

GOVERNMENT'S RESPONSE TO COVID-19: HAS THE BILL OF RIGHTS BEEN GIVEN EFFECT TO?

Three principal ways COVID-19 will affect
South African jurisprudence
in bail proceedings

Should sex workers be
classified as essential
workers?

The impact of COVID-19
on the property sector –
how does it influence
property values and
possible litigation?

Remote commissioning of
affidavits: Who can commission
them and how is it done?

Practical tips for legal practitioners
working from home

*The duty of support in the context of a
permanent universal partnership*

Faith in the
time of lock-
down: A
Constitutional
right to
freedom of
religion

How will
COVID-19 impact
the buying and/or
selling of property?

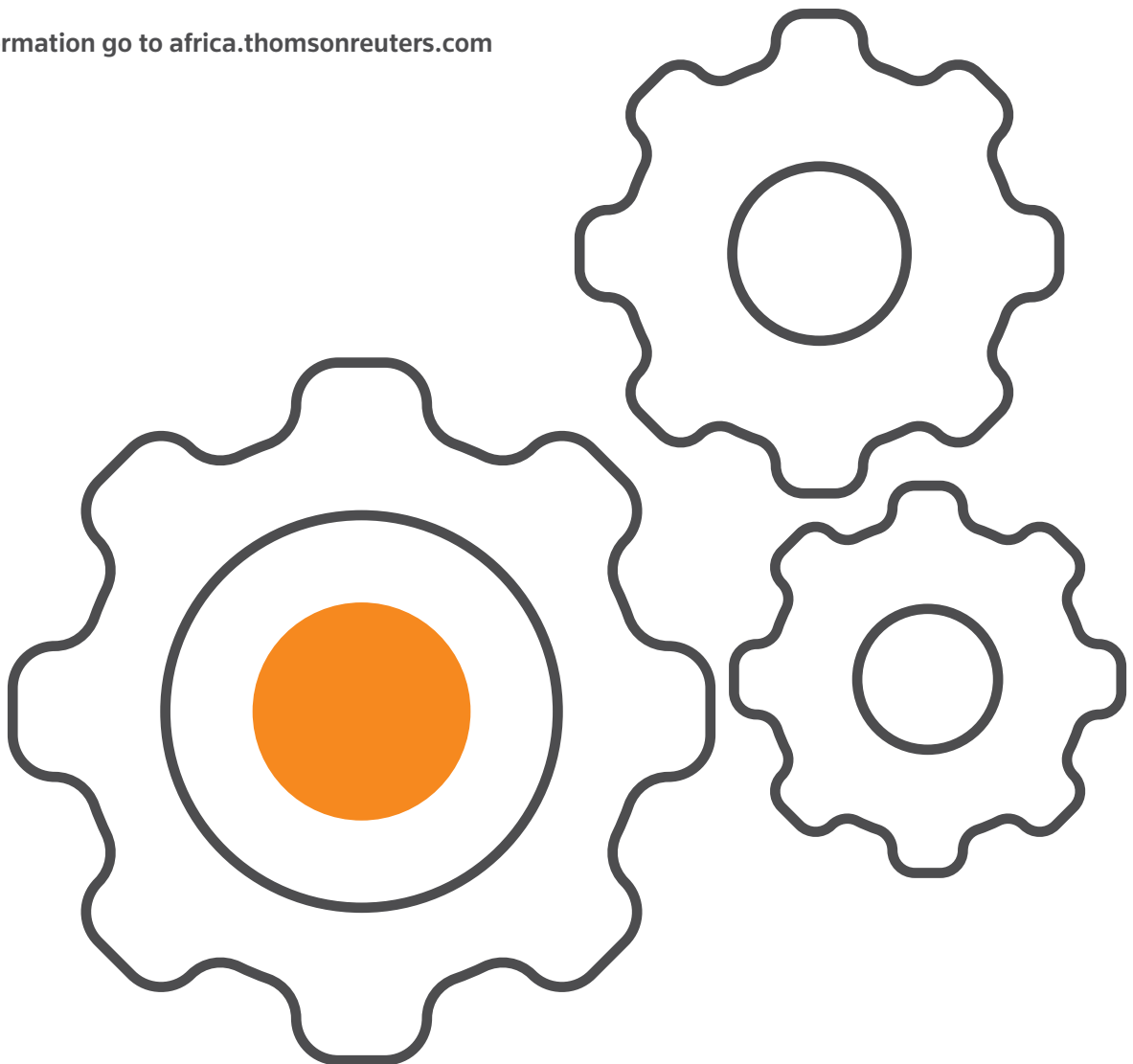




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9	GOVERNMENT'S RESPONSE TO COVID-19: HAS THE BILL OF RIGHTS BEEN GIVEN EFFECT TO?	
14	The impact of COVID-19 on the property sector – how does it influence property values and possible litigation?	
22	Remote commissioning of affidavits: Who can commission them and how is it done?	
6	Practical tips for legal practitioners working from home	
7	The duty of support in the context of a permanent universal partnership	
	Three principal ways COVID-19 will affect South African jurisprudence in bail proceedings	17
	Should sex workers be classified as essential workers?	11
	Faith in the time of lockdown: A Constitutional right to freedom of religion	20
	How will COVID-19 impact the buying and/or selling of property?	6

Articles on the *De Rebus* website published in May:

- SCA successfully holds court proceeding via online video platform
- Deputy Minister says the executive, the judiciary and the DOJ should work together to help flatten the curve of COVID-19
- Access to courts will be limited in level 4 of the national state of disaster
- Chief Justice issues directives that will remain in place during the national state of disaster period
- Candidate legal practitioners get advice from High Court judges
- BLA requests six to 12 months funding for small law firms affected by the lockdown
- Legal practitioners associations react to Brauckmann AJ's judgment
- Drafting and execution of wills should be declared an essential service says FISA
- Lockdown will be gradually phased out



Regular columns

Editorial 3

Letters to the editor 4

Practice management

- Practical tips for legal practitioners working from home 6

Practice notes

- How will COVID-19 impact the buying and/or selling of property? 6
- The duty of support in the context of a permanent universal partnership 7

The law reports 25

Case notes

- The failure to mention the minimum sentence provisions in a charge sheet or indictment and the interest of justice 29
- Briefly highlighting the importance of control in an increasingly digitalised world 29

New legislation 30

Employment law update

- Unfair labour practice in relation to a promotion 32

Recent articles and research 33

Opinion

- A court at war with practitioners 34
- Observing refugee and asylum processing centres through a constitutional lens 35

FEATURES

9 Government's response to COVID-19: Has the Bill of Rights been given effect to?

Legal practitioner, **Tanya Calitz**, discusses the fact that we are currently in an invisible and non-quantifiable storm called COVID-19, however, during a pandemic, government should never lose sight of basic human rights. In fact, it should prioritise the realisation and protection of human rights in such a time even more so. In her view, the Bill of Rights has not been given effect to during the lockdown.

11 Should sex workers be classified as essential workers?

Sex work does not constitute an essential service in South African employment laws. However, faced with s 23 of the Constitution stating that 'everyone' has the right to fair labour practices and the definition of employee in the LRA, which does not expressly exclude sex workers. Legal practitioners, **Koshesayi Madzi** and **Kazimbini Mnono**, suggest that sex workers stand at a vulnerable position and that they could be afforded protection during the COVID-19 pandemic.

14 The impact of COVID-19 on the property sector – how does it influence property values and possible litigation?

The measures implemented to contain the spread of COVID-19 have had severe consequences on the property sector. The impact is far wider than just foregone rent, but includes the downstream influence of income received and spent in the economy and negative growth of new entrants to this sector. Property is a fixed asset, a scarce resource and mostly indestructible. Hence, property forms a very critical part of the economy. Professional Valuer, **Dr Douw Boshoff**, examines ways of determining the impact on individual properties and asks what can be expected of property values in the short to medium term future.

17 Three principal ways COVID-19 will affect South African jurisprudence in bail proceedings

The COVID-19 pandemic has had profound consequences on the criminal justice system. Chief Justice Mogoeng Mogoeng issued directives for the management of courts during the lockdown period and courts across the country have closed their physical doors and opened virtual ones. This has catapulted the criminal justice system, quite suddenly, into the 21st century. Most significantly, the evolving substantive criminal law jurisprudence has seen a profound impact in the area of bail proceedings. Magistrate, **Desmond Francke**, looks at three principal ways this pandemic will affect bail proceedings.

20 Faith in the time of lockdown: A Constitutional right to freedom of religion

It is not evident whether, in the absence of any reference to the manifestation of religious practice in s 15(1) of the Constitution, religious practice should be regarded as protected in the group rather than individual freedom. Legal practitioner, **Mohammed Moolla**, discusses whether religious bodies have the right to open their places of worship during lockdown.

22 Remote commissioning of affidavits: Who can commission them and how is it done?

South Africa's (SA's) legal system depends significantly on evidence being supplied by affidavits. Deponents are, however, not always based in SA and may be unable to attend to commissioning through the overseas processes available to them, such as when the deponent is on a cruise, working remotely, or in a rural country without consular assistance. Could new laws simplify this conundrum? Legal practitioner, **Peter Otzen** and Pupil, **Aran Brouwer** ask this question and examine whether these new laws do so sufficiently to allow a commissioner based in SA to commission a document remotely, through a video call?

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Legal questions brought by COVID-19

As South Africa moves to Level 3 of the COVID-19 Risk Adjusted Strategy, the country and indeed the legal profession has had to grapple with the new regulations implemented by government in order to safeguard the population against the spread of COVID-19. As evident from the articles published in this month's issue of *De Rebus*, many legal questions have arisen from living the new normal.

Our cover feature article traverses the question whether government took the Bill of Rights into consideration with its reaction to the pandemic. Government has a monumental task of balancing the scales between ensuring that the rights of its citizens are protected, while ensuring that the pandemic does not bring the country's health system to its knees. In the article 'Government's response to COVID-19: Has the Bill of Rights been given effect to?' legal practitioner, Tanya Calitz, writes: 'During a pandemic government should never lose sight of basic human rights. In fact, it should prioritise the realisation and protection of human rights in such a time even more so. Clearly, the Bill of Rights has not been given effect to. A pro-human rights lockdown would have perhaps looked much different –

- military officials would have acted more humanly;
- lockdown regulations would have not been equally strict over different parts of the country and would have taken into account personal living conditions of the poor; and
- the fulfilment of human rights would have been the most important priority to attain' (see p 9).

The lockdown also brought about changes within the legal system with numerous directives being issued. Legal practitioners have had to ensure that they have access to the latest information pertaining to the courts they serve. One of the feature articles in this issue deals with the three principal ways this pandemic will affect bail proceedings. In the article 'Three principal ways COVID-19 will affect South African jurisprudence in bail proceedings' Magistrate Desmond Francke looks at the ways this pandemic will affect bail proceedings, which are:

- First, as a material change in circumstances justifying a new circumstance or fact to reconsider a bail decision.
- Second, as a factor affecting public safety under the grounds for detention at s 60(4)(e) of the Criminal Procedure Act 51 of 1977 (CPA), where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.
- Third, as a factor relevant to public confidence in the administration of justice under the detention at s 60(9) of the CPA, which states that '[i]n considering the question in subsection (4) the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody' (see p 17).

On 24 May, in his speech to move the country to Level 3 of the Risk Adjusted Strategy, President Cyril Ramaphosa said: 'We have had fruitful discussions with leaders of the interfaith religious community on their proposals for the partial opening of spiritual worship and counselling services subject to certain norms and standards. We have all agreed to have further discussions on this issue and are confident we will find a workable solution.' Religion is an important part of the lives of many South Africans. In the article 'Faith in the time of lockdown: A Constitutional right to freedom of religion', senior



Mapula Sedutla – Editor

magistrate Mohammed Moolla, discusses whether religious bodies have the right to open their places of worship during the nationwide lockdown (see p 20).

As can be seen above, the June issue is centred around topics pertaining to the COVID-19 pandemic.

See also –

- Practical tips for legal practitioners working from home (see p 6);
- How will COVID-19 impact the buying and/or selling of property? (see p 9);
- Should sex workers be classified as essential workers? (see p 11); and
- The impact of COVID-19 on the property sector – how does it influence property values and possible litigation? (see p 14).



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: 22 June and 20 July and 17 August 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.

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

I refer to the article by Paula Gabriel 'Can victims of revenge pornography rely on POPI's protection?' 2020 (April) *DR* 14.

Firstly, the author does not consider the possibility of the communication being entirely out of the scope of the Protection of Personal Information Act 4 of 2013 (POPIA) as a result of it qualifying for the exclusion in terms of s 6(1) (a) of POPIA, which exempts 'purely personal or household activity'. For example, a man may send naked images of his ex-girlfriend to his friends. As this is outside of any commercial activity he engages in, one would argue that this is a 'purely personal' activity as defined in POPIA and so this would be entirely excluded from the ambit of POPIA.

Secondly, revenge porn is explicitly dealt with in s 19 of the Cybercrimes Bill B6 of 2017 (www.esselaar.co.za) where the act referred to in the above example would result in a conviction of up to three years of imprisonment and/or a fine. This section also criminalises a situation where the friends who receive the image in the above example forward it to their contacts. This Cybercrimes Bill is currently in its final stages and was likely to be enacted very soon, however, due to the national lockdown it has been delayed. Once enacted, I would submit

that this would be the more appropriate path to take in the case of revenge porn.

**Paul Esselaar LLB (Rhodes)
LLM (Electronic Law) (UCT)**
is a legal practitioner at Esselaar
Attorneys in Cape Town.

Reply to Mr Esselaar

I would like to thank Mr Esselaar for taking the time to reply to my article: 'Can victims of revenge pornography rely on POPI's protection?' 2020 (April) *DR* 14.

Mr Esselaar's point is well made that there may indeed be instances where an act of distributing revenge pornography falls within the household exemption, as provided for in s 6 of the Protection of Personal Information Act 4 of 2013 (POPIA). However, I would argue that a perpetrator of revenge pornography should not be able to rely on the household exemption for protection in cases where his behaviour is not only contrary to the *boni mores* of society, but where his behaviour is also criminalised by the Cybercrimes Bill B6 of 2017, as well as the Films and Publications Amendment Act 11 of 2019.

It could also be argued that it makes a difference whether the man in Mr Esselaar's example shares the photo of his girlfriend with just a few of his friends, or whether he posts it on an open social network. It is interesting to note that the

European Court of Justice in its *Bodil Lindqvist v Aklagarkammaren i Jönköping* Case C-101/01 and *Tietosuoja-oikeus v Satakunnan Markkinapörssi Oy and Satamedia Oy* Case C-73/07 judgments recommended that a distinction should be made between data that is disseminated to a finite or an indefinite number of individuals.

Secondly, the criminalisation of revenge pornography in the Cybercrimes Amendment Bill is certainly a positive legal development and is similar to the protection offered to victims of revenge pornography in the Films and Publications Amendment Act. Once enacted, both will offer desirable courses of action. However, my concern is court processes take time, and that by the time a perpetrator is convicted the reputational damage to the victim is done. The point of my article was thus to ask whether POPIA might be able to offer more immediate relief, not instead of the other available remedies, but in addition to them.

Paula Gabriel BMus MMus (UCT) LLB (Unisa) is an advocate in Cape Town.

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

The South African Constitution has a general limitation clause (s 36) that



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states that rights may be limited by a law of general application that is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.

What is the level 4 lockdown? Is it a limitation of rights or suspension of civil rights and *habeas corpus*? To the best of my knowledge, governments can impose such harsh measures under a state of emergency, which has not been declared. Lockdown is unconstitutional as it is cruel to impose an unusual punishment that leads to the suffering, pain, or humiliation it inflicts on the persons subjected to the sanction. The precise definition varies by jurisdiction, but typically includes punishments that are arbitrary, unnecessary and overly severe compared to the crime, and not generally acceptable in society.

The South African government is a member of the International Covenant on Civil and Political Rights (ICCPR) and, it is prevented by that membership, from suspending non-derogable rights of citizens. Non-derogable rights are listed in art 4 of the ICCPR and art 5, 6 and 7 includes the right to life, the right to freedom from arbitrary deprivation of liberty, slavery, torture, and ill-treatment. Regimes often declare a state of emergency, which is prolonged indefinitely for the life of the regime, or for an extended period of time so that deroga-

tions can be used to override the human rights of the country's citizens.

Tim Singiswa *Dip Multimedia Development Dip Legal Studies Dip Business and Legal Studies (Alison University)* is a business owner in Cape Town.

LPC's disturbing silence regarding lockdown and financial implications to legal firms

I want to express my concern at the disturbing silence from both the Legal Practice Council (LPC), as well as the Northwest Provincial Council during the lockdown, specifically their absence from negotiations for financial assistance of small and medium law firms.

We see in the media that the retail sector received relief from rent, and the manufacturing and some other sectors are to get special investment plan assistance through government funding. Yet, we do not hear what our governing councils are negotiating for us, the legal profession. There is no relief as to rent, other overheads, no increased fees, and no appeal against the judgment in *Mpumalanga (Administrator of Dr JS Moroka Municipality and Others v Kubheka)* (MM

(unreported case no 1170/20, 3-4-2020) (Brauckmann AJ)) regarding the forfeiting of fees (see Kgomo Ramotsho 'Legal practitioners traveling with no proper permits during lockdown may face possible criminal prosecution' 2020 (May) DR 26).

Will it be possible to hear from the LPC why they are seemingly not negotiating anything for legal practitioners? Why no special regulations for increased fees? Why has there, for example, been no statement that our membership fees should be decreased?

Bertus J van Vuuren legal practitioner.

- *De Rebus* afforded the Legal Practice Council a right of reply. No reply was received at the time of going to print.

- Editor



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Practical tips for legal practitioners working from home



By Odwa Nweba and Nikita Roode

In his address to the nation on 23 March, President Cyril Ramaphosa announced that South Africa (SA) would be placed under lockdown in an attempt to stop the further spread of COVID-19 in SA.

During the lockdown period, most legal practitioners have been forced to work from home. Working from home undoubtedly comes with various challenges for both employees and employers. We have accordingly formulated a few tips, from our own experience, which we have found to be beneficial when working from home.

- Create a task list, which indicates those tasks that you need to complete by the end of the day or during the week. It is easier to continue working productively from home when you have clearly identified tasks that you

need to complete. You may consider noting your tasks on a notepad and marking them as 'completed' as you proceed with your tasks. At the end of the day, you can revisit your notepad to ensure that you have completed all the tasks that you set out to achieve during the day and you can adjust your task list for the next day accordingly.

- Create or designate a workstation at home. It is important that the workstation is comfortable and presents you with minimal distraction. Working with the television in view may not be conducive for a productive working day, especially if you are easily distracted.
- Manage your time, especially considering the number of tasks scheduled for the day. Do not take extended breaks

if you cannot afford to do so. Rather use additional time to work on earlier uncompleted tasks or tasks that must be performed at a later stage. Get ahead while you have the opportunity.

- Stay hydrated. It helps to maintain concentration levels. Also, avoid big meals and alcohol during the day, especially with your bed now being more accessible than ever.
- Where possible, try to stick to a normal working day routine. This entails getting out of your sleepwear and getting into a work mind set.
- Consider using a communication platform to liaise with colleagues and to mentor and supervise candidate legal practitioners. Platforms, such as Microsoft Teams, allow you to work collaboratively with individuals or groups. For video conferencing, you may consider using platforms such as Microsoft Teams, Google Hangouts, Skype or Zoom.
- To avoid distraction, place your phone on silent while you are working.
- Finally, when the time comes to switch off, try to do so without feeling guilty or thinking about your work. Relax, you deserve it.

Odwa Nweba LLB (UFH) Compliance Management (UCT) and Nikita Roode LLB (Stell) are legal practitioners at the Stellenbosch University Law Clinic.



By
Junior
Sidzumo

How will COVID-19 impact the buying and/or selling of property?

Following the announcement by President Cyril Ramaphosa on 23 March of a 21-day nationwide lockdown and then the announcement of the extension of that lockdown due to the COVID-19 pandemic, many people who are contemplating on buying or selling their property are likely to put their plans on hold. If you are a property buyer, the impact that the pandemic has on you will depend on what stage of the buying pro-

cess you are in. If you are at the beginning stages and contracts have not been signed by the parties involved, it is recommended that you hold off on the process until there is certainty regarding the crisis. Those who find themselves in the middle of the transfer process will be tempted to do everything they can to speed up the process and make sure that the transfer and registration of the property is registered.

Similarly, estate agents and convey-

ancers will have to react strategically to this pandemic, both in the short-term and the longer term. At the time of writing this article, the Deeds Offices were closed due to the COVID-19 crisis and property transfers will be delayed until the Deeds Offices re-open. The COVID-19 crisis also has an impact on the occupancy date of the buyer due to the strict rules of lockdown. So, if the buyer's occupancy to the new property falls during the lockdown period, the

buyer will most likely be required to put their occupancy on hold, until an undetermined future date. This may have several implications on the buyer, such as making alternative plans for living arrangements, termination of leases being re-negotiated should they have been terminated in anticipation of the buyer occupying their new property.

In order for a party in a property transaction to protect themselves during this period, I recommend the following:

- In terms of the delayed occupancy to the property affecting the buyer, the buyer could, for example, charge the seller 1% of purchase price per month also known as occupational rent. The buyer and the seller can also agree to other occupational rent terms, which could be less or greater than the 1% or they may also agree to no fee at all.
- If you have already exchanged con-

tracts and the property is currently occupied, then both parties (the buyer and the seller) can amicably agree on alternative dates to proceed with the move.

- Should the buyer be at the end of their lease agreement, then the buyer should renegotiate their lease agreement with their landlord.
- Where there is a delay in the transfer, the buyer should contact their conveyancer/estate agent for advice on actions to be taken, in order to safeguard the buyer's interests.
- Estate agents can draft 'offer to purchase' agreements with a suspensive condition that stipulates that the purchase will only go ahead once the property has passed a physical home inspection, which can be conducted once the lockdown has been lifted.
- Sellers are free to continue to accept

offers on your property, however, the process of selling the property may take longer than usual.

- Estate agents, as well as conveyancers can carry out video consultations with their clients through video conferencing applications, such as Zoom, WhatsApp, Skype and FaceTime, to name a few.
- Conveyancers should continue to support the sales process as far as possible and should make sure their clients are aware of the difficulties of completing transactions in this period.

