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The Recognition of Customary Marriages Act and the practice of lobola through the lens of the SCA

Government contracts:
When to rely on estoppel

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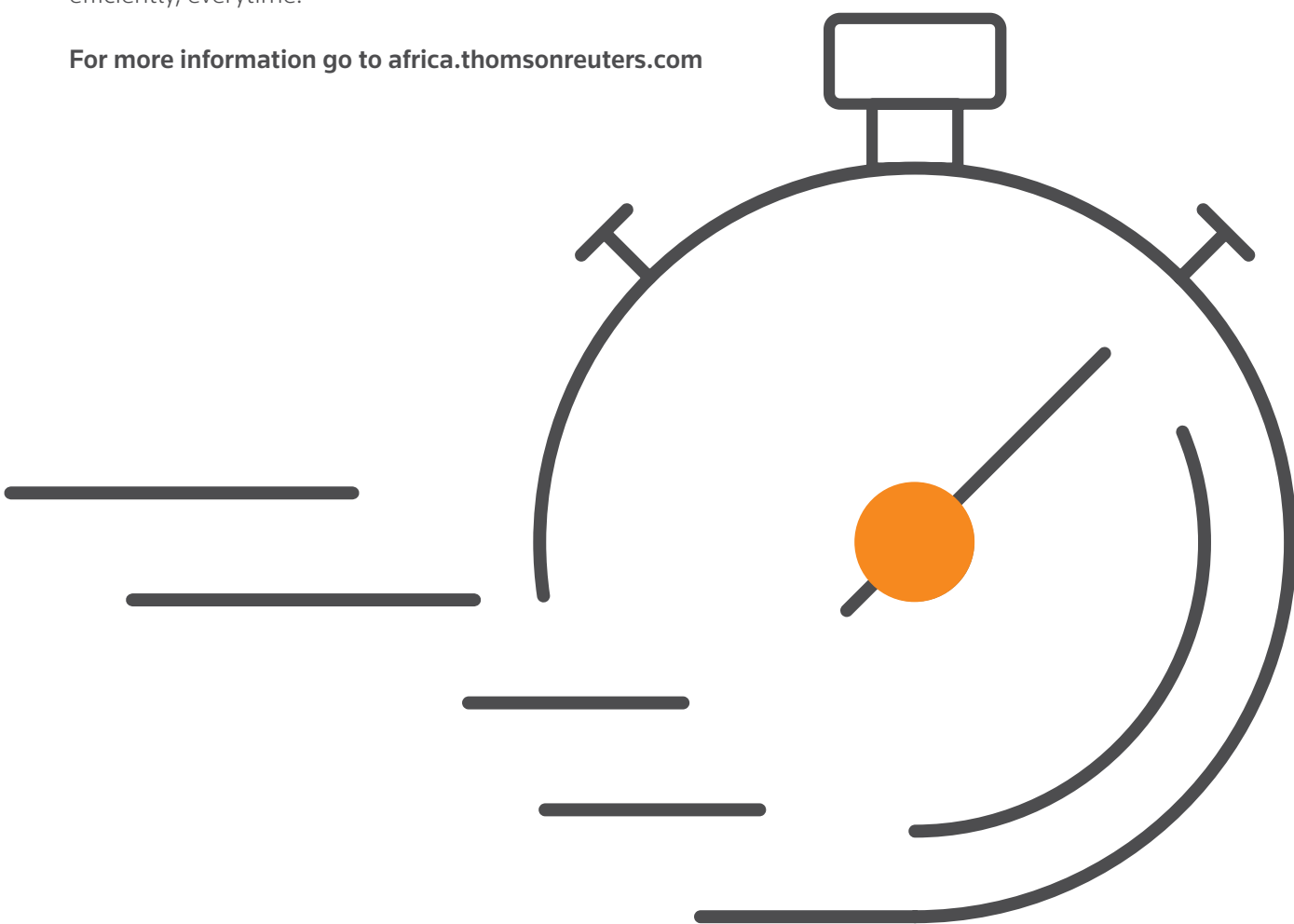


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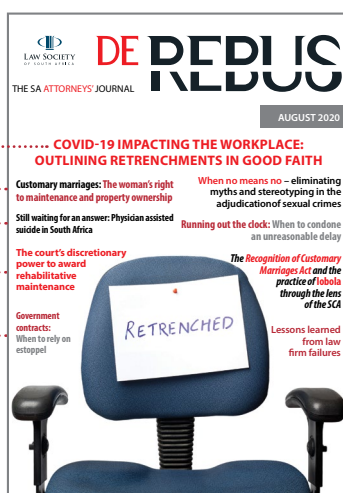
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Rule change to enable online elections for the Legal Practitioners' Fidelity Fund Board

On 24 July the Legal Practice Council (LPC) issued a notice in terms of s 95(5) of the Legal Practice Act 28 of 2014 (LPA). The purpose of the notice is to amend the rules the LPC made under the authority of ss 95(1), 95(3) and 109(2) of the LPA by the deletion, in its entirety, of r 46 and the substitution of a new r 46. The amendment will enable the LPC to run the elections for the Legal Practitioners' Fidelity Fund Board (the Board), online due to the current lockdown regulations that have been implemented due to the COVID-19 pandemic.

According to the notice, the LPC has amended r 46 in line with the provisions of s 95(5), which provides that a rule may be amended without prior publication of a draft as provided for in s 95(4) of the LPA. The amendment to the rule without prior publication is necessitated by the fact that the election must take place but cannot under the lockdown regulations. The amendment will allow legal practitioners to nominate candidates and cast their votes online and through e-mail, thereby avoiding the need for them to travel to voting stations and minimising the risk of contracting the COVID-19 virus.

The new r 46 states:

'Procedure for election of legal practitioners to the Board

[s 95(1)(z)] read with s 62(1)(a)

46.1 Four members shall be elected to the Board from among, and by, the practising legal practitioners who are in good standing and who have their principal place of business as such in the following geographical areas:

46.1.1 one member from the area corresponding with the area under the jurisdiction of the Gauteng Division of the High Court of South Africa;

46.1.2 one member from the area corresponding with the areas under the jurisdiction of the Western Cape Provincial Division of the High Court of South Africa and the Northern Cape Division of the High Court of South Africa;

46.1.3 one member from the area corresponding with the areas under the jurisdiction of the Free State Division of the High Court of South Africa, the North West Division of the High Court of South Africa, the Limpopo Division of the High Court of South Africa and the Mpumalanga Division of the High Court;

46.1.4 one member from the area corresponding with the areas under the ju-

risdiction of the KwaZulu-Natal Division of the High Court of South Africa and the Eastern Cape Division of the High Court of South Africa.

46.2 One member shall be elected to the Board from among the practising advocates referred to in section 34(2) (b) who are in good standing, by all the practising legal practitioners in the Republic who are in good standing.

46.3 An election for members of the Board shall be conducted -

46.3.1 by electronic voting (e-voting) in the manner prescribed by the Council; and/or

46.3.2 by paper ballot in accordance with the provisions of this rule.'

The rule goes on to state:

'46. 11 If the number of eligible candidates who are nominated exceeds the number to be elected as members of the Board then within 30 days after the closing date for nominations, the Council shall publish a notice containing a list of all the persons duly nominated and who have duly accepted such nomination, by notice in the [Government] Gazette, on the Council's website and in such other publications as may be appropriate: Provided that the Council may refuse to include the name of any person who has been nominated in respect of whom the Council has reason to believe that the information provided in the curriculum vitae submitted by or on behalf of such person contains material details that are untrue, and any person whose name is so omitted shall be ineligible for election to the Board.

46.12 The notice referred to in rule 46.11 -

46.12.1 shall draw the attention of legal practitioners to the fact that votes may be cast by ballot paper or by electronic means. Legal practitioners may vote only once in the election concerned,



Mapula Sedutla - Editor

and either by ballot paper or by electronic means;

46.12.2 shall invite the submission of a written or electronic communication from every legal practitioner eligible to vote for the election of the member or members concerned, in such format as the Council may determine, by which such practitioner exercises his or her right to vote;

46.12.3 shall draw the attention of legal practitioners to the following considerations in relation to the constitution of the Board:

46.12.3.1 the racial and gender composition of South Africa;

46.12.3.2 representation of persons with disabilities;

46.12.3.3 provincial representation.'

The date for the actual elections has not been announced as yet, but legal practitioners will be notified as soon as a date is determined.

- Visit www.derebus.org.za for a copy of the notice.



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.

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- Please note that the word limit is 2000 words.
- Upcoming deadlines for article submissions: 17 August and 21 September.

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.

Apology

I wrote an article titled 'Walking a tight-rope: The business rescue practitioner's challenge of serving competing interests' 2020 (July) *DR* 10.

It was brought to the attention of *De Rebus* and subsequently to myself by Dr Lézelle Jacobs that my article had failed to appropriately recognise her doctoral thesis titled: 'Die Vertrouensverpligtinge van Ondernemingsreddingspraktisyne: 'n Regsvergelykende Studie' (LLD thesis, University of the Free State 2015) and that it contained ideas, which were originally espoused in her thesis.

Dr Jacobs had conducted research into the fiduciary duties of business rescue practitioners, which had been the first of its kind in South Africa (SA). Dr Jacobs' doctoral thesis was the first to conceptualise the four groups of stakeholders to whom a business rescue practitioner owes their duties in SA.

Although I had mentioned these four groups in my article and had mentioned Dr Jacobs' thesis, the way in which I did so, had over-simplified the position adopted by Dr Jacobs in her thesis without recognising that she had also advocated for a flexible approach by the business rescue practitioner *vis-à-vis* these four groups as I had done. I wrote my article a few months after I had read excerpts of Dr Jacobs' thesis and I appear to have underestimated the influence that her ideas had had on my under-

standing of a business rescue practitioner's duties, with the result that I did not appropriately recognise her contribution to some of the assertions made in my article.

For this I hereby publicly apologise to Dr Jacobs and would like to express my thanks for her acceptance of my apology. I would also like to express my gratitude to her for her research, which has played an important part in how I understand a business rescue practitioner's duties.

Ricky Klopper LLB (UCT) BCom (Actuarial Science) (Stell) is a legal practitioner at Hans Klopper Inc in Stellenbosch.

Are your debt obligations subject to debt review?

For one's financial affairs and the administration thereof to be subjected to debt review, their debt obligations need to be in a state of 'over-indebtedness' as defined by the National Credit Act 34 of 2005 (NCA). This is determined by a debt counsellor by referring their client's debt obligations and income to the court by way of an application, demonstrating to the court that their client is unable to repay their minimum monthly instalments and still have adequate funds for the upkeep of their family. Debt review is the process where a debt counsellor

assesses a client's outstanding debt obligations and implements a debt restructuring and debt repayment plan. This is done through a process of negotiating reduced interest rates with credit providers, reducing instalments and extending the debt repayment terms.

Most debtors approach debt counsellors in desperation, and without being properly informed by the debt counsellors of their rights. This leads to the debtor's expectations not being met. One of the most common mistakes that debtors make is failing to request a contract in writing from the debt counsellors, which fully sets out the obligations to be met by both parties. A very important obligation that most debtors neglect to bring their attention to, is the administrative fee payable to the debt counsellor. It is very important that the debtor factors this fee into their expenditure, in order to budget for their contribution towards their debts. It is important that the debtor is also aware, that by being placed under debt review, they will lose control of their financial affairs and in particular the ability to obtain further credit.

In order to understand how a consumer may be released from debt review, legal practitioners need to know what the NCA provides in this regard. In terms of s 71 of the NCA, a consumer whose debts have been restructured (placed under debt review) is entitled to a clearance certificate within seven days after -



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- all debts have been paid in full;
- all obligations under the credit agreements are satisfied;
- the debtor demonstrates future ability to satisfy credit agreements related to a mortgage bond.

Once the above has been met, the debtor should be removed from the debt review.

The real benefit of debt review is that it can protect one's assets from being repossessed or attached by the credit provider. The disadvantage is that one cannot apply for any credit while under debt review and the only way to exit the review is to settle all outstanding debts, except for vehicles financed through a financial institution and for one's home,

which is subject to a mortgage bond. Most importantly, when under debt review, clients are legally protected by the NCA and creditors are no longer allowed to institute proceedings against them.

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By
Thomas
Harban

Lessons learned from law firm failures

Much has been written about the impact that the COVID-19 pandemic and other geo-political and macro-economic events may have on legal practice. As legal practitioners analyse the economic impact of these events on their respective practices and reposition their practices in response thereto, some may be considering moving from their current practices and joining new law firms. In this article I hope to raise awareness of the risk associated with the departure of partners from a law firm and the impact on the firm they leave behind. The departure of partners is one of many reasons for the possible failure of the law firm.

In South Africa (SA), just like every other jurisdiction around the world, legal practitioners can recall many examples of once prominent law firms, which no longer exist. Underlying such anecdotes or 'war stories' (perhaps even urban legends in some quarters) are always lessons that can be learned from the failures of others. As can be gleaned from other jurisdictions, the current size and stature (real or perceived) of the firm does not mean that it is immune to failure. History has shown that even large firms with great commercial success can suffer unforeseen events that threaten their existence and even lead to their demise. As aptly put by Professor John Morley of Yale Law School, law firms 'are made of unusually thin glass' and '[l]aw firms don't just go bankrupt – they collapse' (John Morley 'Why Law Firms Collapse' (2020) 75 *The Business Lawyer* 1399).

Unlike some other jurisdictions, South African law firms are not legally obliged to publish their financial information.

While some jurisdictions make the data on the movement of legal practitioners between firms freely available to the public, in SA the data is held by the regulator, the Legal Practice Council, and is not made readily available to the public. In some jurisdictions this information is publicly available. A number of studies have used the publicly available data to interrogate the reasons for the failure of law firms. In order to maintain the focus of this article – on the lessons learned rather than the personalities involved – I have deliberately avoided writing about the failure of firms in SA or repeating the names of the firms included in the international studies referred to below.

The impact of partners leaving

Multiple levels of relationships underlie all legal practices, whether these be the relationships of the people in the firm or those with external stakeholders, such as clients, competitors and possible suitors. The balancing of the various relationships is crucial to the success or failure of the firm. Legal practice is a business with legal practitioners at its core and when legal practitioners are of the view that their commercial and professional interests are not aligned with those of the firm, they are likely to move. A partner in a law firm may take some or all of their clients with them when they leave. A discussion with clients on the planned move may have preceded the announcement of the departure to the other partners. The decision to move may be as a result of an assurance of continued support by key clients to the partner intending to move. In some in-

stances, entire teams and areas of practice are uprooted when there is movement of partners from the firm. Those left in the practice may then be left trying to salvage what – if anything – is left of the practice.

The nature of legal practice is that it is the clients who will have the final say on whether their matters remain with the original firm or are moved to the new firm with the legal practitioner concerned. The firm may have a *lien* over the existing files in respect of work already done, but this does not guarantee future fee income from a client who has decided to move with a particular legal practitioner with whom they have a preferred relationship. A firm cannot force a relationship with a client who no longer wishes to have a relationship with it. Other partners, staff and clients may see the departure of a partner as a symptom of serious underlying problems in the firm and also decide to leave. The legal practitioners who remain then need to spend a lot of time stabilising what remains of the firm in order to avoid an implosion. What happens to a legal practitioner who, for example, is close to retirement or has only practised in a limited area of law and thus does not have many options outside of the existing firm?

The failure of law firms

A number of authors have examined the reasons for the failure of law firms. Lee Rosen in '8 Reasons Law Firms Fail' (<https://roseninstitute.com>, accessed 6-7-2020) for example, lists the eight reasons why law firms fail as –

- fighting between partners;
- failure to focus on clients;
- internal orientation;

- a refusal to learn;
- a lack of focus;
- no experiments;
- no growth budgets; and
- a failure to adapt and change.

In the article 'The Decade's Big Law Failures: Why Do Big Law Firms Fail?' (www.lawfuel.com, accessed 6-7-2020), another study looked at the failure of large law firms in the last decade and listed the main causes of failure as –

- lax management;
- declining productivity;
- mismanagement;
- internal rifts and fading workflow;
- slowing workflow;
- over-extension; and
- over-expansion.

As will be noted from Prof Morley's extensive study (*op cit*), it is normally the rainmakers in the firm who are first to leave. The departure of the rainmaker may be followed by a departure of other partners who view the departure of the former as a sign of impending trouble in the firm. Senior partners will have access to the financial information of the firm and make their decisions armed with that information. Prof Morley conducted an extensive study on the collapse of law firms using the publicly available information on the collapse of 37 large law firms over a 30-year period. He opines that one of the problems with law firms is their ownership structure. The fact that the equity in the firm is owned by the partners rather than investors makes law firms fragile and susceptible to 'partner run' with similar consequences to a run on deposits by investors in a bank when they fear that the bank may be facing the risk of failure. This model of ownership requires that the partners be paid in profits rather than salaries and bonuses. According to Prof Morley, the personal liability of partners for debts of the practice is another reason that law firms fail. He writes at p 1402 that:

'Debt, macroeconomic forces, and declines in demand for legal services all are much less important than we might

think. Governance failures and social factors, by contrast, are much more important.

This theory can also tell us how to stop law firms from going up in flames. The solution is not just for law firms to make more profits and borrow less money. We could also stop law firms from collapsing by changing professional ethics rules to allow them to be owned by investors or permit them to restrict their partners from withdrawing. ...

This theory also reveals a deep connection between partner ownership and the values of friendship, loyalty, and trust. By undermining the formal bonds of money and creating powerful financial incentives to withdraw in times of decline, partner ownership forces firms to rely on informal forces like friendship and loyalty to hold themselves together. Partner ownership cuts the metal nails of contract and replaces them with leather cords of loyalty. Law firms are thus uniquely reliant on informal forms of bonding capital in place of more formal forms of financial capital. The trouble is that if the leather cords of friendship and loyalty cease to bind – if all partners care about is money – then partner ownership has a hard time creating financial incentives that can hold a law firm together. Indeed, ... partner ownership can become the very force that blows a law firm apart.'

In SA, the partner ownership of law firms is entrenched in s 34(5)(a) and (b) and s 34(7)(a) in the Legal Practice Act 28 of 2014 (the LPA).

What firms can do?

Melissa Hogan in 'Skinny Dipping: The Anatomy of Law Firm Demise' (<http://edwesemann.com>, accessed 6-7-2020) suggests the following steps for firms:

- Establishing a culture, compensation system, and other systemic safeguards to help prevent important partner (or partner group) defections.
- Despite best efforts to prevent partner defections, if they do occur, develop

strategies to address the implications of such defections.

- Consider strategic decisions that address the current market conditions in practice areas central to your firm.
- If you are thinking about a potential merger, carefully analyse the possible candidates in an objective manner and create the best business case to bring the merger to fruition.

Firms can also consider addressing the consequences of partnership departure in their partnership agreements. What will happen if the firm is notified of a claim after the departure of the partner concerned and the allegations are that the cause of action relates to something that the latter has either done or omitted to do? Firms can also consider including the debts and liabilities of an incorporated practice (s 34(7)(c)(i) of the LPA) and the liability in respect of any theft committed during their term of office (s 34(7)(c)(ii) of the LPA) in the partnership agreement so that partners who depart do not leave those who remain to face the consequences of any liability on their own.

When the pre-occupation of the partners is on salvaging the firm and preventing the practice from haemorrhaging further, risk and practice management measures may be put on the back burner. That creates a potential fertile environment for something to fall between the proverbial cracks and for errors or omissions to occur which give rise to claims against the firm.

Learn from the reasons listed above for the failure of the firms concerned and avoid following the same route.

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



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COVID-19 impacting the workplace: *Outlining retrenchments in good faith*



By
Ntsako
Reginald
Makhubele

Since the start of the lockdown, due to the COVID-19 pandemic, many business owners have been tasked with taking difficult decisions for survival. Financial strain is at the top of the list of difficulties faced by small and medium businesses, or even the big corporates. Some business owners are already contemplating retrenchments due to the impact of COVID-19 on their businesses. However, employers should be aware that retrenchments are a matter of last resort and an option that can only be undertaken after exploring all alternative measures to avoid it.

Government has introduced a number of measures to minimise the impact of the COVID-19 pandemic

on businesses. It is hoped that the measures will encourage and help businesses to stay afloat and, most importantly, avoid the retrenchment of employees. One important initiative is focussed on tax relief for businesses through the Disaster Management Tax Relief Administration Bill B12 of 2020 (the Bill). Once passed, the Bill will extend employment tax incentives, which were first introduced through the Employment Tax

Incentive Act 26 of 2013. Incentives in terms of this legislation have been available to be claimed by employers in respect of qualifying employees between the ages of 18 and 29. The Bill aims to extend the benefit for the period 1 April to 31 July 2020, and doing with age limitations and ensuring that employers are incentivised to keep their workforce intact.

On 21 April, President Cyril Ramaphosa, announced an economic stimulus fund of R 500 billion to support businesses, subsidise wages and assist with creating new job opportunities. An amount of R 40 billion of the relief fund has been set aside as income support for those workers whose employers are unable to pay their salaries.

Although government has proactively put measures



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to prevent the loss of employment, retrenchments may be unavoidable for some businesses. Should that be the case, the law provides a procedure to be followed by an employer that is contemplating retrenching their employees. Before the employer embarks on the contemplated retrenchments, the employer should take the following facts into consideration:

- Employers are required to issue a notice in terms of s 189(3) or s 189A of the Labour Relations Act 66 of 1995 (the LRA).
- The written notice must set out the following –
 - the reason for the proposed retrenchments, the alternatives considered by the employer before proposing the retrenchment and the reason for rejecting each of those alternatives;
 - the number of employees likely to be affected and the job categories in which they are employed;
 - the proposed method of selecting which employees to retrench;
 - the time or period when the dismissals are likely to take effect;
 - the severance pay proposed;
 - the assistance being offered to the employees who are likely to be retrenched;
 - the possibility of future re-employment;
 - the number of employees employed by the employer; and
 - the number of employees that were dismissed as a result of operational requirements in the preceding 12 months.
- There must be a consultation process with the employees, which –
 - should be aimed at reaching a consensus on appropriate measures to avoid retrenchments;
 - minimises the number of retrenchments;
 - changes the timing of the retrenchments;
 - mitigates the adverse effects of the retrenchments;
 - addresses the method of selecting employees to be retrenched; and
 - addresses the severance pay for the retrenched employees.
- It is not necessary to reach an agreement on the aforesaid issues, but the consultation must be held in good faith and all employee representations must be considered throughout the consultation process.
- An attempt must be made to reach an agreement on the criteria identifying the employees who are to be retrenched. If no agreement has been reached, the selection criteria adopted must be fair and objective – the most common being ‘last in, first out’ subject to skills, qualifications and experience.

The Disaster Management Act 57 of 2002 and its regulations do not prevent an employer from engaging in a retrenchment process during the lockdown period. However, the employer must, even during the lockdown period, comply with the procedural requirements of ss 189 and 189A of the LRA before retrenching their employees.

- Employees are entitled to a minimum of one week's severance pay for each completed year of service unless the employer has a more beneficial policy with regard to severance packages.
- In the case of large-scale retrenchments (s 189A) either party may request facilitation through the Commission for Conciliation, Mediation and Arbitration (CCMA).
- If a facilitator is appointed to assist with the consultation process, an employer may give a notice of termination of employment after 60 days have lapsed from the date on which the s 189(3) notice was issued.
- If no facilitator is appointed, either party may refer a dispute to conciliation after 30 days have lapsed from the date of issue of the s 189(3) notice.
- No notice of termination of employment may be given before the expiry of 60 days from the date of the s 189A notice.

