in terms of the extended SLA's, 42 launched an urgent application on 4 March 2020 in the *Mabunda* case with extremely truncated time periods for the exchange of affidavits (the *Mabunda* application). The relief claimed in the *Mabunda* application is in two parts. In part A, the applicants therein simply claim that, pending the adjudication and finalisation of the review in part B, the RAF be 'interdicted and restrained from implementing and/or giving effect to its

notices of handover addressed to the applicants and all panel attorneys ... dated 18 February 2020 and 20 February 2020 respectively'.

In part B of the *Mabunda* application, the applicants seek a review of the decision to demand a handover of the non-finalised files and of the 'purported' cancellation of the 2018 tender and setting aside of both the decision and cancellation. The *Mabunda* application was allocated by the Judge President of Gauteng Division to be heard as a special urgent application on 17 March 2020. At the hearing of the matter, Davis J granted the Law Society of South Africa (the LSSA) and the Black Lawyers Association (the BLA) leave to intervene as *amici curiae* (friends of the court) pursuant to application by them in this regard. The LSSA's interpretation necessitated a standing down of the matter to 18 March 2020, to accommodate further papers to be filed, dealing with issues raised by them.

The RAF on 25 July 2019 directed a 'handover letter' to the panel attorneys with the following wording: "The Services Level Agreement (SLA) entered into between you and the RAF is due to expire on 25 November 2019. Pursuant to clause 14 of the SLA, you are hereby notified of your obligation to prepare all unfinalised files in your possession for handover to the RAF". (An attached excel spreadsheet template indicating certain required information per file as required by clause 14 was also sent. Nothing turns on the difference between the alleged expiry date of 25 November 2019 and that of 29 November 2019 as mentioned elsewhere or in respect of certain of the panel attorneys).'

The court said that counsel in the urgent applications confirmed that, on the evidence before court, the panel attorneys did nothing to comply with the notice. The panel attorneys were required to sign the addendum, should they wish their SLA were to be extended. Eighty-four of the panel attorneys signed the addenda, resulting in the validity period of their SLA's being extended to 31 May 2020. During the investigation of alternate litigation models, the Acting CEO of the RAF met with, *inter alia*, the Legal Aid Board (who had also discovered that in-sourcing 96% of its work had considerably reduced its litigation costs), various Judge Presidents of at least three Divisions, the Legal Practice Council, Prof Klopper and the Office of the State Attorney.

The court said as part of their legal attack, the applicants attacked the cancellation of the tender on the basis of rationality. The court added that it did not wish to encroach on the jurisdiction of the court, which is to hear part B of the application by dealing with this attack. The court pointed out that it had been informed from the Bar that another

application by yet another panel attorney for review of the cancellation is on the roll for hearing on 21 April 2020. The court further said it was informed that parts B of the *Mabunda* and *Diale* applications would be consolidated with that review but no one could furnish the court with particulars of the status of the matter or papers therein.

The court added that it might well be that the review will not be heard on 21 April 2020 as in the nature of these things, experience has shown that all kinds of disputes regarding the furnishing of the record, the sufficiency thereof and any number of interlocutory issues might result in the envisaged review only being dealt with or finality being reached in respect thereof at some, possibly distant date in the future. The court pointed out that this is without even considering any possible appeal process, which may follow.

The court said the applicants failed to satisfy the requirements of indicating a *prima facie* right in law. It added that absent any such right, there could also be no harm or perceived imminent harm against which an interim order should offer protection. The following order was made:

- In the *Mabunda* case, the applicants' claim for relief in part A of the Notice of Motion was dismissed.
- The applicants in the *Mabunda* case are ordered to pay the respondent's costs, including costs of two counsel, where employed, in respect of that application.
- In the *Diale* case, the applicant's claim for relief in part A of the Notice of Motion is dismissed.
- In the *Diale* case, the applicant is ordered to pay the respondent's costs, including the costs of two counsel, where employed, in respect of that application.
- The applicant in the *Diale* case is ordered to comply with the RAF's handover notice of 20 February 2020 and, insofar as any time period mentioned therein may already have expired, then within seven days from date of this order (which is electronically submitted to the parties). If, due to national emergency measures the said applicant is unable to comply, it is to inform the RAF electronically thereof and to furnish all possible information requested electronically, starting with matters with trial dates from 1 June 2020.
- The LSSA and the BLA shall bear their own costs.

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By
Tobile
Bara

Unpacking the provisions of s 112(1)(a) and (b) of the Criminal Procedure Act

Section 112 of the Criminal Procedure Act 51 of 1977 (the CPA) deals with pleading guilty at summary trial and the circumstances, which demand for the matter to be heard before the court.

State accepting a plea in terms of s 112(1)(a) of the CPA

The accused under such a situation may only be sentenced to a period of imprisonment with an option of a fine or be cautioned and discharged. The section may only be used where the offence committed is of a trivial nature. No serious cases may be dealt with in terms of this section.

The state may not, after accepting a plea in terms of this section, prove any previous convictions against the offender. The court, accepting and considering previous convictions under these circumstances, is seen as committing a travesty of justice and the matter may be subject to a special review. A trivial matter may be regarded as serious if the accused has previous convictions relevant or not to the charge at hand.

It is presumable that a presiding judicial officer is not privy to whether the accused has a criminal record, and only after a guilty plea has been entered and the accused has been found guilty and charged for the offence, the state can prove as such per the SAP 69 record from a local criminal record centre.

It is then advisable that a presiding judicial officer, to be on the safe side, invoke the provisions of s 112(1)(b), which allows for questioning of the accused or failing which, disregards the criminal record and deals with the accused summarily.

Justice (R) Dr Munir Ahmad Mughal in 'Distinction between Summary Trial and Regular Trial under Code of Criminal Procedure, 1898' states: 'The object is to avoid wastage of time but ... never to defeat the ends of justice' (<https://ssrn.com>, accessed 9-4-2020).

Questioning in terms of s 112(1)(b) of the CPA

The court will put certain questions to the accused in order to ascertain whether they admit to the allegations in the charge against them, and whether they are, in law, guilty of the offence to which they have pleaded. If the court, after questioning, is satisfied that they admit to all the allegations, the accused is convicted without any evidence being heard by the court on the merits.

If after questioning, the court is not satisfied that the accused has admitted to all the allegations in the charge, whether they deny or dispute such allegations (briefly state what is in dispute), the record of a plea of not guilty in terms of s 113 of CPA is recorded.

The accused must be informed that the admissions, which they have made while being questioned, will stand as

proof thereof and that it will not be necessary that the state proves the same, and further that the exculpatory statement that the accused has made during questioning has no probative or evidential value. The accused should also be informed that if they want that statement to be included as evidence, they may have to confirm it under oath during the trial. The prosecutor will then proceed with the prosecution.

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The criminal justice system

- When the British occupied the Cape permanently in 1806, they retained the Roman-Dutch legal system. They concluded, however, that the criminal justice system was archaic, and so introduced one based on their own in 1828. It has been developed over the years to suit local conditions.
- The South African system today is an accusatorial system, that is, the state accuses and the accused defends. The accusation and its proof are state-driven, with a state-appointed prosecuting authority.

Early Alerts on the latest COVID-19 Legislation

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COVID-19 Gazette Alert

21 April 2020

Department	Description	Notice	Gazette
Chief of Justice	Directives Issued by the Chief Justice for the Maintenance of Courts during the Lockdown Period	GN 246 of 2020	GG 43241

For more information visit [National State of Disaster \(COVID-19\) Research Area on Lexis® Library](#)



By
Kgomo
Ramotsho

Court dismisses application for man to attend family funeral to curb the spread of COVID-19

Ex parte Van Heerden (MN) (unreported case no 1079/2020, 27-3-2020) (Roelofse AJ)

The applicant approached the Mpumalanga Division of the High Court in Nelspruit seeking permission to travel for a family funeral. The applicant residing in Mbombela, Mpumalanga received a telephone call from his mother on the morning of 27 March 2020, where-in she informed him that his grandfather had tragically passed away in a fire at his home earlier that morning.

The applicant's grandfather lived in Hofmeyr, which is situated in the Eastern Cape. The applicant desperately wanted to travel to Hofmeyr in order to support his mother and assist with his grandfather's funeral, which would be held in April. In terms of the provisions of reg 11B(1)(a)(ii) of the final lockdown regulations, the applicant was prohibited from travelling from Mpumalanga to the Eastern Cape.

The applicant approached the Mpumalanga High Court on an urgent basis because he did not want to contravene the final lockdown regulations. The applicant approached the court for an order that he be –

- temporarily exempted from the travelling restrictions contemplated in reg 11(B)(1)(a)(ii);
- allowed to leave Mbombela on 28 March for Hofmeyr;
- allowed to remain in Hofmeyr until 6 April; and
- allowed to leave Hofmeyr for Mbombela on 7 April.

In his affidavit, the applicant alleged that there would be no risk of him contaminating anyone with COVID-19 (the virus) during his trip to Hofmeyr and set out the reasons for him saying so. The applicant said that he intended to comply with the remaining provision of the regulations and that he would apply all the necessary precautions to prevent contamination and/or the spread of the virus.

The applicant argued in his founding affidavit that funerals are allowed in terms of the final lockdown regulations and that he 'accepts that the regulations were drawn in an urgent manner and that the authors were not afforded ample opportunity to consider all aspects which could relate thereto, including without limitation that persons' family members do not [necessarily] reside in one province and that, in attending a funeral of a family member, a person may be obliged to move between provinces and/or municipalities'.