Junior Sidzumo LLB (UWC) is a legal practitioner at Landen Attorneys in Johannesburg. □



By
Delon
Small

The duty of support in the context of a permanent universal partnership

There is often a duty of support between partners in relationships that are recognised by South African legislation, but can this legally protected duty of support exist in other relationships, such as a permanent universal partnership?

This article endorses the opinion that the legally protected duty of support extends to heterosexual universal life partners and that the common law should allow claims for support on the dissolution of the partnership.

Permanent universal partnership

South African courts have over the years defined a permanent universal partnership as an arrangement between parties who act like partners that both contribute to the partnership for their joint benefit/enrichment with the main aim of making a profit (see *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA) at para 24; and *Le Roux v Jakovljevic* (GP) (unreported case no 14/05429, 5-9-2019) (Opperman JJ)).

The courts have confirmed that a written or oral agreement is not necessary to establish a permanent universal

partnership, and that a tacit agreement (as determined by the intention of the parties through the context and parties' conduct) suffices.

To amplify understanding of a permanent universal partnership, a tacit agreement is reached if it is more probable than not, given the circumstances (see *Mühlmann v Mühlmann* 1984 (3) SA 102 (A) at para 124C -D).

Case law on the duty of support

The reciprocal duty of support is a fundamental part of any relationship. The court recognises different relationships from which this duty arises and it is, therefore, not solely limited only to relationships that are recognised by South African law.

The duty of support cannot exist by the operation of law (through legislation) unless the parties belong to a legally recognised social institution (such as a marriage or civil union), but this duty can emanate from a permanent universal partnership and be protected by the common law.

Volks judgment

The Constitutional Court case of *Volks*

NO v Robinson and Others 2005 (5) BCLR 446 (CC) is the leading authority on the duty of support outside the context of statutorily recognised social institutions.

The surviving partner, in this case, and the deceased were in a heterosexual life partnership. The surviving partner attempted to claim from the estate of the deceased through the Maintenance of Surviving Spouses Act 27 of 1990 (the Act). However, the surviving partner was unsuccessful as the relationship was not recognised by the Act.

The court in *Volks* confirmed that there are legal rights that arise from social institutions recognised by legislation. The court further stressed the fact that partners are free to decide on being regulated by this legislation, and it cannot allow partners (who have decided otherwise) access to these rights. In light of this, the court refused to extend this statutory protection to partners who were in unmarried heterosexual relationships.

The minority judgment, however, did mention that certain relationships, such as a universal partnership, arising from tacit agreements can be afforded legal protection.

The court, therefore, recognises two

instances where there is a legally protected duty of support between partners, by either legislation or a contract.

Paixão judgment

The leading case on a contractual duty of support between partners is *Paixão and Another v Road Accident Fund* 2012 (6) SA 377 (SCA). The court in the *Paixão* case dealt with a claim for loss of support by a previous heterosexual universal partner of the deceased.

In *Paixão* the court considered, among others, whether an agreement existed, and what was the *boni mores* or communities' convictions toward this agreement. It is the latter question that determines whether the existing agreement (and duty of support) should be provided the protection of the law.

After considering society's view, together with the need to extend common law to afford the necessary protection to unmarried heterosexual partners, the court upheld the appeal and allowed the claim against the Road Accident Fund to succeed.

The court *in casu* held that there was a duty of support between the partners

that should be afforded common law protection, and it is on this basis that a claim for loss of support was successful.

Common law development

Common law should always develop and align with societal norms. Formal social institutions are currently less pursued, and parties rather favour cohabitating or less formal relationships, such as a permanent universal partnership. This is influenced by, among others, social, cultural, legal, religious, and financial reasons.

Partnerships should, therefore, be further protected by our legal system. The well-anticipated draft Domestic Partnerships Bill, 2008 that legislators are currently deliberating over is the first step in the right direction.

The Divorce Act 70 of 1979 only allows ex-spouses of a marriage or ex-partners of a civil union to claim for maintenance, but, this protection is founded on the reciprocal duty of support that is fundamental to many other relationships.

Considering that universal partners have this same duty of support, and the courts (through the common law) have

afforded relief on this basis, the common law should be further extended to allow for a separated universal partner to claim maintenance from their ex-partner if they remain dependent on this support.

Conclusion

In light of the above, there can be a duty of support between universal partners, and common law has – in the past – been extended to allow for universal partners to be afforded the same protection as spouses to a marriage.

Therefore, a claim for support by a previous universal partner should be allowed, and the extent of this duty should be *sui generis*.

In conclusion, it is of paramount importance for the court to acknowledge the dynamic nature of societal norms and the need for the common law to be versatile when deciding on this duty of support.

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Government's response to COVID-19: *Has the Bill of Rights been given effect to?*

By
Tanya
Calitz



Under the heading 'The virus does not discriminate; but its impacts do', the United Nations policy brief on 'COVID-19 and Human Rights' states: 'Responses need to be inclusive, equitable and universal – otherwise they will not beat a virus that affects everyone regardless of status. If the virus persists in one community, it remains a threat to all communities, so discriminatory practices place us all at risk. There are indications that the virus, and its impact, are disproportionately affecting certain communities, highlighting underlying structural inequalities and pervasive discrimination that need to be addressed in the response and aftermath of this crisis' (United Nations Covid-19 and Human Rights www.un.org, accessed 14-5-2020).

We are currently in an invisible and non-quantifiable storm called COVID-19.

COVID-19 originated from Wuhan, China, and the first patient in South Africa (SA) tested positive for COVID-19 around early March. Soon thereafter, the number of positive cases dramatically increased. President Cyril Ramaphosa responded and declared a national state of disaster in accordance with the Disaster Management Act 57 of 2002. A

nation-wide lockdown was further introduced whereby the national government released lockdown regulations and implemented support measures across various sectors. At the time of writing this article, South Africa entered day 54 and level 4 of lockdown.

COVID-19 is a fierce pandemic with numerous deaths across the world and unfortunately there is no date on our calendar, which we can circle, to indicate when the storm will finally pass. Yes, there are unprecedented hardships on

social, political, health, and economic sectors, but even more so on basic human rights. These distresses are felt more harshly by the least protected in society who do not have access to adequate housing, clean running water, health care, food, or social security, which are all guaranteed basic human rights.

Simply put, the Constitution is based on transformative constitutionalism, which is the principle of achieving equality and eradicating inequality. This notion is closely linked to the fulfilment of socio-economic rights and guards against an excessive use and misuse of public or state power, which exploits the poor and vulnerable. It requires the state to be proactive and work towards transforming our society into a more equal one by ensuring that the rights under the Bill of Rights are realised.

Although a declaration of a national state of disaster permits limitations of rights subject to the limitation clause in s 36 of the Constitution, the question that arises is whether these rights are still given effect to during a national state of disaster, even if partly limited.

Section 21 of the Constitution guarantees the right to freedom of movement and residence, which has been severely limited due to strict lockdown regulations, which include the avoidance of physical proximity and local and international travel bans. For most people, especially the poor and vulnerable, the limitation of this constitutional human right directly affects their employment and livelihood with some expressing that they would rather die of COVID-19 than of hunger.

The right to access adequate housing is something, which has been overlooked by government for decades. The majority of informal settlements do not provide adequate housing and are not geared to face a pandemic. The right to

health care services and water as envisaged in s 27 of the Constitution has been severely impacted due to the fact that most informal settlements do not have clean potable water or access thereto, which makes practising good hygiene an impossible task to adhere to.

The protection of inherent human dignity is another constitutional right guaranteed in s 10 of the Constitution. While it goes without saying that the loss of employment or livelihood impact on one's dignity; the rapidly increased rate of gender-based violence during lockdown raises concern and alarm. Women and men are beaten and abused by their partners while being compelled by law to stay inside their homes. They cannot run or escape and are left helpless.

The South African National Defence Force (SANDF) has been deployed in order to enforce lockdown regulations, especially in informal settlements, where strikes and riots have been ongoing. There have been reports that the military have used unreasonable force, brutality, and violence toward people in informal settlements, as well as rubber bullets and tear gas to prevent people from violating lockdown regulations. The military gathers at and guards over informal settlements for all the wrong reasons – to attack as soon as someone is seen in public and who is merely suspected of violating the lockdown regulations. Demanding people to roll in mud and violently assaulting them without reason are clear human rights abuses and undermines the rule of law.

On 15 May, a 79-page judgment was handed down in *Khosa and Others v Minister of Defence and Military Veterans and Others* (GP) (unreported case no 21512/2020, 15-5-2020) (Fabricius J). The judgment was based on an urgent application relating to lockdown brutality, where one Khosa, was brutalised and murdered by members of the SANDF on 10 April at his home in the Alexandra informal settlement. The founding affidavit states that Khosa was choked, kicked, and slammed against a cement and steel wall for allegedly violating the lockdown regulations. Three hours after the incident, Emergency Services arrived on the scene and declared Khosa dead due to a blunt force head injury.

In this judgment, the court reaffirmed that state brutality in the form of torture or cruel or inhumane treatment is a clear violation of the Constitution, as well as other international human rights law conventions. The court also highlighted the SANDF's responsibility to protect human rights, act in accordance with the Constitution and to make use of minimum force, if necessary. More significantly, the court held that even though a lockdown is necessary, the public is still entitled to be treated with dignity and re-

spect whether rich or poor. Among other things, the court ordered that the first to fourth respondents (members of the SANDF) be placed on precautionary suspension pending the outcome of disciplinary proceedings.

This judgment serves as a beacon of hope, which reassures and compels the protection of basic human rights, even more so by the SANDF, who should protect the public and abide by the rule of law.

In light of this recent judgment, the SANDF should rather take hands with the various community leaders and implement 'community-oriented policing/patrolling' in order to keep the informal settlements compliant and safe without using unreasonable force and violence.

President Ramaphosa and the government have stepped up and displayed courageous leadership during the national state of disaster. Despite making millions of Rands available that enable various funding packages, such as relief schemes, emergency water and sanitation provision to informal settlements, an increase in the amount of social grants, and the distribution of food parcels across the country, corruption and its key players still loom around every corner, ready to loot whatever comes their way and fill their own pockets.

In his address to the nation on 21 April, President Ramaphosa indicated that a temporary six-month grant will be paid to grant beneficiaries. Child support grant beneficiaries will receive an extra R 300 in May and from June to October, an additional R 500 each month. All other grant beneficiaries will receive an extra R 250 per month for the next six months. In addition, a special COVID-19 Social Relief of Distress grant of R 350 a month for the next six months will be paid to individuals who are currently unemployed and do not receive any other form of social grant or unemployment insurance fund payment. These are indeed noble and noteworthy support measures, but who will keep the President and the Department of Social Development accountable? How will the South African Social Security Agency (SASSA) keep track of the families in dire need and ensure that they are assisted? Who will ensure that these funds are not exploited by corrupt officials and reach those that it is intended to reach?

Evidently, we can have the greatest support and relief measures in place, but in the absence of transparent and accountable governance and good stewardship, these measures are all futile in the fight against COVID-19.

Ultimately, s 7(2) of the Constitution places an obligation on the state – who is the guardian of human rights – to protect human rights. The availability of resources and funding come into play

during a pandemic, however, the state should ensure that a balance is achieved between fulfilling human rights for the poor and the rich alike. This means that when regulations and measures were implemented, their effect and practicality on both the poor and the rich should have been evaluated carefully. Insisting that all people stay indoors for weeks on end cannot be seen as equal treatment between a shack dweller sharing a shack with five other family members and a middle-class family spoiled with a double-storey house and ample space for recreational activities and movement. The increasing limitation and violation of human rights in the wake of enforcing COVID-19 measures is simply a re-inforcement of government cracks that have been embedded in South Africa's deep societal imbalances.

SASSA should similarly implement a transparent system to determine, which vulnerable families must be assisted, and to ensure that no family is left out. To this end, it is advisable for them to get in touch with local non-governmental organisations, shelters for the homeless and even churches to gain more information on the whereabouts of people who desperately require assistance. It is likely that there are thousands of people who have neither applied for social grants nor are registered with SASSA and without a transparent system in place, these people are overlooked.

Strict action must be taken against government looters. They should be prosecuted and held accountable for their unlawful conduct. The government should also establish a monitoring committee of sorts, possibly governed by the National Prosecuting Authority, to oversee how, when, and where funding and food parcels are distributed. This should also be communicated to the public.

During a pandemic, government should never lose sight of basic human rights. In fact, it should prioritise the realisation and protection of human rights in such a time even more so. In my view, the Bill of Rights has not been given effect to. A pro-human rights lockdown would have perhaps looked much different –

- military officials would have acted more humanly;
- lockdown regulations would have not been equally strict over different parts of the country and would have taken into account personal living conditions of the poor; and
- the fulfilment of human rights would have been the most important priority to attain.

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Should sex workers be classified as essential workers?



By Koshesayi Madzika and Zimbini Mnono

C OVID-19, an infectious disease broke out in the Hubei province of China spreading across the globe. The spread of this ongoing pandemic has been rapid and consequently many countries have been affected. One of the affected countries is South Africa (SA). Amidst the chaos spread by the virus, the South African government has put measures in place to try and curb the number of infections. Among these measures is the enforce-

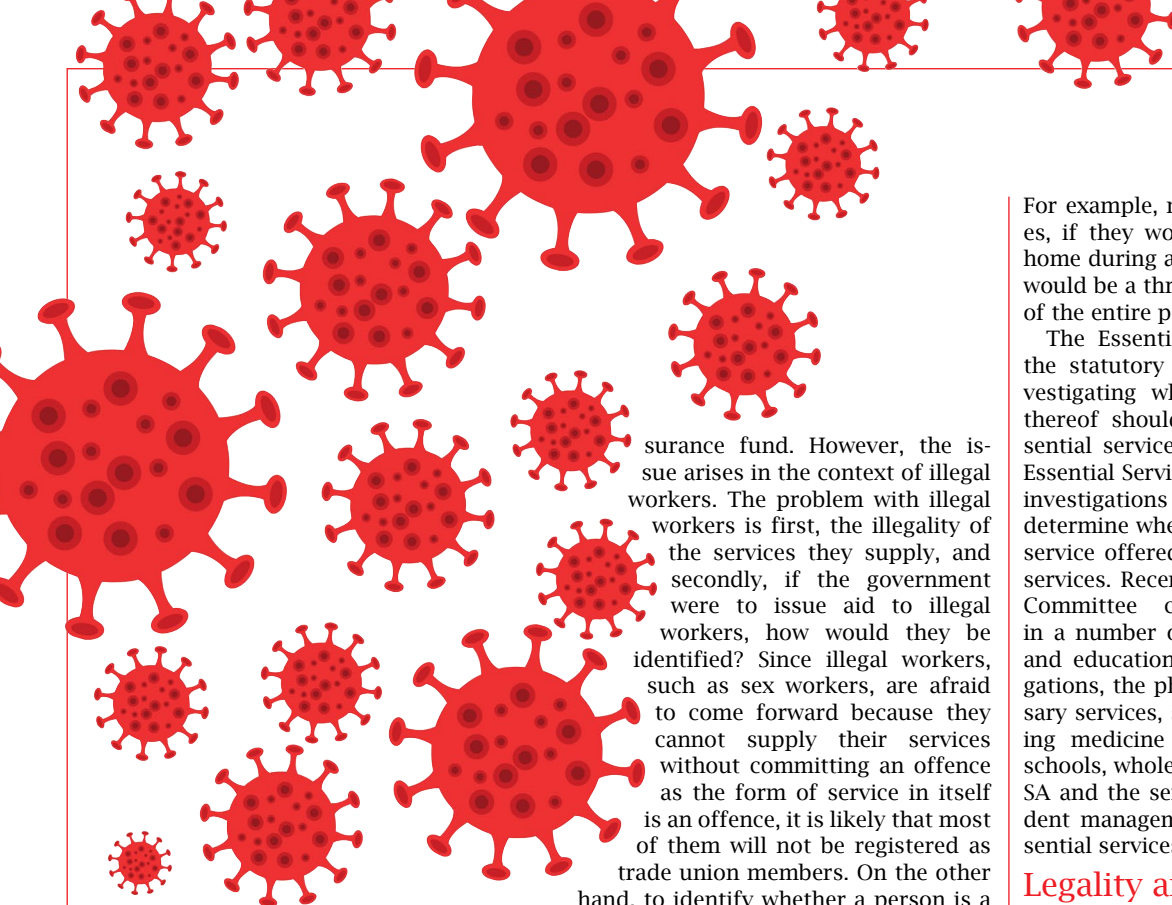
ment of a lockdown, which was extended, with only essential workers allowed to work. As a social security measure, government will also be implementing relief through an employment scheme to vulnerable employees. Of interest to this article is the demand by sex workers to be included as part of essential workers as their business has been allegedly affected. Furthermore, the Sex Workers Education and Advocacy Task Force has argued that 'sex work is also work', therefore, sex workers should be

included in the COVID-19 employment benefit scheme. This is controversial as prostitution is illegal and subject to criminal penalties in SA. Despite its illegality, sex workers do exist in SA. The questions – to be determined in this article – are whether their services are so essential to the extent that they remain open during the lockdown and whether they are so vulnerable to the extent that they need relief and protection from loss of earnings during this period, in light of the fact that sex work is illegal.

Defining essential services

The question whether a service or industry constitutes an essential service is a question that can be answered with reference to s 213 of the Labour Relations Act 66 of 1995 (LRA). The provision defines 'essential service' as those services that if interrupted would endanger the life, personal safety and health of the whole or any part of the population. The provision further labels Parliament and the South African Police Service (SAPS) as essential service.

When a service is considered to be an essential service, the employees of that



service cannot participate in strike action. Employees working under essential services are obligated to refer collective disputes falling within essential services for conciliation to the Commission for Mediation, Conciliation and Arbitration (CCMA). Apart from limiting constitutional rights, such as the right to strike, the declaration of an industry as an essential service also has its own benefits. During national disasters employees working under essential services continue working, in other words unlike sex workers, self-employed car guards and street vendors receive a guaranteed monthly income.

The rationale behind the special classification of these services is the foreseeable instability and social chaos, which would ensue, if the employees under such services are not authorised to continue to work. Likewise, the consequences on the life and health of the population are at great risk if these employees would be allowed to engage in a protest. However, for employees seeking declaration of their profession to be announced as an essential service, the interest is in the financial benefit or security attached to essential service employees. Put differently, unlike employees working under essential services, employees falling outside this category are on lockdown in the interest of saving the lives, health and ensuring personal safety of the population as a whole.

Additionally, during states of disaster the government usually provides some form of aid to those mostly affected by the state of disaster, including relief to casual workers. These employees can also claim from the unemployment in-

surance fund. However, the issue arises in the context of illegal workers. The problem with illegal workers is first, the illegality of the services they supply, and secondly, if the government were to issue aid to illegal workers, how would they be identified? Since illegal workers, such as sex workers, are afraid to come forward because they cannot supply their services without committing an offence as the form of service in itself is an offence, it is likely that most of them will not be registered as trade union members. On the other hand, to identify whether a person is a sex worker based on a trade union membership would amount to an unwarranted differentiation.

What constitutes an essential service?

The test to determine whether a service is an essential service was confirmed by the Constitutional Court (CC) in *SAPS v POPCRU and Another* [2011] 9 BLLR 831 (CC). The CC held that when courts are called to decide on the question, they must follow a restrictive interpretation of 'essential services'. The court following a narrow interpretation to the concept of essential service held that although SAPS is labelled as an essential service under s 213 of the LRA, the court found that not all SAPS employees are engaged in essential services. It held that only the workers that SAPS had chosen as members in terms of s 29 of the South African Police Service Act 68 of 1995 are covered and thus engaged in essential services. It emphasised the purpose of the legislation and the context as important rules to interpretation. Thus, the fact that employees are supplying a service that falls under the two examples of essential services, Parliament and SAPS, in terms of s 213 does not automatically mean they are engaged in essential services.

If a service is not labelled as an essential service, it can only be an essential service if, when interrupted, would endanger the lives, personal safety, health, of the whole or any part of the population. Put differently, if the lives, personal safety, or health of the population would be placed in danger when the service is removed or interrupted then that service may be declared as an essential service.

For example, medical doctors and nurses, if they would be permitted to stay home during a pandemic outbreak there would be a threat to the lives and health of the entire population.

The Essential Services Committee is the statutory body responsible for investigating whether a service or part thereof should be classified as an essential service. The LRA empowers the Essential Services Committee to conduct investigations in various professions to determine whether all or any part of the service offered be declared as essential services. Recently the Essential Services Committee conducted investigations in a number of fields, including health and education. Following these investigations, the pharmaceutical and dispensary services, security services, dispensing medicine to learners at boarding schools, wholesale and supply of cash in SA and the services of road traffic incident management were declared as essential services.

Legality and protection of sex workers

According to the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 any person who unlawfully has carnal intercourse or commits an act of indecency with another person for a reward is guilty of an offence. In essence prostitution in SA is illegal for all purposes, including the buying and selling of sex services. Related activities, such as pimping and brothels are also illegal, although the enforcement of this law is relatively poor. Sex workers in SA are, therefore, generally considered as criminals. This illegality and criminalisation of prostitution can be understood against the background that prostitution itself cannot be separated from many heinous crimes, such as child prostitution, sex trafficking, organised crime and the inhuman treatment of women. South Africa according to reports (Natalie Malek 'Top 10 facts about Human Trafficking in South Africa' (www.borgenproject.org, accessed 21-5-2020) and ECPAT 'Stop sex trafficking of children and young people' (www.ecpat.org, accessed 21-5-2020)) is considered as a source, transit and destination for sex trafficking. It is also believed that the high rate of HIV infections in SA are partly the result of the high levels of prostitution. Despite these strong arguments for the criminalisation of prostitution, there are also a number of arguments that it be legalised, however, whether prostitution should be legalised is a question beyond the scope of this article, and at present, it suffices to say prostitution is illegal.

The issue of legality follows a very controversial issue of protection, which is, even though the practice itself is illegal whether sex workers must be pro-

tected. This is the issue the government currently has to deal with owing to the COVID-19 outbreak. However, this is not the first time the protection of the rights of sex workers has come up. At present, sex workers are asking the government to include them as essential workers so that they may continue working during the lockdown period, and to be included in the employment scheme as part of relief for workers. This is a matter largely touching on labour law and the right to fair labour practices. In 2006 the courts faced a matter similar to this one.