In some instances, these measures may not be enough and a company may be left with no alternative, but to consider the restructuring of the business or the rationalisation of their business, and the retrenchment of the employees. A failure to show a genuine need or rationale for retrenchment, or failure to properly consider alternatives, could result in unfair dismissals and the reinstatement of the employee and full back pay will have to be made.

The Disaster Management Act – regulations and directives

The Disaster Management Act 57 of 2002 and its regulations do not prevent an employer from engaging in a retrenchment process during the lockdown period. However, the employer must, even during the lockdown period, comply with the procedural requirements of ss 189 and 189A of the LRA before retrenching their employees. An employer must give written notice to affected employees and

to their representative trade union once any retrenchments are contemplated.

The requisite notice should provide the detailed reasons for the restructuring and rationalisation and possible retrenchment of the employee, including the alternative consideration before engaging in the retrenchment process. The employer is further required to engage in a consensus seeking process by consultations. The employer must allow the other consulting parties an opportunity to make representations and the employer must consider and respond to the representations that are made. If any representations are made in writing, the employer must respond in writing. During the lockdown period, consultations can be made by e-mail, telephone calls and videos recordings. Recording of the consultations between the consulting parties may be made. The reason for this is that government is encouraging social distancing between people.

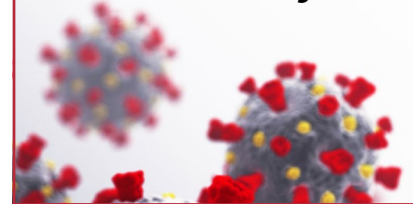
Conclusion

In conclusion it is clear that, the retrenchment process should be contemplated after the consultation and mutual agreement process between the employer and the employee, which enables both the employer and the employee to consider all possible remedies/options to be taken to avoid retrenchment. Both parties should try to mitigate the impact. It is further noted that the retrenchment procedure is laid down in the LRA and must be followed properly and in good faith by the employer. The employer must also prove that they have shared all the documentation and other information with the affected employees or their representatives regarding the retrenchment, to avoid unlawful procedure or unlawful dismissal of the employee.

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When no means no – eliminating myths and stereotyping in the adjudication of sexual crimes



Picture source: Gallo Images/Getty



By
**Desmond
Francke**

The law of sexual assault and legislative changes governing this section of the law has evolved considerably, but this does not mean that the results are being presented in the courtrooms. The topic of sexual violence continues to be a hot debate in the public sphere. One such topic that continues to spark heated debate is the concept of 'consent'. The reason that this topic can cause quite a stir is that people around the globe differ in their view about the definition of consent. For example, some people believe in the notion of 'implied consent', some believe that 'no means no' and others take the

approach that only 'yes means yes'. In no other crime does consent – its presence or absence – play such a pivotal role in the characterisation of the acts as criminal or non-criminal.

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 defines the term 'consent' as a 'voluntary or uncoerced agreement'. Consent means the 'voluntary agreement of the complainant to engage in the sexual activity in question' (see www.justice.gc.ca, accessed 13-7-2020). The first essential point in this definition, arising from the words 'voluntary agreement' is that to be legally effective, consent must be freely given. It is stripped of its de-

fining characteristics when it is applied to the submission, non-resistance, non-objection, or even the apparent agreement, of a, deceived, unconscious, or compelled will. The second essential point, arising from the words 'the sexual activity in question', is that consent must be ongoing. Consent requires an ability to evaluate and to decide on every sexual act in a particular encounter: Lack of consent is established where the complainant was not consenting in their mind while the touching took place, even if she expressed her consent before or after the fact.

In sexual assault cases that centre on differing interpretations of essentially similar events, courts should first consider whether the complainant, in their mind, wanted the sexual touching in question to occur. Once the complainant has asserted that they did not consent, the question is then one of credibility. In making this assessment, the court must take into account the totality of the evidence, including any ambiguous or contradictory conduct by the complainant. If the court is satisfied beyond a reasonable doubt that the complainant did not in fact consent, the *actus reus* of sexual assault is established and the inquiry must shift to the accused's state of mind. Cases involving a true misunderstanding between parties to a sexual encounter infrequently arise, but are of profound importance to the community's sense of safety and justice. The law must afford women and men the peace of mind in knowing that their bodily integrity and autonomy in deciding when and whether to participate in sexual activity will be respected. At the same time, it must protect those who have not been proven guilty from the social stigma attached to sexual offenders.

This article focusses on the assessment of South African courts on the evidence of rape victims. It seems despite radical changes by the legislature, victims of sexual crimes, and especially women, cannot get rid of the burden, which rests on them. These burdens are not an exhaustive list, but it seems as if the cross to bear towards Golgotha is too heavy.

Human behaviour reactions

In criminal proceedings, opposing parties in most instances express views about the predictability of human behaviour in reaction to discomfort, stress, upset, fear, or shock. From the state's perspective, reactions to an array of stressors are variable and unpredictable. Because of this, in the credibility analysis, the variability of responses and reactions should not detrimentally impact the credibility of a witness. The unpredictability of reactive behaviours does not lend itself to value judging the

actions of a complainant. Legal representatives and legal practitioners for the accused emphasises the 'reasonable person test', wherein a complainant, who is in a stressed position, should react with certain measures to support their stated intentions. For example, if a complainant says there was no consent to sex, then there would be a set of predictable responses to support the non-consent. If those predictable, reasonable, or logical responses are not present, then this would detrimentally impact on the credibility of a complainant. There has been considerable research on the 'fight or flight' response when people find themselves in a situation of stress, fear, shock, or crisis. The reality is behavioural responses to these scenarios are highly unpredictable. Most people have a tendency, and perhaps even a strong desire, to structure human behaviour based on predictability and certainty. It is easier to live that way. Many operate more effectively in all areas of their lives when their reactive scripts are predictable, certain, and logical. There is no rule as to how victims of sexual assault are likely to behave. The reference to case law illustrates how South African courts have adopted an approach of myths and stereotyping to form part of decisions that are made. This mythology influences the court's perception of guilt or innocence of the accused and the 'good' or 'bad' in the victim, and has 'carved out a niche in both the evidentiary and substantive law governing the trial of the matter' (see Lyndon Maither *The 325: The Supreme Court and our Criminal Code and Ors* (<https://books.googleusercontent.com>, accessed 13-7-2020)). Common law dictates a negative assessment of credibility, based on an unfounded stereotype to constitute an error of law.

It is understood that someone viewing the behaviour of complainants in sexual crimes, saying 'you could have done this' or 'you should have done that' or asking 'why did you not do this?' or 'why did you not do that?' Those who approach it this way want to classify the complainant's behaviour according to the paradigm of predictability, certainty and logic. The danger of this approach is two-fold.

Firstly, reactive human behaviour is variable and unpredictable. The humanness of this must be understood. Generally, so-called, non-logical behaviour should not be allowed to detrimentally impact the credibility assessment, for example, a woman's credibility should not be considered based on predetermined scripts as to how she should behave.

Secondly, the reasonable person test approach falls into stereotypical thinking as to how, for example, a female complainant should react in a given scenario. This stereotypical thinking does not derive from the findings of fact but mythical assumptions that when a woman

says 'no' she is saying 'yes', 'try again', or 'persuade me'. Such an approach denies a woman's sexual autonomy and implies that all women are 'walking around ... in a state of constant consent to sexual activity' (see Janine Benedet 'Sexual assault cases at the Alberta Court of Appeal: The roots of *Ewanchuk* and the unfinished revolution' (www.albertalawreview.com, accessed 13-7-2020)).

It is an error of law to draw adverse inferences against the credibility of a sexual assault complainant by purporting to measure their reactions to such an alleged offence by reference to some misguided notional concept of how the victim of such an offence normally would be expected to react and behave in such circumstances. There are simply no such norms of reaction or behaviour that one should expect of such victims, and making express or implicit use of such supposed but non-existence benchmarks of ordinary behaviour.

Historically, a host of factors were deemed relevant to the credibility of complainants in sexual assault trials that did not bear on the credibility of witnesses in any other trial and which functioned to the prejudice of victims of sexual assault. Common law dictates presiding officers should reject outdated stereotypical assumptions and myths of how persons react to such trauma, and instead recognise that there is no inviolable rule on how people who are the victims of sexual assault will behave. Here follow a few examples of outdated stereotypes and myths:

- A suggestion that a victim of a sexual assault should be expected to flee before, during, or immediately after the sexual assault has taken place perpetuates myths and stereotypes about the nature of the sexual assault. The law of sexual assault does not require fleeing; it requires consent. In sexual crimes, there is very often a radical power imbalance between the attacker and the victim. The violence is often a silent, raging on aggression, which threatens overt violence but rarely inflicts it. It is a serious misunderstanding of the nature of sexual assault to expect a complainant to ferociously fight back to prevent the offence against them. Some may do so, but others will feel obligated to submit out of fear and paralysis.

In *Tshabalala v S* (GP) (unreported case no A 74/2011, 12-6-2013) (Oosthuizen AJ) the court held: 'On the complainant's version she had more than one opportunity to escape, to make [an] alarm or to call for help. She did neither and this passiveness, over a sustained period of time, cannot be explained simply on the basis that she was afraid of the appellant. That alleged fear would have been all the more reason to get away from him

at the first available opportunity, especially if she also feared for her life, as she claimed in her testimony’.

- A suggestion that a sexual assault complainant who does not raise an alarm, resists with forceful struggle, or fights back is consenting to sexual touching relies on archaic, outmoded and unreliable stereotypes. The issue in such cases is the existence of consent, and not why the complainant did not fight back. Common law and the Sexual Offences Act regulates that the evidence of a complainant cannot be rejected, because they did not report the crime immediately. A complainant’s evidence cannot be rejected because their demeanour does not match a stereotypical idea of how a victim of an incident should act.

In *Makhubela v S* (FB) (unreported case no A320/2017, 9-5-2018) (Benade AJ) at para 20 the court’s criticism is based on the behaviour of the complainant. The court held ‘when she initially tried to flee from the shack and the accused accosted her from the front she did not scream or call for help when he allegedly forced her back to the shack’.

- It is wrong to suppose that the thoughts and responses of sexual assault victims at or around the time of the offence will conform consistently to detailed rational analysis, carefully weighing all the relevant factors that might militate in favour of one course of action or another. It is far more likely that a person in that position might have fleeting thoughts of different sorts that were not the subject of such detailed rational analysis. Exposure of rational inconsistencies through cross-examination of a complainant accordingly should not be given undue weight, although it remains a piece of the overall mosaic of the case to be considered.

See *S v Fourie* (NWM) (unreported case no CA 33/12, 28-2-2013) (Hendricks J) at para 11 ‘Out of the blue, the next day, she made a report to her father and she was very emotional about it. Mind you, she is not a small child. She is the mother of two children. Not only was she all of a sudden overcome by emotions when she made the report to her father but even during the trial, [she was] so emotional that she cried and the Regional Magistrate had to ask her mother to sit next to her whilst she testified in order to comfort and morally support her. Strange behaviour indeed from what her reactions [were] after the ordeal with the appellant on 1st April 2010’.

See also *S v Damane* (WCC) (unreported case no SS 16/12, 4-12-2012) (Yekiso J) at para 77, where the court held: ‘A common thread relating to the incidents of the alleged rapes is that, ostensibly because the complain-

ants involved are children, no specific dates are mentioned on which the alleged sexual molestation could have occurred’. Generalisations and false analogies may obscure a failure to perceive the predicament in which a sexual offence complainant can find herself. When that is done, it can be seen that rather than behaving bizarrely, the complainant’s handling of the situation was completely understandable and rational. Careful attention to the facts and the imagination to see the situation from the complainant’s perspective are all that is required.

- Traditional myths and stereotypes have long tainted the assessment of the conduct and veracity of complainants in sexual assault cases, namely – the belief that women of ‘unchaste’ character are more likely to have consented or are less worthy of belief; – that passivity or even resistance may constitute consent; and – that some women invite sexual assault because of their dress or behaviour.
- An illustration of stereotypical assumptions about how a young sexual assault victim ‘ought’ to behave is in *Makhubela* at para 20, where the court held: ‘Her standing, as a mere Grade 9 schoolgirl, is tainted as she was supposed to stay with her father but she took it upon her (without any parental permission) to stay for more than a week at her friends’ sister’s home – in other words where her parents did not know where she was’.

See also *S v Christo* (NWM) (unreported case no CA 292009, 7-6-2020) (Kgoele J) where the court held at para 14: ‘Her strange behaviour on this aspect of not reporting immediately is worsened by the fact that, even at the stage when she was confronted, she did not immediately say she was raped, she waited for her boyfriend to further ask whether the sexual intercourse was consensual and only replied with the word “no” thereafter’.

- The belief that sexual assault complainants are likely to be lying. The defence uses the existence of a relationship between the parties to blame the victim. Rapists are usually strangers to the victims. There is a myth that rapists are strangers who leap out from the bushes to attack their victims. The view that interaction between friends or between relatives does not result in rape is prevalent.

In *S v Moipolai* (NWM) (unreported case no CA 53/2004, 20-8-2004) (Mogoeng JP) the court held: ‘This rape should, therefore, be treated differently from the rape of one stranger by another between whom consensual intercourse was almost unthinkable. The Appellate Division was more understanding and even lenient in a case where a man had raped his friend. The

mitigatory effect of a relationship of friendship between the assailant and the victim was articulated as follows by Corbet JA (as he then was) in *S v N* 1988 (3) SA 450 (A) at 465H – I: “In the concluding portion of his judgment on sentence the magistrate said: “This is not the usual or ordinary type of case where the rapist grabs an unknown person and rapes her. In this case you knew the complainant well and you had often associated with her”. It is not clear whether he regarded this as a mitigating or an aggravating factor. To my mind, it is a mitigating factor in that the shock and affront to dignity suffered by the rape victim would ordinarily be less in the case where the rapist is a person well-known to the victim and someone moving in the same social milieu as the victim’.

Conclusion

It is the duty of legal practitioners to eliminate myths and stereotyping in the adjudication of sexual crimes and it should be a high priority in South African courts. Misguided beliefs about sexual assaults skew the fact-finding processes. The reliance on those beliefs is one reason why many victims experience and perceive courtrooms as hostile environments. It is recognised that there is no room for special protections that apply to complainants, who may particularly be vulnerable and who have, historically, been subjected to abuse while giving evidence. That extra protection might be afforded to complainants, however, it does not take away from the proposition that myth-based evidence does not meet standards of relevance or cogency, and should not be allowed to be used as a basis for decisions in a criminal trial. Criminal courts carry a heavy responsibility in ensuring every person has a fair trial, which includes a complainant. Courts must reject discriminatory lines of reasoning. While we are loosening the rope against rape victims let us untie it completely.

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

According to the www.saferspaces.org.za website, non-partner sexual violence is particularly common, but reporting to police is very low.

One study found that one in 13 women in Gauteng had reported non-partner rape, and only one in 25 rapes had been reported to the police.



Customary marriages: The woman's right to maintenance and property ownership



By
Nevetha
Maharaj

The focus on gender equality, in particular the rights of women in South African society, has come under the spotlight to the extent that amendments to current legislation is being implemented via the amendment of s 7 of the Recognition of Customary Marriages Act 120 of 1998 (the Act).

What is a customary union?

According to the definition in the Act, a marriage in terms of customary law requires the use of customs and traditions usually observed among the indigenous African people of South Africa, which forms part of the culture of those people.

The definition is inclusive of various customs and traditions of the many indigenous communities within the South African borders. The definition excludes Hindu and Islamic marriages.

Marriages before 15 November 2000

The Act gives recognition to marriages that were concluded before the Act was promulgated. All customary marriages concluded were recognised, including polygamous marriages and every 'wife' was given the status of a 'spouse'.

Section 7(1) of the Act indicates that the proprietary consequences of a customary marriage entered into before the commencement of the Act would continue to be governed by customary law, and s 7(2) provides that a monogamous marriage entered into after the commencement of the Act will be classified as a marriage in community of property and the parties to the marriage will have the option to have their marriage governed by an antenuptial contract.

When this legislation was enforced, a window period was implemented to allow everyone who entered into a customary union – monogamously or polygamously – to have their marriages registered in terms of the Act.

The window period spanned a period of ten years and ended on 31 December 2010. Any attempt to have a customary marriage recognised after this date would have to be accompanied by an application for the condonation of the late filing from the High Court of South Africa.

While the recognition of marriages was given by the Act, implementation on certain events, such as death, maintenance and property rights were impossible as existing legislation had not been amended.

Marriages after 15 November 2000

The requirements, in terms of the Act, for a valid customary union includes:

- The parties to the union must be 18-years-old, and the consent of both persons must be obtained.
- The marriage must be negotiated, entered and celebrated in terms of customary law.
- If a minor is part of the marriage, the parents or the legal guardian must consent to the union.
- The parties may not be prohibited from marrying by blood or affinity.
- The husband in a customary union is further required in terms of s 7(6) of the Act to make an application to court to approve a written contract to regulate the future matrimonial property system of his marriage. A failure to comply with this requirement by the husband could render any further marriage void (*MM v MN and Another* 2010 (4) SA 286 (GNP)). Such contract may be registered up to three months after the marriage.

While the Act was a step in the right direction, there were many practical consequences that were not considered. Existing legislation did not support the Act and this led to legislation being challenged in courtrooms.

When death intervenes

The Intestate Succession Act 81 of 1987 specifically excluded the estates of Black South Africans, which meant that the Black Administration Act 38 of 1927 was

still the legislation used for succession in customary unions that ended with death and where there was no valid will. The inequality of gender and race and its impact on inheritance persisted in the wake of existing legislation that had not been amended.

In 2005, five years after the Act was in existence the Constitutional Court (CC) in the matter of *BHE and Others v Magistrate, Khayelitsha, and Others* (Commission for Gender Equality as Amicus Curiae); *Shibi v Sithole and Others*; *South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC), successfully challenged the legislation. Up until then, only black men could inherit from estates and the *BHE* case was based on the unfair discrimination of the deceased's two daughters and spouse in a customary union who were not allowed to inherit because they were female.

The CC held that in the case where there was no dispute to inheritance, the family had to decide whether indigenous laws of succession or the Intestate Succession Act would apply. Where there is a dispute, such a dispute would have to be decided by the magistrate's court.

The Intestate Succession Act was amended in 2005 to include all intestate estates, without race discrimination.

The right to maintenance

Spouses in a customary marriage are also faced with challenges when they claim maintenance from their spouse in a customary marriage. In the case of *Kambule v the Master and Others* 2007 (3) SA 403 (E), Ms Kambule was married to Mr Baduza, the deceased in terms of a customary union. On Mr Baduza's death Ms Kambule claimed for maintenance in terms of the Maintenance of Surviving Spouses Act 27 of 1990. During the proceedings it was established that Mr Baduza was also married to one, Norah Baduza, in terms of the now repealed Black Administration Act. The court further established, Norah and Mr Baduza had concluded a valid customary union.

At the time, the Maintenance of Surviving Spouses Act did not cater for polygamous unions, however, the judge concluded that Ms Kambule established a customary relationship and union and, therefore, fell within the ambit of the definition of a survivor in the Maintenance of Surviving Spouses Act. This Act was consequently amended to include all the spouses in a polygamous and customary union.

The right to own property

The proprietary consequences of a customary marriage before the commencement of the Act was challenged by spouses who were in a customary union in the case of *Gumede v President of Re-*

public of South Africa and Others 2009 (3) SA 152 (CC). Spouses married before the commencement of the Act, rightfully, pointed out that they were treated differently to spouses that were married in terms of customary law after the commencement of the Act.

The CC dealt with the proprietary and personal rights of a female in a monogamous customary marriage, but failed to extend its judgment to the consequences of a polygamous marriage entered into before the commencement of the Act.

This meant that s 7(1) of the Act was only declared invalid insofar as it related to monogamous marriage and customary law still applied to all polygamous marriages before the commencement of the Act.

The CC in *Gumede* did not deal with the full issue of equality in customary marriages, be it monogamous or polygamous. Government was now aware of the gap in legislation after the judgment of the *Gumede* case. However, it failed to amend the legislation.

Women and their children in polygamous marriages concluded before the Act commenced still stood to be severely discriminated against as a result.

The issue was successfully challenged in the matter of *Ramuhovhi and Others v President of the Republic of South Africa and Others* 2018 (2) SA 1 (CC).

The case dealt with the following issues:

- The unequal treatment of women irrespective of whether their marriage was a monogamous or polygamous marriage concluded before the commencement of the Act.
- Gender discrimination based on whether a husband in a polygamous marriage, entered into before the commencement of the Act, had exclusive proprietary rights on marital property. Wives were considered minors and the impact of the death of the husband or divorce; the wife or wives could be left with nothing.

Discrimination on the basis of gender, race and ethnic origin was evident. It limited the right to human dignity and the right not to be discriminated against unfairly. The infringement of these rights was found not to be justifiable in terms of the general limitation clause in s 36 of the Constitution. Section 36 provides that when determining if a limitation is reasonable and justifiable the following factors must be considered and include but are not limited to –

- the nature of the right;
- the importance of the limitation;
- the nature and extent of the limitation;
- the relation between the limitation and its purpose; and
- less restrictive means to achieve the purpose.

The courts have the further right to consider other vital factors.

Ten years after the *Gumede* case, the

judge in the *Ramuhovhi* case, directed that:

- Section 7(1) of the Act be declared constitutionally invalid.
- The declaration of constitutional invalidity be suspended for a period of 24 months so that the legislature has an opportunity to amend the legislation and correct the invalidity of s 7(1) of the Act.
- Interim measures for customary marriages concluded before the commencement of the Act up to the passing of the amendment to the Act would include:

'(a) Wives and husbands will have joint and equal ownership and other rights to, and joint and equal rights of management and control over, marital property, and these rights shall be exercised as follows –

- (i) in respect of all house property, by the husband and the wife of the house concerned, jointly and in the best interests of the family unit constituted by the house concerned; and
- (ii) in respect of all family property, by the husband and all the wives, jointly and in the best interests of the whole family constituted by the various houses.

(b) Each spouse retains exclusive rights to her or his personal property'.

- Should parliament fail to amend the required legislation within the allocated time of two years, the interim measures shall continue to apply.
- The court in the *Ramuhovhi* case does not invalidate estates that have already been wound up and divorces that have been finalised and marital property that has been transferred.
- The interim measures of the *Ramuhovhi* judgment will apply to matters where, at the time of the transfer of the property, the transferee was aware that the property concerned was subject to a legal challenge on the grounds upon which the appellants brought this case.

Conclusion

The Amendment Bill as envisaged is expected to have a significant bearing on the previously disenfranchised sector of the South African community and it is, therefore, imperative to fully understand its impact as it relates to one's rights in respect of customary marriages.

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Still waiting for an answer: Physician assisted suicide in South Africa



By
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David
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On 30 April 2015 the Gauteng Division of the High Court in Pretoria handed down the landmark judgment that allowed for a person to be assisted by a qualified medical doctor – who is willing to do so – to end their life by either administering a lethal agent or by providing an applicant with such lethal agent to administer by themselves.

Unfortunately, the applicant, Mr Stransham-Ford, passed away a mere two hours prior to the judgment being

handed down. The matter was ultimately appealed by *Minister of Justice and Correctional Services and Others v Estate Late Stransham-Ford (Doctors for Life International NPC and Others as Amici Curiae)* 2017 (3) BCLR 364 (SCA), which the Supreme Court of Appeal (SCA) upheld on 6 December 2016.

Now more than three years later, Parliament has failed to heed the call by the SCA to consider legislation on the issue. When the United States (US), and more particularly the state of Oregon, was faced with the above question, the right to assisted suicide was approved by means of a democratic process, wherein the citizens of the states in question legalised assisted suicide by approving legislation authorising the same.