The applicant also alleged that he had not been in contact with any person from abroad or a person who had contracted the virus and that he did not display any of the known symptoms of the virus. The applicant added that he intended to comply with all the remaining provisions of the regulations and that he would apply all the necessary precautions to prevent contamination and/or spread of the virus.

On 15 March, the Minister of Cooperative Governance and Traditional Affairs (the minister), designated under s 3 of the Disaster Management Act 57 of 2002 (the Act) and in terms of subs 27(2) of the Act declared a national state of disaster (see GN313 GG43096/15-3-2020).

On 17 March, the minister, after consulting the relevant Cabinet members, made regulations regarding the steps necessary to prevent an escalation of the disaster to alleviate, contain and minimise the effects of the disaster (the COVID-19 Regulations (see GN318 GG43107/18-3-2020)).

Sub-section 27(2)(f) of the Act expressly provides for the regulation of the movement of persons and goods to, from or within the disaster-stricken or threatened area.

On 25 March, the minister, after consultation with the Minister of Health, published an amendment to the COVID-19 Regulations (the final lockdown regulation).

The final lockdown regulations provide for restriction of movement of persons during the period the final lockdown regulations are in force and effect, namely from 23:59 on Thursday, 26 March to 23:59 on Thursday, 16 April. Thus, at the time this application was brought to the court's attention on Friday, 27 March at 16:02, the final lockdown regulations were in full force and effect.

In terms of reg 11B(1)(a) of the final lockdown regulations, the movement of persons and goods are restricted. Every person is confined to their place of residence, unless strictly for the purpose of performing an essential service, obtaining essential goods or service, collecting a social grant, or seeking emergency, lifesaving or chronic medical attention. Every gathering is prohibited, except for funerals as provided for in sub-reg 8. The movement of persons between provinces and between metropolitan and district areas is prohibited.

Regulation 11G provides that any person who contravenes the restriction of movements of persons and goods shall be guilty of a criminal offence and, on conviction, be liable to a fine or imprisonment for a period not exceeding six months or both such fine or imprisonment. The court said the circumstances of the application were extremely upsetting. The court held that it shows in the crudest manner the crude effects of the final lockdown regulations on a family.

The court held that the Constitution is the supreme law of the country, and s 165 of the Constitution vests the court with authority and the bounds within which that authority must be exercised. Section 165(2) provides as follows:

'The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.'

The court said that it sympathised with the applicant. However, it pointed out that the law must be upheld. The court added that presently, the law prohibits that which the applicant wants to do, however, urgent and deserving. That, the executive, under enabling legislation, invoked the provisions of the Act by declaring the state of disaster in order to curb the spread of virus.

The court noted that the Act and the final lockdown regulation applies to everyone within the borders of the country. Roelofse AJ held: 'I cannot accede to the relief the applicant seeks because in doing so, I will be authorising the applicant to break the law under judicial decree – that no court can do. In addition, no matter how careful and diligent the application will conduct himself, not only the

applicant but many others may be exposed to unnecessary risk, even death if I grant the applicant the relief he seeks'. The court dismissed the application.

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By
Kgomotso
Ramotsho

Legal practitioners traveling with no proper permits during lockdown may face possible criminal prosecution

Administrator of Dr JS Moroka Municipality and Others v Kubheka (MM) (unreported case no 1170/20, 3-4-2020) (Brauckmann AJ)

In the Mpumalanga Division of the High Court in Middelburg, Brauckmann AJ said that the reason for an urgent matter allowed to be heard at this court, was because he deemed the application extremely urgent, and he did not want to cause the residents of the second applicant to suffer one more day. The applicant and respondent were involved in an ongoing dispute (and litigation in the same court) that did not concern the residents, but caused basic services to be severely disrupted, and prevented the applicants to render basic services to the community and to comply with their constitutional obligations.

Brauckmann AJ said that before he formally started with the court proceedings, he was provided the documentation by the legal practitioners that were appearing on behalf of the parties, purporting to be 'permits' issued to them in terms of reg 11(B)(a)(i) and (3) of the regulations by the Minister of Cooperative Governance and Traditional Affairs (the minister) on 25 March read with the now withdrawn directives (the directives) by the Minister of Justice and Correctional Services (Justice Minister). In the directives the Justice Minister dealt with certain permissions and permits that have to be obtained by legal practitioners in the event that essential services had to be rendered by the legal practitioner.

The court pointed out that much of the events were overtaken by an amendment to the regulations by the minister on 4 April in terms whereof the travel-

ling of essential service workers, which includes legal practitioners, across provincial borders were authorised, though subject still to a permit being obtained. In an exceptional event where a permit cannot be obtained, legal practitioners may still travel to the court for urgent and essential services, provided they comply with certain conditions.

The following appearances were noted on behalf of respective parties at the hearing of the urgent application on 31 March –

- first applicant – advocate Zondo (Johannesburg Bar);
- second applicant to fourth applicants – advocates Laka SC with Zwane (Pretoria Bar);
- first respondents – advocate Matlala (Mpumalanga Bar);
- second respondents – advocate Nongwane SC (Pretoria Bar).

Other individuals and legal practitioners were also present in court at the hearing that indicated that they were legal practitioners involved in the matter, and indicated that they were in possession of permits. Judge Brauckmann AJ said those that were not in possession of permits at court undertook to provide his secretary with such permits before 12:00 on 1 April, permits which were not supplied to her.

Brauckmann AJ noted that COVID-19 had, and is still having, a devastating effect in the country's economy and human capital. He added that it would have far reaching ramifications on the country's future as well. He pointed out that

in order to 'flatten the curve', President Cyril Ramaphosa – duly advised by his cabinet – declared a total lockdown of all citizens in order to prevent the further spread of the deadly COVID-19. Brauckmann AJ added that the regulations were made to keep all citizens at home and safe for at least 21 days in order to prevent the uncontrolled spread of the viral infection.

The court said by restricting movement in the country and limiting the movement between various provinces with different rates of infection, the government is preventing the spread of COVID-19, and thereby the risk of possible large-scale death among the population in the country. On 31 March after finalisation of the hearing, the Justice Minister issued directives that replaced his initial directives. The 'new' directives are not applicable to the matter the court was seized with. The 'new' directives did not vary the initial directives substantially, although there are certain pertinent differences.

Among others, if a legal practitioner is not able to secure a permit from the Director of the Legal Practice Council (LPC), they may travel to a court if they have in their possession and present –

- an original copy of their admission certificate;
- proof of identification; and
- confirmation by the Registrar or Clerk of the relevant court that the matter is on the court roll for that particular day, that the practitioner is on record as the official legal representative in

the particular matter, and that the matter is urgent or essential.

In the regulations, 'essential services' is defined as 'services as defined in section 213 of the [Labour Relations Act 66 of 1995 (the LRA)] and designated in terms of s 71(8) of the [LRA] (and which designation remains valid as at the date of publication of this regulation), as listed in paragraph B of annexure B as may be amended from time to time'.

Paragraph B of annexure B, item 16, determines that essential services shall include and be confined to, among others: 'Services related to the essential functioning of courts, judicial officers, the Master of the High Court, sheriffs and legal practitioners required for those services'.

The court said in terms of reg 11B(2): 'The head of an institution must determine essential services to be performed by his or her institution, and must determine the essential staff who will perform those services: Provided that the head of an institution may delegate this function, as may be required in line with the complexity and size of the business operation'.

Only the minister may issue directions to provide further conditions that will apply to activities in respect to essential services in reg 11G(1). The court said regulations might be varied, depending on the circumstances. To date, the initial regulations still apply to the procedures in urgent court proceedings and more specifically the proceedings on 31 March in that court.

Brauckmann AJ turned to the directives by the Justice Minister. The court said the directives regulate the legal profession and their appearance at courts, during the lockdown. Essential service in the directives is defined in the same terms as in the regulations and the 'Head of Institution', for the purpose of the directives, is defined as 'the head of an institution as defined in the amended regulations, and for the purpose of these directions means the Director of a Provincial Legal Council established in terms of section 23 of the Legal Practice Act [28 of 2014], or her/his delegated authority as the case may be'.

The court pointed out that in order to avoid personal contact between any of the role players in the justice system, to avoid, to combat and prevent the spread of COVID-19 in courts, the directives restrict access to the court precincts and justice points to persons with a material interest in a case, subject to certain exceptions and social distancing requirements. That entering into courts and court precincts is only allowed in essential and urgent matters, and the number of persons is also regulated. The gravity of the government's concerns about the spread of COVID-19 appears from the

strict limitations of attendance to courts and court precincts during the lockdown.

The Justice Minister deemed that attendance of court proceedings by foreigners, and even by foreign language interpreters from other provinces, undesirable to the extent that foreigners may only attend courts if the matter is urgent, and after they have been screened and found not to be infected with COVID-19. In the event that a foreign language interpreter is not available in the relevant province where the court proceedings are to take place, arrangements are to be made for such services by way of audio-visual interpretation.

The court said from the directives, read with the regulations, it is apparent that the director of the relevant LPC may only issue a permit to legal practitioners if –

- they are a practising legal practitioner; and
- they must appear in a case identified as urgent and essential services under reg 11A(B)(16).'