In *Kylie v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 ILJ 1600 (LAC), the appellant was a sex worker who alleged to have been unfairly dismissed from a massage parlour where she worked, performing various sexual activities for a reward. She referred her dispute to the CCMA. Prior to arbitration the commissioner held that the CCMA had no jurisdiction in this case because of the nature of the employment involved. In the Labour Court it was held that as the employment in question was illegal, the claim was void and, therefore, unenforceable. The court stated that to provide the appellant with protection under the LRA would be against the common law principle, which forms part of the Constitu-

tion that a court must not sanction illegal activity.

On appeal, the Labour Appeal Court held that constitutional rights inclusive of s 23 stating that everyone has the right to fair labour practices are afforded to 'everyone' despite a contract being informal or illegal. The court held that Kylie was to be considered an employee under the LRA, as well as the Constitution. The court referred to *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (6) SA 642 (CC) stating that although the work undertaken by prostitutes devalues the respect the Constitution has for the human body, their illegal activity does not *per se* prevent them from enjoying a range of constitutional rights. The court, however, found it inappropriate to reinstate Kylie because of the nature of her work. In closing the court expressed that it cannot and does not sanction sex work as this is a matter for the legislature. However, the fact that prostitution is illegal does not destroy all the constitutional protection, which may be enjoyed by someone like Kylie, were they not a sex worker.

The question posed in light of the judgment is whether sex workers in the present situation are in a vulnerable position to attain relief. We submit that as

the sex workers are in loss of their livelihood because of the current situation, relief may be awarded.

Conclusion

Having stated that essential services are those that if interrupted would endanger the lives, personal safety and health of the whole or any part of the population, it can be concluded that sex work does not constitute an essential service in South African employment laws. However, faced with s 23 of the Constitution stating that 'everyone' has the right to fair labour practices and the definition of employee in the LRA, which does not expressly exclude sex workers, as well as the *Kylie* case, it can be stated that where sex workers stand at a vulnerable position, they could be afforded protection. We submit that instead of piecemeal declarations of protection to sex workers by the courts, the legislature must address this issue in order to bring about legal certainty.

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The impact of COVID-19 on the property sector – how does it influence property values and possible litigation?



Picture source: Gallo Images/Getty



By
Dr Douw
Boshoff

The COVID-19 pandemic has had a major impact on the international population and economic markets. South Africa (SA) has not yet been ruled out and it is expected that this pandemic will still have an impact on the country for quite some time. Apart from the obvious infections and deaths caused by

the virus, the implemented measures to contain the spread has had severe consequences. With businesses that are unable to operate, the income generation of society has been severely hampered. General business expenses are also negatively affected and the immediate consequence of this is that many people and businesses will most certainly fail on their contractual obligations. In the property sector, this impact is far wider than just rent foregone (direct impact), but includes the downstream influence of people that should have received that income and further spend in the economy (indirect impact) and the negative growth of new entrants to the sector (induced impact). The link between the construction sector and the property sector should also be taken into account in the assessment of the impact.

The role of property in the economy is due to property being a fixed asset, with the specific attribute of being a scarce resource and mostly indestructible, and as such very attractive as an investment and the consequent ability to act as security for debt. It is furthermore also

a good indication of wealth and hence very popular for purposes of wealth tax, such as property rates. In addition, all economic activity happens on property, developed or undeveloped, and all people occupy in some form or another the property of someone. It is, therefore, evident that property forms a very critical part of the economy as a whole.

However, how do we determine the impact on an individual property and what can be expected of property values in the short to medium term future?

Valuation methods

The courts throughout the world, including SA, prefer the comparable sales method of valuation (see *Minister of Water Affairs v Mostert and Others* 1966 (4) SA 690 (A) at 723F), but due to the expected reduction in disposable income of households due to the impact of COVID-19 on economic activity, it is expected that property values will reduce (DGB Boshoff 'The impact of affordability on house price dynamics in South Africa' (2010) 17(2) *Acta Structilia: Journal for the Physical and Development Sciences*



126). This might take some time to be evident in the market as it is expected that sales will slow down and will take time to be registered at the Deeds Office and be captured by secondary data providers. So on the one hand there is the reduction in value, but on the other hand is the lag of information behind the change in such values. Furthermore, this reduction in value may have a negative impact on the balance sheet of any property owner, as well as on the security that is placed on such property by financial institutions or any other party where property serves as security (eg, contractors' *liens*, tenant's rights in the event of landlord liquidation, or any other specific contractual arrangement). The lack of information could – if the valuer is not careful – mislead the person that is relying on such a valuation, especially for litigation purposes. Examples of these are when a property is to be foreclosed due to non-performance by the lender, a contractor wishes to exercise their *lien* due to non-performance in terms of a construction contract and has a specific idea of what can be recouped from the property, or a

concurrent debtor that bases their claim on the expected proceeds from the sale of a property.

The comparable sales method is mostly used in a market that is fairly homogeneous, such as residential property, but income producing property such as retail facilities, industrial and offices, are valued on the basis of the expected income that is capitalised at a rate determined by the income/sales price relationships of comparable transactions. Hence, the income capitalisation method is still a type of comparable sales method, albeit considered an indirect sales method. It, therefore, suffers from the same problem of lack of information that can create difficulties in valuing a property. In addition to this, income-producing property is widely reported to suffer severely from non-payment of rent due to the negative impact of COVID-19 on affordability. This means that the income is directly affected and the capitalisation rates that should determine the value of a building from this income, is affected by the lack in information on comparable sales. The commercial real estate market is, therefore, under a double impact of uncertainty in terms of value determination and the information needed for this.

A third method of valuation, and not often used, is the depreciated replacement cost method. Although some may think that this is only a method used to value churches, schools, monuments, etcetera, it is actually used more often than one would think. The reason for this is that it is based on the principle of comparable substitution, whereby a person would not pay more for a property, than another property, that satisfies their needs equally well. Therefore, a property with less depreciation, namely, newer and thus less physical obsolescence, or having a trendier style and layout and thus less functional obsolescence, would probably satisfy more of the needs of the purchaser and would attract a higher price. In addition to this, economic obsolescence can be seen in a market such as the current market where significant impact on value is evident due to external factors. This method, is probably used frequently to compare different options. Also, where there are specific cost related items, namely, properties under construction, it can be used to adjust the market value based on the impact of individual items, such as the cost to complete construction or the impact of an extra lift to an office block.

From the above, it is evident that the different valuation methods are not necessarily loose standing, but interrelated and all feature the use of the basic requirements in South African courts, namely the use of comparable transactions in order to validate the accuracy of

market activities. It is, however, essential that the date of valuation is critical. With a turbulent market as caused by COVID-19, the factors need to be put into perspective. Distinction should be made between temporary, short-term and long-term effects. An example would be the vacancy rate of an income producing property, where it is expected that vacancies would drastically increase due to the impact of COVID-19. Let us assume a rate increases from 5% to 20%. If the income of a property is simply reduced by a 20% vacancy due to the current situation, the capitalised value will be 15% lower than what it would be with the long-term 5% vacancy. This assumes the 20% vacancy would exist into perpetuity, which would undervalue the property in question. Instead, a long-term view with market supply and demand factors should be considered in order to determine the most likely vacancy rate to which the market will return, but also estimating the short-term higher vacancy and deducting the present value of such lost income from the value determined with the long-term equilibrium vacancy. It is, therefore, imperative that in markets such as the one that we find ourselves in currently, valuers make use of a properly researched discounted cash-flow analysis in order to determine the longer term effects on the value of property, rather than a simple income capitalisation.

In order to ensure that the lag of information is captured adequately, valuers should also familiarise themselves with time-series relationships, such as capitalisation of disposable income to determine long-term affordability and subsequent property value indices. The relationship between the marketed price and eventual sales price over time can also give an indication of movement in the market, taking into consideration that in a downturn, a higher percentage of sales take place under duress or are 'forced' sales. It is important to note that valuers cannot simply use dated sales as if they are the current value, but should evaluate sales and adjust them based on properly researched economic factors.

With the above taken into consideration, when one considers the value of a share on the stock exchange, the value is the last sales price of that share, so the comparable sales principle comes into play again. Similarly, one tends to think that a property is different, because it is bricks and mortar, and if the desired sales price cannot be achieved, the seller simply hangs onto it until the desired price is achieved. If the seller cannot hold onto it long enough, it means in essence that the seller is compelled to sell, indicating that the sale would be a sale under duress and, therefore, not qualified as a comparable sale in terms of the definition of open market value. Only

those sales that are achieved, where the seller is not under duress, can be taken as comparable for valuation purposes. But, with a downturn in the market, even if property can be held onto for a better price later, the seller competes with those that need to sell urgently, as well as the increased number of forced sales. In such a market, there are typically fewer buyers, and more 'bargain hunters', the buyers would not pay more for a property than another property that satisfies their needs equally well. Therefore, they would not pay more for an ordinary sale property than for a property that is available as a forced sale. The essence is that a higher number of forced sales are indeed driving the market down, although it might be seen that it does not meet the definition of open market value. More importantly, is that the date of valuation becomes critical.

With the date of valuation the temporary effects of a downturn market would, similar to shares on the stock exchange albeit not as volatile or liquid, cause the property market to see measurable differences in value. In terms of litigation, either where the property itself is cause of litigation or where it serves as security in another form of litigation, the effect of value change over different times should be carefully considered. The question that should be raised is: When did the loss cause litigation to rise? This will determine the date on which the valuer would want to determine the value; or when the anticipated date for realising the value from a property due to sale is in execution or otherwise? These different dates might cause the requirement for more than one valuation on a property at different dates in order to obtain the full picture.

The impact of the date on the actual value of property, or the temporary effect of the out of the ordinary COVID-19 situation, also raises a further aspect, namely, how should a decision on litigation be taken? For example, a financial institution that holds a bond

over a property as security, in the current circumstances if the owner fails to meet payments, the financial institution might consider selling the property in execution in order to recoup losses. But in an already distressed market, and as indicated earlier in the article, a higher number of forced sales can put further downward pressure on the market. The financial institution might not realise the proceeds that it hoped for, given the original decision to finance and the associated security value at the time. The financial institution might consider rather delaying the execution, in order for the market to recover so that a higher sales price may be obtained. In the meanwhile, the interest rollover might be covered by the future market recovery and might even create a situation where the owner's situation also recovers, which will resolve the issue. It is obvious that where a default started prior to the COVID-19 situation, the decision would be different from a situation directly caused by COVID-19.

These effects are then also amplified if indirect real estate is involved, such as Real Estate Investment Trusts (REITs) where the shares in the property fund already take into consideration that the fund is highly geared. The price of such shares are found to be related to the value of underlying property assets (DGB Boshoff and C Cloete 'Can listed property shares be a surrogate for direct property investment behaviour?' (2012) 15(1) *South African Journal of Economic and Management Sciences* 72), but due to the financing and other operating expenses of the company involved, the share price would be much more volatile than underlying property assets at a rate that is directly linked to the structure of the company and its financial performance ratios, such as debt coverage ratio or operating profit (DGB Boshoff 'Towards a listed real estate investment valuation model' (2013) 16(3) *South African Journal of Economic and Management Sciences* 329). Care should, therefore, be

taken when property is valued for indirect purposes and the resultant effect is influenced by non-property aspects, or where property rights are divided, such as with land-leases and associated top-structure development by the land-tenant (DGB Boshoff 'Valuing Real Estate as Contractual Cash-Flow with a Put-Option' (2012) 1 *Proceedings in ARSA-Advanced Research in Scientific Areas* and DGB Boshoff 'The Use of Options Pricing to Value the Bare Dominium of Property with Long Leases' (2016) 24(2) *Journal of Real Estate Literature* 251).

Conclusion

To summarise, the COVID-19 pandemic is to surely result in increased litigation due to contractual agreements that cannot be met, or even be exploited. The reliance on property valuation as a source of information on balance sheets or causes of loss of parties involved can also prove to be more difficult due to changes in the market activities. To address this, valuation methods should be based on comparable transactions as per the requirements by courts, which should carefully take into account the adjustment between different properties, or dates of valuations by using different valuation techniques, wider economic data and statistical significant relationships, in order to get a more accurate determination of value as at the specific date of valuation. A vast amount of knowledge can be gained by comparing the results of different techniques to each other and performing wider statistical and economic analysis.

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Three principal ways COVID-19 will affect South African jurisprudence in bail proceedings



By
Desmond
Francke

The current COVID-19 pandemic is having profound implications on the criminal justice system. Chief Justice Mogoeng Mogoeng issued directives in terms of s 8(3)(b) of the Superior Courts Act 10 of 2013 for the management of courts during the lockdown period. Courts across the country have closed their physical doors and opened virtual ones. Examples of virtual courts reflect in recent cases, such as *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs: KwaZulu-Natal Provincial Government and Another* (SCA) (unreported case no 231/19, 17-4-2020) (Petse DP and Ponnann, Swain, Makgoka and Nicholls JJA) and *Liberty Group Limited t/a Liberty Life v K & D Telemarketing and Others* (SCA) (unreported case no 1290/18, 20-

4-2020) (Ledwaba AJA (Navsa and Van der Merwe JJA concurring)). The criminal justice system has been catapulted, quite suddenly, into the 21st century.

COVID-19 has had a profound impact on the evolving substantive criminal law jurisprudence, principally in the area of bail proceedings, but also in the area of sentencing, and likely in the area of evidence. This trend will only continue as we try to 'flatten the curve'. It is the area of bail proceedings that is of particular importance at this stage, which requires attention. Bail applications are always a matter of urgency (see *S v Block* 2011 (1) SACR 622 (NCK) and *Hans v District Court Magistrate, Cape Town and Others* (WCC) (unreported case no 19047/19, 4-3-2020) (Thulare AJ)). I do not profess to be a prophet, but I predict that our jurisprudence concerning bail proceedings due to the COVID-19 pandemic will be

affected in three principal ways, which I will discuss below.

Principal 1

First, as a material change in circumstances justifying a new circumstance or fact to reconsider a bail decision.

Courts could take judicial notice of the fact that the COVID-19 pandemic represents a material change in circumstances. I purposely use the word could, because it could be argued that taking judicial notice of the impact of the COVID-19 pandemic must be based on evidence. Judicial notice dispenses with the need for proof of facts that are as notorious or generally accepted so not to be the subject of debate or that it is capable of an immediate and accurate demonstration by 'resort[ing] to readily accessible sources of indisputable accuracy' (*S v Mantini* 1990 (2) SACR 236 (E) and *S v Leonards* 1997 (1) SACR 307 (C)). This is particularly so where a person in custody has a medical condition that puts them at a higher risk of contracting COVID-19 in custody. Our courts in *Magawu v S* (NCK) (unreported case no CA&R28/2018, 2-10-2018) (Pakati J) and *Keevy v S* (FB) (unreported case no A66/2013, 2-4-2013) (Daffue J) at para 21 have decided on numerous occasions that poor health and a medical condition is not *per se* an exceptional circumstance or a new circumstance. Courts should also consider whether the time that has already elapsed has had or the anticipated passage of time will have an impact on the appropriateness or proportionality of the detention. In some cases, the passage of time will have no impact on the necessity of continued detention. In other cases, it may be a very strong indicator that the accused should be released, with or without conditions. Courts must be particularly alert to the possibility that the amount of time spent by an accused in detention has approximated or even exceeded the sentence they would serve if convicted.

The risk posed to detained persons from COVID-19 – as compared to being at home on house arrest – is a factor that must be considered in assessing the balancing factor as envisaged in s 60(9) of the Criminal Procedure Act 51 of 1977. I suspect that as this virus worsens, many more applications for bail will be seen. Persons who are presently incarcerated awaiting their trials will inevitably have their trials postponed due to the present health crisis. Some of the detained persons have already stated their intentions to go on a hunger strike. Caution must be exercised not to draw inferences or to speculate, based on very limited information, given the sweeping implications for all people in detention. An assumption about a greatly elevated risk essentially leads to an adverse finding without delving into the actual circumstances. A

systemic failure to adequately care for and protect people in custody should not be assumed.

Principal 2

Second, as a factor affecting public safety under the grounds for detention at s 60(4)(e) of the Criminal Procedure Act 51 of 1977 (CPA), where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.

COVID-19 has had a profound impact on the evolving substantive criminal law jurisprudence, principally in the area of bail proceedings, but also in the area of sentencing, and likely in the area of evidence. This trend will only continue as we try to 'flatten the curve'. It is the area of bail proceedings that is of particular importance at this stage, which requires attention.

Detention is necessary to achieve the purpose of maintaining confidence in the administration of justice in the country. The greatly elevated risk posed to detained persons from COVID-19, as compared to being at home on house arrest is a factor that must be considered in assessing the second principal. I am not suggesting that the Department of Justice and Correctional Services cannot take appropriate steps to protect persons under their care. The practical reality is, the risks to a person's health from COVID-19 in a confined space with many people, like a jail, is significantly greater than if a person can self-isolate at home. The practical reality is that the ability to practise social distancing and self-isolation is limited, if not impossible, in an institution where accused persons do not have single cells. Physical distancing in the true sense is simply not possible. One does not have to have been in jail to realise this. A jail is a government-enforced congregation of people, which is inherent in its very concept. When density and human contact are to be avoided, jail cannot be a safe place to be. No reasonable person expects detainees in custody to be coddled in luxury. However, people in our country held in custody by the state have the right to be held in safe and clean surroundings.

The impact the pandemic would have

on an accused person's time until trial is a relevant consideration. There are significant uncertainties about how long the COVID-19 crisis could affect the criminal justice system. Consequently, it would be naïve to think that it will be 'business as usual' when we all return to our so-called normal judicial duties.

It is in the interest of society as a whole, as well as the inmate population, that the release of persons who can be properly supervised outside the institutions should be permitted. It better protects those who must be housed in institutions (because there are no other reasonable options), those who work in the institutions (because they perform an essential service), and our whole community (because we can ill-afford to have breakouts of infection in institutions, requiring increased correctional staffing, increased medical staffing, and increased demand on other scarce resources).

Principal 3

Third, as a factor relevant to public confidence in the administration of justice under the detention at s 60(9) of the CPA, which states that '[i]n considering the question in subsection (4) the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody'.

The COVID-19 pandemic has introduced a new ground for bail application. This ground of bail is not based on an accused's risk to the community or the importance of ensuring attendance in court. It is anchored exclusively in the perceptions of the public and the maintenance of confidence in the system of bail. The simple fact is that reasonable and informed members of the public would be wary of keeping alleged offenders in pre-trial custody for the sole purpose of advancing confidence in the system of justice. The dangers to the prison population – both to inmates and staff – posed by the risk of infection have changed the way we do things. The views and confidence of the public anchoring the foundation of this factor are not gauged by referendum but by judicial interpretation of societal norms. It is a matter of judicial discretion. A reasonable person test is to be used. The reasonable person test serves as a reminder to each presiding officer that their discretion is grounded in community values, and, in particular, long term community values. In short, the person in question is a thoughtful person, not one who is prone to emotional reactions, whose knowledge of the circumstances of a case is inaccurate or who disagrees with our society's fundamental values.

The conditions in which individuals awaiting trial are held must necessarily be understood within public confidence in criminal justice. Normally, a reasonable, informed, thoughtful member of the public would not be overly concerned with the impact of prison conditions in pre-trial custody. There is nothing ordinary about the COVID-19 crisis. These are extraordinary, dire times. The virus is highly contagious. People who contract the virus are at real risk of very serious illness or death. This is unquestionably a public emergency of a dimension not previously experienced in this country. One phrase can be heard loud and clear throughout the world today, namely, 'social distancing'. This is the main tool advocated by public health professionals and politicians around the globe to fight against COVID-19. Exposure to the media demonstrates how the imperative social distancing is. All group activity, except out of absolute necessity, has ceased. The threat of COVID-19 must be fought head-on by keeping people apart from each other.

Conclusion

The public's confidence in the criminal justice system has been significantly altered as a result of the pandemic. The public are deemed to be reasonable, informed and not without compassion for those in prison. I agree with the words

of late President Nelson Mandela, 'no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones' (Johannesburg: Macdonald Purnell 1994).

People do not lose their humanity when they enter a jail, and those held in pre-trial custody are not convicted criminals. They are innocent until proven guilty.

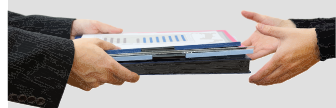
I am aware that the COVID-19 crisis should not be treated as a 'get out of jail free card' or a 'revolving door policy' for offenders who commit crimes during the pandemic. Even in these very challenging times, judicial officers must fully recognise the potentially harmful health impact on detained persons in the various institutions, while at the same time exercising the balance required to sustain its fundamental role in the administration of justice and protection of the public. The health and safety of remand prisoners is the responsibility of prison officials. Those who pose a substantial risk to the safety of the public cannot be released on the basis that detention might pose a heightened health risk to them. COVID-19 is a factor but requires medical evidence of extra susceptibility.

An accused person will, in my opinion, have to adduce evidence, which shows the following facts of the COVID-19 pandemic while in custody. These factors

- are, however, not an exhaustive list and may radically change the more we learn about the COVID-19 pandemic. COVID-19 is a factor, but -
- no differential risk perceived;
 - requires medical evidence of extra susceptibility;
 - could be outweighed by public-protection concerns;
 - limited to the (potential) impact on release-plan compliance;
 - could be offset by evidence of remand-institution response.

I hope this article will provide some guidance to colleagues and legal practitioners when dealing with the COVID-19 pandemic during bail proceedings.

Desmond Francke Bluris (UWC) is a magistrate in Ladysmith.



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Faith in the time of lockdown: *A Constitutional right to freedom of religion*



Picture source: Gallo Images/Getty



By
Mohammed
Moolla

In terms of s 15(1) of the Constitution '[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion' and in s 31(1) it provides that '[p]ersons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community -

(a) to enjoy their culture, practice their religion and use their language'.

Does the lockdown prohibit or infringe these rights?

The relationship between ss 15 and 31 of the Constitution is not entirely clear. It is not evident whether, in the absence of any reference to the manifestation of religious practice in s 15(1), religious practice should be regarded as protect-

ed in the group rather than individual freedom. The Constitutional Court clarified the nature of relationship between the two rights. Section 15(1) protects the practices of religious sects, groups, associations, communities and institutions. In the case of *Prince v President, Cape Law Society, and Others* 2002 (2) SA 794 (CC), Ngcobo J said 'ss 15(1) and 31(1)(a) complement one another. Section 31(1)(a) emphasises and protects the associational nature of cultural, religious and language rights. In the context of religion, it emphasises the protection to be given to members of communities united by religion to practice their religion.'