The questions that arises are whether South Africans have to wait for Parliament to launch an investigation and consider legislation authorising assisted suicide, or are there current alternatives available to South Africans, which offer a swifter resolution for this situation for those seeking such assistance.

The South African position

The SCA confirmed that suicide was not classified to be a crime and that same view has been the stance in South African law since 1940 when the matter of *R v Peverett* 1940 AD 213 was decided.

This leads to the logical inference that a person who refuses treatment, while having the mental capacity to make such a decision, does not commit any crime. Should a medical practitioner cease to treat a patient, on the patient's behest, such doctor also does not commit a criminal offense.

Despite the above, there remains a fine line regarding what is illegal and what is legal regarding the hastening of the death of a patient through medical intervention and medication in South Africa. For example, the practise of hastening the death of a patient is not a criminal offence but for a medical practitioner to administer pain relieving medication – a side effect of which the doctor knows will likely shorten a patient's life-span and may hasten their death – is indeed legal.

Clarke v Hurst NO and Others 1992 (4) SA 630 (D), confirms the aforementioned to be correct by declaring at para 34 that: "If the first purpose of medicine, the restoration of health, can no longer be achieved, there is still much for the doctor to do, and he is entitled to do all that is proper and necessary to relieve pain and suffering, even if measures he takes may incidentally shorten life." (My emphasis.)

Assisted suicide or active voluntary euthanasia on the other-hand remains a

crime. This stance was confirmed in the matter of *S v De Bellocq* 1975 (3) SA 538 (T) and *S v Marengo* 1991 (2) SACR 43 (W). The first-mentioned case involved a son, who was also a doctor, injecting his father, suffering from cancer, with a lethal amount of Pentothal. The court found him to be guilty of murder but sentenced him to a year's imprisonment, in respect of which all but the period until the rising of the court was suspended for one year. The second matter dealt with

a daughter shooting her father who was dying of cancer and being found guilty of murder without receiving a custodial sentence. So, while euthanasia remains a crime, it appears that the courts are currently not inclined to apply maximum or punitive sentences in respect of well-intended cases of euthanasia where the deceased was terminal. One may surmise that this sentiment mirrors the growing movement towards an elected dignified and assisted death.

The position on physician assisted suicide and physician administered euthanasia abroad

Internationally the following countries on the table below, have, by either legislation or case law, allowed physician assisted suicide or physician administered euthanasia:

Country	Legalised in	Physician assisted suicide	Physician administered euthanasia
Belgium	28-5-2002	Not authorised.	A person of any age may request euthanasia, with minors needing the agreement of their parents and the person requesting same must be terminally ill, close to death and suffering beyond any medical help.
Canada	17-6-2016	Authorised. A person must be eligible for health care in Canada and be at least 18 years of age. The person must be capable of making decisions regarding their health, have a grievous and irremediable medical condition and have made a voluntary request for assistance and give informed consent.	Authorised.
Germany	6-11-2015	Authorised, but only on an individual basis out of altruistic motive but forbidding commercial euthanasia or suicide business.	
Netherlands	2002	The Termination of Life on Request and Assisted Suicide (Review Procedures) Act. A person must be 16 years or older. A child between the ages of 12 and 16 must have the consent of their parents. Not only limited to persons with terminal illnesses, but also applicable to persons regarding their lives as complete.	May be done with prior written statement made before they reached the situation where they seek physician administered euthanasia.
Oregon, US	1997	Referred to as physician assisted dying. A person must be – <ul style="list-style-type: none"> • over the age of 18; • a resident of Oregon; • capable of making and communicating decisions; and • diagnosed with a terminal illness, which will lead to death in six months. The person also requires confirmation of the diagnosis and prognoses and mental capacity and at least two requests and a 'cooling off period' of 15 days and information as to the alternatives to physician assisted suicide.	Unlawful.
Switzerland	1937	Authorised if performed with unselfish motives. DIGNITAS, an organisation established in 1998, offers this service to both citizens of Switzerland and non-citizens.	Unlawful.

In the case of *Stransham-Ford* at para 115, the court held that physician assisted suicide and physician administered euthanasia are 'illegal in Denmark, France, Ireland, Italy, Norway, Russia, Spain, Sweden and the United Kingdom. Outside Europe both are illegal in Australia, China, India, Israel, Mexico, New Zealand, the Philippines, Turkey and Uruguay, and probably Japan'.

New Zealand is the first country to put forward voluntary euthanasia legalisation in a binding referendum, which will be decided later on in the year. If supported by over half of the respondents, it will become binding one year after the vote count is announced and will apply in respect of persons diagnosed with a terminal illness, who have less than six months left to live if approved by two doctors.

Physician assisted suicide and physician administered euthanasia in SA

Two forms of assisted suicide need to be considered. The first is referred to as physician administered euthanasia. Despite a patient consenting to their death by physician administered euthanasia, the doctor who administers the drug, leading to the patient's death, is still considered to be a committing murder, when same is done in SA. The rationale for same being that consent is no defence to criminal responsibility for the intentional killing of another person.

Physician assisted suicide relates to the patient taking the drug themselves, which in turn will cause them to die. The medication still needs to be prescribed by a medical practitioner and such action may lead to the doctor being prosecuted for murder.

The Appeal Court, interestingly, notes in footnote 44, by referring to *S v Robinson and Others* 1968 (1) SA 666 (A), that a doctor acting at the patient's request by administering a lethal agent justifies a far lesser sentence but such doctor is still committing a crime.

When one then considers that –

- suicide is not a crime;
- the refusal of treatment by a patient is not a crime;
- administering pain management medicine with the indirect effect of hastening death is not a crime;
- being provided with a lethal agent to terminate one's own life by a doctor

on such patient's request is a crime but will result in a 'far lesser sentence being imposed', then the question that springs to mind is: Why not allow physician assisted suicide in South Africa?

Is DIGNITAS an answer for South Africans seeking physician assisted suicide?

Switzerland is the only country that allows non-residents to apply for and be approved for assisted suicide, referred to as accompanied suicide and done by an organisation known as DIGNITAS.

As part of the process, firstly, the person needs to become a member of DIGNITAS and receive the proverbial 'green light' from the organisation. Thereafter, the parties agree on a date and place. DIGNITAS does have apartments in Switzerland and can make the same available to a member.

A Swiss medical doctor will have to be convinced that the disease the patient is suffering from is an illness that will lead to death and/or unendurable incapacitating disability and/or unbearable and uncontrollable pain. The request for accompanied suicide must be preceded by a written request, directed to DIGNITAS, by the member requesting accompanied suicide.

DIGNITAS reiterates that the member always determines the course of action and that same is customised to that specific person's needs. The patient is given an anti-emetic and a fatal dose, approximately 15 g, of pentobarbital sodium.

The patient must undertake the final act. This, usually, and in the event of the member being able to swallow, consists of the ingesting of the drug. Should a patient not be able to swallow, the dose is administered, by the patient themselves via a gastric tube. In the event of the member not being able to either swallow or administer the agent via gastric tube the pentobarbital sodium can be administered intravenously. The so-called final act in this regard would be the patient opening the intravenous valve themselves.

Unfortunately, should the patient not be able to do any of the above actions DIGNITAS would be unable to assist such patient with accompanied suicide.

The estimated cost, without airfare, accommodation, cremation or official procedures following death, currently amounts to 7 500 Swiss Francs or

R136 000. Should DIGNITAS also arrange for cremation and deal with the official procedures after death the amount increases to in excess of R 160 000.

From the above, it is evident that the average South African will not be in a position to afford to make use of the organisation.

Conclusion

As South African courts have not again been approached with a similar application and Parliament has not yet proposed any legislation to the effect of legalising either physician assisted suicide and physician administered euthanasia, the *status quo* remains. Persons dying and suffering severely and who simply cannot afford to mandate DIGNITAS are, therefore, left at the mercy of their illness.

I submit that either an approach similar to that of Oregon, in 1997, or the binding referendum being implemented by New Zealand, may be a solution to the problem as posed herein, however, the same is unlikely to arise or bear any fruits in the near future.

Ultimately an application in line with the description of the SCA contained in the judgment of *Stransham-Ford* must be heard. An application with the structure and amount of evidence presented to the New Zealand Court in *Seales v Attorney-General* [2015] NZHC 1239 matter needs to be presented to the South African courts in order for the Bench to consider same and make an order it deems appropriate. Should the outcome of the same, sanction physician assisted suicide and physician administered euthanasia, that would be the end of the debate, but there will still be some time before implementation, as the matter would likely be referred to the CC for confirmation as the matter falls within the ambit of the Constitution. If affirmed by the CC it would then be referred the legislature for the further determination and implementation. In the event of the court not allowing for same, at the very least, the legal position would become crystallised until legislative intervention, should such intervention ever arise.

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The court's discretionary power to award rehabilitative maintenance



By
Clement
Marumoagae

In South Africa (SA), there is no law that mandates that spousal maintenance must be ordered when parties divorce. It should also be noted that neither spouse has a right to spousal maintenance on divorce (see *Strauss v Strauss* 1974 (3) SA 79 (A)). Equally so, there is no law that provides guidance on the amount of maintenance that needs to be paid and the period for which such maintenance should be paid. At best, maintenance orders are subject to judicial discretionary power. It was correctly held in *M v M* (WCC) (unreported case no A112/10, 25-2-2011) (Steyn J) at para 5 that '[t]here is no statutory right to maintenance by reason of the marriage and no act proclaims that maintenance in any amount

for any period will be ordered by reason solely of the marriage and the inability of one party to maintain the standard of living to which he or she has become accustomed'. This article examines the law regarding spousal maintenance in SA. In particular, it evaluates the circumstances under which the court can order spousal maintenance for only a defined period.

Marriage creates a reciprocal duty of support between spouses, which lasts for as long as the marriage subsists (HR Hahlo *The South African Law of Husband and Wife* 4ed (Cape Town: Juta 1975) at 114). In *M v M* (FB) (unreported case no 4906/2016, 30-7-2018) (Nulliah AJ) at para 59, the court held that '[i]t is also well established that the reciprocal duty of support, an invariable consequence of marriage terminates when the marriage comes to an [end]'. As it will be shown later, statutory law does make provision for the extension of this duty post the divorce. The extension of support is often necessitated by the financial circumstances of the spouse who was unable to acquire the necessary financial resources to sustain their life post-divorce. Such a spouse, usually a woman, directly or indirectly assisted the spouse from whom maintenance is sought, usually a man, to acquire financial resources during the marriage.

There is a concerning historical, and to some extent current gender aspect to marriage, wherein generally a husband provides financial support to the wife, who is expected to deliver domestic

services (Twila L Perry 'The "Essentials of Marriage": Reconsidering the Duty of Support and Services' (2003) 15(1) *Yale Journal of Law & Feminism* 1 at 10). This arrangement has the effect of financially disempowering women, who due to domestic services rendered in the household and caring for children could not acquire financial resources that could assist them to adequately support themselves post their divorce. According to Bonthuys '[t]he gendered division of labour means that men benefit from the tasks which wives perform. Their earning power increases because they do not have to set aside time or energy for all the tasks which are needed to replenish their labour power' ('Labours of Love: Child Custody and the Division of Matrimonial Property at Divorce' (2001) 64 *THRHR* 192 at 195). While there have been some improvements in women's economic position in SA because of their participation in the workplace and trade, nonetheless, recent cases demonstrate that generally women remain financially weaker spouses in marriages (see *ST v CT* 2018 (5) SA 479 (SCA) and *A v A* (ECP) (unreported case no 707/2018, 18-6-2019) (Lowe JJ)). It cannot be disputed that women who, due to their commitment to their marriage, were not able to acquire financial resources should be able not only to share in the assets acquired by the other spouse during the marriage but should also be financially supported if the need for such maintenance has been established.

Financial support seems to be a fair initiative to provide financially weaker spouses financial security post-divorce, particularly if they were prevented from actively participating in trade or acquiring skills to participate meaningfully in the labour market in order to acquire their own financial resources to sustain themselves. Usually, the employment prospects of such spouses, due to lack of academic qualifications and work experience, are bleak, making it difficult for them to sustain themselves financially post-divorce. Sinclair argues that '[m]aintenance is and will, therefore, remain the key to the financial security of the women of these marriages who ... experience ... difficulties, prejudices and inequalities in employment opportunities after divorce' ('Marriage: Is it Still a Commitment for Life Entailing a Lifelong Duty of Support' (1983) *Acta Juridica* 75 at 85).

This raises a complex question on whether, a financially weaker spouse 'who was an errant spouse' and did not acquire financial resources to survive post-divorce, can compel the financially stronger spouse to support 'her' (J Sinclair 'The Divorce Act and the Duty of Support' (1981) 98 *SALJ* 89 at 95). If so, for how long? In other words, what are the circumstances that would lead the court to order either ongoing maintenance or rehabilitative maintenance? In 1999, Madelene De Jong correctly observed that 'reported case law clearly advocates two different approaches to the maintenance of spouses upon divorce' ('New trends regarding the maintenance of spouses upon divorce' (1999) 62 *THRHR* 75). With reference to decided cases at the time, she illustrated that some cases advocated for a clean-break principle by ordering rehabilitative maintenance, while others were of the view that it is unreasonable to offer a woman who has not worked during the marriage only rehabilitative maintenance, thus advocating for ongoing or permanent spousal maintenance (see also *Beaumont v Beaumont* 1987 (1) SA 967 (A) at 992 – 993 and *Grasso v Grasso* 1987 (1) SA 48 (C) at 58).

Given the educational and economic advancement of women, in recent times, South African courts seem to be embracing the clean-break principle by ordering rehabilitative maintenance. Rehabilitative maintenance 'refers to an amount of money given to a dependent spouse (usually a homemaker) following divorce for a relatively short period of time to allow that person to obtain additional education or have time to look for work to make the person financially independent' (Mary Frances Lyle and Jeffrey L Levy 'From Riches to Rags: Does Rehabilitative Alimony Need to Be Rehabilitated?' (2004) 38(1) *Family Law Quarterly*

3). Generally, spousal maintenance is a discretionary remedy and courts are empowered by s 7(2) of the Divorce Act 70 of 1979 to grant it and the court, usually through the exercise of its discretion, award rehabilitative maintenance. The SCA in *EH v SH* 2012 (4) SA 164 (SCA) at para 13, held that 'the person claiming maintenance must establish a need to be supported. If no such need is established, it would not be "just" as required by this section for a maintenance order to be issued'.

In order to determine whether the spouse who is claiming spousal maintenance has established the need for such maintenance and that it is just for such maintenance to be ordered, the court must have regard to s 7(2) of the Divorce Act. This is the legislative provision that provides the court with the discretionary power to award spousal maintenance when one of the parties to the divorce has not only claimed maintenance, but also made out a case for such maintenance. In *Botha v Botha* (GJ) (unreported case no 2005/25726, 9-6-2020) (Satchwell J), the court held at para 42 that '[i]n exercising its wide discretion, a divorce court may or may not make an order granting maintenance. Where maintenance is granted this may be for "any period" whether a specified period of time or until the happening of an event'.

This indicates that rehabilitative maintenance is not a statutory remedy, but one that can only be granted by the court when a case has been made for it. However, in making this order and absent the parties' agreement to this effect, the court must have regard to the general statutory guidance provided for in s 7(2) of the Divorce Act. This provision provides a list of factors that the court must consider before making a spousal maintenance order such as the 'existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct insofar as it may be relevant to the break-down of the marriage ... and any other factor which in the opinion of the court should be taken into account'.


These factors are not listed in any particular order of importance or of greater or lesser relevance and none of them is more important than the other (see *Grasso (op cit)* at 52). The factors should be considered together in order to enable the court to order a fair and just order. It appears that out of all these factors, only three are instrumental in inducing the court to order rehabilitative maintenance. While the court will generally consider the circumstances of the marriage and the reasons that led to the spouse who is claiming maintenance to become

a financially weaker spouse, nonetheless, in considering rehabilitative maintenance, the court will surely place emphasis on each spouse's existing or prospective means, their respective earning capacities, financial needs and obligations, and the age of the spouse who is claiming spousal maintenance. If such a spouse does not have means to support themselves, the court will assess whether 'she' has the ability to do so in future, by looking at 'her' skills and qualifications. The court should assess the likelihood of such a spouse being able to meet 'her' financial needs and obligations without the required financial assistance and the realistic time 'she' may need to be able to meet such obligations without such assistance. Age is an important aspect of the analysis. Generally, a much younger person is more likely to find employment than an older person without work experience and or qualifications. The court should also look at whether such a spouse, if afforded the opportunity, will be able to acquire the necessary skills or qualification to be able to either participate in the labour market or enter into business so as to be self-sufficient (*Kooverjee v Kooverjee* 2006 (6) SA 127 (C) at 137).

In conclusion, it is evident that rehabilitative maintenance should only be ordered if there is evidence that the financially weaker spouse requires the assistance of the financially stronger spouse to be self-sufficient in a short period of time. The court should be convinced that within a defined period of time, the financially weaker spouse will be able to acquire the necessary skills, experience, training and/or qualifications to be able to participate in any economic activity that would make 'her' self-sufficient.

Finally, it is worth noting that when determining a spousal maintenance claim, the court must consider the need for such maintenance by the financially weaker spouse and the ability of the financially stronger spouse to pay such maintenance (*V v V* (GP) (unreported case no 52799/2016, 30-8-2017) (Kubushi J) at para 11). Each case must be considered on its own merits in the light of the facts and circumstances peculiar to it (see *Grasso (op cit)* at 52).

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Government

Contract

Picture source: Gallo Images/Getty



By Pieter Andrè Botha SC and
Nicolene Schoeman-Louw

Government contracts: When to rely on estoppel

Section 216(1) of the Constitution provides that national legislation must establish a national treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government, by introducing generally recognised accounting practice, uniform expenditure classifications and uniform treasury norms and standards.

In addition, s 217(1) of the Constitution provides that when an organ of state in the national, provincial or local sphere of government, or any other institution in national legislation, concludes an agreement for the rendering of goods or services, it must do so in accor-

dance with a system which is fair, equitable, transparent, competitive and cost-effective.

The Public Finance Management Act 1 of 1999, as amended (the Act) was enacted to 'regulate financial management in the national government and provincial governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management in those governments; and to provide for matters connected therewith'.

The Act is, therefore, the national legislation envisaged in s 216 of the Constitution and seeks to give effect to, among

others, the values underpinning ss 217 and 195 of the Constitution.

Section 38(1)(a)(iii) of the Act provides that an accounting officer for a department, trading entity or constitutional institution must ensure that that department, trading entity or constitutional institution has and maintains an appropriate procurement and provisioning system, which is fair, equitable, transparent, competitive and cost-effective.

The importance of, and the rationale behind, these processes and regulations was outlined in the unanimous judgment by the Supreme Court of Appeal (SCA) in *Eastern Cape Provincial Government and Others v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA). This matter involved

the validity of two lease agreements of immovable property concluded without any reference to the Provincial Tender Board and thus in contravention of the prescribed statutory tender procedure.

The SCA held (at para 8) that both leases were concluded in contravention of the prescribed tender process and were, therefore, invalid. Speaking for the Full Bench, Marais JA held as follows:

'As to the mischief which the Act seeks to prevent, that too seems plain enough. It is to eliminate patronage or worse in the awarding of contracts, to provide members of the public with opportunities to tender to fulfil provincial needs, and to ensure the fair, impartial, and independent exercise of the power to award provincial contracts. If contracts were permitted to be concluded without any reference to the tender board without any resultant sanction of invalidity, the very mischief which the Act seeks to combat could be perpetuated'.

As to the perceived harsh consequences of visiting such a transaction with invalidity, Marais JA remarked at para 9 that 'the consequences of visiting invalidity upon non-compliance are not so uniformly and one-sidedly harsh that the legislature cannot be supposed to have intended invalidity to be the consequence. What is certain is that the consequence cannot vary from case to case. Such transactions are either all invalid or all valid. Their validity cannot depend upon whether or not harshness is discernible in the particular case'.

As an alternative contention, the respondent in the *Contractprops* case also relied on estoppel. However, Marais JA held, at para 11 - 13, that such reliance was misplaced:

'It remains to consider an alternative contention advanced by counsel for respondent: Estoppel. There are formidable obstacles in the way of a successful invocation of estoppel. However, even if it be assumed in favour of respondent that estoppel was pertinently raised in the papers (the matter came before the court *a quo* by way of motion proceedings) and that all the necessary factual requirements for the doctrine to be applicable were canvassed, this is not a case in which it can be allowed to operate. It is settled law that a state of affairs prohibited by law in the public interest cannot be perpetuated by reliance upon the doctrine of estoppel. (See *Trust Bank van Afrika Bpk v Eksteen* 1964 (3) SA 402 (A) at 411H - 412B.)

This is such a case. It was not the tender board which conducted itself in a manner which led respondent to act to its detriment by concluding invalid leases of property specially purchased and altered at considerable expense to suit the requirements of the department. It was the department. If the leases are, in effect, "validated" by allowing estoppel

to operate, the tender board will have been deprived of the opportunity of exercising the powers conferred upon it in the interests of the taxpaying public at large. Here again the very mischief which the Act was enacted to prevent would be perpetuated. (Compare *Strydom v Die Land - en Landboubank van Suid-Afrika* 1972 (1) SA 801 (A) at 815E - F.)

... The fact that [the] respondent was misled into believing that the department had the power to conclude the agreement is regrettable and its indignation at the stance now taken by the department is understandable. Unfortunately for it, those considerations cannot alter the fact that leases were concluded which were *ultra vires* the powers of the department and they cannot be allowed to stand as if they were *intra vires*'. (We deal in more detail hereunder with estoppel within this context.)

From the aforesaid, it is clear that agreements, concluded with a department, trading entity or constitutional institution for the delivery of goods or services to it that do not comply with the requirement that they are the result of an appropriate procurement and provisioning system, which was fair, equitable, transparent, competitive and cost-effective, are *ab initio* null and void. The rationale for nullifying transactions that do not comply with applicable procurement and provisioning systems, is that they deprive the public of the benefit of an open and fair competitive process, and that they are, therefore, not in the public interest.

Extensions versus new agreements

A distinction must be drawn between new agreements concluded with a department, trading entity or constitutional institution for the procurement of goods or services, on the one hand, and the extension of an existing procurement agreement, on the other.

In the matter of *MEC for Health, Gauteng v 3P Consulting (Pty) Ltd* 2012 (2) SA 542 (SCA), a High Court order declaring a services agreement between the parties duly renewed and ordering specific performance in terms thereof, was assailed by the department (the appellant) on the grounds that the purported renewal of the services agreement for three years - one year longer than previously agreed and at an increased contract value - occurred without following a further public bidding process and in a manner which therefore, so it was contended, fell afoul of the statutory procurement provisions referred to above.

In addition, the appellant also relied on the provisions of s 76(4)(c) of the Act, which provides that the National Treasury may make regulations or issue

instructions applicable to all institutions to which the Act applies concerning 'the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective' (para 15 of the *3P Consulting* case).

Pursuant to the aforesaid, the appellant referred to the Framework for Supply Chain Management, which was promulgated in GN R1734 GG25767/5-12-2003 as Treasury Regulations. In terms of this framework, National Treasury is required and authorised to issue instructions to accounting officers/authorities in respect of the appointment of consultants. This it does by way of practice notes. In this regard, National Treasury Supply Chain Management Practice Note No SCM 3 of 2003 provides that '[c]onsultants should be appointed by means of competitive bidding processes, whenever possible'.

Based on these statutory requirements, the appellant argued that, despite the fact that 3P Consulting's proposal was for a contract duration of two years, renewable for a further period of two years, it had, after a due and proper tender process, given approval for a two-year contract only. Thus, according to the appellant, any attempt by the parties to circumvent that approval by concluding a contract for a longer period was unlawful.