No person infected with COVID-19, who has been exposed to persons from a high-risk country, or who have been in contact with persons who were exposed to persons who have tested positive for COVID-19 is allowed in courts or court precincts. No criminal trials will proceed during the lockdown period and such cases, where the accused person is detained, will be postponed by audio-link or special arrangements. No accused awaiting trial will appear in court. The situation is dire to the extent that no contact with accused persons, court personnel and legal practitioners is allowed.

Civil matters enrolled during the lockdown period shall not proceed but be postponed, unless identified as urgent and an essential service. The heads of court retain discretion to authorise hearings of matters through teleconference or videoconference or either electronic mode, which dispenses with the necessity to be physically in the courtroom.

The Chief Registrar must inform the parties and their legal representatives of the new court date, in writing. Brauckmann AJ said that in the Mpumalanga Division, in the case of criminal and civil

matters a directive by the Judge President had already been implemented. All criminal matters were postponed to two weeks after 16 April after the Director of Public Prosecution anticipated the trial dates. All civil urgent, non-essential matters were postponed to 21 April by simply sending a letter to the legal practitioners involved. Even the Legal Aid Board's services are limited to urgent and essential trial cases during lockdown.

Legal practitioners and officers of the court may travel during the lockdown period, provided they comply with the strict requirements in the directive. In applying the directives, the regulations must be kept in mind. Legal practitioners are not allowed to cross provincial borders or to travel from Metropolitans to District areas. In terms of directive 9, the enforcement officers must allow judges, magistrates, legal practitioners and sheriffs to commute between their place of residence and the court within their area of jurisdiction for purposes of performing essential services on presentation of proof of appointment to such office.

The court said the directives were withdrawn, and more specifically directive 9 was substantially amended. The old directives did not apply to the proceedings before the court on 31 March. Not only is such travel restricted to performance of essential services but also calls for production of such officer's appointment to the office. Put differently the court said, legal practitioner's admission certificate's must be produced, unless the Director of the relevant Provincial LPC certifies, in the permits that he issues to a legal practitioner, that such practitioner is a practising legal practitioner. In terms of directive 10, legal practitioners who need to attend to urgent or essential service matters during the lockdown period must also produce a permit issued by the Provincial LPC's Director in terms of reg 10(a)(i) to (v).

The permit can only be issued to practising legal practitioners if they are appearing in a matter enrolled for hearing and is classified as urgent in terms of the directives. The court said it seemed as if the Minister of Justice watered down the initial requirement for the rendering of services in terms of directive 5(a) from being 'urgent and essential services', to 'urgent' in directive 10(a)(iii).

The court added that, however, in directive 9, the Justice Minister once again refers only to 'essential services'. Both the regulations and directives are not models of clarity when it comes to the drafting thereof, but it is clear from reading both that what was intended by the ministers was that travelling done by legal practitioners should be the exception, and not the rule. It should be

reversed from truly urgent matters that involve essential services as defined by the minister in the regulations.

The court said from the directives, read with the regulations, it is apparent that the director of the relevant LPC may only issue a permit to legal practitioners if –

- they are a practising legal practitioner; and
- they must appear in a case identified as urgent and essential services under reg 11A(B)(16).

The permit can only be utilised by legal practitioners with a form of identification, which includes confirmation by the relevant director, signing the certificate, that the legal practitioner is on the counsel's list of practising legal practitioners, which in identification must be presented when the permit is used.

If such identification is not presented, or a permit is not available, such legal practitioner shall return to their residence according to reg 11(B)(1)(a)(i) for the rest of the lockdown. The court may, in the interest of justice, order that application of 'any provision in these directions' be deviated from. It is clear that the court may only deviate from the provisions of the directives issued by the Justice Minister, and not from the regulations. The Justice Minister cannot authorise the court to deviate from the regulations as the directives are always subservient to the regulations and, should the Justice Minister endeavour to authorise, or deviate therefrom, such a directive will be *ultra vires*.

The court added that as dealt with in the *Ex parte van Heerden* (MN) (unreported case no 1079/2020, 27-3-2020) (Roelofse AJ) (see www.derebus.org.za), the whole purpose of the regulations is to avoid personal contact between the citizens of South Africa in order to prevent the spread of the COVID-19 virus. To that effect these strict measures were implemented, and the regulations must be interpreted accordingly. There shall be no travelling across provincial borders, or between metropolitans, and district areas. Any travelling done by legal practitioners shall be in terms of the regulations, duly supplemented by the directives. If a legal practitioner is not in possession of a permit that was properly issued by the relevant authority, such travelling will amount to a breach of the regulations (and directives), will be illegal, the practitioner will be left exposed to possible criminal prosecution, and investigation by the LPC into possible professional misconduct.

Other individuals who indicated that they were legal practitioners involved in the matter were:

- Mr S Setsoalo;
- Ms L Romano;
- Mr T Rampatla;
- Ms P Kwaza;

- Mr H Shilenge; and
- Mr GS Thukwane.

Brauckmann AJ said that he accepted that apart from Mr Setsoalo who is a legal practitioner in Middelburg Mpumalanga, the other legal practitioners were from, either Mbombela, Gauteng, or the Mpumalanga districts. The court added that before the proceedings started, he raised the concern and inquired from the counsel in court whether their permits complied with the requirements of the regulations and directives. The counsel assured him the permits were valid. Brauckmann AJ said he could establish by merely glancing at the 'permits' that there was non-compliance by all, but one legal practitioner in court, with the directives and regulations.

The following legal practitioner produced a valid permit to the court:

- Advocate Matlala: Practising in Mbombela, and a member of the Mpumalanga Bar Association, presented the court with a permit to perform essential services in terms of reg 11B(3) issued by the LPC of Mpumalanga. The Director of the Mpumalanga LPC Provincial Council, Riaz Lorgat on 30 March, issued the permit.

The following legal practitioners and individuals were found not to have complied with regulations, as they did not have proper permits to travel to courts and render or participate in court proceedings:

- Advocate Zondo: Failed to present a permit to the secretary of the court, despite being requested to do so prior to the court proceedings and during the proceedings. The court said advocate Zondo's conduct will be reported to the Gauteng LPC.
- Advocate Ncongwane SC: Presented a 'permit' to the court, signed by Johan van Staden, the Director of the Gauteng LPC on 20 March. The permit did not comply with the requirements of the regulations.
- Advocates Laka SC and Zwane: Presented 'permits to perform essential services' purporting to constitute permits issued in terms of reg 11B(3), to the court. Their 'permits' were issued by Sindisiwe P Xulu, the court said the 'permits were not permits at all'.
- Mr Setsoalo: Provided the secretary of the court with his permit on 2 April, which was only issued by the LPC on 1 April, while he confirmed with the court secretary that (as did Mr Rampatla) that their permits were with them, but they left it in a vehicle that had left in the meantime.
- Ms Kwaza: Produced a 'permit' to the court, issued by her employer, SSM attorneys, who was the first applicant's attorneys. Somebody signed the permit at Randburg on 28 March; the firms' stamp appears on the 'permit'. However, the 'permit' is not compliant

with the relevant requirements of the regulations.

- Mr Shilenge: produced a 'permit', which was presented by TMN Kgomo Attorneys. The court found that the permit was invalid and Mr Shilenge was not entitled to travel to Middelburg on 31 March for court proceedings.
- Mr Thukwane: Provided the court with 'form B', a declaration of citizens' movement in exceptional cases. It was apparently signed before a member of the South African Police Services in Siyabuswa, Mpumalanga. Although the document states (in para 8 thereof) that the reason for travelling was to attend court in Middelburg, it does not constitute a permit as required by the regulations and directives at all.
- Mr Rampatla: The court found that Mr Rampatla – like Mr Setsoalo – gave the impression that he was in possession of a permit. His conduct will be referred to the LPC.
- Ms Romano: Attended court without a permit. The court said although no permit was provided by the said individual and wanted to deal with it in this judgment, but in all fairness, Brauckmann AJ said he was not able to, unless she provided the court with further information. A directive was issued in this regard.

Judge Brauckmann said that as stated by Roelofse AJ in *Ex parte van Heerden*, the court was of the view that the present extreme circumstances caused by COVID-19, justifies the regulations and directives. The court added that it is justifiable and reasonable in an open democratic society. Although legal practitioners render an essential service, they are still subject to the regulations issued by the minister. The court pointed out that there are cogent reasons why these regulations were made, and the directives issued by the Justice Minister. Brauckmann AJ said by bluntly ignoring them or acting without proper attention being paid to the regulations and directives the practitioners are not doing themselves, nor the citizens of the South Africa any favours.

The court said it was not supposed to even have entertained the matter and should have directed the legal practitioners to return to their places of residence and remain there until the lockdown is over, and struck the matter off the roll. However, the court pointed out that it could not do so as it was apparent from the founding affidavit that the residents of Dr JS Moroka Municipality, because of first respondent's conduct, did not have proper access to potable water. The court said water is essential to remain hygienic, and avoid infection of COVID-19.

The court pointed out that it was aware that only one judgment in the country

dealt with regulations, being that of Roelofse AJ. The applicant, albeit for different reasons, and on different facts, in that matter was also a legal practitioner. The court said one would expect legal practitioners to study the relevant provisions regulating their conduct under the current exceptional circumstances before proceeding to the court.

