

THE SLOW RISE OF WOMEN IN THE LEGAL PROFESSION



**The fine line between
freedom of expression
and hate speech**

**Confirmation or rubber stamping?
Understanding the surrogate
motherhood agreement requirements**

**Employee safety during COVID-19: When does
an imminent and serious risk exist?**

**Fighting with your shadow –
understanding the concept of non-
executive and shadow directors**

**Are the stringent COVID-19 lockdown
regulations unconstitutional and unjustifiable?**



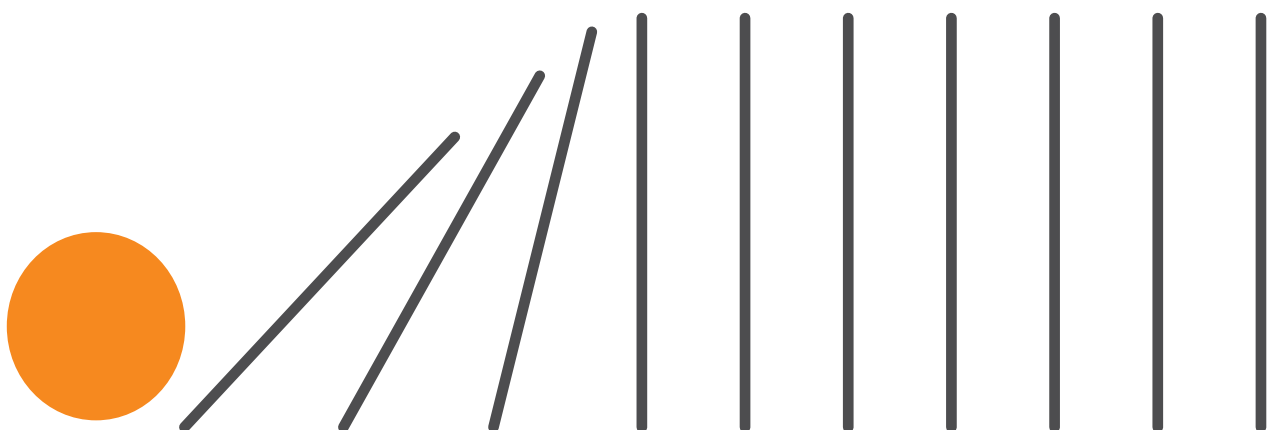
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16 The fine line between freedom of expression and hate speech

There is a fine line between freedom of expression and expression that constitutes hate speech. In today's society there is a constant battle between what can and cannot be said. Copywriter, **Kathleen Mukheibir**, discusses the case of *Qwelane v South African Human Rights Commission and Another (Freedom of Expression Institute and Another as Amici Curiae)* [2020] 1 All SA 325 (SCA) where the Supreme Court of Appeal had to determine the constitutionality of s 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 insofar as it relates to the regulation of freedom of expression and hate speech.

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31 Fighting with your shadow - understanding the concept of a non-executive and shadow directors

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34 Employee safety during COVID-19: When does an imminent and serious risk exist?

Legal practitioner, **Marius van Staden**, explains what reasonable justification means with regard to the health and safety of an employee. An employer is not entitled to take disciplinary action against an employee who harbours an objective view towards the safety conditions in the workplace.

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Available virtual conferencing options

On 15 August President Cyril Ramaphosa announced that South Africa will be moving to Alert Level 2 of the COVID-19 Risk Adjusted Strategy, which meant that restrictions will be relaxed because the country was experiencing a lower rate of infections. In terms of reg 55(2)(d)(i) and (ii) in GN R480 GG43258/29-4-2020 of the Disaster Management Act 57 of 2002, the amended regulations issued in terms of s 27(2) state that conferences and meetings for business purposes, which are subject to a limitation of 50 persons excluding those who participate through electronic platforms are allowed.