In the case of *S v Makwanyane and Another* 1995 (3) SA 391 (CC), O'Regan J said, '[t]he right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life, in the sense of existence, it would not be possible to ex-

ercise rights or to be the bearer of them. ... This concept of human life is at the centre of our constitutional values’.

At the outset, South Africa (SA) is currently in a national state of disaster and not in a state of emergency. A national state of emergency has to be approved by Parliament before it is enforced.

The purpose of the national state of disaster is that the President has, through his cabinet, weighed the key issues of bringing such a declaration into effect and the impact it will have on the economy of the country and the people. The entire purpose of the national state of disaster and lockdown is for protection of life and the sanctity of life.

Section 11 of the Constitution clearly states that: ‘Everyone has the right to life’. Section 24 of the Constitution states that: ‘Everyone has the right –

(a) to an environment that is not harmful to their health and well-being’.

What we do have through the lockdown is a limitation with a purpose to protect health, which is a national prerogative.

Even when we look at s 31 of the Constitution, this right is not a permanent denial, as everyone still has a right to practice their religion. The Constitution does allow in our open and democratic society to limit rights. As I stated above, we are not denied the right to practice our religion, but a restriction of movement has been imposed. We must look at why we have this limitation and weigh it up. The purpose of the limitation is that it would result in the effective reduction of the risk of the spread of the virus that causes COVID-19. If access to religious institutions are allowed there is a high risk of the virus attacking asymptomatic people, who will in turn, infect their family at home. The entire purpose of the limitation is to prevent the spread of the virus.

If we compare the framework of the violation of the lockdown versus the limitation thereof, then this temporary limitation is in the best interest of all citizens. The right to life must be protected.

When looking at the limitation its purpose is for the benefit of all citizens of which, Muslims, Christian, Jewish and Hindu followers form part, the President wants to protect the lives of all the people of SA irrespective of religious persuasion.

The rationalisation is that if the President allows one community, which is a minority, to open their place of worship, then he will have to allow the other communities to do that too and this will only speed up the spreading of the virus resulting in many fatalities. There cannot be a violation of a right if the purpose is a better purpose, namely the sanctity of life. There is a duty and it encompasses an obligation to protect the citizens of

Even when we look at s 31 of the Constitution, this right is not a permanent denial, as everyone still has a right to practice their religion. The Constitution does allow in our open and democratic society to limit rights.

SA from unlawful threats to their life and physical well-being.

In the case of *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC), the Constitutional Court found that the common law of delict was in need of development in order to comport with the constitutional entrenchment of rights to life, dignity and to freedom and security of the person. The court further endorsed a *dictum* by the European Court of Human Rights, according to which the right to life ‘may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual’ (*Carmichele* at para 45).

In the case of *Rail Commuter Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2003 (3) BCLR 288 (C) the High Court recognised that the state ‘have a legal duty to protect the lives and property of members of the public who commute by rail’.

Furthermore, there can be no violation if such limitation is reasonable and based on rights. In terms of Constitutional law public interest always supersedes when balancing a right. It would be different if public interest was eradicating religion all together and that is definitely not the situation.

Madala J in *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) stated: ‘The State undoubtedly has a strong interest in protecting and preserving the life and health of its citizens and to that end must do all in its power to protect and preserve life.’

We are not being denied our right to continue to perform all our prayers in our homes. The main purpose has been

to flatten the curve and also protect the poor and vulnerable societies who may face the brunt of the virus. South Africa has very limited resources when it comes to dealing with a massive outbreak. The United States, Italy and Spain are examples where the pandemic has ravaged the population. These countries have health care systems that are of high standards.

The measures implemented by the South African government are not just essential, but critical, not only for the sake of government but for every individual’s safety and health.

Desai J in the case of *Victoria & Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape, and Others (Legal Resources Centre as Amicus Curiae)* 2004 (4) SA 444 (C) stated: ‘The rights to life and dignity are the most important of all human rights. By committing ourselves to a society founded on the recognition of human rights, we are required to value those rights above all others.’

Professor Salim Abdool Karim explained it very explicitly. He said SA has had a unique trajectory, as the government intervened and put the lockdown in place at the right time. After the first two cases were reported, within the first week it increased to 21 cases. South Africa’s daily average was standing at 110 cases and after lockdown we had 67 cases per day.

Prof Karim also stated that if the lockdown is ended abruptly then all that SA had achieved till now would be lost and the country will run serious risks of infections.

Prof Karim gave an example of small fires in the forest. The small flames that crop up in the forest should be found and doused else it would be very difficult to extinguish the large raging fires. South Africa has over 2,5 million people who are HIV positive and over 500 000 with low CD4 counts and is also heading towards the winter and flu season, thus more caution needs to be taken.

Quite clearly, the limitation is vital in the protection of life and cannot be a violation. The right to life is the most basic, the most fundamental, the most primordial and supreme right, which human beings are entitled to have and without which the protection of all other human rights become meaningless or less effective. If there is no life, then there is nothing left of human dignity. The protection of life is, therefore, an essential prerequisite to full enjoyment of all other human rights.

Mohammed Moolla BProc (UKZN) is a senior magistrate at the Wynberg Magistrate’s Court in Cape Town.



Remote commissioning of affidavits:

Who can commission them and how is it done?

Picture source: Gallo Images/Getty



By Peter Otzen and Aran Brouwer

South Africa's (SA's) legal system depends significantly on evidence being supplied by affidavits. Deponents are, however, not always based in SA and may be unable to attend to commissioning through the overseas processes available to them, take for example, the client who is on a cruise, working remotely, or in a rural country without consular assistance or in quarantine, self-isolation, or subjected to government-imposed lockdown. New laws can certainly simplify this conundrum. The question nevertheless remains whether they do so sufficiently to allow a commissioner based in SA to commission a document remotely, through a video call?

Domestically, Commissioners of Oaths (commissioners) draw their authority from the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 (the

Act), either by appointment or *ex officio*.

In GN903 GG19033/10-7-1988 the minister published a list of *ex officio* commissioners within SA. Naturally, legal professionals are included. The regulation specifically list the various Acts in terms of which legal practitioners are admitted as being sufficient grounds to be considered as *ex officio* commissioners. It must be noted that GN903 does not include legal practitioners admitted in terms of the Legal Practice Act 28 of 2014. Indeed, it remains to be seen whether the powers of a commissioner vests in such legal practitioners – a question not considered for purposes of this article.

The Act does acknowledge that from time to time, certain office holders outside of SA may be authorised as a commissioner while overseas (GN R1872 GG7215/12-9-1980). The minister de-

clared that various office holders, in countries outside of SA, shall in that country, have the powers of a commissioner. These offices are prolix and sometimes slightly bizarre. The list includes the head of a South African diplomatic or consular mission, an officer of the South African Defence Force, the leader of the South African National Antarctic Expedition or the weather station on Gough Island, and the Senior Administrative Officer of the Technical Services Division of the South African Embassy in Paris. Thankfully, the list ends with 'any person who exercises in a state to which independence has been granted by law a legal profession equivalent to that of an attorney, notary or conveyancer in the Republic'. Clearly, a foreign legal professional based overseas may commission a document in that jurisdiction for use in SA, but in practice many non-English speaking legal practitioners are wary of doing this, sometimes being prohibited from doing so without translation (a costly exercise). This alternative is, therefore, only partially workable in practice.

What is clear is that while there are many *ex officio* commissioners in SA, there are few readily available overseas-based office holders who can exercise this function. Rule 63 provides some relief by allowing a document to be authenticated by certain office holders. Authentication, however, is distinct from commissioning – when applied to a document, authentication is the verification of any signature thereon. The rule goes

on to list diplomatic and government office holders who are recognised as being suitable for authenticating documents (such as senior diplomats of the United Kingdom (UK) posted abroad, however, practice reveals that such diplomats often refuse to authenticate or commission documents for anyone other than citizens of the UK). The catch-all provision of the rule is, therefore, useful, subs 4 states: 'Notwithstanding anything in this rule contained, any court of law or public office may accept as sufficiently authenticated any document which is shown to the satisfaction of such court or the officer in charge of such public office, to have been actually signed by the person purporting to have signed such document.'

How exactly an oath is to be administered is covered in GNR1258 GG3619/21-7-1972, which states the commissioning procedure. This procedure, which should be trite to all commissioners but is often not adhered to (an example is the loose practice often followed by South African Police Service), is to ask the deponent –

- if they know and understand the content of the declaration (to which the answer must be 'yes');
- whether the deponent has any objection to taking the prescribed oath or affirmation (this answer to be in the negative); and
- whether the deponent considers the oath or affirmation to be binding on their conscience (again, to be answered 'yes').

At this point the commissioner asks the deponent to recite the words pertaining to either the oath/affirmation, and then the regulation requires that 'the deponent shall sign the declaration in the *presence* of the Commissioner of Oaths' (our italics). It is in this particular section, with the emphasis on 'presence', that is important in the following discussion. Following this process, the commissioner applies the certificate, signature, name and business address, as well as the designation and the area for which the commissioner holds the office, if ap-

pointed *ex officio*. As is practice, the deponent's identity should be evidenced to the commissioner by providing an acceptable identity document.

In *Gulyas v Minister of Law and Order* [1986] 4 All SA 357 (C), Baker J equated 'in the presence of' to be analogous to 'within eyeshot'. We submit that the reason for a commissioner and the deponent to be within eyeshot of one another is for the commissioner to ascertain the identity of the deponent by examining the identity document provided and comparing it to the deponent, and to ensure that the correct papers are properly deposited to.

The Electronic Communications and Transactions Act 25 of 2002 (ECTA) makes provision for data messages (which includes, *inter alia*, any data generated, sent, received or stored) to be used in legal proceedings and in many sections upholds the evidentiary value of data messages. In s 11, '[i]nformation is not without legal force and effect merely on the grounds that it is wholly or partly in the form of a data message' and in s 12 '[a] requirement in law that a document or information must be in writing is met if the document or information is –

- (a) in the form of a data message; and
- (b) accessible in a manner usable for subsequent reference'.

The admissibility and evidential weight of a data message is encapsulated in s 15, which holds that in legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message. A court must have regard to the reliability of the manner in which the data was generated, stored or communicated, and the manner of the integrity of the maintenance of the data message, and the manner in which the originator was identified. Courts are also required to take any other relevant factor into account.

The certifying of electronic documents as originals is further clarified in s 14. This provision states that the originality requirement is met if the integrity of the

original, from the time of generation to its final form as a data message, if the data has remained complete and unaltered, except for –

- any changes, which arise in the normal course of communication, storage, and display;
- the purpose for which the information was generated; and
- with regard to all relevant circumstances.

This is addressed further in s 18(2), which allows a certified copy to be made of an electronic document, which is subsequently printed out.

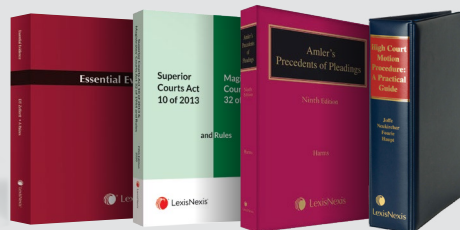
What emerges is that courts have a broad discretion to examine data messages, which are used for evidence, and that the mere electronic nature of that evidence should not be grounds to diminish the probative value of the evidence.

The notarisation, acknowledgement and certification of documents by means of an advanced electronic signature is explicitly addressed in s 18 of ECTA. While progressive, the concept of an advanced electronic signature falls outside the scope of this article.

Is there a reasonably practical, simple solution available, given the raft of legislation and regulations in play, or must a foreign-based client go to significant costs and efforts to attain what should be a simple and freely available service domestically? It is clear that the only difference between commissioning an affidavit in person, and commissioning an affidavit remotely, is that in the latter scenario, the commissioner and the deponent are not strictly 'in the [physical] presence' of one another, as required by the regulations in GN R1258 (*op cit*). However, the term 'in the presence of' has been interpreted not to be the same as 'physically present with one another', but rather as being presented in such a manner so as to allow the parties to see one another. For example, s 158 of the Criminal Procedure Act 51 of 1977 (CPA) requires that witness evidence be given 'in the presence of the accused'. Further,

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the CPA states that evidence can also be adduced by way of closed-circuit TV, arguably expanding on the ‘in the presence of’ provision. In the commissioning setting, an interpretation of the commissioning legislation and regulations would have to give effect to the dominant purpose of the ‘in the presence of’ provision, namely that the commissioner has eyeshot of the deponent (which is achievable by a video link). Naturally, there are risks associated with this – what if the identity document is forged, and that such forgery (which might be readily ascertainable in person) is undetectable over video? This is surely a risk to the legal practitioner. That being so, commissioners are rarely, if ever, trained to spot forged documents and could very easily be duped by a reasonable imitation, even if examining the identity document and viewing the deponent in person.

There is a useful catch-all provision in ECTA at s 15(4) which states that ‘[a] data message made by a person in the ordinary course of business ... certified to be correct by an officer in the service of such person, is on its mere production in any ... [legal proceedings], admissible in evidence against any person and rebuttable proof of the facts contained’. If the identity of the deponent is doubted by the court or an opponent, it is clearly open to rebut the presumption in this section.

In *Uramin (Incorporated in British Columbia) t/a Areva Resources Southern Africa v Perie* 2017 (1) SA 236 (GJ), Satchwell J allowed the use of video link to lead evidence in a civil matter from witnesses who were abroad. It is, therefore, suggested that substantial compliance with the Uniform Rules of Court can be achieved, as well as complying with the relevant legislation and regulations, for a legal practitioner to undertake the following steps to commission a client’s affidavit by remote means. These steps were taken in the 2016 case of *Elchin Mammadov and Vugar Dadashov v Jan Stefanus Stander and Three Others* (GP) (unreported case no 100608/15), and condonation was granted by Mavundla J.

- Transmit the affidavit to the deponent by e-mail, which the deponent then prints.
- The deponent evidences their identity by means of a suitable document shown to the commissioner over video technology.
- Once the deponent’s identity is confirmed, the commissioner applies the questions from GN R1258 (*op cit*) and if the answers are all appropriate, applies the oath or affirmation.
- The deponent then signs and initials where needed, scans the document (or photographs and sends by, for example, WhatsApp) – whereupon it becomes a data message, and sends

it back to the commissioner who then prints it, checks to confirm that the document sent by the deponent matches the document sent to the deponent, and if so, counter-initials and signs where required.

It would be prudent for the commissioner to confirm to the court by means of an affidavit that data integrity was maintained, setting out these steps and any others taken, and to provide reasons for the court to grant condonation, should such be required.

If the legislated options are available to a deponent to commission a document, then these should be used. Alternatively, recognised foreign-office officers can, in theory, be called on, but in reality these officers tend to be confined by one of many possible constraints. Given the global environment, which many legal practitioners find their clients, a pragmatic, technology-driven, and expedient solution, such as has been described, should be employed.

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By
Merilyn
Rowena
Kader

THE LAW REPORTS

April [2020] All South African Law Reports (pp 1 – 352)

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
ECM: Eastern Cape Local Division, Mthatha
GJ: Gauteng Local Division, Johannesburg
KZP: KwaZulu-Natal Division, Pietermaritzburg
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Employment contract

Termination on notice: In *Old Mutual Limited and Others v Moyo and Another* [2020] 2 All SA 261 (GJ), the first appellant (Old Mutual) terminated the contract of employment of its Chief Executive Officer (CEO), the first respondent (Moyo). The court *a quo* granted an interim interdict reinstating Moyo. It found him to have established the existence of a *prima facie* right to reinstatement, which, if not protected by the interim interdict, would cause him to suffer irreparable prejudice. It found that Old Mutual had repudiated the contract of employment by terminating it in terms of clause 24.1.1 of the employment contract, and in not following the disciplinary inquiry procedure contemplated in clause 25.1.1 in circumstances where it had accused Moyo of having had a conflict of interest and of having committed gross misconduct.

The position and scope of Moyo's duties required him to faithfully and diligently perform such duties and exercise such powers consistent with his position. At the time of Moyo's appointment as the CEO of Old Mutual, he was a shareholder and director of an investment holding company (NMT), in which Old Mutual was a 20% shareholder. Because of Moyo's interest in NMT and that of Old Mutual, they concluded protocols, which set out the way in which any potential conflict of interest that might arise would be dealt with. The appellants were of the view that Moyo had not conducted himself in line with the terms of the protocols and that he had not acted in Old Mutual's best interests in his involvement as a non-executive director of NMT, which was the cause of the termination of the employment relationship.

Despite Moyo's express disavowal

of any reliance on his rights under the Labour Relations Act 66 of 1995, the court, per Meyer J (Matojane and Keightley JJ concurring), viewed the interdict application through a labour law prism. There is no self-standing common-law right to fairness in employment contracts. The contract simply provided for termination by either party on six months' notice. Old Mutual's written notification of termination on six months' notice did not require any justification. The court *a quo*'s conclusion that Moyo had established that Old Mutual repudiated the contract when terminating it by providing him with six months' written notice to that effect was wrong. Since Moyo had failed to establish the first requisite for an interim interdict, *viz* a *prima facie* right to reinstatement that requires protection pending the finalisation of the action in which he claimed reinstatement as a contractual remedy, the court *a quo* should not have granted the interim interdict reinstating him in the position as CEO of Old Mutual.

Although it is generally considered not in the interests of justice to permit an appeal against an interim interdict since it will defeat the interim nature of the order, it is now settled that there are limited circumstances where the interests of justice dictate that an interim interdict be appealable. The present matter was one of those exceptional cases where the interests of justice demanded that the interim interdict be appealable. The appeal was upheld with costs.

Family law

Universal partnerships: Arising from their cohabitation as a couple, the plaintiff sought an order declaring that she and the defendant concluded an agreement of partnership (*societas omnium bonorum*), on equal shares, in *Allner v Werner* [2020] 2 All SA 49 (ECG). She also sued for the dissolution of the partnership and for its liquidation. She alleged that the universal partnership emanated from the parties' cohabitation and conduct, thus relying on the existence of a tacit agreement, while the defendant asserted that their relationship was merely one of cohabitation as lovers.

According to the plaintiff, the parties had commenced their cohabitation during 1996 when they, either tacitly or by implication, entered into a universal partnership in equal shares. They conducted a farming business in respect of which they took joint decisions and contributed equally through their labour and business skills. The plaintiff alleged further that she had effectively acted as the defendant's wife and companion and had sacrificed her own career prospects in order to support the defendant.

In South African law, cohabitation does not have special legal consequences. Generally, the proprietary consequences and rights flowing from a marriage are not available to unmarried couples, regardless of the length of their cohabitation. However, if a cohabitee can establish that the parties were not only living together as husband and wife but that they were partners, they can invoke that remedy. The party seeking to invoke this private law remedy must prove that each of the parties brought something into the partnership, or bound themselves to bring something into it, whether it be money or labour skills; the business had been carried on for the joint benefit of both parties; the object was to make a profit; and the partnership contract was legitimate. A universal partnership does not require express agreement but, like any other contract, can come into existence by way of tacit agreement. The contributions by the parties do not necessarily have to be confined to the profit-making entity.

The court, per Smith J, held that South African law recognises two types of universal partnerships, namely –

- *societas universorum bonorum*, where parties agree that all their possessions (present and future) will be considered assets of the partnership; and
- *societas universorum quae ex quaestu veniunt*, where parties agree that all they may acquire during the continuation of the partnership from every kind of commercial undertaking shall be taken to the partnership property.

In order to establish the existence of a tacit contract the plaintiff must establish that –

- the defendant was fully aware of the circumstances connected to the transaction;
- the act relied on was unequivocal; and
- the tacit contract does not extend beyond what the parties contemplated.

A court will find the existence of a tacit contract where by a process of inference it concludes that the most plausible conclusion from all the relevant proved facts and circumstances is that a contract came into existence.

Based on the evidence, the court found that a universal partnership existed between the plaintiff and the defendant of all assets acquired by them up to June 2018. The plaintiff was shown to have a 30% share in such partnership. It was declared that the partnership was dissolved with effect from June 2018.

Interim interdicts

Urgency: In *Marcé Projects (Pty) Ltd and Another v City of Johannesburg Metropolitan Municipality and Another* [2020] 2 All SA 157 (GJ), Marcé brought an urgent application for an interim interdict, preventing the first and second respondents from implementing the contract entered into between them for the supply of fire engines and water trucks pursuant to the award of a tender by the first respondent (the city). The respondents took issue with the urgency of the application, and opposed the application on the merits.

Marcé alleged that the awarding of a tender was unlawful, unreasonable, procedurally unfair and inconsistent with the Constitution because the city had failed to follow proper procurement procedures and to adhere to relevant specifications.

The central issue was whether Marcé, as an unsuccessful tenderer, had the right to interdict the further implementation of the tender and whether such an interdict, if granted, would encroach on the city's executive functions to the prejudice of the second respondent (TFM).

The court, per Modiba J, confirmed the *locus standi* of Marcé, as a bidder, to challenge the award of the tender to TFM.

Regarding the issue of urgency, r 6(12) of the Uniform Rules of Court (the Rules) provides for the abridgment of the times for the service and filing of process and documents prescribed by the Rules. The test for urgency is whether the applicant brought the application with the requisite degree of urgency; and whether, not hearing the application on the basis of urgency will deny the applicant substantial redress in due course. On the common cause facts, Marcé did not bring the application promptly after it learnt that the city had awarded the tender to TFM. The court found that the city had dragged its feet in providing information sought by Marcé, and Marcé's delay in bringing the application was justified.

For an interim interdict to be successful, it must establish –

- the existence of a *prima facie* right;
- a well-grounded apprehension of irreparable harm if the interim relief is not granted (and the ultimate relief is granted);
- the balance of convenience favours the granting of the interdict; and
- the absence of a suitable alternative remedy.

An interim interdict restraining the exercise of statutory powers is not an ordinary interdict. Courts grant it only in exceptional cases and when a strong case for that relief has been made. In this case, the requirements were met. The order granted was, therefore, confirmed.

Nuisance

Offensive odours: The appellants in *Jacobs NO and Others v Hylton Grange (Pty) Ltd and Others* [2020] 2 All SA 89 (WCC) were the trustees of a trust, which owned a farm (MD93). The first and third respondents were companies, which owned or leased grape farms bordering on MD93. The second and fourth respondents were individuals associated with the first and third respondents and resided on the grape farms. They were ordered by the court *a quo*, to cease all composting activities on MD93. The composting activities mentioned in the order were carried out by the trust as part of commercial mushroom farming. The compost (or substrate) was the material in which the mushrooms grew. It was not in dispute that the making of mushroom substrate can emit gases with offensive odours, particularly ammonia and hydrogen sulphide.