The court made the following order:

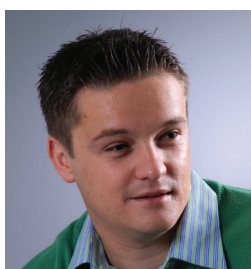
- Ms Romano, and Thukwane, are hereby directed to provide the court via e-mail, with their duly issued permits (if available), and the particulars of the employers, before close of business on 7 April, in the same e-mail, affidavits providing reasons why they were not in possession of the relevant permits, as required in terms of reg 11(B), read with Directive 10(A)(i) to (v) alternatively on what authority they attended court on 31 March, and any cost awards in this regard are reserved.
- Advocate Zondo may not charge his

client, alternatively instructing attorneys any fees or expenses in respect of preparation, travelling to, and from court, and attending court in Middleburg on 31 March.

- Advocates Laka SC and Zwane may not charge their client/s alternatively instructing attorney/s any fees or expenses, and in respect of preparation, travelling to and from court, and attending court in Middleburg on 31 March.
- Advocate Ncongwane SC may not charge their client/s alternatively instructing attorney/s any fees or expenses in respect of preparation, travelling to and from attending court in Middleburg on 31 March.
- Ms Kwaza, and TMN Kgomo and Associates Inc, may not charge their clients any fees or disbursements for preparation, travelling to and from Middleburg, or appearing in court on 31 March.

- Messrs Setsoalo and Rampatla may not charge their clients any fees or disbursements for the preparation, travelling to and from Middleburg (if applicable), and appearance in court on 31 March.
- The Registrar of the court was directed to send a copy of the judgment to the Directors of the Mpumalanga and Gauteng LPCs.
- The legal practitioners acting on behalf of the individual applicants, and the legal practitioners for the respondents are ordered to serve a copy of the judgment on their clients before the return date of the *rule nisi* on 7 May 2020, and file the sheriff's returns on the court file.

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



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

Bills

Fiscal Responsibility Bill B5 of 2020.

Commencement of Acts

Financial Sector Regulation Act 9 of 2017. *Amended commencement:* Various dates. GN356 GG43131/24-5-2020 (Setswana).

Selected list of delegated legislation

Auditing Profession Act 26 of 2005

Amendment to the code of professional conduct for registered auditors relating to registered candidate auditors. BN25 GG43073/6-3-2020.

Fees payable from 1 April 2020. BN47 GG43110/20-3-2020.

Basic Conditions of Employment Act 75 of 1997

Sectoral Determination 6: Private Security Sector, South Africa (correction). GN R317 GG43102/18-3-2020.

Civil Aviation Act 13 of 2009

Twenty-second amendment of the Civil Aviation Regulations, 2020. GenN132 GG43064/3-3-2020.

Companies Act 71 of 2008

Practice note 1 of 2020: Business rescue filing procedure. GN308 GG43090/13-3-2020.

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Period during which the return of earnings should be submitted in 2020: 1 April – 31 May 2020. GenN174 GG43104/18-3-2020.

Annual increase in medical tariffs for medical service providers: Doctors Gazette, 2020. GenN184 GG43111/19-3-2020.

Annual increase in medical tariffs for medical service providers: Prosthetics Gazette, 2020. GenN185 GG43112/19-3-2020.

Annual increase in medical tariffs for medical service providers: General rule. GenN189 GG43119/20-3-2020.

Annual increase in medical tariffs for medical service providers: Physiotherapist Gazette, 2020. GenN190 GG43120/20-3-2020.

Annual increase in medical tariffs for medical service providers: Renal care, wound care and social worker psychology: Renal Care Gazette, 2020. GenN191 GG43121/20-3-2020.

Annual increase in medical tariffs for medical service providers: Ambulance, private hospital and blood services: Ambulance Gazette, 2020. GenN188 GG43118/20-3-2020.

Compensation for occupationally acquired Novel Coronavirus Disease (COVID-19). GenN193 GG43126/23-3-2020.

Annual increase in medical tariffs for medical service providers: Chiropractor Gazette, 2020. GenN200 GG43137/25-3-2020.

Annual increase in medical tariffs for medical service providers: Dental Gazette. GenN201 GG43139/25-3-2020.

Annual increase in medical tariffs for medical service providers: Optometrist and speech/audiologist. Optometrist and Speech/Audiologist Gazette, 2020. GenN202 GG43140/25-3-2020.

Competition Act 89 of 1998, Consumer Protection Act 68 of 2008 and the Disaster Management Act 57 of 2002

Consumer and Customer Protection and

National Disaster Management Regulations and Directions (COVID-19). GN R350 GG43116/19-3-2020.

Competition Act 89 of 1998

COVID-19 block exemption for the healthcare sector. GNR349 GG43114/19-3-2020.

Amendment of the conditions of exemption of the national hospital network. GN319 GG43110/20-3-2020.

Regulations relating to the COVID-19 block exemption for the banking sector, 2020. GN R355 GG43127/23-3-2020.

Regulations relating to the COVID-19 block exemption for retail property sector, 2020. GN R358 GG43134/24-3-2020.

Regulations relating to the COVID-19 block exemption for the hotel industry, 2020. GN R422 GG43175/27-3-2020.

Constitution

Establishment of the National Security Council. Proc13 GG43083/10-3-2020.

Continuing Education and Training Act 16 of 2006

Post-School Education and Training Information Policy, 2019. GenN138 GG43073/6-3-2020.

Council for Medical Schemes Levies Act 58 of 2000

Imposition of levies on medical schemes. GenN164 GG43090/13-3-2020.

Dental Technicians Act 19 of 1979

Regulations regarding the registration and training of student dental technicians and student dental technologists. GN378 GG43145/27-3-2020.

Disaster Management Act 57 of 2002

Declaration of national state of disaster: Drought conditions. GN243 GG43066/4-3-2020.

Guideline on concluding cooperation and mutual assistance agreements. GN244 GG43073/6-3-2020.

Guideline on conducting an initial on-site assessment. GN245 GG43073/6-3-2020.

Guideline on contingency planning and arrangements. GN247 GG43073/6-3-2020.

Classification and declaration of a national disaster: COVID-19. GN312 and GN313 GG43096/15-3-2020.

Regulations in terms of s 27(2) of the Act (COVID-19). GN318 GG43107/18-3-2020 (also available in Afrikaans), GN R398 GG43148/25-3-2020, GN R419 GG43168/26-3-2020 and GN R446 GG43199/2-4-2020.

Regulations made in terms of s 27(2) of the Act (in Setswana). GN354 GG43128/23-3-2020.

Directions on measures to prevent and combat the spread of COVID-19 in cross-border road transport. GN418 GG43167/26-3-2020.

Measures to prevent and combat the spread of COVID-19 in cross-border road transport. GN413 GG43158/26-3-2020.

Directions on measures to prevent and combat the spread of COVID-19 (home affairs). GN416 GG43163/26-3-2020.

Directions on measures to prevent and combat the spread of COVID-19 (transport). GenN216 GG43162/26-3-2020.

Directive on the COVID-19 temporary employee/employer relief scheme. GenN215 GG43161/26-3-2020.

Electronic communications, postal and broadcasting directions. GN417 GG43164/26-3-2020.

Directions on measures to prevent and combat the spread of COVID-19 in air services. GN415 GG43160/26-3-2020, GN423 GG43176/27-3-2020 and GN438 GG43189/31-3-2020.

Directions on measures to prevent and combat the spread of COVID-19 in the railway operations. GN414 GG43159/26-3-2020.

Directions on measures to prevent and combat the spread of COVID-19 in the public transport services. GN412 GG43157/26-3-2020 and GN436 GG43186/31-3-2020.

Directions on measures to prevent and combat the spread of COVID-19 (social development). GN R430 GG43182/30-3-2020.

Directions on measures to prevent and combat the spread of COVID-19 in the public transport services: Learner's and driving licences. GN431 GG43183/30-3-2020.

Directions on measures to prevent and combat the spread of COVID-19 in all courts, court precincts and justice service points. GN440 GG43191/31-3-2020.

Directions on measures to prevent and combat the spread of COVID-19 in environmental matters. GN R439 GG43190/31-3-2020.

Electricity Regulation Act 4 of 2006

Amendment of licensing exemption and registration obligations. GN402 GG43151/26-3-2020.

Electronic Communications Act 36 of 2005

Increase of administrative fees in relation to the type approval. GenN196 GG43129/23-3-2020.

Increase of administrative fees in relation to service licences. GenN197 GG43129/23-3-2020.

Radio Frequency Spectrum Licence Fee Amendment Regulations. GenN195 GG43129/23-3-2020.

Official list of regulated standards for technical equipment and electronic communications facilities amendment regulations, 2020. GN357 GG43132/24-3-2020.

Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947

Amendment of the regulations to the tariffs for registration of fertilizers, farm feeds, agricultural remedies, stock remedies, sterilising plants and pest control operators, appeals and imports. GN R395 GG43146/27-3-2020.

Firearms Control Act 60 of 2000

Firearms Control Amendment Regulations, 2020. GN275 GG43081/9-3-2020 (also available in Afrikaans).

Health Professions Act 56 of 1974

Amendment of fees payable. BN49 GG43145/27-3-2020.

Amendment of the regulations relating to specialities and subspecialties in medicine and dentistry. GN376 GG43145/27-3-2020.

Income Tax Act 58 of 1962

Determination of the daily amount in respect of meals and incidental costs (also available in Afrikaans, Tshivenda and isiXhosa). GN270 GG43073/6-3-2020.

Fixing of the rate per kilometre in respect of motor vehicles in terms of the Act (also available in Afrikaans, isiZulu and Sesotho). GN271 GG43073/6-3-2020.