During his speech, President Ramaphosa reiterated the need for South Africans to continue staying at home and, if possible, to work from home to curb the spread of COVID-19. With this in mind, the option of virtual conferencing would be the best option to conduct meetings for those who work from home or for meetings with more than 50 people in attendance. Virtual conferencing also allows for a hybrid situation where some participants can partake from a conference venue, while other participants connect remotely to the meeting. Below is a list of some virtual conferencing applications (apps) available:

- **Apache OpenMeetings:** This open source virtual conferencing app has whiteboard capabilities, instant messaging and collaborative document editing (<https://openmeetings.apache.org>).
- **Cisco Webex:** The app is tailored for those who want the utmost security during virtual meetings. The app allows for webinars of an audiences of up to 3 000 and webcasting for hosting virtual events of up to 100 000 participants (www.webex.com).
- **ezTalks Meetings:** This free HD web video conferencing application has a virtual whiteboard collaboration tool that can be used for brainstorming and sharing files (www.eztalks.com).
- **GoToMeeting:** A web conferencing app that allows for meetings to be initiated using Microsoft Office programs and e-mail. The free option of the application is limited to three users and only allows for audio conferencing with the option of video limited to paid subscriptions. This app is useful for quick and small virtual meetings. One of the positive aspects of the application is the availability of a real-time transcription service that enables users to send a meeting transcript as soon as the online meeting ends (www.gotomeeting.com).

- **Pexip:** This video meeting and calling app allows for instant scheduling and hosting of meetings on any device. The app has adaptive composition, which means it will adapt to any hardware. As a bonus, the app has real-time image-framing atomisation to ensure people's faces always remain in focus (www.pexip.com).
- **RingCentral Video:** This app allows for virtual conferencing that integrates video, message and telephone. The app works directly on the web browser, therefore, there will be no need to download the app. RingCentral Video allows for integration with other apps such as Microsoft Teams. This app has security controls that are externally verified. RingCentral Video can hold webinars with up to 10 000 attendees and up to 500 presenters (www.ringcentral.com).
- **Skype:** The free virtual meeting option of this app allows for participation of up to 50 people with calls up to 24 hours (www.skype.com).
- **TeamViewer:** TeamViewer virtual conferencing facility is provided for through the Blizz Collaboration Companion app, its features include the ability to run virtual sessions at the same time with up to 300 participants. The app integrates video, voice, instant messaging, and screen sharing on any device. TeamViewer also allows for remote desktop access and control, which means a desktop can be accessed through a smartphone (www.blizz.com).
- **Zoom:** The free option of Zoom offers 40 minutes of conferencing at a time, while the paid for option does not have a time limit. The app has virtual whiteboard capability and a role-based security with password protection and a waiting room. Zoom can host meetings of up to 1 000 video participants, 49 videos on screen and multiple participants can share their screen simultaneously (www.zoom.us).



Mapula Sedutla - Editor

Virtual conferencing etiquette

As a rule of thumb, the same rules that apply during live meetings apply to virtual meetings even when participants are at home. This means for business related meetings, participants should -

- dress accordingly;
- switch off their microphones if they are not speaking to avoid background noise interference; and
- ensure that they are not disturbed by family members.

It is advisable to familiarise yourself with the app used for the meeting before the meeting starts in order to sort out issues such as video, sound and Internet connectivity. If you are using video during the virtual meeting, ensure that your face can be viewed as a 'headshot' as if you are having a face-to-face conversation with other participants.

- See also Kristi Erasmus 'The certainty of legal technology in South African legal practice' 2020 (Sept) *DR* 6 for a discussion on legal technology in the legal profession.



Would you like to write for *De Rebus*?

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

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

- Please note that the word limit is 2000 words.
- Upcoming deadlines for article submissions: 21 September and 19 October, and 16 November 2020.

LETTERS

TO THE EDITOR

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

Contingency

The allowance of legal practitioners to charge on a contingency basis meets with approval since it allows the under-privileged to litigate.

What is not permitted is for witnesses to charge on a contingency basis, because to charge for only successful outcomes would discredit their objectivity.

However, it seems that some legal practitioners do so by asking medical witnesses to 'write off' their fees if the outcome of the case does not provide a reward for the claimant (an *ipso facto* for the legal practitioner).

This is done by selective ostracism of those witnesses who do not 'cooperate', and are thus eliminated from that legal practitioner's inventory of witnesses.

Thus, the conscientious counsel should open their cross-examination by asking the witness whether it is the case that they will only be paid if the outcome of the case is 'successful'. If the question is not asked, then it should be asked by the presiding judge. If this is the case, the specific witness must be classified as 'biased'.