Speaking for the court, Van Heerden JA held, firstly, that it was clear from the evidence that the original decision to approve the initial award to 3P Consulting was taken by the Departmental Acquisition Council (DAC), the procurement decision-making body of the appellant. The original services agreement was, therefore, validly concluded.

The SCA also held that, as there was no new services agreement but merely an extension of the original services agreement, there was no new procurement of goods or services, and it was, therefore, not necessary to follow a further competitive public bidding process in this regard. As a result, it held that the appellant's attack on the validity of the renewal of the services agreement on public law grounds was without merit.

It, therefore, follows that in the case of a renewal of an existing and legally constituted procurement agreement, a further public bidding process is not required, as long as there had been compliance with internal procurement processes when the original procurement agreement was concluded.

Sections 66 and 68 of the Act

In the matter of *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd* 2019 (5) SA 29 (CC), the applicant, the Road Traffic Management Cor-

poration (RTMC), a national public entity, conducted a lawful tender process and contracted with the respondent company (Waymark) to provide it with information technology services over three financial years. However, the RTMC then repudiated the agreement, and Waymark cancelled it and instituted an action for its damages. The RTMC counterclaimed for an order that the agreement was invalid because of non-compliance with s 66(3) of the Act, which provides that a national public entity 'may only through the [Minister] ... enter into any ... transaction that binds ... that public entity to any future financial commitment'.

On appeal, the SCA ruled that the High Court misconstrued the provisions of s 66 of the Act and held that a term contract does not fall under these provisions. As a result, the SCA held that the contract is 'a present commitment to pay for professional services as they were rendered, albeit over a three-year period' and not a future financial commitment.

The Constitutional Court (CC) concurred with the reasoning of the SCA and, among others, held that: 'A contextual reading of ss 66 and 68, given the chapter in which they are located, and the relation of that chapter to other chapters of the [Act], lends itself to the interpretation that the phrase "any other transaction that binds or may bind that

public entity to any future financial commitment" as referred to in s 66, must mean a transaction that is somehow similar to a credit or security agreement'.

From the aforesaid, it is clear that 'future financial commitment' as contemplated in s 66(3)(c) of the Act, means a financial commitment beyond the present moment and that 'transaction' as referred to in s 66, must mean a transaction that is somehow similar to a credit or security agreement.

However, we hasten to add that the RTMC never impugned the validity of the procurement process that culminated in the award of the tender to Waymark and accepted the procurement process without question. The CC held that the SCA's conclusion, therefore, represents the best fit, having regard to the text, context and purpose of s 66. That being the case, the CC did not find it necessary to deal with s 68 of the Act whose ultimate relevance was predicated on the applicability of s 66.

Estoppel

Does the *Contractprops* case exclude a reliance on estoppel in all cases? We are of the view that it does not.

Firstly, we submit that Marais JA's judgment does not provide authority for the contention that it has closed a possible reliance on estoppel in all instances:

- In para 11 of the *Contractprops* case, Marais JA concluded that the case was one in which estoppel cannot be allowed to operate.
- In para 12 Marais JA was also at pains to point out that it was not the tender board, but the department, which led *Contractprops* to act to its detriment. This justifies the inference that, were this not to have been the case, *Contractprops*' reliance in estoppel may very well have been justified.

Secondly, in the matter of *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 (3) SA 1 (SCA), Ponnann JA remarked as follows regarding RPM Brick's attempt to rely in estoppel (at para 11-13):

'It is important at the outset to distinguish between two separate, often interwoven, yet distinctly different "categories" of cases. The distinction ought to be clear enough conceptually. And yet, as the present matter amply demonstrates, it is not always truly discerned. I am referring to the distinction between an act beyond or in excess of the legal powers of a public authority (the first category), on the one hand, and the irregular or informal exercise of power granted (the second category), on the other. That broad distinction lies at the heart of the present appeal, for the successful invocation of the doctrine of estoppel

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may depend upon it. (See TE Dönges & L de van Winsen *Municipal Law* 2ed (1953) 38 - 41.)

In the second category, persons contracting in good faith with a statutory body or its agents are not bound, in the absence of knowledge to the contrary, to enquire whether the relevant internal arrangements or formalities have been satisfied, but are entitled to assume that all the necessary arrangements or formalities have indeed been complied with (see for example *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A); *Potchefstroom se Stadsraad v Kotze* 1960 (3) SA 616 (A)). Such persons may then rely on estoppel if the defence raised is that the relevant internal arrangements or formalities were not complied with.

As to the first category: Failure by a statutory body to comply with provisions which the legislature has prescribed for the validity of [a] specified transaction cannot be remedied by estoppel because that would give validity to a transaction which is unlawful and therefore *ultra vires*. (See for example *Strydom v Die Land- en Landboubank van Suid-Afrika* 1972 (1) SA 801 (A); *Abrahamse v Connock's Pension Fund* 1963 (2) SA 76 (W); and *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 (C).)

Based on the aforesaid, we submit that the following appears to be the legal position regarding a possible reliance on estoppel in instances where agreements have been concluded without proper compliance with the relevant statutory procurement provisions –

- service providers falling within Ponnan JA's 'second category' may rely on estoppel if the defense raised is that the relevant internal arrangements or formalities were not complied with;
- it must be the actions of the relevant procurement decision-making body of the department that led the service provider to act to its detriment; and
- all the other requirements for a successful reliance on estoppel must be present.

Absent a possible successful reliance on estoppel, does this render the innocent service provider without a remedy?

Although there is no general enrichment liability in South African law, there are nonetheless basic requirements that must be met for relief to be granted under any of the recognised actions. These requirements are –

- the defendant must have been enriched;
- the plaintiff must have been impoverished;

Although there is no general enrichment liability in South African law, there are nonetheless basic requirements that must be met for relief to be granted under any of the recognised actions.

- the enrichment of the defendant must be at the expense of the plaintiff; and
- the enrichment must be unjustified (*sine causa*).

It is trite that a party who has performed – whether in whole or in part – in terms of an illegal contract may reclaim performance with the *condictio ob turpem vel iniustam causam*. Such a party must allege and show –

- a transfer of property or payment of money to the defendant from the plaintiff;
- that the transaction or its performance was illegal;
- that the defendant was unjustly enriched.

The central requirement of this *condictio* is, therefore, that the amount claimed must have been transferred pursuant to an agreement that is void and unenforceable because it is illegal, that is, because it is prohibited by law.

If the contract is invalid but not illegal, the cause of action is the *condictio indebiti*. The essential allegations for the *condictio indebiti* are that:

- The transfer or payment must have been made in the *bona fide* and reasonable but mistaken belief that it was owing.
- The transfer must have been made *sine causa* or *indebiti*, there must, therefore, have been no legal or natural obligation to have made it.
- The error must have been reasonable, meaning that the mistake must be excusable in the circumstances of the case.
- The property being reclaimed must in legal terms have been transferred to the defendant.

However, it is generally accepted by South African courts that the identification of the cause of action or the specific *condictio* is not of importance. In this regard, the following quote from the matter of *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 (3) SA 960 (SCA) at para 21 is apposite:

'This difference of approach as to the appropriate *condictio* again underlines the point which I made in *McCarthy Retail Ltd v Shortdistance Carriers CC* [2001 (3) SA 482 (SCA)] that we spend too much of our time identifying the correct *condictio* or *actio*. Counsel frequently err. The academics say that the courts, including this court, frequently err. And

to judge by the difference of opinion as to the *condictio sine causa* revealed in McCarthy's case, some of the academics sometimes err too. My suggestion, in that case, accepted by two of my brethren, was that the adoption of a general action might help remedy this situation, by fixing attention on the requirements of enrichment rather than on the definition and application of the old actions.'

We are of the view that a service provider, that has duly performed in terms of an agreement, which does not comply with the relevant statutory procurement requirements, may rely on an unjust enrichment action against the department, trading entity or constitutional institution.

We furthermore submit that authority for this is to be found in the para 25 from the *City of Tshwane* case:

'It follows that on this aspect, Boruchowitz J was wrong, as indeed was the learned judge in the present case. The appeal must therefore succeed. *This result may well be perceived to be an unpalatable one. It is, however, not so. For it must be remembered that someone in the position of the plaintiff has, in principle, an enrichment action and will thus not be entirely remediless.* In this case, as I have already mentioned, the plaintiff consciously elected at the trial not to pursue its enrichment claim. It must therefore bear the consequences of that election' (our italics).

Conclusion

Service providers to government should ensure that as far as possible, they not only participate in procurement processes underpinned by relevant statutory provisions, but that there has been compliance with the relevant statutory procurement requirements. Should there be any doubt in this regard, we suggest that it would be prudent for a service provider to seek written confirmation from the relevant procurement decision-making body that there had been proper compliance, *inter alia*, with all internal processes. Should any reliance by the service provider later turn out to be misplaced, such a service provider may rely on estoppel. Where a service provider has duly performed in terms of an agreement, which does not comply with the relevant statutory procurement requirements, it may rely on an unjust enrichment action against the department, trading entity or constitutional institution.

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By
Michael
Kabai

Running out the clock: When to condone an unreasonable delay

The commentary on *4 Africa Exchange (Pty) Limited v The Financial Sector Conduct Authority and Others* (GJ) (unreported case no 17/20474, 28-2-2020) (Molefe J) in this article will focus only specifically on the issue of ‘unreasonable delay’ as per s 7(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

Section 7(1) of PAJA reads as follows:

‘Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date –

(a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contem-

plated in subsection (2)(a) have been concluded; or

(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons’.

The 180-day period is calculated either from the date of the notification of the decision or the date on which the affected individual ‘might reasonably have become aware of the action and the reasons’ (Iain Currie and Jonathan Klaaren *The Promo-*

tion of Administrative Justice Act: Benchbook (Cape Town: SiberInk 2001) at 180). Section 7(1) of PAJA requires an applicant for a review to institute proceedings ‘without unreasonable delay’. When it comes to what constitutes an ‘unreasonable delay’ the courts have pointed out many times that it is dependent on the facts of each particular case. If a delay of less than 180 days on the part of the applicant can be shown to be ‘unreasonable’, the court may decline to hear the matter. However, it can be argued that the 180-day period is not a particularly long time in the world of litigation and it may



give an impression that it is unlikely that an agreement, which an applicant has delayed unreasonably before the expiry of this period, will be successful.

4 Africa Exchange (Pty) Limited (4 Africa) filed an application against the decision taken on 31 August 2016 by the then Registrar of Securities Services of the Financial Services Board (FSB) (now known as the Financial Sector Conduct Authority (FSCA)) to grant an exchange licence to ZAR X (Pty) Limited (ZAR X) before the then FSB Appeal Board (Appeal Board). The Appeal Board considered the application and took a decision on 9 February 2017 and confirmed the decision by the FSCA and dismissed internal administrative appeals against the decision brought by 4 Africa and the Johannesburg Stock Exchange Limited (JSE).

On 9 June 2017, 4 Africa filed an application for the review and setting aside of decisions of the FSCA and the Appeal Board before the High Court. This was four months after the decision was since taken on 9 February 2017. The FSCA accepted that the review application was launched within the 180-day period, as referred to in s 7(1) of PAJA. However, the FSCA submitted that 4 Africa delayed unreasonably before launching the review.

The FSCA contended that 4 Africa appeared to have been aware that ZAR X commenced trading shortly after the judgment of the Appeal Board was delivered on 9 February 2017. The FSCA argued that 4 Africa allowed its competitor to begin operations while 4 Africa took a leisurely four months to launch a review, which was intended to deprive ZAR X of the exchange licence that is necessary for its operations.

The FSCA further argued that the delay in the launching of the review was unreasonable and had prejudiced ZAR X. On this ground alone, the FSCA submitted that the review application by 4 Africa should be dismissed.

The FSCA relied on, among other

things, the case of *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited* [2013] 4 All SA 639 (SCA) wherein Brand JA clarified the effects of s 7(1) of PAJA at para 26 by stating that the 'delay exceeding 180 days is determined to be *per se* unreasonable, but a delay of less than 180 days may also be unreasonable and require condonation'. However, 4 Africa in its motivation for the delay, flagged two points as follows –

- the review application is 'complex and voluminous' and involves 'novel' issues; and
- the preparation of the review was hampered by the confidentiality obligations, which ZAR X imposed on it, by non-disclosure agreements.

4 Africa accepted that proceedings for judicial review must be instituted without unreasonable delay, and that the circumstances may require the review to be launched sooner than within 180 days, but argued that these are both independent requirements in the sense that 180 days is the outer-limit. 4 Africa contended that the fact that it brought its review two months earlier than the 180 days outer-limit, alone would suggest that it had acted reasonably and not for the improper reasons attributed to it.

The court held that given the objects of the Financial Markets Act 19 of 2012 (the Act) to maintain stability and public confidence in South African's financial markets, any appeal against the decision taken under the Act must be lodged expeditiously. The court further held that 'within 30 days of the person becoming aware of the decision – and that decision taken under the [Act] may be suspended by the FSB Appeal Board Chair, pending appeal'.

The court emphasised the need to submit a review within a reasonable time, which according to the court might well, in the circumstances of the case, require it to be brought sooner than the outer-limit. The court further quoting the

case of *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 (2) SA 638 (SCA) 650D – E, held that this is to avoid prejudice to the respondents, and to promote the public interest in reaching finality on the status of administrative acts, on grounds of pragmatism and practicality.

The court noted that the mere fact that there has been an unreasonable delay alone does not necessarily require a dismissal of the review. The court held that it has a wide discretion to condone the delay. The court quoting the case of *Khumalo and Another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) at para 44, held: In exercising its discretion the court considers the prejudice to a respondent is an important consideration, among others, including the values of the Constitution.

The court dismissed 4 Africa's application on the grounds of 'unreasonable delay'. The court held that in the 'circumstances, and given the obvious widespread prejudice that would be caused by any delay, [4 Africa's] institution of the review application [after the lapse of time] was plainly unreasonable and is not in the interests of justice'. The court was of the view that 4 Africa had failed to provide a satisfactory explanation for the delay, and thus should not be condoned.

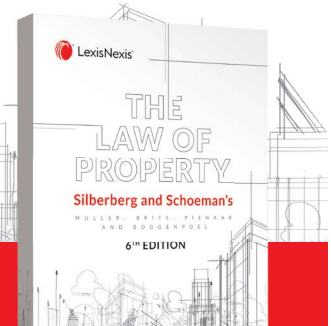
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By
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THE LAW REPORTS

June [2020] All South African Law Reports (pp 637 – 940)

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

ECP: Eastern Cape Local Division, Port Elizabeth

GP: Gauteng Division, Pretoria

SCA: Supreme Court of Appeal

WCC: Western Cape Division, Cape Town

Civil procedure

Running of interest and VAT in court orders: In *Rand West City Local Municipality v Quill Associates (Pty) Ltd and Another* [2020] 2 All SA 921 (GP), the municipality in question made payment to Quill after a court order against it, but not the interest and value-added tax (VAT) portions of the order. Quill then requested the Registrar to issue a writ of execution, in terms of r 45(1) of the Uniform Rules of Court for a further amount and the Deputy Sheriff executed the writ by attaching that amount in the municipality's bank account.

The municipality sought an order reviewing and setting aside the decision of the Registrar. The review application was brought in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). In the alternative, it was sought to have the writ and the notice of attachment set aside.

The municipality argued that the Registrar should have realised that a dispute existed regarding the interest and should have notified the applicant of the application for the writ of execution.

The GP, per Botes AJ, held that one of the issues to be addressed related to the addition of VAT by the court to the amounts ordered to be due and payable. The amounts awarded were for the infringement of copyright. The starting point in determining liability for VAT is s 7(1)(a) of the Value-Added Tax Act 89 of 1991, which provides that VAT is levied on the supply by any vendor of goods or services in the course or furtherance of any enterprise carried on by him. The term 'services' is defined in s 1 of the Act as 'anything done or to be done, including the granting, assignment, cession or surrender of any right or the making available of any facility or advantage'. The court held that Quill's contractual rights were surrendered and replaced by

the award, which occurred in the course of the furtherance of Quill's enterprise or normal business activities. There was, therefore, no basis on which to conclude that Quill would not be liable for VAT on the amount awarded by the court.

The finding that VAT was payable by Quill, led to the questions of whether the court's award should have mentioned VAT, and the effect of the court's award not mentioning anything in that regard. The conclusion was, therefore, that VAT was payable by the applicant on the amount that was awarded by the court in its judgment.

The next question was whether Quill was entitled to claim interest on the amounts awarded by the court a *tempore morae*, namely, from the date on which the summonses were served. A '*tempore morae*' effectively meant 'for the period of default'. Quill was reimbursed or compensated as from the date on which the summonses were served, and if everything went according to plan, would have earned the royalties and monthly licence payments per month. Its calculation of interest from the date the summonses were served was correct.

A related question was whether Quill was entitled to claim compound interest (interest on interest). It was accepted that Quill suffered further damage by the applicant failing to effect payment of the royalties and the monthly licence fee since the date on which the combined summonses were served. *Mora* interest remains a specie of damages which Quill was entitled to recover from the applicant. It was thus entitled to claim compound interest.

Was the Registrar's decision to issue the writ susceptible to review in terms of PAJA? Not all acts by state entities are administrative acts that fall within the ambit of PAJA and are reviewable under the Act. The court accepted that when a Registrar does not apply his mind or makes another mistake in respect of which grounds for review are present, the decision to issue the writ must be reviewed and set-aside. However, in this case, the Registrar did not err in issuing the writ. The application for review was thus refused.

Constitutional and administrative law

Right to religious practices – COVID-19:

In response to COVID-19, a state of disaster was declared and a national lockdown put into effect, with regulations that people were confined to their place of residence and they were prohibited from moving around, unless to perform certain essential functions. All gatherings were strictly prohibited, and places at which people congregated were expressly required to remain closed.

In *Mohamed and Others v President of the Republic of South Africa and Others (United Ulama Council of South Africa and Another as Amici Curiae)* [2020] 2 All SA 844 (GP) the applicants sought declaratory relief and amendment to the regulations. The applicants contended that it was obligatory, in terms of their religious beliefs, to perform the five daily prayers in congregation and at a mosque. They, therefore, argued that the Lockdown Regulations violated their constitutional rights to freedom of movement, freedom of religion, freedom of association (including religious association) and the right to dignity. The respondents' position was that the limitations were a reasonable and justifiable limitation and constitutionally permissible under s 36 of the Constitution.

The court held, per Neukircher J, that due to the virulent nature of the pandemic, the rate of infection, and the high risk of exponential infection, social distancing measures put into place had to be enforced as far as possible. Making allowances of the nature of the relief sought, would be tantamount to opening the floodgates. The call to every citizen to make sacrifices to their fundamental rights entrenched in the Constitution was essential in stemming the tide of the insidious and relentless pandemic. It could not be found that the restrictions imposed were either unreasonable or unjustifiable. The application thus failed.

Review of Public Protector's report – payments to President's campaign fund:

In *President of the Republic of South Africa and Another v Public Protector and*

Others (Information Regulator as Amicus Curiae) [2020] 2 All SA 865 (GP) complaints were filed with the Public Protector (PP) about payments made by a company to the President's campaign fund and his answers to a question posed in the National Assembly. The PP issued a report making three serious findings against the President. It was stated that –

- the President had misled Parliament;
- he failed to disclose donations to his election campaign; and
- the PP had a *prima facie* suspicion of money laundering.

The President sought to have the Report reviewed and set aside.

A Full Bench, per Mlambo JP, Keightley J and Matojane J found that the PP's reports did not amount to administrative action. As they involve an exercise of public power, and are reviewable under the rule of law. The grounds of review included arguments that the PP's findings were based on a material error of law, and that it was tainted by irrationality and unlawfulness.

Regarding the finding that the President had misled Parliament, the court found that the PP appeared confused about the legal foundation of such finding. Her finding was based on the Executive Code, which prohibits the wilful mispleading of Parliament, not inadvertent instances. The PP applied the wrong test and was fatally flawed due to a material error of law.

The next question was whether the PP had jurisdiction to investigate the election campaign donations. Setting out the wide powers of the PP, the court found that the conduct of political party members in conformity with their party structures fell within the private domain and was beyond the sphere of competence of the PP.

The court also confirmed that the President was under no duty under the Executive Code to disclose donations made to the election campaign.

In making a finding of money laundering, the PP cited the basis of the allegation as the Prevention and Combatting of Corrupt Activities Act 12 of 2004. However, that Act does not deal with money laundering. In any event, the facts before the PP did not support the very serious finding she made.

The Report contained remedial action to be taken by the Speaker of the National Assembly and the National Director of Public Prosecutions (NDPP). The court found the remedial action to lack clarity and as regards the NDPP, to be beyond the limits of the PP's powers.

The review application was granted, and a punitive costs order was made against the PP.

Delict

Unlawful arrest and detention: In the case of *Mahlangu and Another v Minister*

of Police [2020] 2 All SA 656 (SCA) the appellants were arrested without a warrant on four counts of murder on 29 May 2005. They were brought before a magistrate's court, for their first court appearance, on the morning of 31 May 2005. They were remanded in custody until 14 June 2005, pending the prosecutor's request to allow for further investigation and the bail hearing. Subsequent appearances before the magistrate's court on numerous remand dates resulted in their further detention until 10 February 2006, when they were released after the Director of Public Prosecutions had decided to withdraw the charges against them.

The trial court held that the arrest and police detention were unlawful, and awarded damages to the appellants. No damages were awarded in respect of the claims for alleged loss of income and earning capacity, nor in respect of the claim for non-patrimonial damages in respect of the plaintiffs' judicial detention. The court held that the appellants' unlawful detention came to an end once they were detained in terms of a court order after their first appearance in court.

On appeal, the Full Court confirmed the trial court's refusal to award the appellants damages for the period of their judicial detention and dismissed the appeal with costs. The present appeal was against that decision.

The SCA had to decide whether the inclusion of an inadmissible confession in the docket at the first appearance factually and legally caused the appellants to be detained thereafter. Assuming in favour of the appellants, that the factual cause of their detention for the remainder of their entire judicial detention after 14 June 2005 was the inadmissible confession, the decisive inquiry was whether legal causation was proved, and whether the Minister should be held liable for the full period of their judicial detention. That inquiry raised the issue whether the appellants should have applied to be released on bail during the period of judicial detention, and what limits of liability the legal convictions of the community and legal policy determined.

The inclusion of the inadmissible confession in the docket with the intention that it be relied on, was the factual cause of the appellants' further detention from their first appearance until they appeared in court on 14 June 2005. However, it was not the legal cause of their detention beyond 14 June 2005, on which date they could on the probabilities have applied for bail, and would have been released – that is, after a period of some two weeks' judicial detention.

In addition to the amounts awarded by the trial court in respect of the damages suffered preceding their judicial detention, the majority of the appeal court, per Koen AJA (Cachalia JA and Dolamo

AJA concurring) awarded R 100 000 as damages for the above period of two weeks' detention. Van der Merwe JA dissented, with Petse DP agreeing, that the additional damages should have been R 400 000 each.

Immigration

Demand by refugees to be moved from their ordinary places of residence: In *City of Cape Town v JB and Others* [2020] 2 All SA 784 (WCC) the respondents were refugees occupying the streets in the City of Cape Town (the City), while waiting for compliance by the City of their demand to be moved from their ordinary places of residence in the country to another area where they would be provided with accommodation by the government, or be taken out of the country at State expense and be moved to Canada or another country in Europe. They essentially sought to be moved to another area or country in order to improve their standard of living.