International Air Services Act 60 of 1993

International Air Services (COVID-19 Restrictions on the Movement of Air Travel) Regulations, 2020. GenN175 GG43105/18-3-2020.

International Trade Administration Act 71 of 2002

COVID-19 Export Control Regulations. GN R424 GG43177/27-3-2020.

Judges' Remuneration and Conditions of Employment Act 47 of 2001

Determination of remuneration of Constitutional Court judges and judges. GenN204 GG43142/25-3-2020.

Local Government: Municipal Finance Management Act 56 of 2003

Exemption of municipalities and municipal entities during national state of disaster. GN429 GG43181/30-3-2020.

Local Government: Municipal Systems Act 32 of 2000

Upper limits of total remuneration packages payable to municipal managers and managers directly accountable to municipal managers. GN351 GG43122/20-3-2020.

Magistrates Act 90 of 1993

Determination of salaries and allowances of magistrates. GenN205 GG43142/25-3-2020.

Medicines and Related Substances Act 101 of 1995

Annual single exit price adjustment of medicines and scheduled substances for 2020. GN322 GG43110/20-3-2020.

Regulations relating to a transparent pricing system for medicines and schedule substances: Dispensing fee. GN377 GG43145/27-3-2020.

Mineral and Petroleum Resources Development Act 28 of 2002

Amendment of the Mineral and Petroleum Resources Development Regulation. GN R420 GG43172/27-3-2020.

National Environmental Management Act 107 of 1998

Procedures for assessment and minimum criteria for reporting on identified environmental themes when applying for environmental authorisation. GN320 GG43110/20-3-2020.

National Environmental Management: Air Quality Act 39 of 2004

Amendment of listed activities and associated minimum emission standards. GN421 GG43174/27-3-2020.

National Ports Act 12 of 2005

Regulations in terms of s 80(1)(g) of the Act (COVID-19). GenN173 GG43103/18-3-2020.

National Qualifications Framework Act 67 of 2008

Revised occupational qualifications sub-framework. GN239 GG43062/2-3-2020.

Policy and criteria for recognising a professional body and registering a professional designation. GN400 GG43150/26-3-2020.

Policy and criteria for registration of qualifications and part-qualification. GN401 GG43150/26-3-2020.

National Railway Safety Regulator Act 16 of 2002

Determination on verbal safety-critical communication protocol. GN347 GG43110/20-3-2020 and GN360 GG43138/25-3-2020.

Perishable Products Export Control Act 9 of 1983

Imposition of levies on perishable products from 1 April 2020. GenN206 GG43145/27-3-2020.

Pharmacy Act 53 of 1974

Regulations relating to fees payable to the South African Pharmacy Council. BN26 GG43073/6-3-2020.

Rules relating to services for which pharmacists may levy a fee and guidelines for levying such a fee or fees. BN27 GG43073/6-3-2020.

Postal Services Act 124 of 1998

Unreserved Postal Services Regulations, 2020. GN381 GG43145/27-3-2020.

Prescribed Rate of Interest Act 55 of 1975

Prescribed rate of interest: 9,75% per annum with effect from 1 March 2020. GN

R397 GG43146/27-3-2020 (also available in Afrikaans).

Private Security Industry Regulation Act 56 of 2001 and Security Officers Act 92 of 1987

Amendment of regulations. GenN177 GG43110/20-3-2020.

Public Audit Act 25 of 2004

Audit Fees Regulations. GN443 GG43194/1-4-2020 (also available in Afrikaans).

Public Finance Management Act 1 of 1999

Exemption of institutions as a result of the COVID-19 National State of Disaster. GN437 GG43188/31-3-2020.

Remuneration of Public Office Bearers Act 20 of 1998

Determination of salaries and allowances of traditional leaders, members of national house and provincial houses of traditional leaders. Proc14 GG43142/25-3-2020.

Social Assistance Act 13 of 2004

Increase in respect of social grants. GN R361 GG43143/25-3-2020.

South African Police Service Act 68 of 1995

Regulations under s 15AD. GN R396 GG43146/27-3-2020.

South African Schools Act 84 of 1996

Amendment of the national norms and standards for school funding. GN366 GG43145/27-3-2020.

Taxation Laws Amendment Act 17 of 2009

Allocations to metropolitan municipalities of general fuel levy revenue. GN326 GG43110/20-3-2020.

Draft delegated legislation

- Draft amended Refugee Appeals Authority of South Africa rules in terms of the Refugee Act 130 of 1998. GenN133 GG43067/4-3-2020.
- Draft amended regulations regard-

ing standard terms and conditions for class licences under Chapter 3 of the Electronic Communications Act 36 of 2005 for comment. GenN157 GG43077/5-3-2020.

- Property Practitioners Regulations, 2020 in terms of the Property Practitioners Act 22 of 2019 for comment. GenN139 GG43073/6-3-2020.
- Draft amendment of the licensing processes and procedures regulations for class licences, 2010 and the amendment regulations, 2016 in terms of the Independent Communications Authority of South Africa Act 13 of 2000 for comment. GenN160 GG43082/9-3-2020.
- Regulations regarding the category and type of all notifiable occurrences to be reported to the chief executive officer of the Railway Safety Regulator, 2020 in terms of the National Railway Safety Regulator Act 16 of 2002 for comment. GenN162 GG43085/11-3-2020.
- Draft amendments to certain regulations governing various marine protected areas in terms of the National Environmental Management: Protected Areas Act 57 of 2003 for comment. GN321 GG43110/20-3-2020.
- Code of conduct: Regulations regarding criteria and procedures for recommendations of conferment of Senior Counsel and Senior Attorney status in term of the Legal Practice Act 28 of 2014 for comment. GenN208 GG43145/27-3-2020.

Draft Bills

- Draft Merchant Shipping Bill, 2020 for comment. GenN148 GG43073/6-3-2020.
- Draft Social Service Practitioners Bill, 2019 for comment. GN387 GG43145/27-3-2020.



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Employee resigning prior to being unfairly dismissed

In *Bester v Small Enterprise Finance Agency (SOC) Ltd and Other* [2020] 3 BLLR 244 (LAC), the employee, a qualified advocate, was employed in an organisation that was later taken over by Small Enterprise Finance Agency (the company). Her services were transferred in terms of s 197 of the Labour Relations Act 66 of 1995 (LRA) along with the organisation as a going concern. Under the new regime, the employee was appointed to a line manager, one Maboa. Almost immediately, the employee and Maboa clashed. As a result, the employee contemplated resigning and posed questions to the company's Human Resources Department about the logistics of a resignation. On the same day, the employee was suspended pending a disciplinary hearing into allegations relating to absenteeism and 'insolence'.

Initially, the employee was suspended by the company on full pay. Shortly thereafter, her remuneration ceased without further notice and she resigned with immediate effect. The company, however, refused to accept her resignation on those terms and insisted that she serve her one month notice period. The disciplinary hearing proceeded in the employee's absence while she was ill and she was dismissed. The dismissal took effect before the end of her notice period.

The employee referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). Only one of the alleged unexplained absences was not rebutted by the employee. The arbitrator found that the charge of insolence was bald of detail and consequently held that the employee's dismissal was both substantively and procedurally unfair. As the restoration of the employment relationship was inappropriate in the circumstances, the arbitrator awarded the employee compensation equal to eight months' remuneration. The company sought to review the award.

On review, the Labour Court (LC) upheld the unfair dismissal. However, the court found that eight months' compensation was too much on the grounds that the employee had resigned and was, for that reason, entitled to no more than the equivalent of the balance of her notice period. The employee appealed the judgment.

On appeal, the sole issue before the Labour Appeal Court (LAC) was the appropriateness of the quantum of compensation awarded. The LAC asked why, if the arbitration award was based on a finding that the employee had been unfairly dismissed, was there any room to factor the employee's resignation into the amount of compensation awarded? The LAC noted that the premise of a compensation award is to give recognition to an unfair act on the part of the employer. Compensation in terms of s 194 of the LRA serves a purpose wider than recovering patrimonial damages.

On the facts, it was apparent that the employee's deteriorating relationship with Maboa was the reason for her contemplating resigning from the company, which resignation could not be construed as 'voluntary' in the circumstances. The employee's actual resignation was then prompted by the stoppage of her remuneration. Moreover, her resignation, which was intended to be with immediate effect, was rejected by the company. Accordingly, she remained in service at the time she was dismissed. In this context, the LAC found that the employee's resignation was irrelevant to the computation of the compensation. Once she was dismissed, her resignation played no further role.

Leaving aside the resignation issue, the LAC held that the arbitrator's reasons for granting the employee eight months' compensation were entirely reasonable. Apart from ignoring the evidence that the employee's resignation was not voluntary, the LC had treated the matter as a contractual claim and took the view that, given her resignation, the employee could have no material interest in her job beyond her notice period. This overlooked the purpose of compensation, which was not to yield a quantum based on the concept of positive interest, but rather is premised on a broader consideration of fairness.

Turning to costs, the LAC held that although the employee had represented herself in both the LC and LAC proceedings, fairness dictated that she be granted costs, including those equal to the worth of her own legal expertise.

The appeal was upheld with costs.

Must disputes arising from the Basic Conditions of Employment Act first be dealt with by labour inspectors?