Accepting cases on a contingency basis is a gamble that some legal practitioners take, which mostly pays handsomely. However, there is no reason why advocates and witnesses should act on

the same basis when the gamble fails, least of all when they are not informed of the risk in advance.

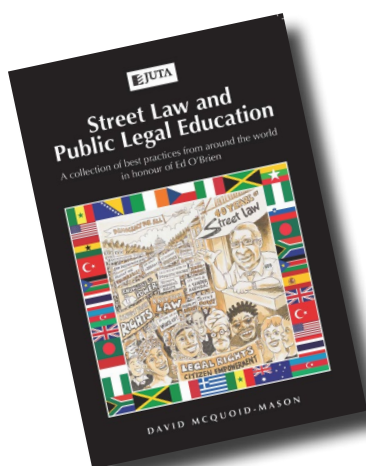
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Book announcement



Street Law and Public Legal Education: A collection of best practices from around the world in honour of Ed O'Brien

By David McQuoid-Mason

Cape Town: Juta

(2020) 1st edition

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By
Joel
Zinhumwe

Legal practice management during and beyond COVID-19

The world is currently facing a huge challenge in the form of the COVID-19 pandemic. This situation presents many challenges and uncertainties, as well as new opportunities for businesses. It is no secret that many businesses, which are not founded and grounded on the right business values and principles, will not survive to operate another day. Well-documented business strategies and visions that are not fine-tuned to adapt to the challenges, may not make it. Gone are the days of rigid and stagnant ways of operating a business. It is time for a business to be positioned in a way that embraces change without overhauling too much of the current *status quo*.

Although the current situation poses a lot of unknown and undefined new risks to legal practices, locally and globally, law firms that can adapt swiftly to the changing environment will have a good chance of surviving this storm. It is true that many of the processes and systems in place will be rendered useless and not viable in this new environment. For any business to be successful, including legal practices, those in positions of authority must adopt methods that conform to the existing environment.

In recent years, technological advancements have been introduced to the world and yet, many companies still prefer the traditional ways of doing business. It is now time for the business sector to realign and relook at their strategies and set their focus on technological innovations that deliver new service offerings to their clients and customers. The same applies to law firms. A law firm's success will be determined by how legal practitioners are willing and able to effectively tap into technology. In addition to that, certain aspects of the business would require special attention as well. Some of these aspects are discussed below.

Engagement with clients

Due to the COVID-19 pandemic, it is no longer safe or advisable for legal practitioners to conduct face-to-face consultations with their clients. Even though certain regulations may be adhered to, for example social distancing, hand washing, sanitisation and the wearing

of masks, the risk of being infected with COVID-19 is still very high because of the uncertainty of human behaviour and the consequence thereof can be unthinkable. Law firms, therefore, must consider having consultations via secure virtual platforms. It is also true that there are certain risks that come along with such platforms, therefore, it is important to investigate ways to reduce this risk. The cost of using such a platform can also be a determining factor, but the expense can be shared with the client, provided it is discussed upfront. Virtual platforms such as Zoom, allows for the sharing of important documents and/or signed mandates.

Engagement with employees

Now that it is not possible to have every employee at the office at the same time, working from home has become the 'new normal'. Close supervision of individual employees becomes difficult and reliance is now placed on employees to be more disciplined and honest. The use of virtual platforms for regular updates and meetings has become of paramount importance. Employers are realising that working from home produces almost the same results and the employee probably gets more work done. This realisation might result in many law firms opting not to have physical offices or limit the amount of office space required in the future. This will result in reduced office rental costs for law firms.

Engagement with other stakeholders in the legal profession

The legal profession generally prides itself on being conservative. The change brought about by COVID-19 has forced many professions, including the legal profession, to adopt new ways of doing business, including the adoption of information and communications technology (ICT). The concept of electronic filing of documents, virtual court sessions and a paperless office are being adopted by the profession at a very slow rate. On the other hand, most of the people who use legal services have always derived satisfac-

tion from consulting their legal representative face-to-face. COVID-19 brought in the new norm, where court sessions are now conducted virtually, electronic filing has taken centre stage and clients are now e-consulting with their legal representatives.