Thulare AJ held that the respondents were not forced by circumstances not to return to their ordinary places of residence in South Africa (SA). They chose not to return and elected to move elsewhere. They were drawn to housing or another country because of the prospect of and a desire to escape the social and economic situation in their ordinary places of residence in SA.

The court was critical of the respondents' demands. Their request did not engage humanitarian issues but was simply based on economics. They refused to subject themselves to the country's laws and procedures. Their conduct had the potential to undermine the legitimate concerns of refugees, asylum seekers and migrants in the country. The court, therefore, confirmed the interim order made in favour of the City.

Income tax

Losses or gains caused by foreign exchange fluctuations: In *Telkom SA SOC Limited v Commissioner for the South African Revenue Service* [2020] 2 All SA 763 (SCA), Swain JA (with Cachalia JA, Mbha JA, Mokgohloa JA and Koen AJA concurring) heard a matter where Telkom and a subsidiary had acquired the entire share capital in a Nigerian company, Multi-Links, between 2007 and 2009. In order to make Multi-Links commercially viable, Telkom advanced the company a number of loans in US dollars until October 2011 at which point it disposed of its interest to a third party. As part of the sale, Telkom also sold its rights in respect of its loan to Multi-Links, for USD 100 in its 2012 tax year of assessment.

In its income tax return for the 2012 year of assessment, Telkom instead of reflecting the realisation of the loan as a

foreign exchange gain, claimed a deduction in the amount of R 3 961 295 256 as a foreign exchange loss, in terms of s 24I of the Income Tax Act 58 of 1962. The effect was that what would have been reflected as a taxable income of R 3,12 billion, with a resultant tax liability of R 875 million, then reflected as a tax loss of R 106 billion, with the result that Telkom was due a refund of the provisional tax paid for that year, in the amount of R 822 million. The Commissioner issued an additional assessment for the 2012 tax year, disallowing the deduction of R 3 961 295 256 and assessing Telkom for tax in the amount of R 425 188 643, as a foreign exchange gain in terms of s 24I of the Act. Telkom also claimed a deduction of R 178 788 421 in respect of cash incentive bonuses paid to a company, Velociti, pertaining to the connection of initial subscriber contracts for a specific tariff plan, which Velociti made on behalf of Telkom Mobile. The Commissioner, however, only allowed a deduction of R 42 256 879.

Telkom appealed to the Tax Court, which dismissed the appeal, the foreign exchange issue, but upheld the appeal on the cash incentive bonus issue. In the present proceedings, Telkom appealed against the Tax Court's dismissal of its appeal on the foreign exchange issue, and the Commissioner cross-appealed against the upholding of Telkom's appeal on the cash incentive bonus issue.

It was held that s 24I of the Act deals with gains or losses on foreign exchange transactions. The resolution of the dispute as to the deduction of R 3 961 295 256 by Telkom was to be found in s 24I, because the loan to Multi-Links in US dollars, constituted an 'exchange item' as defined in s 24I(1), as it was an amount in foreign currency owing and payable to Telkom.

The loan was realised in terms of the definition, when Telkom received USD 100 in the 2012 year of assessment, when the loan was settled. When the loan (the exchange item) was realised by Telkom in its sale for USD 100, Telkom was obliged to determine an 'exchange difference' in accordance with a *proviso* to s 24I(10) of the Act, in the 2012 year of assessment.

The determination of the ruling exchange rate, on the realisation date of the loan, lay at the heart of the dispute between the parties. It was held that the Tax Court correctly dismissed Telkom's appeal against the additional assessment issued by the Commissioner, on the basis that Telkom invoked the provision involving exchange rate gains and losses in order to deduct a commercial loss, which was completely unconnected to foreign exchange currency differences. Telkom's appeal was dismissed.

The Tax Court, however, erred in concluding that there was no basis to add back and disallow R 136 531 542 of the

cash incentive bonus expenditure by the application of s 23H, in the 2012 year of assessment. The respondent's cross-appeal was thus upheld.

Intellectual property

Computer programs – ownership: In *Bergh and Others v Agricultural Research Council* [2020] 2 All SA 637 (SCA), the Agricultural Research Council (ARC) obtained interdictory relief against the appellants in respect of breach of copyright and unlawful competition in relation to a computer program called 'Beefpro' that served as a cattle or herd management tool. The ARC's complaint was the 'misappropriation' of BeefPro by the appellants, which it alleged the appellants were utilising for purposes of conducting a parallel system for financial benefit and consequently undermined the ARC in the performance of its statutory duties. The ARC sought relief on the basis that it owned the copyright in BeefPro. The question to be addressed was whether it discharged the onus of proving its ownership.

Navsa JA (with Schippers JA, Van der Merwe JA, Wallis JA and Mojapelo AJA concurring) held that the Copyright Act 98 of 1978 defines the author of a computer program as the person who exercised control over the making of the computer program. The onus to prove that it exercised control over the making of BeefPro rested on the ARC. The evidence established that the program had been authored by a person who worked on it independently, bringing his own skills and experience to bear, only seeking certain information from the ARC in order to ensure that the program served its purpose. He did not follow instructions from, or work under the supervision of anyone at the ARC, and also reserved ownership in the program. In the premises, the appeal was upheld.

- See Erika Heaton 'Briefly highlighting the importance of control in an increasingly digitalised world' 2020 (June) *DR* 29.

Local government

Dissolution of council: In *Democratic Alliance and Others v Premier for the Province of Gauteng and Others* [2020] 2 All SA 793 (GP), the first applicant was a political party, the Democratic Alliance (DA), and the remaining applicants were three councillors, who were its members, serving in the City of Tshwane. They sought to review and set aside the decision to dissolve the sixth respondent which was the City of Tshwane Metropolitan Municipality (the Municipal Council).

The court, per Mlambo JP, Potterill ADJP and Ranchod J, held that it was common cause that the Municipal Council had reached a deadlock. No parties

therein could win an argument or gain an advantage and no action could be taken by the Municipal Council. The council had no Mayor, Mayoral Committee or Municipal Manager. It was unable to conduct its business and could not serve its residents. The reason for the deadlock was located in the Municipal Council's inability to convene and run council meetings to transact and take necessary decisions in line with its responsibilities. That situation existed as a direct consequence of the disruption of its meetings due to the walkout from council meetings by councillors from two political parties (the African National Congress and the Economic Freedom Fighters) thus depriving the Municipal Council of the necessary quorum. The result of the dissolution decision was that the Municipal Council was immediately dissolved, an Administrator was to take over the functions, and fresh elections throughout Tshwane would have to take place within three months.

The dissolution decision was taken in terms of s 139 of the Constitution. The jurisdictional fact necessary to invoke that provision was either the inability to fulfil an executive obligation or the failure of the Municipal Council to fulfil an executive obligation. Section 139(1)(c) has an additional jurisdictional fact in that it provides that dissolution can only be resorted to should there be exceptional circumstances warranting it. A court can interfere with the dissolution decision if objectively the jurisdictional facts were not present at the time the decision was made, thus a review based on the principle of legality. That meant that there must be a direct correlation between the exercise of the power, namely, the decision to dissolve the Municipal Council, and the objective sought to be achieved namely, the fulfilment of the stated executive obligation. For a court to decide whether an executive obligation was breached the executive obligation must be identified. It was found that the decision was not linked to fulfilment of any recognised executive function. The court also found merit in the DA's submission that less restrictive means should have been resorted to instead of the drastic measure of dissolving the Council.

The decision was reviewed and set aside, and ancillary relief was granted.

Property

Expropriation of servitudes: The issue in the appeal of *Staufen Investments (Pty) Ltd v Minister of Public Works and Others* [2020] 2 All SA 738 (SCA), was whether the Minister's decision of 30 September 2016, to expropriate certain servitudes over the appellant's farm in favour of Eskom, was lawful. The appellant unsuccessfully sought to review the decision in the High Court and then appealed again.

In 1997, the then owner of the farm concluded a notarial deed of servitude with Eskom, granting Eskom and its successors in title and assigns, the perpetual right to a right of way (6m wide) over the farm; the perpetual right to a portion not to exceed 1 240 square meters, for the purpose of erecting an electrical substation; and an exclusive perpetual right to lead electricity over the land. The farm was sold several times before being sold to the appellant. In each title deed giving effect to the successive transfers, only the 6m right of way servitude was carried forward as a title condition.

By the time the appellant purchased the farm in 2014, Eskom's substation had existed thereon for some 17 years. The substation had, however, expanded beyond the area originally provided for in the notarial deed. A challenge to Eskom's rights led to the discovery that such rights were personal in nature and enforceable only against the owner with whom Eskom had contracted in 1997. The parties, therefore, agreed that the substation and the overhead power cables across the farm were erected unlawfully. In August 2014, the appellant demanded that Eskom cease its unlawful occupation. It eventually launched an application to evict Eskom. Eskom re-

sponded by launching an application for expropriation. The latter application was approved by the Minister.

The issue in the present appeal concerned the lawfulness of the Minister's decision. Koen AJA (with Cachalia JA, Nicholls JA, Swain JA and Ledwaba AJA concurring) found that the first question was whether the expropriation decision was taken for an improper or unlawful purpose. The expropriation had as its purpose, the regularising of Eskom's unlawful use of part of the farm. The court rejected the proposition that an expropriation could not occur, if there was a pre-existing unlawful use and occupation of the land. The application to expropriate was clearly for a public purpose or in the public interest, viz the provision of electricity. Expropriation was correctly contemplated as a remedy to regularise the situation.

The court confirmed that what was to be expropriated was adequately described. It also rejected various allegations of procedural irregularity, and concluded that the Minister's decision was lawful.

- See Heinrich Schulze 'The law reports' 2019 (May) *DR* 19 'land law' for the ECP judgment.

Other cases

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

- copyright and trademark infringement in the confectionery industry;
- review and environmental factors in authorization of a logistics park; and
- trademark infringement and trade mark use by a competitor.

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Tumelo
Mdhuli

The interpretation of what constitutes a benefit in terms of s 186(2) of the LRA: Is it by entitlement of contract, law or by sole discretion of the employer?

Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (2013) 34 ILJ 1120 (LAC)

The underlying undefined concept by s 186(2) of the Labour Relations Act 66 of 1995 (the LRA), has raised many questions, which has had to be broadly unfolded to accommodate both the employer and the employee in a binding contract of employment.

The question whether an employee who alleges that their employer has committed an unfair labour practice – in relation to the provision of benefits – has a remedy if such an employee can prove that they have a right or entitlement to the benefit as envisaged in terms of s 186(2) of the LRA?

The term 'benefits' is not defined in the LRA or any other legislation, and South African courts were tasked with defining and clarifying this concept – something that turned out to be an onerous task.

The narrow interpretation of the term 'benefits' can perhaps be ascribed to the courts' quest to uphold the distinction between disputes of rights and disputes of interests and, therefore, in their attempt to separate benefits from remuneration the court has created an artificial divide. ('A dispute of right refers to an infringement, application or interpretation of existing rights embodied in a contract of employment, collective agreement or legislation, while a dispute of interest refers to the creation of a new right' (see E Fourie 'What constitutes a benefit by virtue of section 186(2) of the Labour Relations Act 66 of 1995? *Apollo Tyres South Africa (Pty) Ltd v CCMA* [2013] 5 BLLR 434 (LAC)' (2015) 18.1 PER 3300).)

The court, therefore, upheld the restrictive interpretation of benefits to uphold the divide between disputes of interest and disputes of rights and to ensure that issues that should be the subject of negotiation could not become issues that can be decided by an arbitrator (s 191(5) of the LRA provides that disputes in respect of unfair labour practices must be referred to arbitration and s 65(1)(c) prohibits strikes or lock-outs when an issue can be referred to arbitration).

The case of *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ

1120 (LAC), is noteworthy for its interpretation of the term 'benefits'. Hoosen, a 49-year-old female, was employed by the appellant from 1 April 1984. The appellant, a tyre manufacturing company, was struggling under economic pressures and introduced an early retirement scheme for certain employees.

Through the introduction of this scheme the appellant company tried to reduce the number of employees in accordance with the decrease in demand for its products. Employees were informed of this decision through various meetings and notices placed on the notice boards at the premises of the appellant. According to the notice the scheme applied only to staff between the ages of 46 and 59 who were paid on a monthly basis.

The successful applicant would receive two months' additional pay and an *ex gratia* payment calculated on a sliding scale based on the age of the applicant. Hoosen, (the third respondent) enquired about the scheme, however, she was refused entry into the scheme and was informed that to qualify for the early retirement scheme, applicants had to be between 55 and 59. When Hoosen asked for reasons she was sent from pillar to post.

She enquired if she could appeal against the decision and mentioned that the phrase 'subject to management's discretion' could be abused, but was told by her immediate senior that his mind was made up and that she was to be replaced. Hoosen resigned and while serving her notice she referred an unfair labour practice dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The argument raised at the CCMA was that the early retirement package was not a benefit in terms of s 186(2) and in any event that it was not unfair not to grant Hoosen the early retirement package.

The commissioner found that it was unfair to deny Hoosen entry into the scheme. The court found that the commissioner's ruling that the scheme was a benefit within the ambit of s 186(2)(a) of the LRA was a decision that fell within the band of reasonableness.

According to the Labour Appeal Court

(LAC), the question before the court should not have been whether the commissioner reached a conclusion that a reasonable commissioner could not reach, but whether the second respondent was correct in his ruling that the CCMA had jurisdiction to adjudicate the dispute.

The court *a quo* supported the statement in *Protekon (Pty) Ltd v CCMA and Others* [2005] JOL 14544 (LC), that the mere existence of a discretion exercised by an employer does not deprive the CCMA of jurisdiction and also highlighted two instances where the CCMA would have jurisdiction to consider the fairness of the employer's conduct, namely where –

- the employer fails to comply with a contractual obligation that it has towards the employee; and
- the employer exercises a discretion that it enjoys in terms of a contract of the scheme conferring the benefits.

The court further overturned the decision in *Schoeman and Another v Samsung Electronics SA (Pty) Ltd* [1997] 10 BLLR 1364 (LC) where it was held that the term 'benefit' could not be interpreted to include remuneration. It stated that a benefit is something extra to remuneration. Leave to appeal was granted by the LAC.

The LAC found that the early retirement scheme was a benefit, and that by not granting it to Hoosen, the employer committed an unfair labour practice. Hoosen did not have a contractual entitlement to the early retirement benefits and the granting of this benefit was subject to the employer's discretion.

I agree with the court's decision that it was clear that there was no acceptable, fair or rational reason why Hoosen was not allowed to participate in the scheme. The employer did not exercise its discretion fairly. The appeal was dismissed with costs.

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By
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The Recognition of Customary Marriages Act and the practice of *lobola* through the lens of the SCA

Tsambo v Sengadi (SCA) (unreported case no 244/19, 30-4-2020)
(Molemela JA (Maya P, Mbha, Zondi JJA and Mojaelo AJA concurring))

Envisage this: Your partner asks for your hand in marriage, subsequently sends a letter to your family, a date is set, *lobola* is negotiated and the families agree on a figure and a portion of that amount is paid. The delegation is offered lunch and while the mood is jubilant, the families sing in celebration of the newly founded union. Although the couple may not know it, they may be presumed to be married in terms of customary law. This is why.

Section 3(1) of the Recognition of Customary Marriages Act 120 of 1998 (the Act) sets out the requirements for a valid customary marriage. These are:

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

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

The Act, often deemed to be one of the most misinterpreted pieces of legislation in postdemocratic South Africa (SA), has in recent times been under the spotlight in the Supreme Court of Appeal (SCA). Whether you believe in the culture of *lobola* or not, the courts have and are still grappling with this customary practice and this is often illustrated in cases where litigants request the courts to make declarations regarding the existence and validity of a marriage.

Section 3 of the Act was dealt with by the SCA and brought this very issue back into the spotlight in the recent decision by the SCA in *Tsambo v Sengadi* (SCA) (unreported case no 244/19, 30-4-2020) (Molemela JA (Maya P, Mbha, Zondi JJA and Mojaelo AJA concurring)). This was an appeal against the decision of the Gauteng Local Division of the High Court in Johannesburg, which found that the respondent was the customary wife of the deceased and that the two had con-

cluded a valid customary marriage on 28 February 2016. The appellant in the SCA was the deceased's father who contended that the respondent was not the customary wife of the deceased because the deceased family had not followed an important ritual of formally handing over the bride. The deceased's father considered this ritual as the most crucial part of the customary marriage and that without this being done, there could not be a valid customary marriage between the respondent and the deceased. In essence, the contention of the deceased's father was that the third requirement, as stipulated in s 3(1), which requires that a marriage be negotiated and entered into or 'celebrated in accordance with customary law', had not been satisfied.

While the SCA observed that the ritual of handing over the bride did not in fact occur, the SCA did not end the inquiry there. The SCA took into consideration various factors to conclude that the respondent was in fact the customary wife of the deceased. The court considered that –

- the deceased's aunts had provided the respondent with matching attire to that of the deceased;
- the attire was referenced as a 'wedding dress';
- the respondent was formally introduced as the deceased's wife and finally, the deceased's father had congratulated the respondent on her marriage to the deceased.

An important consideration made by the SCA in concluding that the respondent and the deceased were in fact married in terms of customary law was the fact that the couple, after the *lobola* celebration, continued cohabiting. In this instance, the SCA relied on the writings of Professor Bennett (TW Bennett *A Sourcebook of African Customary Law for Southern Africa* (Cape Town: Juta 1991)), who holds the view that where parties are cohabiting without objection from their families, a marriage will be presumed.

In his final remarks, Molemela JA, re-

versed the decision of the High Court, which found that the practice of handing over the bride is unconstitutional. The SCA, in this regard, held that the parties had not pleaded such a case in the High Court to rule that the ritual was unconstitutional.

Similarly, an earlier decision of the SCA in *Mbungela and Another v Mkabi and Others* 2020 (1) SA 41 (SCA), examines whether the practice of handing over the bride is a requirement for the conclusion of a valid customary marriage. Briefly on the facts, the first respondent (Mr Mkabi) sought an order confirming that he and the deceased had met the requirement in s 3(1)(b) of the Act and that they had concluded a customary marriage in terms of the Act. Mr Mkabi had sent his delegation to ask for the deceased's hand in marriage. The *lobola* was negotiated and the families agreed on a sum of R 12 000. Of this sum, R 9 000 was paid, which was accompanied by various gifts. The couple did not register their customary marriage in accordance with s 4 of the Act, but they travelled to the Traditional Council to confirm their marriage. The appellants were of the view that the deceased and Mr Mkabi were not married as the relevant rituals (such as handing the bride to Mr Mkabi's family) had not been completed in terms of their customs. In this regard, the SCA held that '[i]t is important to bear in mind that the ritual of handing over of a bride is simply a means of introducing a bride to her new family and signifies the start of the marital consortium'. Again, as is in the above decision, the SCA had due regard to the fact that the deceased and Mr Mkabi were cohabiting and held that proof of cohabitation alone may raise a presumption that a marriage exists, especially where the bride's family has failed to raise objection.

The SCA's interpretation of s 3(1)(b) of the Act is wide. It is evident that courts will take into account various factors when considering whether a marriage has been validly concluded. The first two requirements in s 3(1) of the

Act are fairly easy to prove, namely that both parties must be over 18-years-old and that both parties must have consented to enter into the marriage. It is the last requirement, that 'the marriage must be negotiated and entered into or celebrated in accordance with customary law', which the courts have grappled with. This is likely due to the vast cultural regimes in SA that require different rituals and practices to conclude a marriage. Some legal commentators have gone so far as to conclude that inviting the 'grooms' delegation for a 'lunch' may be deemed a celebration that satisfies the requirement in s 3(1)(b). Moreover, couples that cohabit after the conclusion of a successful *lobola* negotiations, will be deemed to be married.

Important lessons from the SCA's interpretation of s 3 of the Act

- Couples who intend to commence *lobola* negotiations and intend to marry

out of community of property are advised to consider approaching a legal practitioner to assist them with drafting an antenuptial contract before the commencement of the *lobola* negotiations. Although many couples may feel as though this approach is jumping the gun as it precedes negotiations between the two families, this may ideally be the best option for couples who want to avoid being presumed to be married in community of property (this being the automatic marital regime for couples who meet the requirements of s 3 of the Act).

- Couples who wish to marry out of community of property but have already commenced and concluded their *lobola* negotiations irrespective of whether they may have not concluded the various 'rituals' as required in terms of their customs may, if the various interpretations of the court are anything to go by, be regarded as being married in community of property. Although this, of course, will

depend on the circumstances of each case. However, this does not mean that the marital regime cannot be altered. However, altering the marital regime is not as simple as signing a document at the Department of Home Affairs. It requires the couple to approach a High Court with an application to alter the marital regime. A legal practitioner specialising in family law can assist with such an application in terms of s 21(1) of the Matrimonial Property Act 88 of 1984.

- Finally, for couples who wish to marry in community of property, although there is no need to protect themselves by signing an antenuptial contract, it is advised that such a customary marriage be registered in accordance with s 4 of the Act.

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By
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A suretyship agreement remains accessory to the main agreement

Liberty Group Ltd v Illman (SCA) (unreported case no1334/2018, 16-4-2020) (Makgoka JA (Swain, Mokgohloa, Nicholls JJA and Koen AJA concurring))

On 10 March 2003 Liberty Active Ltd (Liberty), a subsidiary of Liberty Group Ltd, the holding company, concluded a written broking agreement with ECE Financial Holdings (ECE) in terms of which ECE was to act as an independent intermediary for its financial products. As compensation for its services, ECE would be paid commission on premiums received by Liberty for contracts issued pursuant to proposals submitted by ECE. ECE was placed in final deregistration on 24 February 2011. Between March 2003 and February 2005, eight individuals, including the respondent, each signed separate but identical deeds of suretyship in terms of which they bound themselves as sureties and co-principal debtors *in solidum* with ECE for the payment to Liberty of all money, which ECE could in future, owe to Lib-

erty, 'from whatsoever cause arising'. During March 2003 and March 2011, and before receiving any premiums in respect of contracts issued on proposals submitted by ECE, Liberty advanced commissions to ECE. However, during the same period, up to August 2011, the contracts in respect of which commissions were advanced to ECE, either lapsed, were cancelled or terminated, because of non-payment of premiums to Liberty. As a result, the commissions, which Liberty had paid in advance, became repayable to it by ECE and by the sureties in terms of the deeds of suretyship. Later, all the rights to claims arising from the claw-back commissions in respect of the broking agreement were ceded to the holding company, Liberty Group Ltd. On 22 September 2011, the appellant, as cessionary, issued summons against all the sureties and co-prin-

cipal debtors for the re-payment of the amount due. It alleged in its particulars of claim, among others, that the agreement between the parties was terminated on 14 March 2011. On 29 September 2011 the summons was served on one of the sureties, Russel John September (Mr September), the seventh defendant. He failed to deliver a notice of intention to defend. As a result, the appellant obtained default judgment against him on 27 January 2012. With regard to the respondent, who was the sixth defendant, the summons was served on him on 31 March 2016, approximately five years after it was issued. The respondent raised a special plea of prescription to the appellant's claim. The respondent asserted that to the extent that the appellant's claim against him was based on the alleged termination of the agreement on 14 March 2011, such claim became pre-

scribed after three years of that date, in terms of s 11 of the Prescription Act 68 of 1969. The appellant delivered a replication to the respondent's plea of prescription, the essence of which was that: As the appellant and Mr September had bound themselves to the appellant as sureties and co-principal debtors *in solidum* with ECE, they became 'co-debtors.' The claim against ECE and the sureties became due on 14 March 2011. Service of the summons on Mr September within the prescription period, interrupted the running of prescription in favour of ECE and all co-debtors, including the respondent. Accordingly, it was pleaded, the claim against the respondent had not prescribed.