It was held that the case was about alleged unlawful nuisance in the form of offensive odours. Although the term 'nuisance' continues to be used in this country under the influence of English law, the question is whether the conduct of the person causing the alleged nuisance is, in the delictual sense, wrongful in relation to the party complaining of the nuisance. Since the applicants sought an interdict, and not damages, the question of fault was not relevant.

In a case of nuisance, the neighbour complains that his right to enjoy the undisturbed use of his property with reasonable comfort and convenience is impaired. Because the offending conduct does not cause physical damage to body or property, wrongfulness is not presumed. Wrongfulness must be determined regarding the particular circumstances of the case. The question is whether the harm-causing conduct, assessed in accordance with public policy and the legal convictions of the community, constitutionally understood, is or is not acceptable; in short, whether it is objectively reasonable to impose liability.

The court, per Rogers J (Allie and Cloete JJ concurring), held that balancing the right to an environment that is not

harmful to health or well-being against the right to choose a trade, occupation or profession freely, and found that on the evidence it ought to be possible, by taking reasonable steps, for the trust to abate the nuisance. The appeal was, therefore, dismissed.

Property

Interdict by neighbour: In *Kruger and Another v Rayner and Others* [2020] 2 All SA 138 (KZP) the first applicant lived on a farm, and was the sole member of the second applicant, which owned the farm. The first and second respondents (the Rayners) owned an adjoining farm (the third respondent). The fourth respondent was the municipality within which the farm was located. The Rayners operated a school on their farm but were not authorised to do so under the South African Schools Act 84 of 1996.

The applicants sought to interdict the Rayners from operating the school on their farm until the municipality granted the required permission in terms of the Spatial Planning and Land Use Management Act 16 of 2013 and the KwaZulu-Natal Planning and Development Act 6 of 2008 – and a certificate of occupation in terms of the National Building Regulations and Building Standards Act 103 of 1977.

The land was zoned primarily for agricultural purposes and the applicants contended that the increased traffic caused by the school impeded access to their property. They contended that their clear right to apply for an interdict was based on the unlawful operation of the school.

The court, per Chetty J, held that the building and structures constituting the school had not been approved for such use by the municipality. However, neither the applicants' nor the Rayners' property fell within any town planning scheme. The applicants had to prove that a violation by the Rayners had caused or would cause damage. They relied on the Rayners' failure to adhere to the by-laws and to obtain a certificate of occupation. The applicants had to show that the alleged contravention of the by-laws would impact their interests. The high-water mark of their case was that the school disturbed the sense of peace in their agricultural environment. The first to third respondents were ordered to apply for approval of the use of the relevant buildings as a school, and for permission by the provincial Department of Education, to operate an independent school.

Review

Application in dispute over town name change: In terms of s 10 of the South African Geographical Names Council Act 118 of 1998 (the Act), the first respondent decided to approve the change of name of the town of Grahamstown to 'Makhanda'. The present application was for the review of that decision.

In *Ndumo v Minister of Arts and Culture NO and Others* [2020] 2 All SA 225 (ECG) it was held that the court, in considering the review application, was not required to comment on the appropriateness or merits of the name change issue. The sole inquiry was whether irrelevant considerations were taken into account or relevant considerations not considered in the impugned decision. In the alternative, the court had to address a rationality challenge.

As distinct from an appeal, a review is generally about illegality, procedural irregularity or irrationality, which is such as to justify intervention by the court. Where the Promotion of Administrative Justice Act 3 of 2000 is applicable, it forms the foundation of such administrative review.

At the heart of the application for review was whether, in the statutorily prescribed process, adequate consultation with communities and stakeholders took place. The crucial inquiry was thus whether the second respondent (the Names Council) had correctly informed the minister that a proper consultation process had been followed.

The court, per Lowe J, held that the Act sets out the process to be followed in the change of geographical names. The Act requires the minister to issue regulations as to the criteria to be followed when deciding whether or not a geographical name should be regarded as a national, provincial or local competence. In terms of those regulations, the change of geographical names of towns are geographical names of 'national concern' (national competence) and not of local concern. Section 9(1) of the Act refers to the guidelines, which require that the Names Council ensures that proper consultation has taken place.

The general rule that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity, is subject to three important interrelated riders, namely –

- statutory provisions should always be interpreted purposively;
- the relevant statutory provision must be properly contextualised; and
- all statutes must be construed consistently with the Constitution.

On a purposive interpretation of the Act, standardisation and transformation are key factors in effecting name changes.

Accepting that the Act clearly envisages and provides for a consultative process as to name changes, the court found that such process did in fact occur. There was, therefore, no material misstatement of fact in the recommendation to the minister in that regard. Further grounds of review raised by the applicant were all found to lack merit and were also dismissed. The review ap-

plication was dismissed, and each party was ordered to pay its own costs.

Delays in legality review: A post advertised by the applicant municipality was filled by the appointment of the first respondent. The advertisement had specified the minimum requirements for the position. Alleging that the first respondent failed to meet the minimum experience requirement, the applicant sought to review and set aside its own decision to appoint her to the post. The appointment was said to be null and void in contravention of s 56 of the Local Government: Municipal Systems Act 32 of 2000.

In *Sakhisizwe Local Municipality v Tshetu and Others* [2020] 2 All SA 299 (ECG) the parties were in dispute about the extent of the first respondent's experience at middle management level. It is generally undesirable to decide an application on affidavit where the material facts are in dispute. In such a case it is preferable that oral evidence be led to enable the court to see and hear the witnesses before coming to a conclusion. On the other hand, it is equally undesirable for a court to take all disputes of fact at their face value. If this were done a respondent might be able to raise fictitious issues of fact and thus delay the hearing of the matter to the prejudice of the applicant. Whether a factual dispute exists is not a discretionary matter, but a question of fact and a jurisdictional prerequisite for the exercise of the court's discretion. The court, per Lowe J, found no genuine dispute of fact in this case.

It was common cause that this was a legality review and not one subject to the Promotion of Administrative Justice Act 3 of 2000. A critical issue was that of delay in bringing the review application. Legality reviews must be brought within a reasonable time. The court is required to determine –

- whether there was unreasonable delay;
- if so, whether in all the circumstances the unreasonable delay ought to be condoned; and
- whether in appropriate circumstances relief should in any event be granted, in constitutional matters.

The delay inquiry is a factual one calling for a value judgment. A condonation inquiry requires the exercise of a judicial discretion considering all relevant circumstances.

The applicant correctly conceded that the delay in this matter, viewed factually, was unreasonable. The court found no basis on which to condone the delay. The application was dismissed.

Tenders

Request for bids – requirement for compliance with s 217 of the Constitution: The Airports Company (ACSA) published a Request for Bids (RFB) calling for bids for the hiring of car rental

kiosks and parking bays at airports operated by it. The RFB indicated that each successful applicant would be granted car rental concessions for ten years. The first respondent (Imperial), a car rental company, submitted a bid in response to the RFB.

After ACSA published a document addressing bidders' queries, Imperial contended that the pre-qualification criteria and several provisions of the RFB contravened s 217 of the Constitution and legislative prescripts relating to procurement. Imperial launched a two-pronged urgent application in the High Court. In Part A, it successfully sought the joinder of all entities having an interest in the matter as co-respondents in the application. In Part B, Imperial sought an order reviewing and setting aside ACSA's decision to issue and publish the RFB on the basis that it was unlawful, unreasonable, inconsistent with the Constitution and invalid.

The High Court held that the RFB and the decision to publish it were unlawful, inconsistent with the Constitution and invalid. It reviewed and set aside the RFB and the decision to publish the RFB based on the principle of legality, alternatively in terms of ss 6(2)(a)(i), and/or 6(2)(b), and/or 6(2)(e)(i), and/or 6(2)(f)(i), and/or 6(2)(i) of the Promotion of Administrative Justice Act 3 of 2000.

On appeal in *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others* [2020] 2 All SA 1 (SCA) the main issues were the interpretation and applicability of s 217 of the Constitution together with the relevant statutes falling under its legislative scheme; and, the rationality of several provisions of the RFB (impugned provisions), as well as the process leading to the decision to publish the RFB culminating in its publication. Two ancillary issues were whether the terms of the RFB were vague and whether ACSA committed an error of law that impacted negatively on the RFB.

The SCA held that the disqualification of Imperial at the first hurdle of the evaluation process would have an external effect and adversely affected Imperial's rights. It was not reasonable to expect Imperial to wait for the outcome of the entire process before launching a challenge. The RFB constituted an administrative action that was ripe for a judicial challenge.

Section 217 of the Constitution provides that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with the system, which is fair, equitable, transparent, competitive and cost-effective. The RFB was subject to s 217.

The principle of legality dictates that there must be a rational connection be-

tween the decision taken and the purpose for which the decision was taken. ACSA's preferential procurement policy as reflected in its RFB bore no relation to the requirements of s 217 of the Constitution or the Broad-Based Black Economic Empowerment Act 53 of 2003 and the Preferential Procurement Policy Framework Act 5 of 2000. The appeal was dismissed.

Traditional leadership

Incumbency of kingship of traditional community: The case of *King Phahlo Royal Family and Another v Molosi and Others* [2020] 2 All SA 111 (ECM) concerned the incumbency of the kingship of AmaMpondomise. An earlier court decision, in the case of *Matiwane v President of the Republic of South Africa and Others* [2019] 3 All SA 209 (ECM), saw the kingship of AmaMpondomise restored, but the question of incumbency remained unresolved.

In the present application, the applicants sought a declaration that the resolution dated 31 May 2019, issued by the third respondent in terms of which it identified the second respondent as the King or Queen of AmaMpondomise was unlawful and void *ab initio*, and accordingly fell to be set aside. A further declaration was sought that the third respondent was not a royal family entitled

and responsible for the identification of any person and making recommendations to the fourth respondent in terms of s 9 of the Traditional Leadership and Governance Framework Act 41 of 2003 to assume kingship or queenship of AmaMpondomise. In addition, an interdict was sought preventing the first to third respondents from identifying a person to assume kingship or queenship and making recommendations to the fourth respondent in terms of s 9 of the Act. Finally, an order was sought directing the fourth respondent to recognise the second applicant as King of AmaMpondomise.

The respondents' basis for opposing the application was that the second respondent was the descendant of Dosini who was the heir of King Ngcwina.

The court, per Jolwana J, held that the second applicant was properly identified by the first applicant to the extent that he came from the Cira lineage and was a direct descendant of Mhlontlo. What the respondents disputed was the entitlement to the throne of AmaMpondomise of not only the second applicant but also King Mhlontlo and all those who reigned before him up to King Cira, the first king in the Cira lineage. That challenge or allegation of non-compliance with the customary law prescripts was premised in the disinheritance of Dosini by his father King Ngcwina. It was the compliance of

King Ngcwina with customary law and custom in disinheriting Dosini and handing over the kingship to the minor house of Cira in or around 1300 that was in dispute.

Invalid administrative action may not simply be ignored but may be valid and effectual and may continue to have legal consequences, until set aside by proper process. That is known as the *Oudekraal* principle. The recognition of the second applicant could not affect the respondents in taking whatever steps necessary to prosecute their claim for the throne of AmaMpondomise in future. The application was granted.

Other cases

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

- damages in medical negligence and the once-and-for-all rule;
- marriage, the right to equality and rational grounds for statutory differentiation; and
- prohibited charges in credit agreements and club fees.

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By
Charnét
Swart

The failure to mention the minimum sentence provisions in a charge sheet or indictment and the interest of justice

Nxele v S (SCA) (unreported case no 271/19, 12-3-2020)
(Ledwaba AJA) (Ponnan and Nicholls JJA concurring)

The sentencing phase requires a diligent application of expert skills, which should not be applied swiftly. Too often this is the phase in a criminal trial that is neglected. Section 51 of the Criminal Law Amendment Act 105 of 1997 (the Act) prescribes the minimum sentence of imprisonment for specific serious offences. The presiding officer will only deviate from the prescribed minimum sentence if there are substantial and compelling circumstances to deviate from.

The Supreme Court of Appeal (SCA) was tasked with the determination of whether a presiding officer may rely on s 51 of the Act if it was not specifically referred to in the charge sheet or indictment. The appeal was against a judgment of the Full Court of the Kwa-Zulu-Natal Division of the High Court in Pietermaritzburg, which confirmed a sentence of life imprisonment imposed on the appellant by a single judge of the

division. The Full Court was of the view that life imprisonment was the appropriate sentence and that the provisions of the Act were applicable and even if the trial court was wrong in applying the provisions of the Act, the court still had its common law jurisdiction.

The accused in this matter was legally represented and entered a guilty plea to the charge of murder. The accused was subsequently convicted and sentenced to life imprisonment. The murder was premeditated, therefore, the minimum sentence provisions of life imprisonment found application (even though it was not specifically stated in the charge sheet). The mitigating circumstances placed on record were not enough to constitute substantial and compelling circumstances to deviate from the prescribed minimum sentence.

Where s 51 of the Act is not referred to specifically in the charge sheet or indictment a court should determine whether the accused's constitutional right to a

fair trial had been breached at the sentencing stage. In *Legoa v S* [2002] 4 All SA 373 (SCA) and *Ndhlovu and Others v S* [2002] 3 All SA 760 (SCA) the court held that 'a vigilant examination of the relevant circumstances' is required to determine whether the accused's constitutional rights as set out in s 35(3) of the Constitution have been compromised or not.

Both counsel and the trial court approached the matter as if the minimum sentence provision of life imprisonment found application. It is clear that each case will be dealt with in accordance with the facts presented. The main determination will be whether the presiding officer is satisfied that the interests of justice are served.

Charnét Swart LLB (UP) is a non-practising legal practitioner in Pretoria. Ms Swart has written this article in her own capacity. □



By
Erika
Heaton

Briefly highlighting the importance of control in an increasingly digitalised world

Bergh and Others v Agricultural Research Council (SCA)
(unreported case no 93/2019, 1-4-2020) (Navsa JA) (Wallis, Van der Merwe and Schippers JJA and Mojapelo AJA concurring)

This matter relates to an appeal, which dealt squarely with the issues surrounding the development of computer programs and copyright. Various sections of the Copyright Act 98 of 1978 were considered and the Animal Improvement Act 62 of 1998 was also considered as the facts of the appeal concerned a copy-

right dispute in relation to 'BeefPro', a computer program that serves as a cattle or herd management tool.

Short overview of the judgment

In reaching the conclusion that the appeal was to be upheld with costs, Navsa

JA interrogated the three possible situations where the issues of copyright and computer programs intersect, namely -

- where a programmer writes a program while not being under any contractual obligation to do so;
- where a programmer writes a program in fulfilment of their obligations in terms of an employment contract;

- a programmer writes a program in fulfilment of their obligations to do so under a commission contract (see R de Villiers 'Computer programs and copyright: The South African Perspective' (2006) 123 SALJ 315 at 320).

The key to understanding and solving the issues surrounding this inevitable intersection of copyright and computer programs is the concept of 'control'. This key concept was explored in the case of *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd and Others* 2006 (4) SA 458 (SCA), whereby, the Supreme Court of Appeal (SCA) considered the meaning of 'control' in relation to the definition of author of a computer program as provided for in s 1 of the Copyright Act. In this case, the SCA extended the meaning of 'control' to include in-

stances where a position of authority is exercised over the programmer insofar as the development of the program is concerned, and, therefore, not only instances where the computer programmer is in control of writing a computer program. Simply put, if the computer programmer develops their work under a commission contract but is subject to a position of authority's command their copyright could potentially vest in the position of authority.

The present case distinguishes itself from the *Haupt* case because the fourth appellant (the programmer) was not subject to any checking and approval and was not paid for his efforts. As a result, the court found that the respondent failed to discharge the onus in relation to its claim of copyright and, therefore,

the vested authorship lay in favour of the fourth appellant (the programmer).

Significance of this judgment

Although this case did not further develop this area of law, I submit that it should be recognised for highlighting the increasing importance for computer programmers under a commission contract to understand the importance of control in relation to protecting their works.

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NEW LEGISLATION



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

Commencement of Acts

Labour Laws Amendment Act 10 of 2018, ss 7, 8(b)(dA), and 12 – 16. Commencement: 1 April 2020. Proc R17 GG43202/3-4-2020.

Selected list of delegated legislation

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Increase of the maximum amount of earnings on which the assessment of an employer shall be calculated: R 484 200. GenN236 GG43203/3-4-2020 and GenN243 GG43220/9-4-2020.

Prescribed return of earnings form (2A). GN476 GG43249/24-4-2020.

Competition Act 89 of 1998

Regulations on the Competition Tribunal Rules for COVID-19 excessive pricing complaint referrals. GN R448 GG43205/3-4-2020.

Expansion of the scope of the COVID-19 block exemption for health care sector, 2020. GN R456 GG43215/8-4-2020.

Customs and Excise Act 91 of 1964

Amendment of rules: COVID-19 lockdown. GN R458 GG43222/9-4-2020.

Dental Technicians Act 19 of 1979

Amendment of regulations relating to the registration of dental laboratories and related matters. BN51 GG43192/3-4-2020.

Disaster Management Act 57 of 2002

• Call centres

Directions regarding call centres providing essential services during the COVID-19 lockdown. GN R459 GG43224/9-4-2020.

• Communications and digital technologies sectors

Directions on the risk-adjusted strategy for the communications and digital technologies sector. GN484 GG43263/3-5-2020.

• Electronic communications, postal and broadcasting

Amendment of the Electronic Communications, postal and broadcasting directions. GN451 GG43209/6-4-2020.

• Essential goods and services

Directions regarding the implementation of the provisions for essential goods and services to prevent and combat the spread of COVID-19. GN R462 GG43227/11-4-2020.

Guidance on the implementation of the

provisions for essential goods and services for higher education institutions to prevent and combat the spread of COVID-19. GN R468 GG43237/17-4-2020 and GN R478 GG43255/29-4-2020.

• Healthcare

Amendment of the health directions: Address, prevent and combat the spread of COVID-19. GN457 GG43217/8-4-2020.

• General regulations

Amendment of regulations issued in terms of s 27(2). GN R463 GG43228/14-4-2020. (Afrikaans and Setswana regulations) (repealed by GN R480 GG43258/29-4-2020).

Amendment of regulations issued in terms of s 27(2). GN R465 GG43232/16-4-2020 (repealed by GN R480 GG43258/29-4-2020).

Amendment of regulations issued in terms of s 27(2) (exclusion of cooked hot food). GN R471 GG43240/20-4-2020 (repealed by GN R480 GG43258/29-4-2020).

Regulations issued in terms of s 27(2): Alert level 4 during the COVID-19 lockdown. GN R480 GG43258/29-4-2020.

Regulations issued in terms of s 27(2)(f): Once-off movement of persons. GN482 GG43261/30-4-2020.

• Labour and workplaces

Amendment of the COVID-19 temporary

employee/employer relief scheme (C19 TERS). GenN240 GG43216/8-4-2020.

COVID-19 occupational health and safety measures in workplaces (C19 OHS), 2020. GN479 GG43257/29-4-2020.

• **Mineral resources and energy**

Directions for the mineral resources and energy industry to address, prevent and combat the spread of COVID-19. GenN250 GG43256/29-4-2020.

• **Small businesses**

Small Business Development directions on the implementation of provisions relating to essential services during the COVID-19 lockdown. GN R450 GG43208/6-4-2020.

• **Social development**

Amendment of the social development directions to address, prevent and combat the spread of COVID-19. GN R455 GG43213/7-4-2020.

• **Sports, arts and culture**

Directions issued to public entities and sport bodies, arts and cultural bodies: Extensions of the term of office of councils and boards of public entities and suspension of sport, arts and cultural events to prevent and combat the spread of COVID-19. GN461 GG43226/9-4-2020.

• **Tourism**

Directions to provide guidance on the implementation of provisions relating to essential services in the tourism industry. GenN235 GG43200/2-4-2020.

• **Transport**

Amendment of the directions to prevent and combat the spread of COVID-19 in public transport services. GN454 GG43212/7-4-2020.

Directions to prevent and combat the spread of COVID-19 in public transport services: Once-off long distance inter-provincial transport. GN483 GG43262/1-5-2020.

• **Water and sanitation**

Water and sanitation emergency pro-

curement COVID-19 disaster directions. GN464 GG43231/15-4-2020.

Electronic Communications Act 36 of 2005

Numbering Plan Amendment Regulations. GenN245 GG43230/15-4-2020.

Harmonisation of the short code '111' for the COVID-19 National Emergency Services. GenN244 GG43229/15-4-2020.

Higher Education Act 101 of 1997

Extension dates for Post-School Education and Training Institutions (public and private higher education institutions as well as public colleges) due to the COVID-19 lockdown. GN R467 GG43236/17-4-2020.

Independent Communications Authority of South Africa Act 13 of 2000

Information and Communications Technology COVID-19 National Disaster Regulations. GenN238 GG43207/6-4-2020.

Labour Relations Act 66 of 1995

Bargaining Councils that have been accredited by Commission for Conciliation, Mediation and Arbitration. GenN225 GG43192/3-4-2020.

Medicines and Related Substances Act 101 of 1965

Exclusion of sch 2, sch 3 and sch 4 substances from the requirement that substances must be dispensed for no longer than six months. GN R481 GG43260/30-4-2020.

Nursing Act 33 of 2005

Fees payable to the South African Nursing Council. BN52 GG43223/9-4-2020.

Public Funding of Represented Political Parties Act 103 of 1997

Allocation of funds for political parties. GenN239 GG43214/8-4-2020.

Remuneration of Public Office-Bearers Act 20 of 1998

Determination of the upper limits of salaries, allowances and benefits of different members of municipal councils. GN475 GG43246/24-4-2020.

South African Reserve Bank Act 90 of 1989

Second amendment of the Directive (1 of 2017) within the National Payment System in respect of the collection of payment instructions for authenticated collections. GN R472 GG43242/21-4-2020.

Superior Courts Act 10 of 2013

Directives issued by the Office of the Chief Justice for the management of courts during the lockdown period. GenN246 GG43241/21-4-2020.

Draft delegated legislation

- Draft guidelines for application for accreditation by the South African Legal Practice Council to present practical vocational training in terms of the Legal Practice Act 28 of 2014. GenN226 and GenN227 GG43192/3-4-2020.
- Draft Merchant Shipping (Training, Certification and Manning) Regulations, 2020 in terms of the Merchant Shipping Act 57 of 1951. GenN232 GG43192/3-4-2020.
- Draft amendment of the Civil Aviation Regulations, 2011 in terms of the Civil Aviation Act 13 of 2009. GN R445 GG43198/3-4-2020.
- Increase in monthly pensions in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 for comment. GenN242 GG43221/9-4-2020.
- Consultative paper on proposed amendments to the National Qualifications Framework Act 67 of 2008 for comment. GN R469 GG43238/17-4-2020.