These changes have brought with them business efficiencies, which are linked but not limited to efficient client service through ICT and the reduction of expenses for office space. The other side of these advantages presents several negatives, which include, job losses for support staff, empty offices as more staff can now work virtually and challenges around the issue of the assessment of a witnesses' demeanour during a trial.

Human Resource (HR) management

The HR department plays a vital role during and beyond the COVID-19 pandemic, in terms of taking care of the welfare of both the organisation and that of the staff. The HR management function, has a responsibility to play a leading role in enhancing a cultural shift from the 'old normal' to the 'new normal'. The HR function should focus on areas, such as the upskilling and reskilling of employees, as well as employee wellness in this difficult time.

- **Reskilling and upskilling:** According to the Cambridge dictionary 'upskilling' is 'the process of learning new skills or of teaching workers new skills' (dictionary.cambridge.org, accessed 1-8-2020) and 'reskilling' is 'the process of learning new skills so you can do a different job, or of training people to do a different job' (dictionary.cambridge.org, accessed 1-8-2020). During the COVID-19 pandemic, a business must find ways to train their employees in order to improve their efficiency when executing their duties and responsibilities. For example, the upskilling of ICT skills to enhance remote communication.
- **Employee wellness:** The recognition of mental health and wellness issues is very critical during and beyond this pandemic. The current state of the economy is dull and financial and

job insecurity is a concern for most employees. This uncertainty will trigger many wellness issues, such as but not limited to, depression, anxiety, stress, etcetera. Therefore, one of the HR's functions include developing strategies and programmes to create awareness and support for employees. For example, partnering with the Independent Counselling and Advisory Services or other organisations, which deal with programmes pertaining to employee health and wellbeing.

Risk management

It is critical for law firms to be aware of how to manage new risks arising from

COVID-19. Depending on the size and complexity of the firm, different risks will be faced and different mitigating factors must be implemented. Law firms must develop risk-adjusted models that assesses their risk as often as possible. The risk-adjusted models will be driven by ever changing government regulations and laws, changes in employee behaviour and market forces.

Conclusion

Legal practitioners are sailing in uncharted waters and there are many uncertainties about what the future holds. Some can find comfort in the fact that, in the past there were other pandemics,

such as the HIV/Aids and H1N1 virus, etcetera. This past knowledge can be used to navigate through this storm. There is no one universal solution to this situation but our ability to adapt and become flexible to this environment will surely determine our fate.

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By
Kristi
Erasmus

The certainty of legal technology in South African legal practice

The year 2020 will forever be remembered as representing the epitome of uncertainty and extraordinary times, and has seen the rapid market integration of legal technology across various industries, including the legal profession. In 2016, LexisNexis and the Law Society of South Africa (LSSA) *Attorneys' Profession in South Africa* survey confirmed that the improved use of technology was considered a priority for business growth in South Africa (SA) with the majority of surveyed members regarding the same as 'very important' (see www.LSSA.org.za). The prominent role of technology in today's legal practice was also highlighted in the 2019 LSSA's *Young Lawyers Survey*, which found that 74,3% of legal practitioners, aged 35 or younger, made use of some form of electronic communication, online research, website updates and developments, social media, online training and/or mobile applications (see www.LSSA.org.za).

Despite the recognition of the importance of technology in conducting business today, the adoption of technology within the South African legal arena remains slow and stagnant among the smaller to medium sized legal firms. There are various debates as to why legal practitioners are hesitant to invest and embrace technology in their practice, with costs and a mistaken belief

that one should have at least a Master's level understanding of technology, programming and coding, often cited as the primary barriers to the integration of technology.

However, hidden in the South African legal landscape is an abundant network of easy to use and cost-effective legal technology, which is easily accessible through a stable Internet connection and the mere click of a button. Although not possible to applaud and reference all available legal technology in SA, this article will focus on legal technology categorised as 'business-to-business' or 'business to lawyers'. Some of the key providers of legal technology in SA will be identified and described herein, in no particular order or ranking.