In *Amalungelo Workers' Union and Others v Philip Morris South Africa (Pty) Ltd and Another* [2020] 3 BLLR 225 (CC), Amalungelo Workers' Union and 75 of its members (the applicants) alleged that Philip Morris South Africa and Leonard Dingler (the employers) had breached the Basic Conditions of Employment Act 75 of 1997 (the BCEA) by deducting tax from their salaries for their company vehicles, without taking into account the depreciation of the vehicles. The applicants instituted proceedings in the Labour Court (LC) for an order compelling the employers to repay the amounts, which had been deducted and interdicting them from making the deductions going forward.

The LC, on its own accord, ruled that it lacked jurisdiction to directly enforce the provisions of the BCEA in the absence of an assertion that those provisions formed part of a contract of employment as envisaged in s 77(3) of the BCEA. Relying on two of its previous judgments, the LC held that disputes concerning the enforcement of the provisions of the BCEA must first be referred to a labour inspector and that they can reach the LC only in the form of an appeal.

Unhappy with this outcome, the applicants sought leave to appeal. Both the LC and the Labour Appeal Court refused to grant leave to appeal. The Constitutional Court (CC), however, granted the employees leave to appeal only in respect of whether the LC lacked jurisdiction. In this regard, the question before the CC was whether, barring claims based on employment contracts, the LC's jurisdiction under the BCEA is deferred until the matter has been resolved by a labour inspector appointed in terms of the BCEA.

The CC noted that the provision that addresses the LC's jurisdiction is s 77 of the BCEA, which section must be construed in a manner that complies with the Constitution. Section 77 says in unambiguous terms that the LC has exclusive jurisdiction over matters arising from the BCEA, except where the Act provides otherwise. One exception is where the matter concerns contracts of employment where the LCs and civil courts have concurrent jurisdiction.

On a proper interpretation of the section, the CC held that s 77 of the BCEA was designed to promote rather than limit access to the LC in respect of claims under that BCEA. Section 77, when read as a whole, provides that the LC, subject to a few exceptions, enjoys exclusive jurisdiction over all disputes and claims arising from the provisions of the BCEA. This means that on a proper reading of the section, as soon as a dispute is ripe

for litigation, the claimant is entitled to refer it directly to the LC.

In the present matter, the LC found that it lacked jurisdiction because disputes under the BCEA must first be referred to labour inspectors and that thereafter they could reach the LC only by way of appeal. When the present dispute arose, the appeal provision had been revoked. This notwithstanding, the CC noted that there is simply no provision in the BCEA which expressly requires that disputes first be referred to labour inspectors before the LC could entertain them.

Having regard to the enforcement provisions of the BCEA, the CC noted that none of the functions assigned by the BCEA to labour inspectors envisages dispute resolution. The fact that labour inspectors are empowered to issue compliance orders does not deprive the LC of jurisdiction to determine disputes concerning compliance with the BCEA. Un-

like the Labour Relations Act 66 of 1995, the BCEA does not require that disputes first be referred to the Commission for Conciliation, Mediation and Arbitration before the LC can be approached.

In conclusion, the CC held that determining disputes arising from the BCEA is the function of the LC and if the LC lacked jurisdiction, no forum could entertain such matters because s 77 confers exclusive jurisdiction on the LC in respect of all matters arising from the BCEA. This interpretation is consistent with the applicants' right to have their dispute resolved by application of law in a fair manner, which right cannot be exercised before a labour inspector. The LC's order declaring that it lacked jurisdiction in respect of the particular claim was set aside and the matter was remitted to that court.

- See also law reports 'Labour law: Jurisdiction of Labour Court (LC)' 2020 (April) DR 22.



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Employee working post the expiry of a fixed term contract – automatically permanent or not?

Ukweza Holdings (Pty) Ltd v Nyondo and Others (LAC) (unreported case no PA2/19, 4-3-2020) (Waglay JP (Murphy and Savage AJJA concurring)).

The appellant employer appointed the respondent employee on a fixed-term contract, commencing 11 December 2014 and ending 31 December 2014.

The employee's duties as a project manager, was to manage a catering service provided by the employer to its client, Life St George's Hospital. At the time the employer had a three month 'probationary' contract with the hospital where after, the employer and hospital would have had an opportunity to enter into a longer service level agreement. During its three-month contract with the hospital, the employer's erstwhile project manager resigned, prompting

the employer to enter into a fixed-term contract with the employee.

Post 31 December 2014, the employee continued to tender services and it was only in the second week of January 2015, that the employer, by consent with the employee, extended the fixed-term contract to 31 January 2015.

Sometime in January the employee became aware that the position he occupied was being advertised. He contacted his supervisor who assured him he would be considered for the permanent post along with all others who applied.

On 3 February 2015, the employee received a notice of termination advising him that his fixed-term contract would end on 13 February 2015. The employer was under the impression that it had to afford the employee two-week notice period in line with the provisions of the Basic Conditions of Employment Act 75 of 1997. The employee was also informed that he was unsuccessful in his application for the post he occupied.

The employee referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) citing that he had an expectation that he would be permanently employed.

At arbitration the employer objected to the CCMA's jurisdiction, arguing that the employee had not been dismissed but rather that his contract was terminated due to the effluxion of time.

The arbitrator found that the employee had been dismissed. Once the contract expired on 31 January 2015 the employee had continued to tender his services which meant, according to the arbitrator, that the employee as at 3 February 2015, was employed on a permanent basis and not in terms of a fixed-term contract. Having satisfied himself

that the employee was dismissed, the arbitrator went further and found that his dismissal was unfair and awarded him compensation.

The Labour Court (LC) dismissed a review application brought by the employer. The court held that it could not fault the arbitrator's finding in respect of the employer terminating the employee's services after the fixed-term contract had expired at the time the employer issued the notice of termination of employment.

The employer, with leave from the LC, turned to the Labour Appeal Court (LAC), before which it raised several grounds on appeal.

The LAC reaffirmed that the test on review was not whether the arbitrator arrived at a reasonable decision but rather whether his decision, in respect of the employee being dismissed, was a correct decision.

Adopting this approach, the LAC found that the arbitrator's approach was too technical and failed to take into account the practical manner in which the parties dealt with each other. On the arbitrator's reasoning, the LAC held, the employee would have been permanently employed as of 1 January 2015, that being when the initial fixed term contract expired and before parties agreeing to extend the fixed-term contract. However, the reality was that the parties only commenced discussion and agreed to an extension of the initial fixed-term contract in mid-January 2015 and at that time, there was no discussion or suggestion that the employee had already been made a permanent employee as of 1 January 2015.

The LAC went further to say: 'On 3 February, after being informed

that he was unsuccessful, the employee raised the issue that he had a legitimate expectation to be permanently appointed to the post and as such the notice to say that his fixed term contract came to an end constituted a dismissal. This argument is misconceived. The facts are that the employee was or became aware that the appellant advertised to fill the post the employee occupied and that he made himself available to be considered for the post. In the circumstances there could be no legitimate expectation to the post he occupied. Furthermore, that he

rendered services to the appellant after the end of January when his fixed-term contract came to an end does not mean that ... the fixed-term contract morphed into permanent employment. Also the appellant's mistaken belief that it was obliged to pay two weeks' notice pay, during which time the employee did not nor was he required to render any services meant that the relationship had gone beyond the fixed-term relationship.

In my view, the fixed term contract ended on 31 January 2015. The fact that the appellant did not inform the employee

prior to the expiry of the contract that the contract will not be renewed or extended or that it will be coming to an end does not mean that it is either automatically extended or that the employment has become permanent, unless provisions of the law specifically provided for that.'

The LAC upheld the appeal and substituted the award with a finding that the 'CCMA has no jurisdiction to arbitrate the dispute in the absence of a dismissal'.



By
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Recent articles and research

Abbreviation	Title	Publisher	Volume/issue
CILSA	Comparative and International Law Journal of Southern Africa	Juta	(2019) 52.2 (2019) 52.3
ITJ	Insurance and Tax Journal	LexisNexis	(2020) 35.1
JJS	Journal for Juridical Science	Free State University, Faculty of Law	(2019) 44.2
Obiter	Obiter	Nelson Mandela University	(2019) 40.3
PER	Potchefstroom Electronic Law Journal	North West University, Faculty of Law	(2020) 23
PLD	Property Law Digest	LexisNexis	(2020) 24.1
SAIPLJ	Southern African Intellectual Property Law Journal	Juta	(2019) 7.1
SAJCJ	South African Journal of Criminal Justice	Juta	(2019) 32.3
TPCP	Tax Planning Corporate and Personal	LexisNexis	(2020) 34.1
THRHR	Tydskrif vir Hedendaagse Romeinse-Hollandse Reg	LexisNexis	(2020) 83.1

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By Meshack
Fhatuwani
Netshithuthuni

Can the Energy Efficiency Programme be an obstacle to renewable energy transition?

South Africa's climate change mitigation and adaptation objectives

Energy is fundamental for the economic development of any country, and it should, therefore, be considered in economic development strategies. A number of developing countries are without energy services, making access to energy paramount, as development is not possible without energy services. As a developing country, South Africa (SA) is energy intensive and has a huge reliance on conventional sources of energy to drive its development goals, with its major energy source being indigenous coal. Coal is associated with a number of environmental effects, such as air pollution from the release of greenhouse gases that contribute to climate change. This makes coal unsustainable if continued unabated reliance on it intensifies. It is, therefore, important that measures to reduce energy intensity and reliance on conventional sources of energy are developed.