The main issue on appeal is whether sureties who also bind themselves as co-principal debtors become co-debtors with the principal debtor, and with each other. The secondary issue is whether the service of a summons on any of the sureties interrupts the running of prescription in favour of the others.

In order to resolve the issues, the SCA considered three of its decisions, namely *Kilroe-Daley v Barclays National Bank Ltd* 1984 (4) SA 609 (A); *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A) and *Jans v Nedcor Bank Ltd* 2003 (6) SA 646 (SCA).

In the *Jans* case, the issue was whether the interruption in the running of prescription in favour of the principal debtor, interrupted the running of prescription, in favour of a surety. After an extensive review of the authorities, the court pointed out that there were significant differences between the relationship existing between the principal debtor and surety on the one hand, and that between co-debtors, *in solidum* on the other. The court accordingly concluded that an interruption or delay in the running of prescription in favour of the principal debtor, interrupted or delayed the running of prescription in favour of the surety. As between co-debtors, the common law allowed the judicial interruption of prescription of a co-debtor by service on another co-debtor. In this regard, it is significant to point out that the appellant in its replication, referred to the respondent and other sureties as 'co-debtors'. This is at the heart of the appellant's case. The sum total of the appellant's case is that the sureties, by binding themselves also as 'co-principal debtors *in solidum*' with ECE, the subsidiary nature of their obligations lapsed. Their liability became equal to that of the principal debtor, and they in fact, became co-debtors. The appellant's case continues to be that the effect of a renunciation of the benefit of the legal exception of excussion is that the surety's liability is no longer subsidiary to the primary liability of the principal debtor. The addition of the words 'co-principal

debtor *in solidum*' signalled an intention that the liability shall be of the same scope and nature as that of the principal debtor. This made the principal debtor and the surety, co-debtors. Thus, service of summons on any of them, Mr September in this case, interrupted prescription running in favour of the rest.

The aforesaid submission was contrary to the jurisprudence of the SCA in the decisions of *Kilroe-Daley* and *Neon*. In *Kilroe-Daley*, the accessory nature of a suretyship agreement to the main contract was emphasised, despite it being a separate contract from that of the principal debtor and his creditor. The addition of the words 'co-principal debtor' did not transform the contract into any contract other than one of suretyship. Consequently, if the principal debt became prescribed the surety's debt also became prescribed and ceased to exist.

In *Neon* it was held that the sole consequence of a surety binding himself as a co-principal debtor is that, as regards the creditor, they renounce the benefits, such as excussion and division available to them, and they become liable with the principal debtor jointly and severally. It did not make them a co-debtor.

The appellant submitted that *Kilroe-Daley* and *Neon*, to the extent that they limited the effect of the phrase 'and co-principal debtor' to only a tacit renunciation of the legal exceptions, had been wrongly decided. To that end, the appellant placed reliance on a dictum by Wessels JP in *Union Government v Van der Merwe* 1921 TPD 318 at 322: 'We must give some meaning to the words "co-principal debtor". ... The addition of these words shows that the surety intends that his obligation shall be co-equal in extent with that of the principal debtor: or otherwise expressed, that his obligation shall be of the same scope and nature as that of the principal debtor.'

The appellant further relied on the article by JC Sonnekus 'Borg en tegelyk medehoofskuldenaar is 'n *contradictio* in terminis en onversoensbaar' (2018) 2 TSAR 256, that the words 'co-principal debtor' do not only operate as a renunciation of the benefits of the surety, these words show that the surety intended that his obligation shall be co-equal in extent with that of the principal debtor. The appellant, therefore, submitted that the SCA ignored this phrase in *Kilroe-Daley* and *Neon* and the cases, which followed these decisions, and this phrase should have been given a textual interpretation.

This criticism was rejected. In all of the cases sufficient attention was devoted to the phrase, and a proper contextual meaning attributed to it. The flaw in the criticism of the decisions, is the conflation of two distinct concepts: Co-debtors and co-principal debtors. The undertaking of the surety is accessory to the main contract. It is an undertaking that the

obligation of the principal debtor will be discharged, and if not, that the creditor will be indemnified. What is more, the dictum in *Union Government* was explained in *Neon* at 472 – 473 where Trollip JA said that he did not think that Wessels JP, when saying that the surety's obligation 'shall be of the same scope and nature as that of the principal debtor', meant to convey that by signing as co-principal debtor, the surety became a party to the main contract. Earlier, at 471C – 472E it was pointed out that the correct legal position was as follows: Although the surety binds himself as co-principal debtor, that does not render him liable to the creditor in any capacity other than that of a surety who has renounced the benefits ordinarily available to a surety against the creditor. They do not become a party to the contract between the creditor and the principal debtor. A surety and co-principal debtor does not undertake a separate independent liability as a principal debtor; the addition of the words 'co-principal debtor' does not transform his contract into any contract other than one of suretyship. The surety does not become a co-debtor with the principal debtor, nor do they become a co-debtor with any of the co-sureties and co-principal debtors, unless they have agreed to that effect. The jurisprudence of this court in *Kilroe-Daley* and *Neon* accordingly correctly reflects South African law on this topic.

With regard to prescription, the court held in para 21 that if a creditor, through the service of a process, claimed payment from one co-debtor who bound themselves jointly and severally with others, the remaining co-debtors could not rely on the extinction of the debt by prescription. The principle was received into Roman-Dutch law and extended to sureties by adopting the view that interruption of prescription in respect of a principal debtor served to interrupt prescription in respect of a surety. The appellant urged the SCA to apply this principle to the converse situation. It was found by the court *a quo* that neither in the Roman law nor in the Roman Dutch law had it ever been suggested that the converse should apply – in other words that interruption of prescription against the surety should constitute interruption of prescription against the principal debtor. The Roman Dutch writers, who wrote extensively on the topic and debated it were *ad idem* that the converse should not apply. It is consequently simply not part of our common law.

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By
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Judicial control of enforcement of contractual terms

Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others (CC) (unreported case no CCT109/19, 17-6-2020) (Theron J (Khampepe ADCJ, Jafta J, Majiedt J, Mathopo AJ, Mhlantla J and Tshiqi J concurring))

In the *Beadica* decision, the Constitutional Court (CC) had an opportunity to clarify its approach on the judicial enforcement of contractual terms since the decision in *Barkhuizen v Napier* 2007 (5) SA 323 (CC). This case note scrutinises the CC decision of *Beadica* and briefly examines the extent to which a court can interfere with a parties' contractual terms.

In *Beadica*, four applicants entered into franchise agreements with the respondent to operate a franchise business for a period of ten years. The franchise agreements required that the franchisees operate their franchised businesses from an approved location leased by the Trust. In addition, the franchise agreement gave the respondent an option to terminate the agreement in the event that the applicants were ejected from the approved location. The applicants concluded five-year lease agreements with the Trust and the renewal clause thereof required that the lessees give six months written notice of intention to renew prior to termination. The applicants failed to give written notice of their intention to renew within the period of six months as required. Pursuant to this failure, the Trust demanded that the applicants vacate the leased premises. The applicants challenged the renewal clause contending that the strict enforcement thereof would be contrary to public policy.

With reference to the *Barkhuizen* case, Theron J held at para 37 that the case involved a two-stage inquiry. 'The first stage involves a consideration of the clause itself. The question is whether the clause is so unreasonable, on its face, as to be contrary to public policy. If the answer is in the affirmative, the court will strike down the clause. If, on the other hand, the clause is found to be reasonable, then the second stage of the inquiry will be embarked upon. The second stage involves an inquiry whether, in all the

circumstances of the particular case, it would be contrary to public policy to enforce the clause. The onus is on the party seeking to avoid the enforcement of the clause to "demonstrate why its enforcement would be unfair and unreasonable in the given circumstances." ... [T]hat particular regard must be had to the reason for non-compliance with the clause'.

However, before embarking on an investigation into these inquiries, the court took time to clarify the divergence of approaches between SCA decisions and the CC in regard to the judicial control of contracts. The 'divergence' is said to centre on the role of the abstract values of fairness and reasonableness in South African law of contract and whether the values could be directly relied on to invalidate, or refuse to enforce, contractual terms. In this regard, Theron J held that there was an agreement between the CC and the SCA that abstract values do not provide a free standing basis on which a court may interfere in contractual relationships and that their application is governed by the rules of contract law, including the rule that a court may not enforce contractual terms where the term or its enforcement would be contrary to public policy.

To dispose of the matter, the court first considered the question as to whether the applicants discharged the onus of demonstrating that the enforcement of the renewal clauses would be against public policy in the particular circumstances of the case at hand. In addition, Theron J at para 91 held that a party who 'seeks to avoid the enforcement of a contractual term is required to demonstrate good reason for failing to comply with the term'. The applicants' contention was that the enforcement of the renewal clause would lead to the failure of the black economic empowerment initiative. Theron J found that there were no circumstances that prevented the ap-

plicants from complying with the terms of renewal clauses in the leases and that the only inference to be drawn was that the applicants simply neglected to comply with the clause. Accordingly, it was held that the applicants had failed to discharge the onus resting on them to demonstrate that in the circumstance of the case, the enforcement of the clause would be contrary to public policy and thus on that ground alone had to be dismissed. In addition, Theron J acknowledged the outcome on black economic empowerment initiative, but held at para 96 that '[t]his harsh outcome alone, absent an explanation for their failure to comply with the terms of the renewal clauses, cannot constitute a sufficient basis to hold that the enforcement of the clauses would be contrary to public policy'.

Judicial control of contractual terms

The CC was presented with an opportunity to develop the doctrine of judicial control of enforcement of contractual terms and clarify its proper approach since the decision of *Barkhuizen*. In South African law, judicial control of enforcement of contractual terms has been exercised primarily through the prism of public policy. The important principle in this regard is that public policy demand that contracts freely and consciously entered must be honoured. This in essence is the principle of *pacta servanda sunt*, which the court held at para 92 gives 'effect to the central constitutional values of freedom and dignity'. However, it is recognised that in our new constitutional dispensation, *pacta servanda sunt* is not the only, nor the most important principle relating the judicial control of the contracts, as the requirement of public policy is governed by a wide range of constitutional values. Thus, there is no

basis for privileging *pacta servanda sunt* over other constitutional values and rights. This is so because the determination of public policy is now rooted in the Constitution. As result, where a number of constitutional rights and values are implicated, a carefully balancing exercise is required to determine whether

enforcement of the contractual terms would be contrary to public policy in the circumstances (see para 87).

In conclusion, parties to a contract have autonomy or freedom to determine the terms they wish to include in their contract. However, where parties exercise their freedom of contract to

incorporate or enforce a term, which is contrary to public policy, the court will invalidate it.

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By
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Are delictual claims subject to time limitation clauses and is an action in delict separate from the contract entered into?

G4S Cash Solutions (SA) (Pty) Ltd v Zandspruit Cash & Carry (Pty) Ltd and Another 2017 (2) SA 24 (SCA)

Zandspruit Cash and Carry (Pty) Ltd and Another v G4S Cash Solutions SA (Pty) Ltd [2020] JOL 46778 (GJ)

The first (Zandspruit) and second (Devland) respondents' are general merchandise and food product retailers and wholesalers who concluded written agreements with the appellant, G4S Cash Solutions (SA) (Pty) Ltd (formerly known as Fidelity Cash Management Services (Pty) Ltd), on 6 December 2006 and on 6 April 2005 respectively, for the collection, conveying and delivery of cash from the respondents' premises. Both agreements were similarly worded, except for the personal details of the respective respondents. The appellant, is a company conducting the business of collecting, conveying, storing and delivering money on behalf of clients requiring such services.

The first respondent on 3 April 2010, and the second respondent on 12 March 2011, fell victim to thefts perpetrated by unknown third parties, whereby the employees of the first and second respondents believed that the perpetrators were authentic cash collection security guards of the appellant performing the services described above.

The perpetrators copied the exact procedures of the appellant in conducting cash in transit collections using vehicles, personnel uniforms, cash boxes, identification cards and receipt books that were similar to those used by the appellant deceiving the respondents' employees into believing that they were dealing with employees of the appellant.

As a result of the aforementioned, the criminals collected and stole amounts of

R 265 465,25 from Zandspruit and R 641 744 from Devland, respectively.

In order to recover the losses sustained, the respondents' instituted action against the appellant alleging that their losses were attributable to the negligence and/or gross negligence of the appellant, in that it had failed in its duty of care to warn the respondents of similar incidents, which had occurred in the industry and to other clients' of the appellant.

The respondents served summons on the appellant more than 12 months after the alleged events, which gave rise to the claim/s against the appellant. In addition to a plea on the merits, the appellant raised a special plea alleging that the respondents' claims were time-barred by virtue of the provisions of clause 9.9 of the written services agreements concluded by the parties.

The time-limitation clause and special plea

Clause 9.9 of the services agreements stated: 'The Client shall notify Fidelity immediately of the discovery of a loss, which notification shall be confirmed in writing within 24 hours. Fidelity shall not be liable in respect of any claim unless written notice of the claim has been given within three (3) months and summons has been issued and served within 12 months from the date of the event giving rise to the claim.'

The respondents replicated to the special plea, alleging that its claims did not

arise from the agreements, but by virtue of delict and, therefore, did not fall within the ambit of the aforesaid time-limitation clause. As a result thereof, the matter proceeded to trial and by agreement between the parties it was ordered in terms of Uniform r 33(4) the special plea be heard first, with the remaining issues to stand over to be determined at a later stage, if required.

In the court *a quo*, per Van Oosten J, it was held that the time-limitation in clause 9.9 of the agreements did not apply to the respondents' delictual claims and that the claims were, therefore, not time barred. The trial court consequently dismissed the special plea.

The matter was then taken on appeal to the Full Court of the Gauteng Local Division, where the appeal was subsequently dismissed by the court.

The appeal against the judgment of the Full Court was heard in the Supreme Court of Appeal (SCA).

The SCA's determination of the issue and decision

The delictual claims arose in circumstances where the respondents' handed over the money to unknown third parties. The SCA held that it was common cause that the respondents' claims were founded in delict for the loss suffered as a consequence of the theft of its money caused by the alleged wrongful or negligent conduct of the appellant. The appellant raised the special defence that the claims were time-barred by virtue

of clause 9.9 of the agreements and accordingly bore the onus of proving this defence.

Furthermore, the SCA stated that to determine whether or not the respondents' delictual claims are time barred, the agreements and in particular clause 9.9 would have to be interpreted.

The SCA emphasised that the starting point would be the wording of the agreements. However, as indicated by Lewis JA in *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) at para 27 that 'this court has consistently held that the interpretative process is one of ascertaining the intention of the parties – in this case, what they meant to achieve by incorporating clause 9.9 in the agreements. To this end the court has to examine all the circumstances surrounding the conclusion of the agreements, i.e. the factual matrix or context, including any relevant subsequent conduct of the parties'.

As a result of the aforesaid, should the appellant intend the time-limitation in clause 9.9 to also apply to delictual claims of this nature, it could have drafted the agreements to include such claims. The appellant's failure to do so justified the inference that the parties did not intend clause 9.9 to encompass the respondents' delictual claims.

The SCA subsequently dismissed the appeal with costs based on the fact that the appellant failed to discharge the onus of proving the special defence. Hence, delictual claims were held not to be subject to the time-limitation clause.

Brief summary of the evidence at the trial on the merits

A former employee of the first appellant conceded under cross-examination that she had not verified the identity of the imposter from his identification card and that the appellant's usual identification card was a cardboard type booklet and not the plastic identification card the imposter had.

The national investigations manager of the appellant, testified that falsified or

stolen identification cards were used to satisfy the identification requirement in the appellant's procedures. Similar cash boxes were used by criminals in cash collections, vehicles were made to look like the appellant's vehicles and stolen or falsified receipt books were also used.

He conceded under cross-examination that if 'bogus pick-ups' were occurring in one area, it was just a matter of time before another area would also be targeted. He explained that it is procedure for an appellant's branch to inform its client's if there were incidents that occurred within that area.

A Director of the respondent, then testified that the appellant was specifically contracted to take cash from the respondents' stores and deposit it safely with the specified bank.

Breach of legal duty

In accordance with the pleadings and the evidence given by the investigations manager of the appellant, the appellant knew that its clients and that of other cash in transit service providers had been victims of bogus pick-up schemes in which criminals stole money by fraudulently impersonating the appellant's employees had failed to advise the respondents thereof.

Determination of the issue in dispute at the trial on the merits

The main issue that the court had to decide on was whether the agreements' concluded between the parties prevent the respondents from instituting an action in delict, where claims of this nature were not contemplated by the parties at the time when the contract was entered into.

Matojane J referred to *Trio Engineered Products Inc v Pilot Crushtec International (Pty) Ltd* 2019 (3) SA 580 (GJ), where the court held that delictual claims were competent where there was a contract concluded between the parties, thus a duty in delict separate from the agreement was recognised.

He further referred in para 27 of his judgment, that the loss the respondents

had suffered originate from the services that the appellant was contracted to provide. He referred to para 14 of the SCA judgment, where the SCA held that 'the wording of the agreements, and in particular clause 9 thereof read within the context of the agreements as a whole ... clearly conveys that the loss or damage in respect of which the appellant wished to restrict its liability is a loss or damage suffered by the respondents pursuant to or during the provision of services by the appellant to the respondents'.

The court emphasised that the moral and legal convictions of the community required the appellant to warn its clients of the hidden danger of allowing its employees to enter its client's premises to collect cash.

Furthermore, the failure by the appellant to warn its clients of the hidden danger of which it was aware was an omission, which grounded an action in delict.

Matojane J, also found that in regard to both incidents, the appellant had not informed the Director about the bogus pick-ups that occurred in the industry at the time, whereas should the employees at the first respondent have been timeously informed, they would have been on their guard and would have treated every collection with heightened scrutiny. For this reason, the employees of the respondents' were held not to be contributorily negligent.

As a result of the aforesaid, judgment was granted in favour of the respondents.

Conclusion

In his judgment, Matojane J, found that a delictual claim is separate from the contract entered into between parties where a claim of this nature was not contemplated by the parties at the time when the agreement was entered into.

Adnaan Dabhelia LLB (Unisa) is a candidate legal practitioner at Ziyaad E Patel Attorneys in Johannesburg. Ziyaad E Patel Attorneys acted on behalf of the respondent. □



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

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By
Kgomotso
Ramotsho

Court dismisses appeal due to no prospect of success

FourieFismer Inc and Others v Road Accident Fund and Others (Maponya Inc intervening); Mabunda Inc and Others v Road Accident Fund; Diale Mogashoa Inc v Road Accident Fund (GP) (unreported case no 17518/2020, 15876/2020, 18239/2020, 19-6-2020) (Hughes J)

The Gauteng Division of the High Court in Pretoria dismissed an application for leave to appeal brought by the Road Accident Fund (RAF), the Chief Executive Office, the chairperson of the Board and the Minister of Transport after the judgment it handed down in the matter of *FourieFismer Inc and Others v Road Accident Fund and Others; Mabunda Inc and Others v Road Accident Fund; Diale Mogashoa Inc v Road Accident Fund* (GP) (unreported case no 17518/2020, 15876/2020, 18239/2020, 1-6-2020) (Hughes J). The court held that the RAF should fulfil its obligation to panel attorneys in terms of the existing Service Level Agreement (SLA). For a full discussion on the case see Kgomotso Ramotsho 'Will the RAF have to fulfil its obligation to its panel of attorneys?' 2020 (July) *DR* 36.

Following the judgment on 1 June, the RAF, the Chief Executive Office, the chairperson of the Board and the Minister of Transport sought leave to appeal the previous judgment in terms of s 17(1)(a)(i) and (ii). The premise of the leave sought to appeal was 'belatedly' mentioned in the papers submitted to the court and it was held by the court that the reasoning within the judgment was being appealed instead of the order.

The court held that the applicant argued that on the *stare decisis* principle alone, leave to appeal ought to be granted. That the crux of the argument was that the Constitutional Court (CC) even declined to revisit the decision of the Supreme Court of Appeal decision in *Tshwane City and Others v Nambiti Technologies (Pty) Ltd* 2016 (2) SA 494 (SCA). The court said in its view the case of *Nambiti and SAAB Grintek Defence (Pty) Ltd v South African Police Service and Others* [2016] 3 All SA 669 (SCA) are distinguishable from the current cases before it. The court said it was mindful

that the *dicta* of *South African National Parks v MTO Forestry (Pty) Ltd and Another* 2018 (5) SA 177 (SCA) is of relevance in this instance, where Dambuza JA stated that pivotal to characterising a decision as executive or administrative is 'the effect that the exercise of a power sourced in a contract would have on the public and its interests'.

The court said in terms of s 172 of the Constitution, the court exercised its powers accordingly and a just and equitable remedy was issued in terms of those powers. The court added that the grounds of appeal (19 in total) were fashioned against the reasoning of the court and not the order as should be the case. Hughes J pointed out that the court was of the view that the applicants had not set out grounds relating to the order appealed against and have instead set out ground encompassing an analysis of the reason instead.

The court said that in the circumstances, it found that the applications for leave to appeal, had no prospects of success and there are no compelling reasons enunciated in the applications. Thus, another court would not have come to a different conclusion.

The court turned to the issue of bias raised by the applicants during the proceedings. Hughes J said that she was mindful of the warning echoed by the CC in the cases of *Bernert v Absa Bank Ltd* 2011 (3) SA 92 (CC) and *De Lacy and Another v SA Post Office* 2011 (9) BCLR 905 (CC), where Ngcobo CJ in *Bernert* held: 'It thus seems to me that, in our law, the controlling principle is the interests of justice. It is not in the interests of justice to permit a litigant, where that litigant has knowledge of all the facts upon which recusal is sought, to wait until an adverse judgment before raising the issue of recusal. Litigation must be brought to finality as speedily as possible. It is undesirable to cause parties

to litigation to live with the uncertainty that, after the outcome of the case is known, there is a possibility that litigation may be commenced afresh, because of a late application for recusal which could and should have been brought earlier. To do otherwise would undermine the administration of justice.'