Practice management tools

Baobab Connect, powered by Legal Connection, provides a centralised platform on which all correspondence regarding a client's matter can be monitored and controlled, ensuring that all communication relevant to a client's matter, whether consisting of e-mails, WhatsApp messages or traditional letters, are secured and easily accessible by authorised users. It further provides accurate reports on work performed, ensuring that all resources, human or otherwise, are being used as effectively and efficiently as possible, making it easy to identify

where resources need to be reallocated or additional team players need to be incorporated. In terms of securing the payment for services to be provided, Baobab Connect provides for the setup of paid memberships or online selling of legal services at fixed prices with quick quotes provided in chat and a wide range of integrated payment options, which ensure that fees can be discussed, settled and paid within a few minutes, promising receipt of payment prior to proceeding with a client's legal matter. Supported by the Hague Institute for Innovation of Law (HiiL) and the Children's Institute, Baobab Connect ensures a centralised approach to legal practice, providing easy access via desktop or mobile, with packages ranging from R 250 per user per month to customisable payment options depending on the user's needs. A small price to pay for convenience, security and management ease (see <https://baobab.law>).

Libryo provides regulatory and compliance solutions to professionals, including environmental health and safety (EHS) managers or legal practitioners, ensuring the easy management of legal obligations and compliance. Libryo provides up-to-date regulatory tracking, which ensures that a legal practitioner is never behind nor reading irrelevant, out of date regulatory material or updates. With new laws added to its platform on

a daily basis, their regulatory coverage provides regulatory and compliance law across 75 jurisdictions, with more than 13 000 users across the globe. The online platform offers various regulatory management services, including translations for multi-jurisdictional businesses, the secure storage of compliance documents for easy access and referencing, as well as control and oversight on compliance status of all operations. Additionally, users also have the ability to create tasks for themselves or teammates to help keep on top of their legal requirements and to do lists. Libryo technology is based on stable, secure and data rich foundations, with each Libryo product created from the 'ground up'. It is scalable to suit a specific legal firm's needs and is ISO aligned. The greatest part of the Libryo solution is the fact that it is freely available to law firms and its legal practitioners, with the primary aim to establish a unique partnership with the law firm, so that the law firm can itself, through Libryo services and technology, offer the best services to its clients in resolving their legal matters, which has the added benefit of the law firm itself incorporating a new revenue stream into the firm based on client demands for solutions offered by Libryo (see <https://libryo.com/products/>).

Contract management tools

Updraft is an Origin Systems Company. It is a proudly South African product, and provides what is described as a smart contract drafting tool and platform. Updraft uses algorithms and legal databases to mimic and automate contract drafting, which promises to cut the time and costs of drafting contracts by up to 90%. Its unique features include colour coded tracking of contract deadlines, analytic tools for real time reporting, infographics, and secure contract storage and retrieval. Additionally, there is a central repository of all signed contracts, their supporting documents and annexures, ensuring full knowledge and oversight over all contracts and the automatic exclusion of illegal, outdated or unapproved legal terms or precedents, all based on the completion of a simple questionnaire. The cost of R 591 per user, per month, is a minor expense in comparison to the time, costs and energy saved in drafting a contract, and includes the benefit of ensuring one avoids the inevitable and expensive human errors and mistakes incurred in manual contract review and drafting (see www.updraftsoftware.com).

Afriwise is an innovative online platform that provides instant, easy access to critical legal and business related legal intelligence in Africa and assists in

identifying and connecting the right local legal counsel. Winner of the Innovation Award at the 2019 African Legal Awards, Afriwise hosts the largest collection of practical legal intelligence in Sub-Saharan Africa, having fully mapped the legal environments in 11 African countries to date, with new countries being added on a regular basis. With the combination of powerful technology and top in-country legal counsel knowledge and experience, Afriwise provides current, reliable and area-specific answers to legal and regulatory questions in various African states anytime, anywhere. With various subscription options and custom solutions available, Afriwise offers fully tailored subscriptions that start from R 375 per month for a legal practice area. Afriwise is the ideal partner in accessing relevant legal information and overcoming compliance challenges when dealing with African clients or African business transactions (see <https://afriwise.com/>).