Draft Bills

- Draft Disaster Management Tax Relief Bill, 2020.
- Draft Disaster Management Tax Relief Administration Bill, 2020.



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Employment law update



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

Unfair labour practice in relation to a promotion

In *Department of Rural Development and Agrarian Reform v General Public Service Sectoral Bargaining Council and Others* [2020] 4 BLLR 353 (LAC), the employee referred an unfair labour practice dispute relating to a promotion as a result of his employer's refusal to promote him after acting in a senior managerial position for several years. The employee had initially been requested to act in the position temporarily when the holder of that position at the time was seconded to another position. That person was eventually recalled from his secondment, but was placed in another post in January 2009. The position in which the employee was acting was then advertised but before the interview process commenced a moratorium was placed on appointments. The employee then continued to fill the position in an acting capacity for several more years. In April 2011 the position was re-advertised, but for reasons, which are not clear, this vacancy announcement was withdrawn. It was later re-advertised around July 2011 but this time there was a requirement to hold a specific degree of qualification, which the employee did not possess. The employee was of the view that this requirement was included to exclude him from the process. When he was not shortlisted on the basis that he did not have the qualification, he addressed a letter to the employer challenging this. He was then assured that he would be invited to attend an interview and that the qualification requirement had been widened so that he would still be eligible for consideration.

He did attend the interview process and was also recommended for competency testing. The employee and another candidate were found to be the most suitable. The panel recommended that

the other candidate be appointed but the employee was advised that if the other candidate declined the post then he would be appointed to the position. The other candidate did in fact decline the post but the post was still not filled.

The employee then referred an unfair labour practice dispute concerning a promotion to the bargaining council on the basis that s 186(2)(a) of the Labour Relations Act 66 of 1995 (the Act) provides that an unfair labour practice includes 'any unfair act or omission that arises between an employer and an employee involving –

(a) unfair conduct by the employer relating to the promotion ... of an employee'.

In terms of s 193(4) of the Act, any unfair labour practice dispute referred to arbitration may be determined on terms that the arbitrator deems reasonable. The arbitrator considered the fact that the candidate who had declined the post did not satisfy the experience requirement of the position and was of the view that the employee should have been appointed notwithstanding that he did not meet the qualification requirement and that the refusal to promote was irrational, capricious and unfair. The employer was ordered to appoint the employee to the position with retrospective effect.

The employer took the matter on review to the Labour Court where the review application was dismissed. On appeal to the Labour Appeal Court (LAC), the employer argued, *inter alia*, that the arbitrator should have deferred to the employer's prerogative to decide on whom to promote.

The LAC held that when considering such disputes the arbitrator should, in general, show some deference to the decision made by the employer and should exercise caution when ordering the appointment of an employee into a promotion position because there is no right to a promotion. However, the arbitrator may interfere in circumstances where an employer acted capriciously, arbitrarily or in bad faith. In this case, it seemed that the only reason why the employee was not appointed was because he was not in possession of a particular qualification. However, the employer had dispensed with this requirement when the employee was shortlisted for the position and there was no rational explanation for the introduction of rigidly applying the requirement to hold a particular degree. Furthermore, the employee had been acting in the role for several years and had, therefore, already proved his ability and that he was qualified for the

role. It was held that the employer's failure to fill the post when a suitable candidate was available was unreasonable. The employer's decision not to appoint the employee to the post was, therefore, irrational, capricious and unfair. The appeal was dismissed with costs.

Breach of contract claim

In *Archer v The Public School – Pinelands High School and Others* [2020] 3 BLLR 235 (LAC), the employee instituted a breach of contract claim in the Labour Court (LC) after initially pursuing an unfair dismissal claim in the Commission for Conciliation, Mediation and Arbitration (CCMA).

In this case, the employee was dismissed and referred an unfair dismissal dispute to the CCMA. The CCMA found that the dismissal was substantively and procedurally fair. The employee elected not to review the CCMA decision but instead instituted an action for breach of contract in the LC, seeking reinstatement of the contract or damages. The employee claimed that he was removed from his place of employment by the school governing body and not his employer and that this was accordingly unlawful. Furthermore, his employer failed to reinstate him or remedy the unlawful actions by the school governing body, which constituted an unlawful breach of contract.

The LC held that it lacked jurisdiction to determine the matter as the matter was precluded by the principle of *res judicata* on the basis that the claim that he had pursued in the CCMA was essentially the same.

The matter was then taken on appeal to the Labour Appeal Court (LAC). The LAC considered the matter with reference to the decision in *Makhanya v University of Zululand* [2009] 8 BLLR 721 (SCA) in which it was held that dismissed employees may either pursue relief under the Labour Relations Act 66 of 1995 (the Act) or for breach of contract simultaneously or in succession. Based on this, the employee had both contractual and unfair dismissal claims arising from the termination of his contract of employment and these claims were independent of each other. Furthermore, s 77(3) of the Basic Conditions of Employment Act 75 of 1997 provides that in addition to pursuing their rights under the Act, employees may pursue contractual claims in either the High Court or the LC. Section 195 of the Act also provides that an award of compensation made in terms of the Act is in addition to, and not a substitute for, any other amount

to which the employee is entitled to in terms of any law, collective agreement or contract of employment. An award of compensation made in terms of the Act is for an unfair dismissal or an unfair labour practice and is capped. This may be less than the amount that the employee can claim for breach of contract and the employee may accordingly claim additional compensation in terms of the

breach of contract. This view was also approved in *Gcaba v Minister for Safety and Security and Others* [2009] 12 BLLR 1145 (CC).

The contractual claim could be pursued in either the High Court or the LC. It was held that the *res judicata* principle could not apply to the contractual claim because contractual claims and unfair dismissal claims are different causes of

action. The LC accordingly did in fact have the jurisdiction to determine a contractual claim despite the fact that there had already been a finding by the CCMA that the dismissal was fair. The appeal was upheld and the matter was remitted to the LC for determination on the merits.

□



By
Kathleen
Kriel

Recent articles and research

Abbreviation	Title	Publisher	Volume/issue
DJ	De Jure	University of Pretoria	(2020) 53
ILJ	Industrial Law Journal	Juta	(2020) 41
SALJ	South African Law Journal	Juta	(2020) 137.1

Banking and finance law

Ngidi, M 'The termination of the bank-client relationship in South African banking law' (2020) 53 DJ 54.

Van Niekerk, G and van Heerden, C 'The importance of a legislative framework for co-operation and collaboration in the Twin Peaks model of financial regulation' (2020) 137.1 SALJ 108.

Commercial law

Hamman, A and Koen, R 'Carpe Pecuniam: Criminal forfeiture of tainted legal fees' (2020) 53 DJ 19.

Constitutional law

Bekink, B 'From mere Christmas decorations to concrete constitutional ethics – *EFF v Speaker of the National Assembly*; *DA v Speaker of the National Assembly* 2016 (3) SA 580 (CC)' (2020) 53 DJ 104.

Contract law

Boonzaier, L 'Rereading *Botha v Rich*' (2020) 137.1 SALJ 1.

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Cameron, E 'The crisis of criminal justice in South Africa' (2020) 137.1 SALJ 32.

Van der Merwe, A and Mitchell LM 'The use of impact statements, minimum sentences and victims' privacy interests: A therapeutic exploration' (2020) 53 DJ 1.

Customary marriages

Sibisi, S 'Is the requirement of integration of the bride optional in customary marriages?' (2020) 53 DJ 90.

Estate planning, wills and trusts

Abduraof, M 'An analysis of the rationale behind the distribution of shares in terms of the Islamic law of intestate succession' (2020) 53 DJ 115.

Maunatlala, K and Maimela, C 'The implementation of customary law of succession and common law of succession respectively: With a specific focus on the eradication of the rule of male primogeniture' (2020) 53 DJ 36.

Intellectual property

Oriakhogba, DO 'Empowering rural women crafters in KwaZulu-Natal: The dynamics of intellectual property, traditional cultural expressions, innovation and social entrepreneurship' (2020) 137.1 SALJ 145.

International law

Imiera, PP 'The corruption race in Africa: Nigeria versus South Africa, who cleans the mess first?' (2020) 53 DJ 70.

Jurisprudence

Wallis, M 'What's in a name? A note on nomenclature' (2020) 137.1 SALJ 25.

Labour law

Fergus, E and Jacobs, M 'The contested terrain of secret ballots' (2020) 41 ILJ 757.

Smuts, M and Smit, D 'Excessive stress and eliminating barriers to decent work' (2020) 41 ILJ 779.

Mujuzi, JD 'Hearsay evidence in labour disputes in South Africa' (2020) 41 ILJ 804.

Le Roux, R 'Decoding s 200B of the LRA: *Masoga and Another v Pick n Pay Retailers (Pty) Ltd and Others* (2019) 40 ILJ 2707 (LAC)' (2020) 41 ILJ 822.

Newaj, K 'Can employees be fairly dismissed for refusing to accept a demand? A discussion of *National Union of Metalworkers of SA and Others v Aveng Trident Steel (A Division of Aveng Africa (Pty) Ltd) and Another* (2019) 40 ILJ 2024 (LAC)' (2020) 41 ILJ 834.

Medical law

Townsend, B and Thaldar, D 'Informed consent in medical malpractice suits: An analysis of *Beukes v Smith*' (2020) 137.1 SALJ 13.

Persons and family law

Calitz, K and de Villiers, C 'Sexual abuse of pupils by teachers in South African schools: The vicarious liability of education authorities' (2020) 137.1 SALJ 72.

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By
Maboku
Mangena

A court at war with practitioners

The recent judgment of *Administrator of Dr JS Moroka Municipality and Others v Kubheka* (MM) (unreported case no 1170/20, 3-4-2020) (Brauckmann AJ) on the interpretation of the lockdown regulations has attracted both acclaim and criticism among legal practitioners.

The judgment follows hot on the heels of other cases, which will be discussed in the article below, wherein Judge President Francis Legodi of the Mpumalanga Division ordered that practitioners forfeit their fees owing to non-compliance with Practice Directives.

Reading the judgment by Brauckmann AJ, one cannot help but wonder if the court is not at war with its practitioners.

In the judgment, there does not appear to be any reason whatsoever that justifies the punitive cost order imposed on the legal practitioners who had permits in their possession issued by the Provincial Council where the practitioners are enrolled.

The regulations were promulgated to give effect to a legitimate government purpose of containing the spread of COVID-19 and were admittedly made in haste as various ministers have laboriously explained, mistakes will be made. Indeed, there were a lot of mistakes made as some of the provisions did not make sense and it was very clear that not much attention was paid to lucidity. The judge himself found that they are not a model of clarity.

If they are riddled with ambiguity (as the judge had so correctly found) and susceptible to multiple interpretations, why does the judge's interpretation reign supreme in a matter where he was not called to offer interpretation. The Legal Practice Council (LPC) was not even called on to make representation and explain itself and its understanding of the regulations, as at the time, the LPC's officials issued the permits.

The above, notwithstanding the fundamental legal question crying for an answer in the judgment is: Should failure to observe the regulations of necessity result in the disallowance of fees due to the practitioners by their respective clients?

The judge answered the question af-

firmatively and from the reading of the judgment the reason is that the practitioners, as officers of court, should have known that they were prohibited from travelling across the metropolitan and district boundaries to perform their essential service.

According to the judge, as legal practitioners they are judged at a higher standard than that of ordinary people and where they transgress the law, their penalty will be different. This is where he could not see the wood for the trees.

The basic and fundamental principle of South African law is that we are equal before the law. In the interpretation of the law and the application of legal principles, citizens should all be treated the same. The rule of law requires consistent application of the law to both the rich and poor in equal measure. In this instance, the regulations provide for a penalty in the event of the contravention. The penalty is imprisonment for a period not exceeding six months or a fine or both imprisonment and a fine. It is also a principle of South African law that any legislation that creates criminal and administrative penalties requires restrictive interpretation. Now, how did the judge arrive at a finding that is so egregious and disproportionate to the offence committed in total disregard of the penalty provisions?

The answer could be found in the case of *Magagula v Minister of Police; Manzini v Minister of Police* (MN) (unreported case no 1530/2017 and 2362/2017, 15-10-2019) (Legodi JP) and *Nthabiseng and Others v Road Accident Fund* (GP) (unreported case no 3492/2016, 19-6-2018) (Legodi JP) where the Judge President ordered that legal practitioners forfeit their fees in the matters they were instructed in.

In the *Magagula* case Legodi JP said at para 26:

'[L]egal practitioners are expected to assist our courts in accelerating the pace of litigation and not to distract it.

A new division like this, still on its feet, deserves to be a model division and any distractive conduct in pursuit thereto, in appropriate circumstances, ought to be halted by resorting to the consequences.'

The above remarks were made as an expression of displeasure at the conduct

of the legal practitioners who failed to adhere to the Practice Directives in the Mpumalanga Division. The Judge President found authority for the orders he made in r 37(9)(a)(ii) of the Uniform Rules of Court.

In this regard, the judge failed to appreciate context and went overboard as the provisions of r 37(9) were not applicable in this matter. Nowhere in the judgment does the judge express any displeasure in the conduct of any of the legal practitioners in the manner that they conducted themselves during the hearing of the matter.

On the contrary, the matter was properly enrolled and deserved to be heard on an urgent basis given the nature of the relief the applicant had sought and the consequences, which were to befall the community, if it was not heard.

What the judge failed to appreciate is that not every act done contrary to the law is visited with a nullity.

The law reports are replete with cases where that legal principle was expounded dating as far back as 1925. In *Standard Bank v Estate van Rhyn* 1925 AD 266 at 274, the court per Solomon JA expressed the legal position as follows:

'The contention on behalf of the respondent is that when the Legislature penalises an act it impliedly prohibits it, and that the effect of the prohibition is to render the act null and void, even if no declaration of nullity is attached to the law. That, as a general proposition, may be accepted, but it is not a hard and fast rule universally applicable. After all, what we have to get at is the intention of the Legislature, and, if we are satisfied in any case that the Legislature did not intend to render the act invalid, we should not be justified in holding that it was'.

In *Oilwell (Pty) Ltd v Protec International Ltd and Others* 2011 (4) SA 394 (SCA), the court quoted J Voet as having written that '[t]hings done contrary to the laws are not *ipso jure* null if the law is content with enacting a penalty against transgressors.

...

Nay indeed there is no lack of laws which forbid, and yet do not invalidate things to the contrary, nor impose any penalty upon them. Hence came into vogue the famous maxim [m]any things

are forbidden in law to be done which yet when done hold good’.

In this regard the overriding consideration is always whether greater inconveniences and impropriety would result from the rescission of what was done, than would follow the act itself done contrary to the law. The judge clearly failed to follow this approach and had he done so – as he is in law obliged to – he would have arrived at a different conclusion.

A consideration of the lockdown regulations reveals that they were enacted to control the movement of people as a measure to contain the spread of the COVID-19 disease and certain requirements were put in place for compliance. Failure to comply with them will attract a penalty as explained above and clearly it was never envisaged that a violation will result in the nullification of an act of travelling and provision of the services rendered.

It is, therefore, very clear that an order disallowing the payment of fees in cases where the legal practitioners had permits (albeit invalid according to the judge) was in the circumstances of this case a misapplication of the law. The judge failed to distinguish power and remedy.

To the extent that if he was right to de-

clare the permits invalid in the exercise of his judicial power, it did not necessarily follow that an appropriate remedy, which is just and equitable is the disallowance of fees. In this regard, he acted overzealously and exceeded the judicial limits. He was not entitled to do so without affording the respective counsel an opportunity to explain themselves.

The judge failed to heed the wise counsel from the Supreme Court of Appeal in *Motswai v Road Accident Fund* 2014 (6) SA 360 (SCA) wherein the judges issued a reminder to all and sundry that charges of fraud and other conduct that carry serious consequences must be proved by the clearest evidence. While the judge was entitled to investigate the issue of the permits, he was, however, not entitled to make conclusions that appeared obvious to him only from those documents in his possession. To do so amounts to a reckless exercise of judicial power, which Cachalia JA cautioned against in *Motswai* at para 59 when he said:

‘Through the authority vested in the courts by s 165(1) of the Constitution judges wield tremendous power. Their findings often have serious repercussions for the persons affected by them. They may vindicate those who have been wronged but they may condemn others.

Their judgments may destroy the livelihoods and reputations of those against whom they are directed. It is therefore a power that must be exercised judicially and within the parameters prescribed by law. In this case it required the judge to hold a public hearing so that the interested parties were given an opportunity to deal with the issues fully, including allowing them to make all the relevant facts available to the court before the impugned findings were made against them. The judge failed to do so and in the process did serious harm to several parties’.

The judgment, when considered together with the others mentioned above, ineluctably leads one to a conclusion that the Mpumalanga High Court is at war with its legal practitioners. This is not good for the judiciary, nor does it advance the noble cause of making justice accessible as legal practitioners.

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By
Anda
Jojo

Observing refugee and asylum processing centres through a constitutional lens

The process for the regulation of refugee and asylum seekers must adhere to several international and constitutional rights and obligations. Consequently, the detention and processing centres for refugees and asylum seekers, as per the White Paper on International Migration for South Africa adopted by the Department of Home Affairs in 2017 and proposed to be implemented by 2030, must be a matter of last resort. Any mechanisms, which utilise detention centres must be determinable by law and offer legal certainty that is challengeable through law, as stated by guidelines 2 and 3 of the United Nations High Commissioner for Refugees Detention Guidelines (UN Guidelines).

The underlying provision of concern is s 10 of the Constitution, which deals

with human dignity. Nugent J in *Minister of Home Affairs and Others v Watchenuka and Another* [2004] 1 All SA 21 (SCA) at para 25 stated that ‘[h]uman dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human’. Such dignity entitled people within the country to work, be respected and protected by the Bill of Rights.

South Africa’s (SA’s) state obligations relating to refugees and asylum seekers

The majority judgment written by Madlanga J in *Saidi and Others v Minister of Home Affairs and Others* 2018 (4) SA 333 (CC) at para 28 held that the state’s

obligations relating to refugees and asylum seekers are mediated by the Bill of Rights, and the Refugees Act 130 of 1998, interpreted in line with international obligations. Section 39 of the Constitution prescribes that in order to give content to refugees’ rights, states obligations to international law and foreign law may be used. This is further supported by the s 7 constitutional obligation for the state to protect, promote, respect and fulfil the rights in the Bill of Rights.

Mechanisms for the regulation of refugees and asylum seekers are regulated by several fundamental rights. According to guideline 1 of the UN Guidelines refugees enjoy the right to, ‘seek and enjoy in other countries asylum from persecution, serious human rights violations and other serious harm’. Additionally, the fundamental rights to liberty

and security of the person are central animating rights in the consideration of processing mechanisms. Guideline 2 of the UN Guidelines has determined that these rights taken together 'mean that the detention of asylum-seekers should be a measure of last resort.'

Further, the detention of refugees and asylum seekers must be in accordance with the law with clear legal processes characterised by defined and determinable periods of detention (UN Guidelines 3). Thus the legal provisions must meet the requirements of legal certainty by including explicit grounds of detention (UN Guidelines 4), clear limits on maximum periods of detention (UN Guidelines 6) and include access to effective remedies to contest detention and the ability to call into question the legal validity of any detention (UN Guidelines 7).

Taken together these rights provide that the detention of refugees and asylum seekers must be a matter of last resort. Thus the proposed system of detention centres has the potential of violating the international constitutional rights to liberty and security of the person, as well as equal access to the law and the right to dignity.

The Belgium experience of detention centres

Author Giusto Catania in his article entitled 'The living conditions in detention centres' (www.gettingthevoiceout.org, accessed 19-5-2020) writes that in Belgium, centres are akin to prisons. Former 'detainees' note that the doors are metal and you have to talk to the guards through a metal door.

Communication with the outside world is only possible by doing chores to

buy telephone cards, cigarettes, etcetera. Detainees may only get personal phone calls from their legal practitioner. The detainees may have a cell phone provided that it does not have a camera.

Detainees do not have freedom of movement. In several facilities all rooms require a key for opening, detainees are forced to live in groups with a strict timetable from wake-up time to bedtime. Their freedom of movement is severely restricted including their access to fresh air.

The Australian experience

The Australian experience shows similar infringements, including indignity and physical violations of the person. Author Victoria Crow in her article titled 'Immigration detention centres: What life is really like inside and how it impacts mental health' published in 2014 (www.news.com.au, accessed 19-5-2020) makes reference to Iran refugee, Mohsen Soltany Zand, who spent four years in the immigration detention before getting refugee status. Mr Soltany Zand stated 'people have more respect for criminals in this country than those seeking asylum'. Mr Soltany Zand further stated that the detention centre left him like a 'dead zombie' plagued with anxiety and nightmares. He recalled being woken up at midnight and being forced to recite his identity number.

University of New South Wales School of Psychiatry, St John of God Professorial Chair of Trauma and Mental Health, Professor Zachary Steel, works with asylum seekers and believes detention centres induce a progressive terror in people's mental state.

Children are in no better position.

Everyone lives side by side and children have nowhere to learn how to crawl or walk. Mothers experience post-partum depression (with no medical or psychological treatment) and suffer from health problems related to childbirth and the unhygienic conditions in the camps. The mother-child bond is then disrupted and has grave consequences for the child's mental health.

In Nauru, Australia, detainees allege that female asylum seekers are forced to strip naked in exchange for showers. Access to justice is not a reality for these detainees, there is no redress for injustices.

Conclusion

From the above, it is clear that immigration detention centres are inappropriate as mechanisms for regulating the refugee and asylum seeker process as they violate several rights both at the international and national levels.

Further, foreign law comparisons indicate that the centres are a forcibly militarised way of living where trauma, cruel and inhuman treatment is rife. Human dignity is both a right and a core value animating from our constitutional dispensation. Thus all measures in relation to refugees and asylum seekers must be cognisant of not only the international obligations, which SA has undertaken, but also the constitutional obligation to protect, promote and respect the rights in the Bill of Rights.