The court added that the applicants failed to raise the issue of bias at the appropriate time, that being before the proceedings or during the application when duly noted by the applicants. The court said the applicant's reservation of the apprehension until after the judgment was improper and unacceptable. The court dismissed the applicants claim and made the following order:

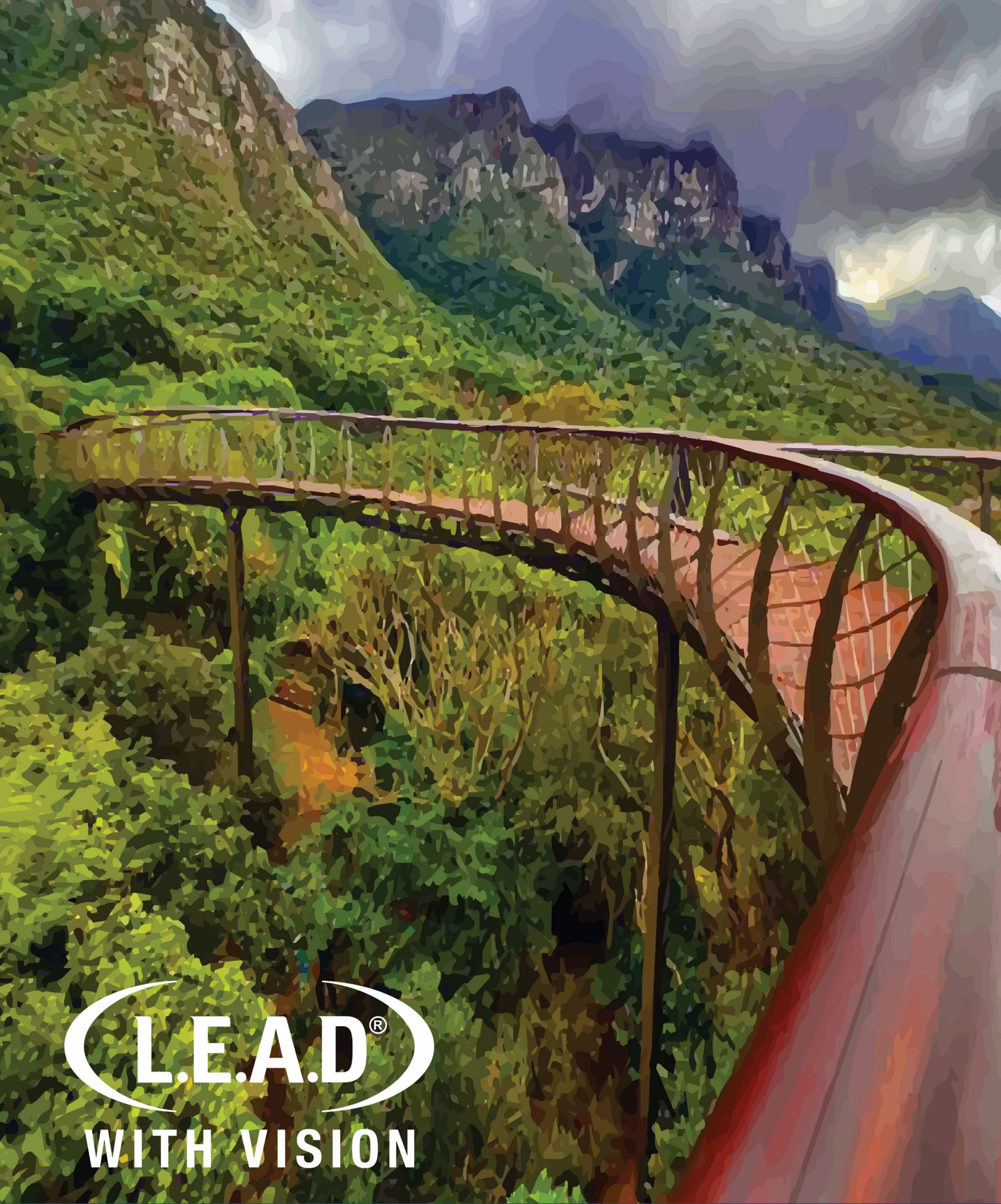
'(a) The applications for leave to appeal by the Road Accident Fund, the Chief Executive Office, the chairperson of the Board and the Minister of Transport are refused and dismissed with costs.

(b) Such costs are to be paid jointly and severally and are to include the costs of two counsel where so employed.'

See also:

- Kgomotso Ramotsho 'The RAF to use new litigation model to reduce its litigation costs' 2020 (May) *DR* 22 for the full report on part A of the application.
- Kgomotso Ramotsho 'Will the RAF have to fulfil its obligation to its panel of attorneys?' 2020 (July) *DR* 36.
- Nomfundo Jele 'Litigation: Update on *Mabunda Inc and Others v RAF* case' 2020 (16 July) www.derebus.org.za.

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The Kirstenbosch Centenary Tree Canopy Walkway, also known as *The Boomslang*, takes visitors on a 130 metre-long walkway, snaking its way through the canopy of the National Botanical Garden's Arboretum. The walkway is crescent-shaped and takes advantage of the sloping ground, touching the forest floor in two places and raising visitors to 12 m above ground in the highest parts. Kirstenbosch National Botanical Garden was established in 1913 to promote, conserve and display the extraordinarily rich and diverse flora of southern Africa. It was also the first botanical garden in the world to be devoted to a country's indigenous flora.


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LEGAL EDUCATION & DEVELOPMENT



New legislation

Legislation published from
1 – 30 June 2020

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

Bills

Adjustments Appropriation Bill B10 of 2020.

Disaster Management Tax Relief Administration Bill B12 of 2020.

Disaster Management Tax Relief Bill B11 of 2020.

Division of Revenue Amendment Bill B9 of 2020.

Commencement of Acts

Protection of Personal Information Act 4 of 2013. *Commencement:* 1 July 2020 (ss 2 – 38, 55 – 109, 111 and 114(1) – (3)) and 30 June 2021 (ss 110 and 114(4)). Proc R21 GG43461/22-6-2020 (also available in Afrikaans).

Promulgation of Acts

Appropriation Act 7 of 2020. *Commencement:* 23 June 2020. GN702 GG43468/23-6-2020 (also available in Setswana).

Child Justice Amendment Act 28 of 2009. *Commencement:* To be proclaimed. GN641 GG43402/4-6-2020 (also available in Setswana).

Division of Revenue Act 4 of 2020. *Commencement:* 23 June 2020. GN701 GG43467/23-6-2020 (also available in isiXhosa).

Foreign Service Act 26 of 2019. *Commencement:* To be proclaimed. GN642 GG43403/4-6-2020 (also available in Xitsonga).

Hydrographic Act 35 of 2019. *Commencement:* To be proclaimed. GN631 GG43389/3-6-2020 (also available in isiXhosa).

Independent Police Investigative Directorate Amendment Act 27 of 2019. *Commencement:* To be proclaimed. GN628 GG43385/3-6-2020 (also available in isiXhosa).

Selected list of delegated legislation

Architectural Profession Act 44 of 2000 Guideline Professional Fees issued in terms of s 34(2). BN66 GG43392/4-6-2020.

Framework for Guideline Professional Fees in respect of architectural services rendered by registered architectural professionals. BN65 GG43391/4-6-2020.

Carbon Tax Act 15 of 2019

Regulations on the allowance in respect of trade exposure in respect of carbon tax liability under s 10. GN690 GG43451/19-6-2020.

Regulations on greenhouse gas emissions intensity benchmark for the purposes of s 11. GN691 GG43452/19-6-2020.

Notice in respect of the renewable energy premium in respect of the tax period for purposes of symbol 'B' contained in s 6(2). GN692 GG43453/19-6-2020.

Constitution, 1996

Transfer of the administration and powers entrusted by legislation to certain members of the cabinet in terms of s 97. Proc22 GG43474/26-6-2020 (also available in isiZulu).

Customs and Excise Act 91 of 1964

Testing of alcohol strength in spirits – DAR196. GN R638 GG43399/5-6-2020.

Disaster Management Act 57 of 2002

• Communications and digital technologies sectors

Amendment of the directions on the risk-adjusted strategy for the communications and digital technologies sector during alert level 3. GN671 GG43439/12-6-2020.

• Correctional services

Directions to address, prevent and combat the spread of COVID-19 in all correctional centres and remand detention facilities during alert levels 3, 4 and 5. GN698 GG43463/22-6-2020.

• Education

Amendment of directions regarding the reopening of schools and measures to address, prevent and combat the spread of COVID-19 in the Basic Education Sector. GenN304 GG43381/1-6-2020, GenN343 GG43465/23-6-2020 and GenN357 GG43488/29-6-2020.

Directions for the resumption of construction and related services in post school education and training institutions to address, prevent and combat the spread of COVID-19. GN617 GG43378/1-6-2020.

Directions on zero-rating of websites for

education and health to address prevent and combat the spread of COVID-19. GN651 GG43413/5-6-2020.

Directions for criteria to return to public university and private higher education campuses as part of a risk-adjusted strategy for a phased-in return during the Level 3 COVID-19 lockdown. GN652 GG43414/8-6-2020.

Direction for the reopening of institutions offering qualifications registered on the occupational qualifications sub-framework (OQSF) as part of a risk-adjusted strategy for a phased-in return of skills development activities. GenN355 GG43486/29-6-2020.

• Environment, forestry and fisheries

Directions regarding measures to address, prevent and combat the spread of COVID-19 relating to National Environmental Management Permits and Licences. GN650 GG43412/5-6-2020.

Directions regarding measures to address, prevent and combat the spread of COVID-19 relating to the forestry sector. GN649 GG43411/5-6-2020.

Directions regarding measures to address, prevent and combat the spread of COVID-19 relating to the freshwater and marine fishing sectors. GN648 GG43410/5-6-2020.

Directions regarding measures to address, prevent and combat the spread of COVID-19 relating to the biodiversity sector. GN647 GG43409/5-6-2020.

• Healthcare

Amendment of the directions on measures to address, prevent and combat the spread of COVID-19 in the health sector. GN R716 GG43479/26-6-2020.

• General regulations

Amendment of the alert level 3 regulations. GN714 GG43476/25-6-2020.

• Home affairs

Directions regarding temporary measures in respect of the entry into or exit from the Republic for emergency medical attention for a life-threatening condition, the evacuation of South African nationals to the Republic, the repatriation of foreign nationals to their countries of nationality or residence or the return of South African nationals to their place of employment or study outside of the Republic, as well as the extension of the

validity period of an asylum seeker permit issued, and refugee status granted in terms of the Refugee Act 130 of 1998, in order to prevent and combat the spread of COVID-19. GN664 GG43420/10-6-2020.

• *Justice and courts*

Directions to address, prevent and combat the spread of COVID-19 in all courts, court precincts and justice service points during alert level 3. GN623 GG43383/2-6-2020.

• *Labour and workplaces*

Consolidated COVID-19 direction on health and safety in the workplace. GN R639 GG43400/4-6-2020.

• *Mineral resources and energy*

Amendment of directions regarding measures to prevent and combat the spread of COVID-19: To provide for continuous supply of energy and petroleum to society and to allow maintenance and construction work for energy projects. GN697 GG43460/19-6-2020.

• *Small businesses*

Directions to address, prevent and combat the spread of COVID-19: Protocols to mitigate and manage the COVID-19 outbreak among employees and customers in the personal care services industry. GN R696 GG43459/19-6-2020.

• *Sports, arts and culture*

Amendment of the directions regarding the suspension of sport, arts and cultural events as measures to prevent and combat the spread of COVID-19 (alert level 3). GN669 GG43434/11-6-2020. Amendment of the directions regarding the live streaming of the creative sector services to prevent and combat the spread of COVID-19 (alert level 3). GN668 GG43433/11-6-2020.

• *State of disaster*

Extension of the state of disaster (drought) to 4 July 2020. GN632 GG43390/3-6-2020.

Extension of national state of disaster (COVID-19 lockdown) to 15 July 2020. GN646 GG43408/5-6-2020.

• *Tourism*

Directions on a risk-adjusted strategy for tourism facilities, services and products to prevent and combat the spread of COVID-19. GenN356 GG43487/29-6-2020.

• *Trade, industry and competition*

Amendment of regulations relating to the COVID-19 state of disaster (alert level 3) and withdrawal of certain directions: Call centres, car sales, automotive repairs, sale of clothing, footwear and bedding, COVID-19 export control regulations, and the block exemption for the retail property sector. GN R667 GG43432/11-6-2020.

Division of Revenue Act 16 of 2019

Provincial disaster relief grant. GN637 GG43398/5-6-2020.

Electricity Act 41 of 1987

License fees payable by licensed generators of electricity. GN708 GG43474/26-6-2020.

Electronic Communications Act 36 of 2005

Framework to qualify to operate a secondary geo-location spectrum database. GenN311 GG43398/5-6-2020.

Engineering Profession Act 46 of 2000

Engineering Council of South Africa: Annual fees. BN75 GG43474/26-6-2020.

Financial Advisory and Intermediary Services Act 37 of 2002

Amendment of the determination of fit and proper requirements. GN707 GG43747/26-6-2020.

Amendment of the General Code of Conduct for Authorised Financial Services Providers and Representatives, 2003 and the Specific Code of Conduct for Authorised Financial Services Providers and Representatives Conducting Short-term Deposit Business, 2004. GN706 GG43747/26-6-2020.

Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972

Authorisation of certain local authorities to enforce ss 10(3)(b), 11 and 24 of the Act. GN680 GG43447/19-6-2020 (also available in Afrikaans).

Amendment of the regulations regarding preservatives and antioxidants (in bread). GN681 GG43447/19-6-2020.

Hazardous Substances Act 15 of 1973

Temporary exemption of medical device establishments licenced in terms of s 22C(1)(b) and authorised in terms of s 21 of the Medicines and Related Substances Act 101 of 1965 to sell electronically controlled ventilators (Group III Hazardous Substances). GN R722 GG43485/26-6-2020.

Income Tax Act 58 of 1962

Amount of value of assets that may be paid in lump sum under definition of living annuity: R 125 000. GN619 GG43380/1-6-2020.

Method or formula for purposes of the determination of the amount under a living annuity. GN618 GG43379/1-6-2020 and GN636 GG43398/5-6-2020.

International Trade Administration Act 71 of 2002

Amendment of guidelines for Rebate Item 412.11 for goods imported for the relief of distress of persons in cases of famine or other national disaster. GenN345 GG43470/25-6-2020.

Labour Relations Act 66 of 1995

Commission for Conciliation, Mediation and Arbitration: Tariff of fees. GN616 GG43376/1-6-2020.

Medicines and Related Substances Act 101 of 1965

Regulations relating to a transparent pricing system for medicines and scheduled substances: Dispensing fee for pharmacists. GN679 GG43447/19-6-2020.

Temporary exclusion of certain alcohol-based hand-rubs from the operation of specified provisions. GN R721 GG43484/26-6-2020.

National Education Policy Act 27 of 1996

Amended 2020 school calendar for public schools. GN666 GG43431/11-6-2020.

National Environmental Management: Biodiversity Act 10 of 2004

Amendment of the alien and invasive species list and the list of critically endangered, endangered, vulnerable and protected species. GN627 GG43386/3-6-2020.

Regulations relating to trade in rhinoceros horn. GN626 GG43386/3-6-2020.

Notice prohibiting the carrying out of certain restricted activities involving rhinoceros horn. GN625 GG43386/3-6-2020.

Nursing Act 33 of 2005

Regulations relating to the approval of and the minimum requirements for the education and training of a student leading to the registration as a nurse specialist or midwife specialist. GN635 GG43398/5-6-2020.

Occupational Health and Safety Act 85 of 1993

Standards for first aid training. GN682 GG43447/19-6-2020.

Temporary exemption from Ergonomics Regulations of 2019. GN683 GG43447/19-6-2020.

Prescribed Rate of Interest Act 55 of 1975

Prescribed rate of interest from 1 May 2020: 8,75% per annum. GN R713 GG43475/26-6-2020 (also available in Afrikaans).

Public Finance Management Act 1 of 1999

Statement of the national revenue, expenditure and borrowing as at 31 May 2020. GenN358 GG43489/30-6-2020.

Public Protector Act 23 of 1994

Determination of salaries and allowances of the Public Protector. GenN359 GG43491/30-6-2020.

South African Human Rights Commission Act 40 of 2013

Determination of salaries and allowances of Commissioners of the South African Human Rights Commission. GenN360 GG43492/30-6-2020.

Sugar Act 9 of 1978

Amendment of the Constitution of the South African Sugar Association and the Sugar Industry Agreement, 2000. GN R700 GG43466/23-6-2020.

Value Added Tax Act 89 of 1991

Expiration of VAT Certificate issued in terms of sch 1(8) of Act, rebate item 412.11. GenN305 GG43384/3-6-2020.

Draft Bills

- Draft Public Finance Management Amendment Bill, 2020. GenN318 GG43418/12-6-2020.
- Draft Local Government: Municipal

Demarcation Bill, 2020. GenN332 GG43440/17-6-2020.

Draft delegated legislation

- Amendment of regulations relating to the registration of persons and maintenance of registers: In terms of the Pharmacy Act 53 of 1974 for comment. GN656 GG43418/12-6-2020.
- Proposed amendments to the regulations relating to the practice of pharmacy in terms of the Pharmacy Act 53 of 1974 for comment. GN657 GG43418/12-6-2020.
- Proposed amendment to the regulations relating to pharmacy education and training in terms of the Pharmacy Act 53 of 1974 for comment. GN658 GG43418/12-6-2020.
- Draft Second Generation Air Quality Management Plan for the Vaal Triangle Airshed Priority Area in terms of the National Environmental Management: Air Quality Act 39 of 2004 for comment. GN654 GG43418/12-6-2020 and GN655 GG43418/12-6-2020.
- Draft Code for Persons with Disabilities Regulations in terms of the Independent Communications Authority of South Africa Act 13 of 2000 for comment. GenN317 GG43418/12-6-2020.
- Regulations regarding fees payable in terms of the Medicines and Related Substances Act 101 of 1965 for comment. GN659 GG43418/12-6-2020.
- Draft control measures relating to Asian citrus psyllid (*Diaphorina citri*) in terms of the Agricultural Pests Act 36 of 1983 for comment. GN R662 GG43419/12-6-2020.
- Proposed amendments to schs 1, 2 and 3 to the Financial Intelligence Centre Act 38 of 2001 for comment. GN R684 GG43447/19-6-2020.
- Draft Regulations on Long Term Operation of Nuclear Installations in terms of the National Nuclear Regulator Act 47 of 1999 for comment. GN R694 GG43456/19-6-2020.
- Draft amendments to the National Estuarine Management Protocol in terms of the National Environmental Management: Integrated Coastal Management Act 24 of 2008 for comment. GN705 GG43474/26-6-2020.
- Proposed extended producer responsibility scheme for the lighting sector in terms of the National Environmental Management: Waste Act 59 of 2008 for comment. GN717 GG43480/26-6-2020 for comment.
- Draft regulations regarding extended producer responsibility in terms of the National Environmental Management: Waste Act 59 of 2008 for comment. GN718 GG43481/26-6-2020.
- Proposed extended producer responsibility scheme for paper, packaging and some single use products in terms of the National Environmental Management: Waste Act 59 of 2008 for comment. GN719 GG43482/26-6-2020.
- Proposed extended producer responsibility scheme for the electrical and electronic equipment sector in terms of the National Environmental Management: Waste Act 59 of 2008 for comment. GN720 GG43483/26-6-2020.



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Dismissal for incompatibility

In *Zeda Car Leasing (Pty) Ltd t/a Avis Fleet v Van Dyk* [2020] 6 BLLR 549 (LAC), the Labour Appeal Court (LAC) considered whether the employee's dismissal for operational requirements was procedurally unfair.

In this case, the employer dismissed an employee for operational requirements in circumstances where the real reason for the dismissal was incompatibility. In this regard, the general manager had a falling-out with another senior manager. Initially the employer tried to remedy the issue by embarking on a mediation process and requesting each employee to answer a list of questions regarding the dispute. The employee who was dismissed responded to the questions, but the responses lacked specificity and she

indicated that the falling-out had no detrimental effect on the business. The other employee provided comprehensive responses and provided specific examples of the lack of trust, accountability and mutual respect. She was of the view that the conflict had an effect on the operational requirements of the business and proposed a change in structure.

After considering the responses, the employer then decided to consolidate the posts of the two incompatible managers and invited each of the managers to apply for the new post without first consulting with them on selection criteria. The employee's legal representative challenged the decision to merge the posts and requested that the employer engage in a fair consultation process with the employee. In response to this the employer issued the employee with a s 189(3) letter. The employer explained that the employee had not applied for the new combined position and offered the employee a generous severance package. While the employee was still considering this option the employer issued a notice

of termination for operational reasons.

The employee then referred a dispute to the Labour Court (LC). The employee alleged that she was unfairly discriminated against but the LC rejected this. The employee also alleged that the dismissal was both substantively and procedurally unfair. The LC held that there was an operational requirement to justify the dismissal but the procedure was unfair because the employee had been presented with a *fait accompli* and because the employer had not properly consulted with her. The LC awarded ten months' remuneration as compensation.

On appeal, the LAC found that the real reason for the dismissal was incompatibility as the employee was unable to work with others and adapt to the employer's corporate culture but the employer had instead categorised the issue as operational. The LAC remarked that incompatibility is a category of incapacity because it impacts on work performance. Therefore, the appropriate process to follow is to inform the employee about the conduct that has caused dis-

harmony, identify how the relationship has been affected and propose remedial action. The employee should then be given a reasonable opportunity to improve the situation. In this case, the employer had started off trying to mediate the matter but then decided to pursue a redundancy process instead. The operational requirements dismissal did not stem from economic issues or technological changes at the employer. Rather, the employer decided to make a structural change to deal primarily with the conflict, which had arisen between two senior employees. The employer was required to engage in a meaningful joint consensus seeking process, which it did not do. Instead, when the employee did not apply for the position it took the opportunity to dismiss the employee. There was no consultation over selection criteria. The LAC accordingly held that the dismissal was procedurally unfair.

The LAC found that when making an award for compensation the court must consider all relevant factors and be fair to both parties. The LC had correctly

considered the extent of the procedural unfairness, the employee's length of service and the emotional and financial stress suffered. However, the LC should have also considered the *ex gratia* payment that had been made to the employee, as well as a further two months' salary that had been paid to the employee after her dismissal. The LAC held that if these amounts were considered, then the employee effectively received more than the maximum compensation of 12 months' remuneration permitted under the LRA. The amount of compensation was accordingly decreased to seven months' remuneration.

Fixed-term contracts

In *National Union of Public Service and Allied Workers v Mfingwana and Others* [2020] 6 BLLR 600 (LC) an employee was engaged on a six-month fixed-term contract. The employee was deemed permanent by virtue of s 198B of the Labour Relations Act 66 of 1995. At the end of the fixed-term contract, the contract was extended for another five months. There

was an addendum to the extended contract, which specified a termination date after the extension period. The contract was not renewed after this extended period and the employee referred an unfair dismissal dispute.

The commissioner found that the work was not of limited duration and there was no justifiable reason for fixing the term. The employee was, therefore, permanently employed and the termination of the contract constituted a substantively and procedurally unfair dismissal. The employee was reinstated on an indefinite basis. The matter was taken on review to the Labour Court (LC). The LC per Rabkin-Naicker J held that the employer could not rely on the termination date in the addendum to argue that there was no reasonable expectation of renewal as this did not change the fact that the employee had already been deemed permanent when the initial contract expired. The application for review was accordingly dismissed.



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Dismissed for lodging an internal grievance – can an employee claim an automatically unfair dismissal?

DBT Technologies (Pty) Ltd v Garnevsha (LAC) (unreported case no JA61/2018, 18-5-2020) (Murphy AJA with Sutherland JA and Waglay JP concurring)

In terms of s 187(1)(d) of the Labour Relations Act 66 of 1995 (LRA), a dismissal is automatically unfair if the reason for the dismissal is that the 'employee took action, or indicated an intention to take action, against the employer by –

(i) exercising any right conferred by this Act; or

(ii) participating in any proceedings in terms of this Act'.

In *Mackay v Absa Group and Another* (2000) 21 ILJ 2054 (LC) the Labour Court

(LC), in adopting a purposive interpretation, held that the above section allowed an employee who alleges that, as a reprisal for lodging a grievance against their supervisor, they had been dismissed; to claim an automatically unfair dismissal. Although the Labour Appeal Court (LAC) overturned the court's decision, they did so on the basis that the employee in that matter failed to establish on the facts that the predominant reason for her dismissal was because she had lodged a grievance. Thus the LAC dispensed with the appeal without having to consider the court's reasoning in respect of an employee claiming an automatically unfair dismissal in such circumstances.

Following and relying on the principle set out in *Mackay*, the LC in *De Klerk v Cape Union Mart International (Pty) Ltd* (2012) 33 ILJ 2887 (LC), held:

'I am not persuaded that the purposive interpretation adopted by Mlambo J is clearly wrong. It does seem anomalous that an employee in the position of Ms de Klerk or Mr Mackay should not enjoy special protection. Why would a whistleblower enjoy special protection in terms of s 187(1)(h), but not an employee who lodges a grievance in terms of her own employer's procedures?