Energy efficiency framework and renewable energy transition

South Africa has a rather complex fragmented climate change framework to address energy efficiency and climate change. The framework is administered by different governmental departments, with different objectives and/or purposes. It is apparent that energy efficiency is lucrative in meeting sustainable development needs as it can directly and indirectly mitigate the effects of atmospheric pollution, which is linked with the burning of fossil fuels to generate energy. Policy and law are drivers of energy efficiency across the globe, including specific decision-making drivers such as a need for energy security, environmental conservation and mitigation of climate change. The drivers that give policy direction to energy efficiency differ between countries. Developing countries' policies are shaped by a need for more energy supply infrastructure and more efficient use of existing capacities, with less interest in mitigation of greenhouse gases.

South African energy efficiency was introduced through a range of policies, strategies and laws. A White Paper on the Energy Policy of the Republic of South

Africa was published in 1998, its main purpose was to provide SA with wider access to energy sources, while ensuring that the environmental impact of energy conversions and use are minimised in as far as possible. This was an initiative towards energy efficiency, as it was one of the cross-cutting issues identified in the policy. In 2004, a White Paper on the Renewable Energy Policy of the Republic of South Africa supplemented the White Paper on Energy Policy as a pledge of government's support to the development, demonstration and implementation of renewable energy sources for both small and large scale applications. Following which, the Department of Mineral Resources and Energy published the National Energy Efficiency Strategy in 2005 in response to the 1998 White Paper on Energy Policy. The objectives of the efficiency strategy were to encourage the development of the sustainable energy sector and efficient use of energy, thereby minimising undesirable impacts of energy usage on health and the environment, and to contribute towards securing affordable energy for all.

South Africa developed energy strategies, which aimed to improve energy efficiency and ensuring secured energy supply, therefore enabling, *inter alia*, the country to achieve its economic development goals. The Energy Security Master Plan – Electricity 2007 – 2025 was also developed to address energy requirements by providing low cost, high quality energy inputs to the industrial, mining and other sectors to achieve environmental sustainability of natural resources. Furthermore, laws were enacted to put the visions of the energy efficiency strategies into effect. These include the Electricity Regulation Act 4 of 2006 and National Energy Act 34 of 2008, whose objectives include promoting the diverse, efficient, effective and sustainable development of energy sources. Apart from energy efficiency sought by the abovementioned Acts, these laws also opened room for the development of renewable energy sources, which encompass wind, hydro, biomass, landfill gas and solar energy. It can be argued that this suggests that the energy efficiency programme supports a renewable energy transition, with wind and solar sources identified as potentially preferred energy sources.

Challenges to renewable energy and energy efficiency

I submit that poor implementation of the climate change and energy law regulations seem to be hindering the progress towards the realisation of the energy efficiency goals. For example, s 19(d) of the National Energy Act provides for the minister to make regulations regarding, *inter alia*, minimum contributions to national energy supply from renewable energy sources. No regulations under this Act have been enacted to date. South Africa is in a state of paradox in achieving sustainable development through moving towards renewable and sustainable energy production, while improving energy efficiency. The generation of energy is still hugely reliant on conventional sources of energy (namely, coal), reliance on renewable energy remains uncertain. The South African Renewable Energy Independent Power Producer Procurement Programme was designed to facilitate investment in renewable energy generation in the private sector. The Integrated Resource Plan for Electricity 2010 – 2030 is also aimed at achieving sustainable development objectives nationally, while simultaneously responding to climate change. It can be argued that environmental law is more advanced/established than energy law, it can be a meaningful tool in driving towards renewable energy. The misalignment between SA's energy laws and environmental laws proves challenging, with a lack of synergy between the two, although they both are driven toward the same goals.

Best avenues for climate change mitigation and adaptation

Climate change can be mitigated through a move from conventional sources of energy to renewable sources of energy, and through the improvement of energy efficiency. Energy efficiency can be improved through demand, side management and energy conservation awareness programmes that will translate to a behavioural change in consumers on energy consumption (Shirene A Rosenberg and Harald Winkler 'Policy review and

analysis: Energy efficiency strategy for the Republic of South Africa' (2011) 22.4 *Journal of Energy in Southern Africa* 67). Local government can be the best conduit in promoting small-scale renewable energy projects that if successful, would later be implemented at national level (Tumai Murombo and Willemien du Plessis 'Energy efficiency: New strategies for improving South African Energy Laws' IUCN Academy of Environmental Law).

Programmes aimed at improving energy efficiency and combating climate change have been successfully implemented in some South African municipalities. For example, the Ethekwini Municipality established an Environmental Planning and Climate Protection Department that plans for the mitigation and adaptation to the impact of climate change. It has, as such, developed -

- a Sustainable Energy Theme Report (aimed at generating 40% of Durban's electricity demand from renewable energy; improving energy efficiency in building, industrial and manufacturing operations; and ensuring access by all citizens to suitable energy forms in order to meet their needs); and
- Climate Change Adaptation Planning (to respond to environmental challenges faced by the world today).

The City of Cape Town has an action plan for energy and climate change that seeks to ensure energy security by, *inter alia*, introducing low carbon initiatives to energy efficiency, renewable energy and public transport. The City of Cape Town further developed a Climate Change

Policy in 2017 to become a city, which is climate resilient, resource efficient, with low carbon emissions towards environmental sustainability and socio-economic development.

On the other hand, Nelson Mandela Bay Municipality adopted an Integrated Environmental Policy that provides for efficient energy use, low carbon practices, and encourages the use of technology with minimal release of greenhouse gases, including reducing emissions from vehicles utilised by the municipality. Furthermore, the Nelson Mandela Bay Municipality developed a Climate Change and Green Economy Action Plan aiming to secure a climate resilient city with the objective to include a share of 50% growth in green economy business and 25% share of energy from renewable energy sources by 2025.

Conclusion

I argue that an energy efficiency programme is not an obstacle and/or barrier to a renewable energy transition. As stated above, I hold the view that local municipality initiatives prove to be the best avenue in promoting the objectives of the SA's climate change mitigation and adaptation. There is also a need for the alignment of energy policies and environmental management laws to ensure a balance in energy supply and climate change mitigation plans. I submit that the South African energy sector is rooted within the system that promoted innovation system centred on fossil fuels and did not allow room for independent

supply of energy, but monopolised to only two main energy providers, namely, Eskom (electricity) and Sasol (fuel), therefore, development in this regard is needed. South Africa needs a shift of investments in innovation from conventional sources of energy to renewable energy sources, as well as the promotion of independent power producers (IPP's) in order to realise sustainable development. In order to encourage more renewables into SA's energy mix, government needs to create a legislative, social and economic environment that is conducive for easy entry into the renewable energy market for IPP's. There is a marked increase in interest in generation capacity from renewables, which clearly indicates the intention to move away from heavy dependence on fossil fuel. South Africa shall integrate more renewables into its energy mix as is proven by the success of the South African Renewable Energy Independent Power Producer Procurement Programme. The laws in my view, possibly lack objectivity and are not insurmountable.

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The lethargy of the Constitutional Court justices to engage one another: Reflections on *Jacobs and Others v S* 2019 (5) BCLR 562 (CC)

By
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Judges account to the nation through their reasons. This assures society that judges make defensible decisions. In his article 'Mute Concurrence in the Appellate Division: Is Silence Golden?' (1979) 42 *THRHR* 419, Justice Cameron bemoaned the fact that in the 1978 term the Appellate Division delivered a number of unanimous decisions where no judge wrote a concurring opinion. In his view, that starved the court's jurisprudence of vigour. Whether this observation was correct is beyond the scope of this article. Besides, the Constitutional Court (CC) judges are not timid in producing

concurring opinions. For example, in *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC), Sachs J wrote a judgment wherein he concurred with both the majority and the minority judgments.

The disquiet that this article seeks to traverse is the level to which the judges of the CC are prepared to engage with one another's reasoning when there are disagreements. The fact that a judge is too timorous to express a concurring separate opinion is one thing, but engaging with a differing opinion is quite another. In relation to the former, the concurring judge may be providing an

emphasis or nuance and is, therefore, at liberty not to engage with every aspect of the judgment. The fact that judges may express differing opinions is not enough. There should be '[a]n agreed procedure for reaching responsible decisions' (Cameron (*op cit*)). This presupposes that judges who come to different conclusions or reach the same conclusions on different reasons must engage head-on with the views that expressly (even impliedly) contradict theirs.

The rationale for this is that society must be able to determine the basis of a particular decision. It is, therefore, not only unjustifiable but discourteous

when a judge does not only share the conclusions of a colleague, but also differs in relation to the factual matrix of the case and fails to set out the shortcomings of their colleague's conclusions and understanding of the factual matrix. This starves South Africa's (SA's) jurisprudence of rigour and vitality. Failure to engage does not bode well for SA's jurisprudence.

This is what happened in the *Jacobs* case. Although a number of articles have been written about this specific case, this article will be limited to the failure by the judges to engage one another's understanding of the factual matrix and reasoning.

In this case, the applicants had been convicted of murder on the basis of the common purpose doctrine. Although this article does not address the application of common purpose, suffice it to say that the CC was split on whether or not the application of common purpose engaged the jurisdiction of the court.