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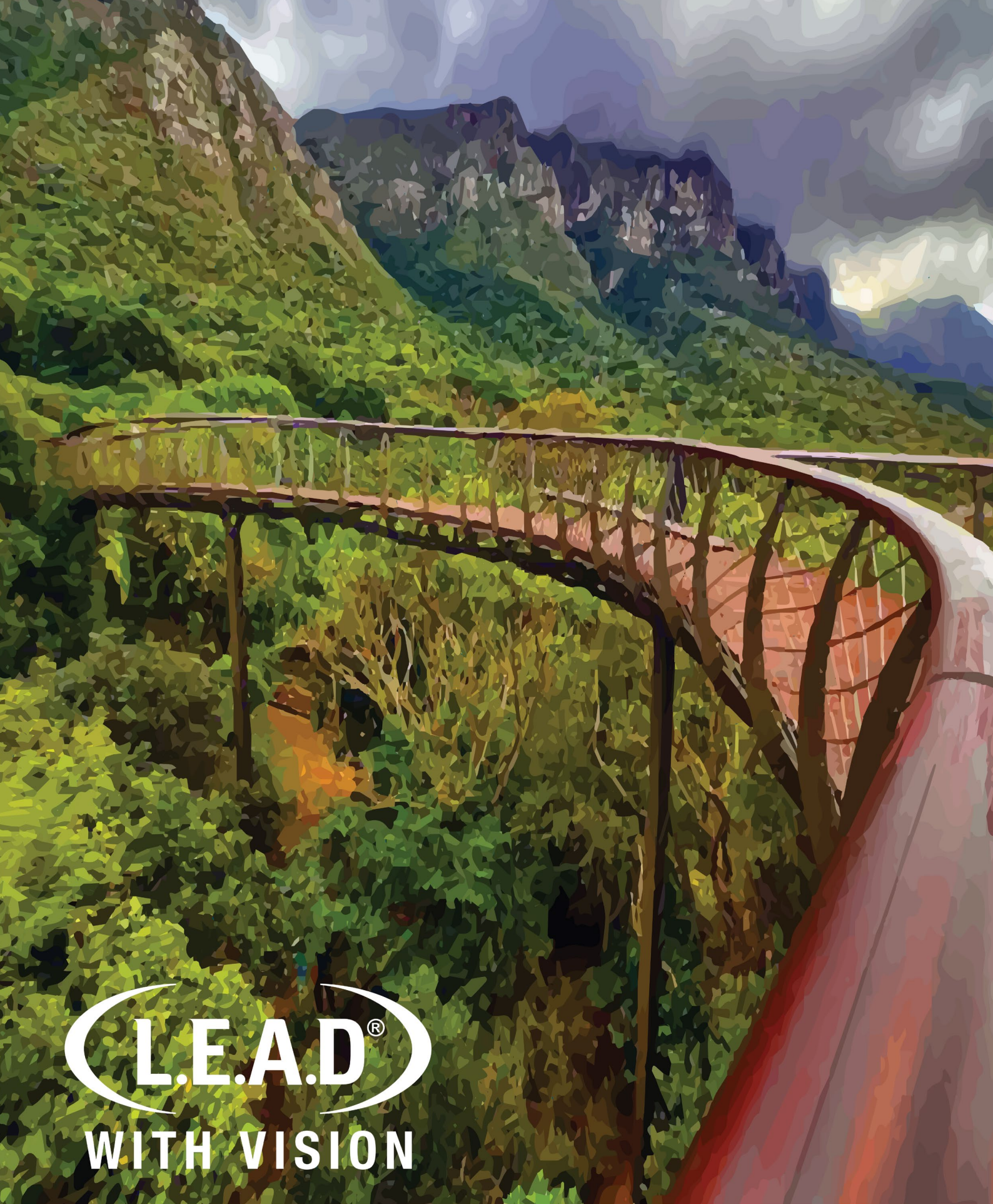
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Index Page

Business opportunities.....	1
For sale/wanted to purchase.....	1
To Let/Share.....	1
Services offered.....	1
Smalls.....	4

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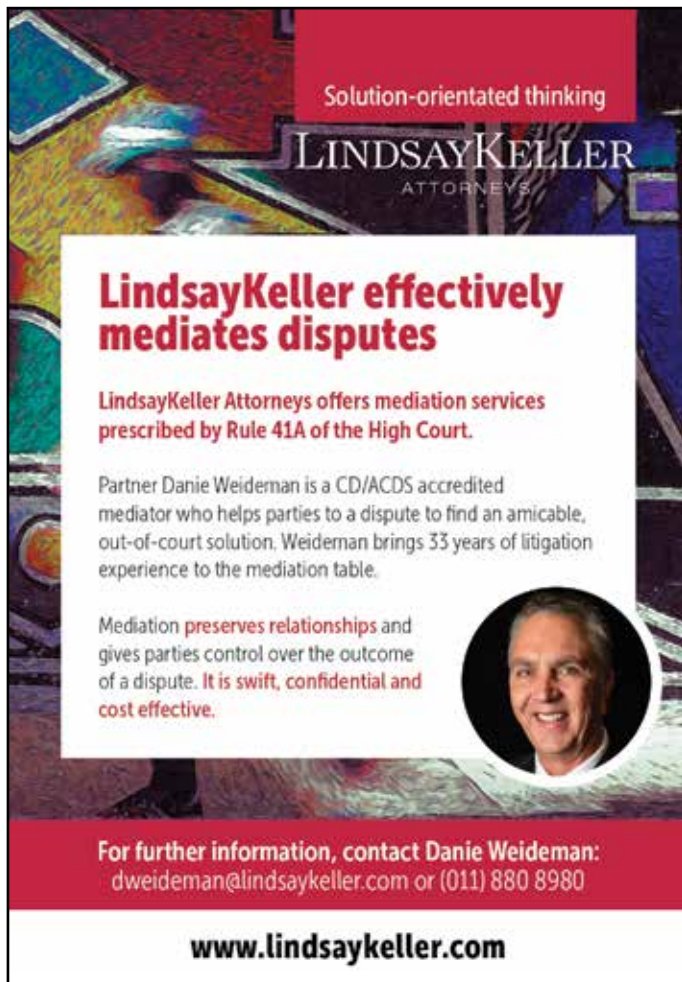
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RISKALERT

JUNE 2020 NO 3/2020

IN THIS EDITION

RISK MANAGEMENT COLUMN

- Amendments to the LPIIF policies 1

GENERAL PRACTICE

- Keeping proper consultation notes saves the day: The defence to a professional negligence claim turns on the attorney's consultation notes – by Khopotso Selepe 3
- Integrity as a lifelong commitment in the legal profession – by Mtho Maphumulo 5
- Arguments for a delay in the completion of prescription and expiry periods during the lockdown period – by Thomas Harban 7

RISK MANAGEMENT COLUMN

AMENDMENTS TO THE LPIIF POLICIES

The annual renewal of the Legal Practitioners Indemnity Insurance Fund NPC (the LPIIF) policies will take place on 1 July 2020. The new policies will be published on that date and will also be uploaded onto the LPIIF website (www.lpiif.co.za).

The LPIIF team has, once again, carefully considered the wording of both the professional indemnity Master Policy and the Executor Bond Policy. All insured legal practitioners must study the policy wording carefully.

The Master Policy

The current Master Policy wording can be accessed at www.lpiif.co.za. The changes to the Master Policy do not introduce any new exclusions and are aimed at improving the articulation of the affected clauses and removing any potential ambiguity.

Changes have been made to the following clauses:

- XIII – clarification that this definition refers to the excess.
- XXIV – only legal practices conducted as a sole practitioner, a partnership of practitioners, an incorporated legal practice as referred to in section 37 (4) of the Legal
- 6 – clarification of the existing position that indemnity is granted to the legal practice – that is, the firm – and not to the individual practitioners in the firm separately.
- 16 (e) – the definition of “Investment Advice” has been



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RISK MANAGEMENT COLUMN continued...

added in order to clarify the meaning of the existing exclusion. The change to this clause reads:

*'For purposes of this clause, **Investment Advice** means any recommendation, guidance or proposal of a financial nature furnished to any client or group of clients –*

- (a) in respect of the purchase of any financial product, or*
- (b) in respect of the investment in any financial product, or*
- (c) the engagement of any financial services provider.'*
- 16 (f) – the reference to section 78 (2A) of the repealed Attorneys Act 53 of 1979 has been removed.
- 16 (m) – the change in the wording clarifies the scenarios where the exclusion applies being (i) the insured acts purely as a conduit for the funds with no underlying mandate to provide legal services, and (ii) where, after the completion of the mandate, the insured takes further action which has no impact on the mandate to provide legal services, which action the client can perform successfully without the involvement of a legal practitioner, and such action amounts to the taking of further and unnecessary risks by the insured.
- 16 (o) – tidying up the wording in order to clarify that the exclusion applies to payments made by the insured into an incorrect account(s).
- 30 – the word 'Notice' has been replaced with 'Notification'.

The annual limits of indemnity (amount of cover) and the applicable excesses remain unchanged.

Please direct any queries in respect of the Master Policy to the LPIIF's Claims Executive, Joseph Kunene, at sithembikunene@LPIIF.co.za or telephone (012) 622 3917.

The Executor Bond Policy

The changes to the Executor Bond Policy are as follows:

- References to 'attorney' have been replaced with 'legal practitioner'.
- References to the old law society provincial jurisdictions have been updated to refer to the Legal Practice Council (LPC).
- The policy clarifies the existing position that bonds of security will only be issued to executors. An applicant seeking appointment in other capacity, including as a Master's representative in terms of section 18 (3) of the Administration of Estates Act 66 of 1965, will not be granted a bond of security (clause 2.1).
- The day-to-day administration of the estate must be done by the legal practice in which the executor practices.
- The LPIIF has the right to refuse to issue a bond of security to an applicant who has breached any term of the policy, whether in respect of the current application or any previously granted bond of security (clause 2.10).
- Clauses 3.3.2.1 and 3.3.2.3 have been amended to give the LPIIF the rights (i) to refuse to issue further bonds to an applicant who fails to provide a copy of the letters of executorship within 30 days of such letters being issued, and (ii) giving the LPIIF the right to apply to the Master of the High Court for the removal of the executor for a failure to comply with the obligations in this clause.
- Clause 3.3.2.4 creates an obligation on the executor to apply to the Master for the closure of the bond within 30 days after the liquidation and distribution account has been approved and the executor has accounted to the Master.
- In terms of clause 3.9, the LPIIF will

have the right to report the executor to the LPC at any stage where dishonesty is detected.

- Practitioners linked to more than one firm will have bonds issued to them in the name of only one firm (clause 4.2). This is a risk management measure aimed at ensuring (i) that the administration of the estates which are the subject of bonds issued to a particular executor are all administered in one firm, and (ii) preventing attempts by certain practitioners to breach the limit of R20 million per firm.

It will be appreciated that these amendments are aimed at improving the management of the risk associated with this line of business, addressing the long-tail nature of this business and also to align the obligations of the executors with the provisions of the Administration of Estates Act. The aim is also to encourage the prudent management of this area of practice. The value of active bonds issued by the LPIIF is currently approximately R5 billion with some bonds having been issued in as early as 2002 and the executors not properly reporting to the LPIIF on the progress made in the administration of the underlying estates. The risk cannot be left to exist in perpetuity. Claims in this area have also emanated mainly from dishonesty on the part of the executors or their staff.

Any queries in respect of the amendments to the Executor Bond Policy can be addressed to Zodwa Mbatha, the Executor Bond Executive, at zodwa.mbatha@lpiif.co.za or telephone number (012) 622 3925.

Keep a look out for the new policies in the next edition of the *Bulletin*.

GENERAL PRACTICE



KEEPING PROPER CONSULTATION NOTES SAVES THE DAY: THE DEFENCE TO A PROFESSIONAL NEGLIGENCE CLAIM TURNS ON THE ATTORNEY'S CONSULTATION NOTES

By: Khopotso Selepe (LLB)

Associate at Ditsela Incorporated Attorneys, Email: khopotso@ditsela.com

Introduction

The making and retention of proper consultation notes were crucial in the successful defence of a recent professional negligence claim brought against an attorney. The matter in question is that of *PJ Nienaber vs Pierre Kitching Attorneys and Another* (53906/2011) ZAGPPHC (21 May 2019) (unreported).

Background

His lordship Millar AJ delivered judgment in the matter. The plaintiff had sued the defendants (his erstwhile attorneys) for damages arising from alleged professional negligence, alleging that his claim against the Road Accident Fund (RAF) had been under settled.

On 26 April 2006, the plaintiff was involved in a motor vehicle accident (MVA). Pursuant to the MVA, the plaintiff was taken to Wilgers Hospital to be treated for his injuries. X-rays were taken and he was given a neck collar to wear and medication for pain. The plaintiff had only sustained neck injuries. On 29 June 2006, the plaintiff instructed the defendants to assist him with a claim against the RAF. His initial intention was to recover the medical expenses he had incurred.

During December 2007, the plaintiff was informed that a medico-legal examination had been arranged for

him with an Orthopaedic Surgeon in Pretoria. The plaintiff attended the appointment on 23 January 2008 at the Orthopaedic Surgeon's rooms.

During the trial, the plaintiff testified that he received a telephone call in May 2009 from an attorney employed by the second defendant (Ms L) who informed him that she had received an offer of R40 000.00 in respect of his claim and that she had been unable to get hold of the instructing attorney to discuss the offer. He further testified that to the best of his recollection she had informed him that the offer was a good one in the circumstances and that the offer had been increased to R45 000.00. The plaintiff followed Ms L's recommendations and instructed her to accept the offer. He was unable to recall that, before taking his instructions, she had informed him of the 'once and for all rule' or that he had only instituted the claim so as to recover his past medical expenses.

During cross examination, it was put to the plaintiff that he had consulted with Ms L at the offices of the second defendant on 21 May 2009 and he was shown the contemporaneous note made by her in respect of that consultation. The plaintiff denied that the consultation had taken place. He was asked whether he regarded the notes of the discussions

and, in particular, the note relating to the consultation on 21 May 2009 as being *ex post facto* fabrications. The plaintiff declined to characterise them as such. It was demonstrated that the contemporaneous notes made by Ms L were referred to in the bills of costs that had been prepared after the settlement of the matter during 2009 and before the present action had even been instituted. He was unable to offer any comment.

The plaintiff further testified that he subsequently learned that the case had become settled on the basis that the RAF would pay the sum of R47 235.73 and would furnish him with an undertaking in terms of section 17(4)(a) of the RAF Act to cover 80% of the cost of future medical treatment arising out of the injuries sustained in the MVA and would pay a contribution towards his medical costs.

After the settlement, so the plaintiff testified, he was advised by a parent of a boy who he coached rugby that he had a claim against his former attorneys for under settlement of his claim against the RAF.

Ms L had kept the following notes relating to the plaintiff's action against the RAF:

File Note Dated 21 May 2009

'Consultation - [DL] consults with client in order to discuss the offer

GENERAL PRACTICE continued...

from the RAF. It was explained to client that there was a risk in finalizing the case in the Magistrate's Court in light of the fact that the jurisdiction possibly could be the cause that his undertaking would in the future be limited to the difference between R100 000.00 which is the jurisdiction and the amount that is offered for pain and suffering and medical expenses. I proposed further that we send him to an industrial psychologist in order to ascertain if he will possibly have to retire early or not. The client confirms to me that he currently does not have any problems at work and that he really wants to have the case settled and that he is not interested in going to an industrial psychologist. He instructs me to continue with written settlement negotiations with the other side and to give him written feedback on the result whereafter he will decide whether he is going to accept the offer.'

File Notes Dated 26 May 2009

'Attendance at court etc - matter must stand down because the other side still doesn't have instructions. B discussed general damages and settlement proposals - stand down - we receive offer - past medical expenses R2 235.73, future medicals - Section 17(4) limited to 80% and general damages R45 000.00. DL telephone client. He wants to accept the offer and to settle the matter. Risks are again explained regarding "once for all". He alleges that he only instituted a claim for past medicals and that he is happy. I telephone the instructing attorney. The attorney who is handling the case is not available and his cell phone is off. I left a message yesterday afternoon with his secretary and speak to her. He apparently confirmed that he is busy with one or other amendment and that the case

must be postponed. I confirmed to her that client wants us to accept the offer and that I don't know what to do because the attorney is avoiding me and we are dealing with the client directly because he asked us to because it is a client who requires a lot of feedback and is difficult. Client is happy with us and I cannot see what the problem is. She will urgently get someone to call me. [PK] calls me back. Explain the situation and he confirms that we must please immediately go ahead and settle the case and he will take the matter up with his PA. I call client again, he is happy and we accept.'

Telephone Notes Dated 19 June 2009

'[JN] - one of his friends told him on Saturday that he should have got much more for his case - can we ask for more? - no, final. Cannot just ask for more - must prove it - every case has its own facts. His settlement was based on the medical report. Remind him that he did not want to go to the industrial psychologist - if he now suddenly unhappy with the settlement then he must obtain a professional opinion and sue us. He must just remember that the settlement was on his instruction after I properly advised him. He won't - just wanted to know if he could get a little more.'

The plaintiff was unable to dispute the contents of the contemporaneous notes made by Ms L relating to either of his discussions with her, but stated that while he recalled the discussions, he did not recall the discussions as recorded in the notes. He was adamant that his memory was good notwithstanding his own failure to keep notes and the passage of 10 years and that the consultation on 21 May 2009 had never taken place.

The plaintiff refused to concede that after the elapse of 10 years it was possible that his memory was not as good as he believed.

Ms L testified that shortly before the trial and on 21 May 2009 she had consulted with the plaintiff wherein the plaintiff refused to consult with an Industrial Psychologist and instructed Ms L to continue with the settlement negotiations. The consultation was on the day immediately after an offer had been received from the RAF.

The defendant's expert attorney also testified that having regard, *inter alia*, to the discussion and consultations between the plaintiff and Ms L, a reasonable attorney in her position would not have done anything further in investigating a claim for loss of earning capacity and was entitled to accept and follow the plaintiff's instructions to settle the case for the amount that it was settled for.

Conclusion

The court noted that the plaintiff testified that the consultation on 21 May 2009 did not take place. He was adamant that he did not do so and went so far as to testify that he had never ever been to the second defendant's offices. Unlike Ms L who had kept notes of her interactions with the plaintiff, he had not done so.

Notwithstanding the passage of 10 years since the events in question, the plaintiff was dogmatic that his memory was accurate and disavowed any flaw or possibility of a flaw in it. Ms L, on the other hand, readily conceded that due to the passage of such a long time that her memory of what had transpired was vague and she was frank with the court when she testified that she could do little better than to confirm her notes.

GENERAL PRACTICE continued...

Besides being challenged factually whether the consultations of 21 May 2009 took place, it was not suggested that the notes which had formed part of the second defendant's file had been fabricated *ex post facto* – indeed the party and party bill of costs submitted to the RAF as well as the attorney client bill of costs of the second defendant, both of which had been drawn in 2009 referred to the consultation on 21 May 2009 as having taken place and was consistent with the contents of all the other relevant notes made by her.

The court held that the consultation of 21 May 2009 did in fact take place. It was during this consultation that Ms L had suggested to the plaintiff that he could go to an industrial psychologist to ascertain whether he would retire earlier than he would otherwise have done. The notes of the consultation specifically records that

the plaintiff did not want to go for a further examination and wanted the case to be finalised and settled.

The court further held that having regard to the fact that the plaintiff on 21 May 2009, having been informed of the option of attending an Industrial Psychologist, refused this and instructed Ms L to proceed to negotiate for a higher offer and then on 26 May 2009, a higher offer having been negotiated proceeded to instruct her to accept it.

The court further held that it was unable to find that she did not discharge her obligations to either properly investigate the case or that she was negligent in advising the plaintiff that in her opinion the offer that had been received was a reasonable one.

On that basis, the plaintiff's case was dismissed with costs.

Lesson learned

In a nutshell, the important lesson to be drawn from this case is that attorneys should keep proper detailed notes when consulting with their clients. It is important to document every advice and instructions given by your client. This is more so in the current environment where some clients are inclined to want a second bite at the cherry after spending their settlement amounts. The attorney becomes an easy target. If steps taken by the attorney in settling the matter are not documented, the claimants' versions usually carry the day.

Practitioners are therefore advised to be smart and keep proper consultation notes to defend themselves against any future professional negligence claims.



INTEGRITY AS A LIFELONG COMMITMENT IN THE LEGAL PROFESSION

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'Integrity: The indispensable element – the Fundamental Principles Leading to Trust, Reputation, Fair Play, Reliability, Adherence to Proper Conduct, Standards, Values.' – James Thomas.

Integrity is integral everywhere and, in every space, however, in the legal profession, it is a non-negotiable trait – one that the court needs to be satisfied with before one becomes a le-

gal practitioner. Upon admission, one becomes part of the noble profession and, naturally, is expected to uphold the law and have the utmost regard for it. It is thus justifiable to expect every lawyer to be a person of integrity.

Experience has, however, shown that this is not always the case – some lawyers do not maintain their integrity. Amongst other things, money, greed, influence and pressure

push lawyers to partake in activities that usually prove detrimental to their hard-reached goal of becoming lawyers. Hereinunder, we will zoom into some of the conducts/behaviours which lawyers usually take 'lightly' yet may get them into trouble; demonstrate few measures/ways to deter such conduct whilst also reminding the practitioners of the gravity of maintaining integrity

GENERAL PRACTICE continued...

both in their personal and professional spaces.

‘Trivial misconducts’ not so trivial for legal practitioners

Certain misconducts are generally perceived as trivial and easily pardonable for general members of the public and members of certain other professions. For legal practitioners, this does not hold true, as they are expected to uphold the law to the ‘t’. As explicated above, sometimes lawyers do get pushed by certain factors and end up ‘doing favours’; ‘helping friends/family/colleagues’ – which requires them to transgress the perimeters of the law. A simple act of usage of the official stamp – certifying or commissioning a document – can have dire consequences if utilised inappropriately. Very often, a friend or a colleague will ask you to certify and/or commission a document without producing the original document or the identity document. This may, in the near or distant future, backfire. It often happens that a lawyer will ask for a ‘favour’ from his opponent – which, in a greater scheme of things, jeopardises the interests of the client of the lawyer doing the favour. This is prevalent in cases where the other party is the state/state organ or if the client is not so hands-on in the matter – thus leaving the practitioner ‘to run the show’. Doing each other favours as colleagues is applaudable and advisable if it advances the interests of all parties involved/strengthens the legal position and contributes positively to the law. It then becomes imperative for legal practitioners to decide carefully on the favours they do for their colleagues.