... In the absence of any finding to the contrary by the LAC, I consider the interpretation adopted by Mlambo J to be sufficiently persuasive not to prevent the applicant from pursuing her claim in those terms'.

The facts in this matter are analogous to the facts presented in the *Mackay* and *De Klerk* cases. The employee, in a meet-

ing with various people had a disagreement with a colleague where after the latter, according to the employee, hit her over the head with a file while on his way out of the meeting.

The employee lodged a grievance in terms of the employer's grievance policy. Her grievance was chaired by an external chairperson who found the employee had failed to prove her claim, so too did the chairperson of the appeal grievance hearing. Thereafter the employee was charged and dismissed for falsely accusing another employee of assault and preventing others from performing their duties.

Invoking s 187(1)(d), the employee referred an automatically unfair dismissal alleging she was dismissed for lodging a grievance against her colleague. The LC found that the predominant reason for the employee's dismissal was in accordance with the reason she alleged, and not for falsely accusing a co-worker of assault as argued by the employer. To this end the court granted the employee nine months compensation for an automatically unfair dismissal.

Central to the issue before the LAC on appeal was whether s 187(1)(d), interpreted correctly, contemplated a dismissal as claimed by the employee. Otherwise stated, could an employee who believes that the true reason for their dismissal is because they lodged a grievance, claim an automatically unfair dismissal.

On this score, the LAC held:

'A grievance complaining about a fellow employee's conduct, filed in terms of a contractually agreed grievance procedure at first glance does not constitute

taking action against an employer, nor ordinarily, does it involve the exercise of any right conferred by the LRA or the participation in any proceeding in terms of the LRA. The LRA does not expressly confer rights upon employees to file grievances. Nor does it establish a mechanism or proceeding for the resolution of grievances filed by employees.'

Continuing with this point the LAC stated that the right to follow a grievance process is based either in the employee's employment contract in that the employer's grievance process is incorporated into the employment contract as an implied term, alternately it is a right derived from a collective agreement, which prescribes a grievance process. While the grievance process initiated by the employee in this matter was set out in an internal policy, the LAC in passing nevertheless addressed circumstances where an employee, following a grievance procedure set out in a collective agreement, claims they had been dismissed for such action. In those circumstances, according to the LAC, it may be argued that the employee was exercising a right (albeit indirectly) conferred by

the LRA, however, the employee must still prove that they intended to take action or took action against the employer prior to being dismissed and that such action was the proximate cause for their dismissal.

Reiterating its stance in respect of this matter, LAC held:

'As said, the filing of a grievance about the behaviour of another employee does not amount to taking action against the employer. It is a request by an employee for action to be taken to resolve an internal problem. Nor does it involve the direct exercise of a statutory right against the employer. Section 187(1)(d) of the LRA is not concerned with the filing of a grievance. It is directed rather at situations such as an employee exercising a right to refer a dispute to the CCMA or another governmental agency concerning the employer's conduct. A request by an employee to discipline another employee for alleged misconduct does not fall within the ambit of conduct targeted by the provision.'

Although appreciating the fact that it may well be found to be unfair if an employer dismissed an employee for

lodging a grievance, the LAC stated that the Commission for Conciliation, Mediation and Arbitration (CCMA) would be the correct forum to deal with those dismissal disputes under s 191(5)(a) of the LRA and not to the LC as an automatically unfair dismissal.

In respect of the earlier precedent, the LAC found that there was no reason for the court in *Mackay* to read into s 187(1)(d) an additional species of automatically unfair dismissals under circumstances where an employee, armed with such a claim, has recourse by referring a dismissal dispute to the CCMA under s 191(5). Moreover, *Mackay* was distinguishable from the facts of this case. The LC in *Mackay* found that the employee was dismissed for lodging a grievance. The LAC on appeal, as is the case *in casu*, found that on the facts there was nothing to support the contention that the employee had been dismissed for lodging a grievance.

The LAC upheld the appeal and set aside the LC's finding with no order as to costs.



By
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Abbreviation	Title	Publisher	Volume/issue
<i>Advocate</i>	Advocate	General Council of the Bar	(2020) 33.1
<i>EL</i>	Employment Law Journal	LexisNexis	(2020) 36.2 (2020) 36.3
<i>ITJ</i>	Insurance and Tax Journal	LexisNexis	(2020) 35.2
<i>JCCLP</i>	Journal of Corporate and Commercial Law and Practice	Juta	(2019) 5.2
<i>JJS</i>	Journal for Juridical Science	Free State University, Faculty of Law	(2019) 45.1
<i>LitNet</i>	LitNet Akademies (Regte)	Trust vir Afrikaanse Onderwys	(2020) 17.1 (2020) 17.2
<i>PER</i>	Potchefstroom Electronic Law Journal	North West University, Faculty of Law	(2020) 23
<i>PLD</i>	Property Law Digest	LexisNexis	(2020) 24.2
<i>PSLR</i>	Pretoria Student Law Review	Pretoria University Law Press (PULP)	(2020) 14
<i>SAJBL</i>	South African Journal of Bioethics and Law	South African Medical Association NPC	(2019) 12.2 (2020) 13.1
<i>SALJ</i>	South African Law Journal	Juta	(2020) 137.2
<i>SJ</i>	Speculum Juris	University of Fort Hare	(2019) 33.2
<i>SLR</i>	Stellenbosch Law Review	Juta	(2020) 31.1
<i>THRHR</i>	Tydskrif vir Hedendaagse Romeinse-Hollandse Reg	LexisNexis	(2020) 83.2
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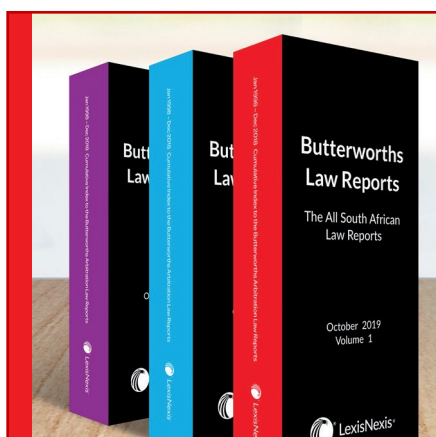
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Balancing the landowners' right to evict with the unlawful occupiers right of access to adequate housing and the government's legitimate interest therein



By
Sithelo
Magagula

In the pre-constitutional dispensation, the court could grant an eviction order without considering the risk of homelessness to the evictees. This was possible because there was no constitutional right of access to adequate housing, and there was no law obligating the government to provide alternative accommodation to vulnerable evictees. In this context, the common law right to evict unlawful occupiers was absolute and it trumped all the interests of the unlawful occupiers. Notably, this legal framework was predominantly in favour of the landowners, and undermined and weakened the vulnerable evictees' housing rights.

In the new constitutional dispensation, there has been a shift away from the pre-constitutional dispensation's legal framework. The eviction landscape has been transformed by s 26 of the Constitution, which gives all citizens the right of access to adequate housing and the right not to be arbitrarily evicted. Section 26 further obliges the State to take all reasonable steps to realise the right of access to adequate housing. The subsequent promulgation of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) and the Extension of Security of Tenure Act 62 of 1997 gives effect to s 26 of the Constitution. Accordingly, evictions are now qualified in terms of s 26 of the Constitution.

In a situation where unlawful occupiers have no prospect of finding alternative accommodation of their own, the court may order the local government to provide them with temporary alternative accommodation. Therefore, in

the new constitutional dispensation the government has the constitutional duty to provide alternative accommodation to the vulnerable evictee (see *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC); and *Occupiers, Berea v De Wet NO and Another* 2017 (5) SA 346 (CC)). Notably, government has a central legitimate interest in evictions. To the extent that the government cannot provide alternative accommodation, the court may refuse to grant eviction or suspend it until the government makes such provision. This new development aims to infuse the principle of justice and equity in South African eviction law by balancing and reconciling the landowners' interests with those of the occupiers.

However, this transformative development has been hindered by the government's failure to play its central role. In the sense that if government fails to provide alternative accommodation or provides inadequate forms of alternative accommodation the eviction will be refused or delayed. As the result, the landowner's property rights and the unlawful occupiers' housing rights are compromised. Ultimately, the courts' balancing approach will be hampered. Therefore, this article deals with the government's failure to play its central role in evictions. As such, balancing the landowners and the unlawful occupiers' opposed interests in the context of eviction is a complex exercise. This article concludes that it is impossible to balance the subject rights without meaningful involvement of government.

There is no doubt that unlawful occupation results in the conflict of the unlawful occupiers' housing rights with the landowner's property rights. However, balancing these opposed interests is a complex judicial exercise. When confronted with this issue in *Port Elizabeth Municipality* case, Sachs J held at para 23 that 'judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather, it is to balance out and reconcile the opposed claims in as just a manner as possible, taking account of all the in-

terests involved and the specific factors relevant in each particular case'.

One of the major factors in determining eviction is the provision of temporary emergency accommodation or alternative accommodation to the unlawful occupiers. It is well-established in South African law that until this duty is fulfilled by the municipality that has jurisdiction, it is difficult for the court to grant an eviction. However, there are so many issues associated with the provision of temporary emergency accommodations, especially in the City of Johannesburg where the *Blue Moonlight* precedent was set. (In the *Blue Moonlight* judgment, the Constitutional Court (CC) was asked to decide whether the City of Johannesburg had the duty to provide temporary emergency accommodation to the occupiers. The CC held that municipalities are constitutionally obliged to provide temporary emergency accommodation to the unlawful occupiers facing the risk of homelessness. Thus, the City of Johannesburg was ordered to develop new policies and structured programmes to give effect to the provision of temporary emergency accommodation). This seriously affects the landowners who cannot effectively evict nor regain possession of their properties if the municipality fails to provide temporary emergency accommodation to the evictees. The case of *Hlophe and Others v City of Johannesburg and Others* 2013 (4) SA 212 (GSJ) is the classical example of where the City of Johannesburg failed to provide temporary emergency accommodation to the unlawful occupiers for almost four years after the eviction order was granted.

It is clear, therefore, that if the municipalities fail to provide temporary emergency accommodation to the evictees, the landowners' property rights would continuously be compromised and the court's balancing approach will ultimately be hampered. Thus, one can argue that South African eviction laws and the current court's approach to evictions overprotects unlawful occupiers at the expense of the landowners' property rights. This is because the law allows the unlawful occupiers to remain in occupation of the landowner's property, sometimes indefinitely, until the municipality has provided temporary emergency accommodation to the evictees. This means that the landowner must contin-

ue shouldering the State's obligation until such time that temporary emergency accommodation is made available.

To a certain extent the failure on the part of the State to fulfil its constitutional obligation to provide temporary emergency accommodation amounts to the simultaneous breaches of the State's s 25(1) obligation towards the landowners and the right to provide alternative housing to the evictees in terms of s 26 of the Constitution. Therefore, the State's unreasonable failure to give effect to the obligation to provide, at least, basic temporary alternative shelter for unlawful occupiers who face homelessness, constitutes a breach of constitutional rights. André Walters argues that refusing eviction on the basis that the municipality is unable to provide alternative accommodation undermines the landowner's property rights. As a result Walters argues that the scale of justice and the scale of equality imposed by the South African eviction law is predominantly in favour of the unlawful occupiers (André Walters 'A balancing act between owners and occupants – is PIE unconstitutional?' 2013 (July) *DR* 22).

Walters bases his argument on: 'A society based on freedom should also include the freedom of a property owner to deal with his or her hard-earned property as he or she pleases for his or her benefit to the exclusion of others'. Jackie Dugard in 'Beyond *Blue Moonlight*: The Implications of Judicial Avoidance in Relation to the Provision of Alternative Housing' (2014) 5 *Constitutional Court Review* 265 also acknowledges that the municipalities' failure to play their central role in evictions hampers the balancing process of the landowners' right to evict, with the unlawful occupiers' housing right. However, Dugard levels her criticism against the court's weak enforcement mechanism to compel the municipalities to meaningfully discharge their constitutional obligation to provide temporary emergency accommodations. Dugard argues that the failure to provide temporary emergency accommodation by municipalities has been 'aided and abetted by the CC's disposition toward judicial avoidance in socio-economic cases'.

Dugard also argues that the municipalities' non-compliance with the court orders, which direct them to provide temporary emergency accommodation is a big frustration to property owners. Dugard further questions whether it is not the right time for the CC and other courts to adopt a new approach to cure the municipalities' delays to provide temporary emergency accommodation to evictees. Lowesa Antoinette Stuurman (*Illegal eviction and unlawful occupation of land: A comparative perspective* (LLM thesis, North-West University 2002))

does not necessarily criticise the courts as Dugard does, neither does she criticise the municipalities for failing to play their central role in eviction. Stuurman's criticism is levelled against PIE itself. Stuurman argues that the lack of balance between the right to evict and the right to housing was created by PIE. She further argues that PIE over-remedied Apartheid's legal framework for eviction in that the legislature did not fully consider the impact of PIE on the ownership right as protected by s 25(1) of the Constitution. She argues that PIE lacks proper balance between the right of the unlawful occupiers and the rights of the landowners.

What these scholars underscore is that there is a big gap in our constitutional-property law, which allows the violation of the landowners' property rights. However, I am not inclined to accept Stuurman's argument as her criticism levelled against PIE fails on the basis that when the court fails to protect the ownership rights or over-protects the unlawful occupiers' rights, whatever the case may be, it is not because PIE lacks proper balance but an independent court that fails to correctly apply the Act. On the contrary, I am inclined to accept that the lack of balance between the two subject rights is caused by the municipalities' unwillingness and reluctance to provide temporary emergency accommodation to evictees.

It is clear that eviction cannot be granted without the meaningful involvement of the State. The big question is how to remedy the municipalities' failure to play their central role in evictions and to ultimately bring the proper balance of the landowner's right to evict with the unlawful occupiers right of access to adequate housing. It appears that constitutional damages and a *mandamus* are the best remedies in the circumstances. The court should not hesitate to award constitutional damages as a way of discouraging the State's continuous failure to fulfil its constitutional obligation. It is not fair that the landowner has to wait for an indefinite period before the State accommodates unlawful occupiers elsewhere while shouldering the housing responsibility of the State without being compensated.

In situations where the municipality is unable to find alternative land to build temporary emergency accommodations municipalities must be ordered to pay each evictee a rental fee in order to secure alternative accommodation elsewhere. This should happen where the municipality does not have available temporary emergency accommodation, therefore, in order to give the landowner's access to their property while the municipality is preparing temporary emergency accommodation elsewhere, which could take

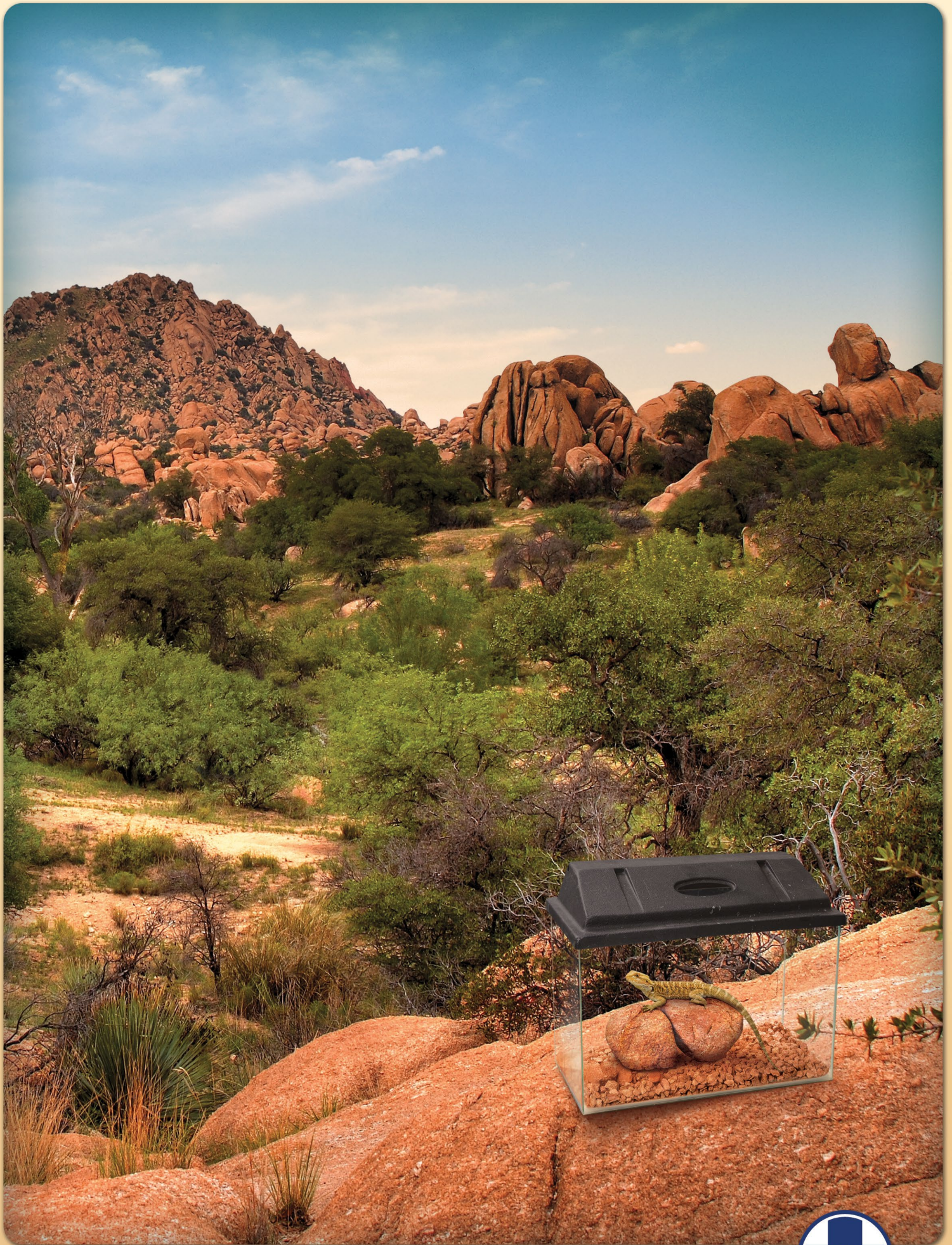
long, the municipality must find ways to assist the unlawful occupiers to rent accommodation elsewhere while waiting to be provided with temporary emergency accommodation. This will help the landowners to regain access to their properties speedily as opposed to waiting indefinitely while waiting for the municipality to secure temporary emergency accommodation elsewhere.

In this way, landowners will be able to regain possession and exclusive use of their private property, and at the same time unlawful occupiers will be resettled as required by s 26 of the Constitution in an orderly manner. The court enjoys a wide discretion to award constitutional damages – where the State has violated the constitutional rights of its citizens – especially where circumstances make it appropriate particularly in cases of glaring and continuous State failure to adhere to its constitutional obligation. Although the remedy of constitutional damages is not new in South African law, it is, however, not properly implemented in the eviction law or constitutional property law jurisprudence. In the context of eviction, constitutional damages will be a rectifying mechanism in circumstances where the municipality has violated the constitutional rights of both landowners and unlawful occupiers.

A *mandamus* is an order of court directing a party to do something or to refrain from doing something. A municipality is a juristic person, which operates through its functionaries. Just like a company, the directors are expected to demonstrate the highest standard of care in the company they owe fiduciary duty to. Directors are personally responsible for the management of the affairs of the company. The same applies to the municipal functionaries as they are responsible for ensuring that the municipality complies with eviction orders directing them to provide temporary emergency accommodation to evictees. What makes a *mandamus* a strong enforcement mechanism is that if the functionaries fail to act, as per the court order, they could be held in contempt and face imprisonment. It is now the time to hold the municipal functionaries personally responsible in situations where the municipalities fail or unreasonably delay to provide temporary emergency accommodation to evictees. Therefore, I recommend that a *mandamus* should be immediately issued by the courts where there is failure by the municipality to provide temporary emergency accommodations to evictees.

Sithelo Magagula *LLM (UKZN)* is a legal practitioner in Johannesburg.

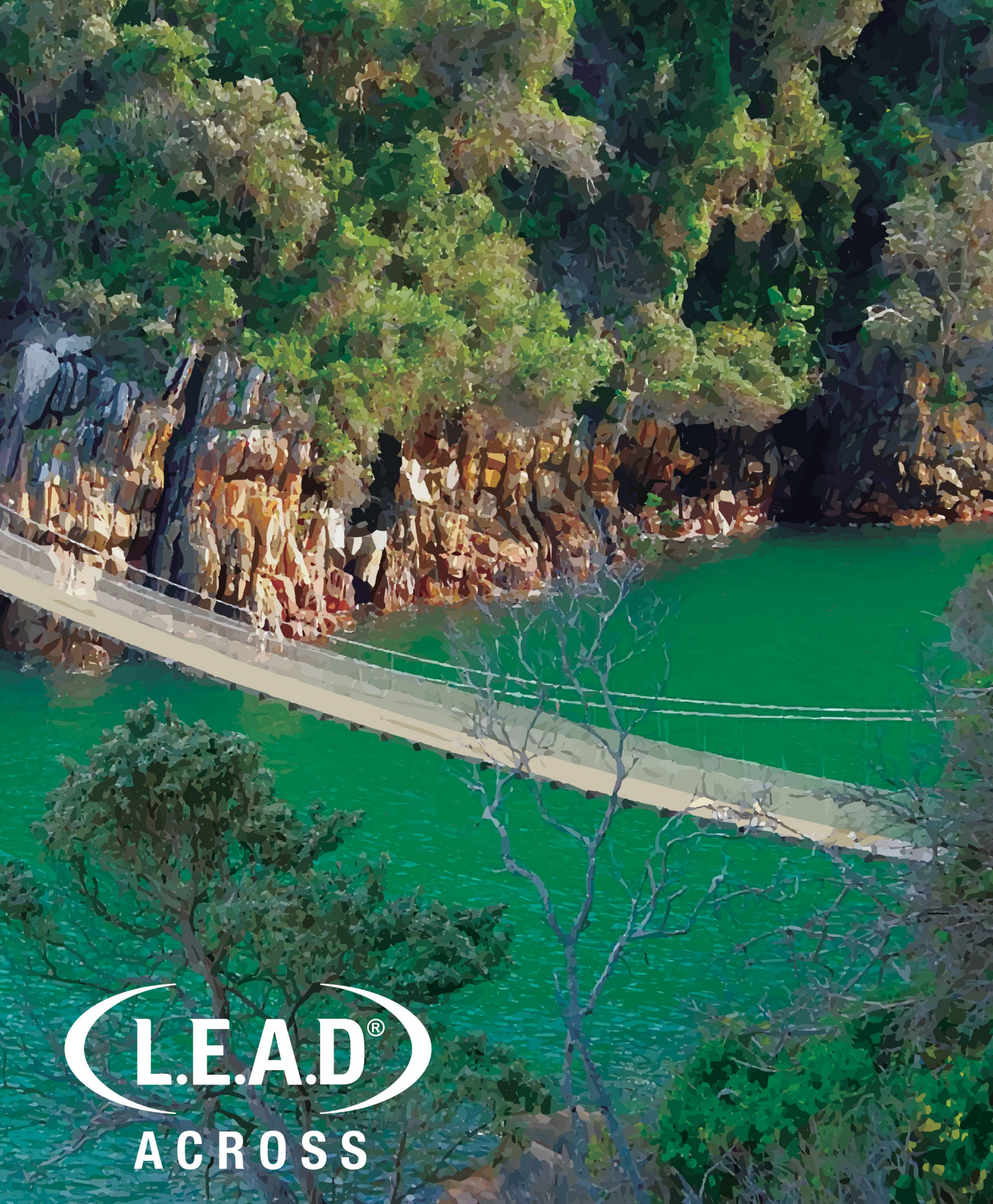




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