However, of concern is the manner in which the different judgments engaged each other on matters of divergence. There has not been a concerted effort to indicate why the judges did not agree on some aspects. For example, the applicants relied on *Makhubela v S*; *Matjeke v S* 2017 (12) BCLR 1510 (CC) for the proposition that the application of common purpose raised a constitutional issue and, therefore, engaged the jurisdiction of the court. Zondo DCJ (at para 132), with Theron J concurring (at para 56), relied on the passage from the *Makhubela* case where it was held that

the application of the common purpose 'is therefore far-reaching, and implicates the constitutional rights of freedom of the person and the right to a fair trial, including the right to be presumed innocent'. For Goliath AJ, however, the rationale for granting leave to appeal in the *Makhubela* case was not based on common purpose but on the fact that the applicant's co-accused had all been granted leave to appeal and subsequently their appeals were successful. The fact that the CC in the *Makhubela* case relied on a non-existing proposition expounded in the quotation above (not just the passage) from *S v Thebus and Another* 2003 (6) SA 505 (CC) weighed heavily with Goliath AJ (at para 45). Theron J and Zondo DCJ did not deal with the issue.

For Froneman J, even if the quoted passage formed part of the ratio it was made through the lack of care. Froneman J reasons that the lack of care stems from the fact that what was asserted in the *Makhubela* case flew in the face of what *Thebus*, the authority for the proposition, says (at paras 96 – 99). Given Froneman J's findings in relation to this (ie, that *Makhubela* relied on a non-existent authority), Theron J and Zondo DCJ had an obligation to deal with this matter head-on. Froneman J posits that if the authority to which a litigant relies was based on a non-existent authority and its proposition is wrong, such 'authority' is not good law (at para 101). What are the views of Theron J and Zondo DCJ in this regard? Failure to address this question by the latter amounts to a dereliction of duty. By having failed to address this is-

sue, the two judges have left SA's jurisprudence in limbo. In light of the *Jacobs* case, *Makhubela* is still good law despite resting on shaky grounds.

In relation to the facts, Theron J questions Goliath AJ's assessment of the facts. Theron J at para 68 states:

'[Goliath AJ] repeatedly states that the High Court made certain factual findings which were confirmed by the Full Court. Unfortunately it does not set out factual findings it refers to. On my reading of the judgments of these two courts, they made contradictory findings. ... The two courts had different reasons for their respective conclusions'.

The propositions by Theron J cry out for a reply. Should Goliath AJ not have pointed out the factual findings that have been confirmed by the appeal court that she referred to? It is not sufficient for Goliath AJ that the 'incorrect findings of fact do not raise constitutional issues' (at para 39).

Lastly, Froneman J, takes issue with Theron J's assertion that Goliath AJ's judgment does not accord with the record. According to him, such a judgment call cannot be made when the CC did not have full record evidence before them (at para 91 – 92). Unfortunately, Theron J and Zondo DCJ's judgment did not reply to this.

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By
E Herbert
Ludick

Judicial shadowing: Has the time arrived?

This may come as a shock to the purist.

Bryan A Garner in his article 'Learn the fundamentals of writing first – experiment later' (www.abajournal.com, accessed 9-4-2020) expressed the following views: 'Mastery of any discipline begins with imitation. You must know what's been done before, and you must know about technique. You must know the rules of the discipline so that you can produce consistently strong results. Otherwise, you're just acting in ignorance, and the quality of your results will be wildly variable – and generally poor.'

A Google search of the word 'discipline' produced the following result: '[T]he quality of being able to behave and work in a controlled way which involves obeying particular rules or standards' (www.collinsdictionary.com, accessed 9-4-2020).

To further illustrate the above, Mr Garner, uses the sport of golf as an example: 'Professional golfers may look very different from one another, but they're very much alike in the fundamentals – especially how the clubface, shoulders, feet and body look at the moment of impact with the ball. If there's variation among true experts, it's at the fringes. And all

true experts have begun by imitating their great predecessors'.

Now, you may ask, what this has to do with judicial shadowing?

The above was not written with judicial shadowing in mind. The lessons it teaches, however, are universal when it comes to technique and knowledge of the rules of a discipline.

Judicial shadowing is not new. Foreign jurisdictions such as England and Wales encourage those who are interested in serving on the Bench to avail themselves to shadow judges.

The Judicial Work Shadowing Scheme as it is known in England and Wales is

administered by the Judicial Office and supported by Her Majesty's Courts and Tribunals Service.

Many an appointee to the Bench has expressed gratitude for being able to shadow judicial officers prior to taking on an acting appointment.

It is, therefore, mind boggling that some candidates take on an acting appointment without familiarising themselves with life on the Bench, so to speak. On the other hand, this may not be important to those candidates with previous judicial experience.

Further, s 174(2) of the Constitution provides that the judiciary should broadly reflect the racial and gender composition of South Africa.

There seems to be a problem with attracting female candidates to the Bench

for several reasons. In my opinion, judicial shadowing provides prospective candidates with the opportunity to assess whether life on the Bench would suit them. This can be done in their own time and crucially without the rigors of an acting appointment.

I strongly suggest that would be candidates, when shadowing a judge, take full advantage of the opportunity.

Enquire about how to pace yourself when acting (similar to preparing for a marathon). Spending time on the road in preparation for the big event, equates to an understanding of the fundamentals, namely law of evidence and procedure and how to pace yourself throughout the race (how to work smart).

More specifically, how does a judge prepare for judgment in a lengthy trial

(ie, summarise evidence each day as you go along), and how does one make a credibility finding after one has scrutinised/analysed the evidence of all the witnesses who have testified in a specific matter.

Lastly, in my opinion, to be an accomplished judge comes down to some creativity and an application of the fundamentals.

Most important, however, judges impress on candidates that they do not need a box.

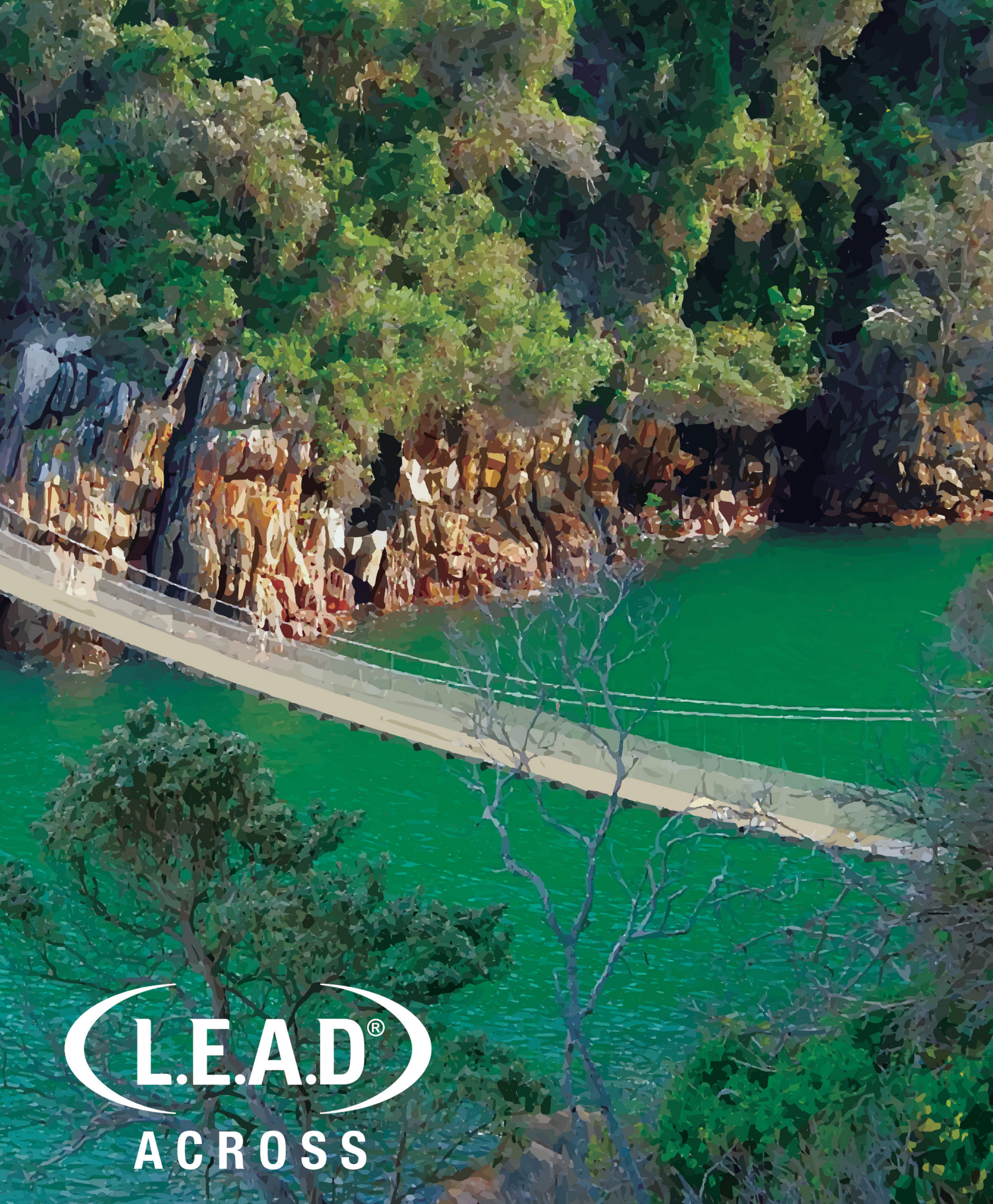
E Herbert Ludick *BProc LLB (UWC)* is a legal practitioner at EHL Attorneys in Durban. Mr Ludick is admitted to the Roll of Solicitors of England and Wales. □



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