Every legal practitioner is (or rather should) be aware of the statutory requirements one has to meet in order to appear in certain courts,

for example, the High Court. It sometimes happens that a legal practitioner would appear without having the requisite right of appearance just because ‘it will only take 5 minutes’ or ‘it is just to take the order’. This, if reported, followed and investigated, can have adverse ramifications for the concerned practitioner. The same applies to the signing of certain court documents, for example, the pleadings. Lastly, advocates sometimes double book themselves with the hope that one matter will settle, and s/he will deal with the other. This is a pure example of taking a chance which may greatly affect the rights and interests of one or both of your clients. As such, advocates must always avoid being double briefed.

Much more serious offences

If committing a trivial offence can have serious ramifications, one can only imagine how much harm can be caused by more serious offences-for example fraud, bribery and corruption. As demonstrated above, selfishness and greed have, on a number of occasions, been a downfall of some lawyers.

There is a trail of cases where lawyers have been struck-off the roll for offences one would not have imagined could be committed by members of the profession. For example, an attorney in the employ of a firm running his/her own matters on the side. There are no proper books; no necessary accounts in place and totally no compliance with the relevant law regulating the offering of legal services to the public. Others would brief certain advocates and get a share of the fee paid to counsel. This is a typical “*quid pro quo*” example where the attorney feeds a specific

counsel with briefs and, in turn, gets to share the fees.

One may argue that although this is an unacceptable practice, some advocates may be prompted to resort to it due to lack of briefs. Be that as it may, it is unacceptable and cannot be condoned in our profession. Some lawyers have, in the past, been reported to the provincial law society (as it was then) for offences of bribery – bribing the court officials in order to ‘get things done’. The offence of bribery is quite grave – be it in your personal or professional realm – offering or accepting a bribe is grave and, if reported and investigated, can have severe consequences.

In certain instances, prominent in cases against the RAF – lawyers mislead their clients (deliberately so) by not reporting properly or at all on the progress (or lack thereof) of the matter etc. Misleading of clients is unacceptable. Also, misleading your colleagues within your profession is unacceptable and is a breach of ethical duties.

These are but some of the prominent examples of trivial and serious offences that legal practitioners commit, and which has proved fatal to most hard-earned and promising careers. They speak to the core of one’s integrity. Temptations, selfishness and greed is part of human nature but, as a person of integrity, you should be able to resist these for a greater good. For aspiring and current legal practitioners, it is pivotal to always remember that being a person of integrity does not cease upon admission, but it is a lifelong commitment.

Possible Measures

To curb the occurrence of the afore-said offences, it is incumbent upon

GENERAL PRACTICE continued...

the Legal Practice Council (LPC), courts and relevant role players to ensure that the integrity of the profession is restored and maintained. This is not only important for the judiciary but for the public at large – the public must have full confidence and belief in everyone associated with the judiciary in one way or the other. It is also imperative that each lawyer, as an officer of the court, reports those disobeying the law and breaching their ethical duties. Silence about such acts is a loud support of unethical behaviours.

When someone reports illegal/unethical behaviour, the LPC needs to protect that particular individual so as to encourage others to report such. Also, the LPC has to take robust decisions against perpetrators; courts' decisions relating to such offences need to be harsh and send a very strong message to everyone, so as to deter further misconducts.

Different national and provincial organisations, need to prioritise integrity amongst their members, continuously encourage/remind members of significance of upholding the law at all times. Further, these organisations are well positioned to transmit information further down to law students. If the right mentality is cultivated and implanted at the university level, then we will be right on course to eradicating unethical/illegal behaviour going forward. Most trivial offences can easily be obliterated through basic house-keeping, for example, lawyers producing their certificates of rights of appearance whenever they appear unless excused by a presiding officer specifically.

Conclusion

Every legal practitioner will agree that the journey to becoming a member of the profession is never easy. This, on its own, should be a suffi-

cient reason for every practitioner to never want to risk losing everything they have worked so hard for. Our obligation, as officers of the court, is to safeguard and uphold the law and, in so doing, we instil confidence in the general public. As a person who has been declared fit and proper to safeguard the law and legal interests, you need to maintain integrity – be it in your personal or professional space and this must be your lifelong commitment.

This lifelong commitment births long-lasting fruits.

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ARGUMENTS IN SUPPORT OF A DELAY IN THE COMPLETION OF PRESCRIPTION AND EXPIRY PERIODS DURING THE LOCKDOWN PERIOD

By Thomas Harban

Introduction

At the time of writing, South Africa is in a state of national lockdown as part of the measures implemented by the government to combat the spread of the coronavirus (COVID 19) pandemic. Legal practitioners have, on various platforms, raised

various concerns regarding the effect of the lockdown measures on their ability to conduct their practices. Similarly, various sectors of the general population have decried the effect of the lockdown on their ability to conduct their general affairs and to exercise their rights including their rights to pursue legal action. In this article I focus on the effect of the lockdown measures on matters that prescribe in the this period.

Many practitioners are concerned about the potential severe impact of prescription on themselves and their clients. The effect of the lockdown measures is that proceedings cannot be instituted and practitioners, by virtue of the measures in place, may not be able to attend to and have legal processes issued and timeously served on the defendants concerned in order to interrupt prescription. The circumstances under

GENERAL PRACTICE continued...

which proceedings can be instituted under the lockdown regulations are very limited. The courts are only providing limited services. Not all of the courts have electronic infrastructure such as CaseLines for the issue of new legal proceedings. Litigants who choose to pursue actions in person without the assistance of a legal practitioner do not have access to the electronic systems, where such systems are implemented.

The concerns raised by the practitioners in respect of prescription are well placed. Prescription of debts will, effectively, deny creditors their right to pursue claims against debtors concerned – I use the terms ‘creditor’, ‘debt’ and ‘debtor’ in the context that they are used in the Prescription Act 68 of 1969. Furthermore, the statistics for professional indemnity claims notified to the Legal Practitioners Indemnity Insurance Fund NPC (LPIIF) reveal that prescription related claims are perennially the highest in terms of both the number and value of claims brought against legal practitioners. If this risk is not properly addressed, many legal practices will face the prospect of a flood of professional indemnity claims being brought against them by clients whose claims have allegedly prescribed in this period. Such claims arising out of the alleged prescription, individually or in aggregate, may exceed or substantially erode the firm’s available limit of indemnity under the LPIIF Master Policy (a copy of which is available at www.lpiif.co.za). This will potentially leave such practitioners personally exposed in the event that they do not have sufficient top-up insur-

ance or some other risk transfer measure in place. A flood of prescription related claims will also threaten the sustainability of the LPIIF as the primary insurer of all legal practitioners practising with Fidelity Fund certificates (section 77(1) of the Legal Practice Act 28 of 2014 and the clauses 5 and 6 of the Master Policy). The court rolls could also be further flooded with condonation applications and litigation launched in this regard. This is thus a potential catastrophic event that none of the stakeholders in the profession can risk facing.

There are a number of legal arguments that can be raised against a special plea of prescription where it is alleged that the debt prescribed during the lockdown period. This article focusses mainly on the delay in the completion of prescription stipulated in section 13 of the Prescription Act 68 of 1969. Though I have focussed on personal injury claims, the principles will apply to all litigation. Other grounds for the delay in the completion of prescription gleaned from the various authorities considered include the impossibility of performance and the related maxim of *lex non cogit ad impossibilia* and the *exceptio doli* concept.

It will be appreciated that it is not possible in the limited space available in this *Bulletin* to explore every possible legal argument *ad nauseum*. I will highlight the main principles of the arguments that can be raised in support of the argument that the completion of prescription is delayed in the current circumstances.

The uncharted nature of the lockdown regulations

The COVID 19 virus is novel and the measures implemented by government in response to the pandemic have taken plaintiffs and their legal representatives into uncharted territory. Both the plaintiffs and their legal representatives are subject to the restrictions. The pandemic is, itself, a superior force requiring an unprecedented response and so are the drastic and draconian measures implemented to curb it. The lockdown measures are unforeseen, exceptional and extra-ordinary. The effects of the lockdown on the public in general and legal practitioners in particular are well documented. Some of the circumstances that are relevant for present purposes are outlined below.

The offices of the RAF are closed during the lockdown period. It is physically impossible for new claims to be legally hand delivered to the RAF offices. The Post Office is only providing limited services during the lockdown. Claims can thus not be submitted by registered mail. The effect of the closure of the RAF offices is also that plaintiffs cannot have summons served on that institution in respect of matters previously lodged with the RAF and in respect of which the 120 day period has expired. The RAF has not made any alternate facility available for plaintiffs to prosecute their claims during the lockdown period. In recent years the RAF has gone on a drive to encourage plaintiffs to lodge claims directly with it without the assistance of legal representatives. The direct claimants (as the RAF refers to them), being

GENERAL PRACTICE continued...

laypersons without legal training, are in a particularly vulnerable position as they do not know the technicalities of pursuing claims, including the applicable time limits. It is not known whether the RAF will raise the prescription point in respect of the matters which were due to be lodged during the lockdown period. Should the RAF raise the prescription point, this may 'come back to bite it' (so to speak) as the 120 day period within which it has to consider claims will then also have to run during this time. The RAF cannot raise prescription against claimants, but expect that the time limit within which it must consider claims will not run in the lockdown period.

The instruction to pursue a RAF claim requires, in practical terms, a physical consultation between the plaintiff and the legal representative. The effect of the lockdown measures on the parties (the plaintiffs, potential witnesses and the legal representative(s)) is to introduce a number of significant challenges to the effective launching of proceedings). Legal practitioners are thus unable to have the essential documents such as a power of attorney, contingency fee agreement in accordance with Contingency Fees Act 66 of 1997 (where applicable), claim forms and affidavits by claimants and witnesses drawn up, and signed and commissioned.

Medical facilities are only providing limited services. The examination of potential claimants in order to complete the statutory RAF 4 claim forms is not permitted as it is not an essential service. It is also not possible for claimants to

undergo the required medico-legal examinations for assessments to be made whether or not they have met the standard for the lodgement of claims and the proper assessment of the extent of the injuries (and any *sequelae*) and thus properly quantify their damages. Accident reports and other required documents such as hospital and clinical reports cannot be obtained. Practically, a party in the position of the plaintiff in *Links v Member of the Executive Council, Department of Health, Northern Cape Province* (CCT 29/15) [2016] ZACC 10; 2016 (5) BCLR 656 (CC); 2016 (4) SA 414 (CC) (30 March 2016) will not be able to have the required consultation at which the circumstances of his or her injury can be explored by medical professionals and explained to him or her giving rise to the knowledge that a cause of action exists.

The courts and the sheriffs are only providing limited services during the lockdown period. Service by the sheriff of a process in order to interrupt prescription is not legally possible in most instances or only possible under very restricted and difficult circumstances in others. Sheriffs in some jurisdictions have been worse affected than others. As noted above, electronic platforms (such as Caselines) or the issuing of summons are not available in all of the high, regional and lower courts.

In cases where the plaintiff is faced with some or other legal impediment preventing the taking of steps to interrupt the completion of prescription, such impediments are compounded by the lockdown

measures. Judicial recognition (see the cases cited below) has been taken of those instances where impediments such as the fact that a curator *ad litem* or curator *bonis* has not been appointed for the plaintiff or a liquidator (or trustee) has not been appointed as yet for an insolvent as circumstances where the completion of the running of prescription is delayed until the impediment imposed by the superior force is removed.

The lockdown measures thus make it impossible for claimants to take the required steps to interrupt the running of prescription and expiry periods.

The applicable law

Various regulations and directives have been promulgated in terms of the Disaster Management Act 57 of 2002 aimed at regulating some or other aspect of the lockdown measures. The Office of the Chief Justice and the various heads of the high, regional and lower courts have issued a number of directives aimed at regulating the conduct of matters in their respective courts. It is trite that the regulations and directives do not repeal legislation. The various regulations and directives cannot be read as having the effect of denying a plaintiff the right to pursue an action against a defendant which such plaintiff would otherwise have in law, but for compliance with the lockdown conditions.

The Constitution

The Constitution (Constitution of the Republic of South Africa Act 108 of 1996) is the supreme law

GENERAL PRACTICE continued...

of the Republic (section 2). A number of the fundamental rights enshrined in the Bill of Rights (Chapter 2) will be violated by extinctive prescription running under the lockdown conditions. These include the rights to equality (section 9), the rights of children in cases where a *curator ad litem* needs to be appointed (section 28(1)(h)), access to information (section 32), just administrative action (section 33) and, most importantly for current purposes, access to courts (section 34). The lockdown measures cannot be read as having the practical effect of permanently negating these rights. (see CM van der Bank, *The Constitutionality of Prescription Periods in the South African Law, Journal of Finance & Economics*, Volume 2, Issue 1 (2014), Published by Science and Education Centre of North America).

The Prescription Act

The enactment of the Prescription Act was aimed at consolidating and amending the laws relating to prescription. The prescription of debts is governed by chapter III of the Prescription Act. A creditor interrupts the running of prescription by the service on the debtor of a process whereby payment of the debt is claimed (section 15 (1)). In the normal course, this will be service of a summons. A common mistake made by practitioners is labouring under the view that issuing proceedings before the expiry of the prescription period is sufficient. Section 13 of the Prescription Act is relevant for present purposes, the applicable provisions which read as follows:

Completion of prescription delayed in certain circumstances

‘(1) If—

(a) *the creditor is a minor or is insane or is a person under curatorship **or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15(1); ...***

(b) ... ;

(c) ... ;

(d) ... ;

(e) ... ;

(f) ... ;

(g) ... ;

(h) ... ; and

(i) *the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist, the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).*’ (My emphasis)

(See MM Loubser *Extinctive Prescription* at 119.)

The lockdown regulations are a form of law (law is one of the impediments listed in section 13(1)(a)) which will prevent a creditor from instituting action in order to interrupt the running of prescription. In order to initiate litigation and have the process served on all the defendant(s), a plaintiff will need to breach the lockdown regulations in

overcoming the practical disabilities referred to above in interrupting the running of prescription. It could not have been the intention of the legislative or the executive branches of government that members of the public and their legal representatives break the law in order to have actions instituted and served in order to interrupt prescription—consideration can be given by the judiciary to the application of the *exceptio doli* in these circumstances. The lockdown measures are temporary and with a specific intention—curbing the spread and impact of the pandemic. Such temporary measures with a specific purpose cannot have the effect of permanently denying a party a constitutionally enshrined right. The institution of legal proceedings to enforce a right and adjudication of the dispute by a court cannot be expunged as a collateral consequence of the fight against COVID 19.

Judicial consideration of superior force

The concept of a superior force in section 13 (1) (a) has received extensive judicial consideration. Many of the judgments that I have been able to access pre-date South Africa’s constitutional democratic era where certain rights are now enshrined in the Bill of Rights. Be that as it may, the principles enunciated in the *ratio decidendi* (and the *obiter dicta*) of each of the cases can, in many instances, be applied as a test in assessing whether or not the lockdown measures can be said to be a superior force delaying the completion of the running of prescription.

GENERAL PRACTICE continued...

Some of the judgements considered the concept in the context of the Prescription Act, while others have considered the failure by plaintiffs to comply with the expiry period in statutes such as the now repealed section 32 of the Police Act 7 of 1958, the forerunner of Part 2 of the Institution of Legal Proceedings Against Organs of State Act 40 of 2002. The principles enunciated in the various judgements still apply today – perhaps even to a greater degree under the current constitutional order.

The plaintiff in *Magubane v Minister of Police* 1982 (3) SA 542 (N) had been detained in terms of section 6 of the Terrorism Act 83 of 1967 (described by the court at 545 as draconian both in intent and effect) from 13 September 1976 until 3 November 1977. She was assaulted by members of the Security Branch of the then South African Police on 13,14 and 15 September 1977. The plaintiff's notice of the action against the defendant was given on 17 January 1978 and the summons was served on 24 April 1978. The defendant raised a special plea that the plaintiff had failed to comply with the provisions of section 32 of the Police Act in that she had failed to commence her action within six months after her cause of action arose. It was common cause between the parties that the plaintiff was unable to obtain legal advice or to institute action by reason of her detention *per se*. Based on the agreed facts, the court was called upon to decide the following questions of law before any evidence was led:

- (a) Whether section 32 of the Police Act applied to the proceedings and, if it did, whether or not the Prescription Act also applied?
- (b) If section 32 applied and the Prescription Act did not, had the plaintiff complied with the provisions thereof?
- (c) If the provisions of section 32 had not been complied with and the Prescription Act did apply, whether the defendant was debarred and/or precluded from relying on such non-compliance.

It had been agreed that in the event of the court finding that question (a) should be answered in the affirmative and questions (b) and (c) answered in the negative, then the plaintiff's claim should be dismissed with costs.

In finding in favour of the plaintiff, the comments of the court relevant for present purposes are summarised below.

Section 32 applied to the proceedings and that the cause of action had not commenced within the prescribed six month period (at 549).

The provisions of the Terrorism Act operated to deny the plaintiff access to legal advice and 'she was clearly prevented by "superior force" [as postulated in section 13(1)(a) of the Prescription Act] from serving her summons' (at 549).

Unless otherwise indicated, the language of legislation must be given an interpretation which avoids harsh consequences (at 549-550 and 552).

The provisions of the Prescription Act applied to actions contemplated in section 32 of the Police Act (at 552-3). The obiter comments by the court on the *exceptio doli* are instructive.

The lockdown measures also, in my view, prevent some plaintiffs from obtaining legal advice and properly taking the required actions to interrupt prescription and/or expiry periods applicable to their matters. These measures cannot, to paraphrase the court, have been intended to have the draconian intention and effect of permanently denying plaintiffs their rights to institute actions.

The court in *Hartman v Minister van Polisie* 1983 (2) SA 498 (A) reached a different conclusion to that in *Magubane*, finding that the Prescription Act did not apply to actions under section 32 of the Police Act.

In *Montisi v Minister van Polisie* 1984 (1) SA 619 (A) the court, in considering a special plea of prescription where the appellant had failed to comply with the time limits set out in section 32 (1) of the Police Act, held that the service of the required notice was prevented by the detention of the appellant in terms of section 6 of the Terrorism Act. The court held that the period in section 32 (1) does not run against a detainee for as long as the detention was in place (at 633). The appellant was unable to obtain legal advice or to institute action while so detained (page 631) – in other words, while the superior force preventing him from exercising his rights to bring

GENERAL PRACTICE continued...

the action existed. Rabie CJ noted (at 631) that it was not suggested that the appellant was blameworthy for his detention and, therefore, he could not say that it was his fault that he could not comply with the prescripts of section 32 as a result thereof. (The same can be said of blameless plaintiffs unable to pursue actions as a result of the lockdown measures.) It would be unreasonable to expect that a person who was prevented by superior force (detention in that case) to comply with the time period in section 32 (1), to be unsuited because he did not comply with that provision. The legislature had not intended to deny a person who alleged that he had an action against the defendant, on the risk of prescription, within the relative short time of six months after the cause of action arose to bring the action (at 634). The court also held that the maxim *lex non cogit impossibilia* was applicable. The court in the *Montisi* matter thus reached a conclusion which differed to that in *Hartman*.

The court in *Knysna Hotel CC v Coetzee* 1998 (2) SA 743 (SCA) stated that the provisions of sections 13 (1)(a) and 15 (1) of the Prescription Act contemplated circumstances where a party was prevented by a certain form of law or inability to act (*handelingsonbevoegdheid*) or superior force (*'oormag'*) from serving a summons on the debtor, the completion of prescription was delayed. The superior force referred to, according to the court, must in the context of the section be seen as *eiudem generis* of the inability to act. The superior force must, objectively viewed, thus prevent the creditor from serving his summons. For example, where a company has been

liquidated and a liquidator has not been appointed as yet or where a person is prevented by detention in terms of the Terrorism Act from obtaining legal advice in order to bring an action.

The approach taken in *Gassner NO v Minister of Law and Order* 1995 (1) SA 322 (C) is that the maxim *lex non cogit ad impossibilia* is applicable to the enforcement of such an expiry period.

Other judgements which can be considered in respect of section 13 (1) (a) of the Prescription Act include *Mattioda Construction (SA) (Pty) Ltd v Everite Ltd* 1980 (3) SA 157 (W) at 161 F-G, *A Adams (Pty) Ltd v Vermaak NO and others* 1993 (1) SA 107 (N), *ABP 4X4 Motor Dealers (Pty) Ltd v IGI Insurance Company Ltd* 1999 (3) SA 924 (SCA), *Lombo v African National Congress* (17/2001) [2002] ZASCA 61; [2002] 3 All SA 517 (A) (30 May 2002), *Advocate Jan-Hendrik Roux SC NO v Road Accident Fund* 2014 JDR 1235 (WCC), *Skom v Minister Of Police and Others, In Re: Singatha v Minister Of Police and Another* (285 & 284/2014) [2014] ZAECBHC 6 (27 May 2014), *Minister of Law and Order v Maserumule* 1993 (3) SA 688 (T), *Mati v Minister of Justice, Police and Prisons* 1988 (3) SA 750 (Ck), *Brosens v Minister van Verdediging* 1983 (3) SA 803 (T) and *Pizani v Minister of Defence* 1987 (4) SA 592 (A).

In so far as claims against the RAF are concerned, the approaches taken by the courts in the following matters create important precedents.

In *Gabuza v Road Accident Fund* (70524/16) [2018] ZAGPPHC 634; 2020 (2) SA 228 (GP) (29 August

2018), looking at the practical realities applicable in the plaintiff's claim which prescribed on a Saturday when the RAF offices are closed and the Post Office closing at 13:00, the court dismissed the RAF's special plea of prescription.

In *Road Accident Fund v Masindi* (586/2017) [2018] ZASCA 94 (1 June 2018) - where the last day before prescription fell on a public holiday, the court gave the plaintiff the benefit of that day.

In *Msiza v RAF* (Case No. 17335/2004) (a judgement delivered by Phatudi AJ (as he was then) in the then Transvaal Provincial Division on 23 June 2008) the plaintiff's claim was delivered to the RAF offices on the day before it prescribed. The delivery was made after the RAF offices had closed for the day. The court dismissed the RAF's special plea of prescription.

Conclusion

There is thus ample legal authority on which a special plea of prescription can be challenged in respect of a matter prescribing during the lockdown period. Where an argument based on any of the grounds of delay set out in section 13 (1)(a) of the Prescription Act is made, the plaintiff will be well advised to set the applicable grounds out in a replication to the special plea of prescription. Where an expiry period applies, the grounds can be set out in a condonation application.