Epoq Legal has simplified the drafting of legal documents and contracts by way of technology that replicates the question and answer consultation between a legal practitioner and a client to create a bespoke legal document in real time. Questions have helpful explanations and searchable guidance notes, all written in plain English so that anyone can create a legal document. One underlying template can create thousands of permutations, which are designed to meet the unique needs of the end user's requirements, based on their specific circumstances. Epoq Legal provides both family and business legal services, typically used by insurers, banks, law firms and other financial service providers to meet the legal needs of their clients. They are trusted by over 60 South African brands including companies in the United Kingdom and the United States. Epoq Legal's services are priced according to the technological deployment required, as well as the volume of users who will access their service, typically under R 50 per year when made available to insurance policyholders, thus creating value for both their client and their end users at the fraction of traditional costs. Their JusDraft in-house legal document drafting tool, created in association with HiiL's Innovating Justice Challenge, propelled Epoq Legal into the finals at the 2019 African Legal Awards (see www.epoqlegal.co.za/about).

Contracts Tech offers AI Smart Contract Creation, based on dynamic questionnaires that guide a user through a series of questions relevant to the contract itself. Contracts Tech ensures that all details are covered and that the necessary legal documents are assembled and are compliant with the applicable laws, creating a tailor made contract within minutes. Contracts Tech additionally

offers electronic signature management that ensures that all the required signatures are obtained, with a complete audit report on relevant correspondence, which dates when same was sent and received, as well as when documents were viewed and signed, with all contracting parties receiving a final copy of the signed contract on completion. Contracts Tech ensures that important contact dates, lapses and renewals are never missed by providing a platform for the management of all contracts and documents in one place, setting reminders for important dates and saving document information with related parties and participant details. Through the collaboration and input by various legal experts across various fields, Contract Techs has also automated the most used contract templates, which are regularly updated and stored in a database together with other useful legal documents that can be retrieved by the mere click of a button, providing immediate search results for any phrase or word contained in the user's legal documents, including scanned PDF documents. Given that Contracts Tech is cloud based, no additional software needs to be installed. All contracts are offered in a simple word.docx format that are real text searchable. Contract Techs offers a basic account for single users, which is free and includes access to common document templates that can be downloaded at a small fee, while subscription packages are offered from R 799 per month, which provides access to all document templates with ten downloadable documents per month, electronic signature of five transactions per month, full document management, 5GB of storage, team management services with access rights and full text searching (see <https://contracts.tech/>).

Security management tools

In a recent Legal Insurance Cover in South Africa Law For All survey (www.lawforall.co.za), *Surveying the Legal Landscape in Lockdown* (www.futurelaw-faculty.online), 59% of the legal practitioners surveyed were concerned about online security and rightly so, given the increased risks and possibility of cybersecurity breaches and 'the coronavirus era phenomenon, Zoombombing', as experienced by the programming committee of the National Assembly (Toby Shapshak 'South Africa's Parliamentarians Zoombombed with Porn Images' www.forbes.com, accessed 31-7-2020). With the Protection of Personal Information Act 4 of 2013 (POPIA), sensitive information and data that legal practitioners inevitably deal with, namely protecting the confidentiality of clients and their documents, correspondence and negotiations, is a major concern for many legal practitioners who have

thought about incorporating web-based legal technology into their practice but shy away from the same given the risks of data leaks and accessibility by unauthorised persons. However, a block chain based solution is offered by Custos. As the first company in the world – with clients across four continents – to use block chain technology in protecting against and detecting sensitive data and information leaks. Custos uses patented block chain technology together with forensic watermarking, which ensures the safe keeping of confidential files and prohibits the online or offline sharing of same, offering decentralised leak detection across the globe, identification of leaks with precision and instant infringement reports with tiered detection for tamper proof incrimination, which document protection features can be integrated into any enterprise information management system. Service packages are tailor-made depending on the user's needs, infrastructure and business type, with payment by way of instalments or by way of one flat rate based on enterprise pricing. Custos promises to safeguard sensitive and confidential client information and data at a price affordable to the user and their needs. This is a small price to pay for mitigating and preventing the extraordinary costs in damages and loss of reputation that could be incurred where confidential client data is leaked or hacked (see www.custostech.com).

Exigent Group Limited needs no formal introduction and has been a key player in legal technology service offerings for individuals, sole or small practitioners and big corporates for many years. Although exigent offers various legal tech products and services, two deserve specific mention. Exigent's Contract Management Solution, Chameleon

is an end-to-end contract and obligation management tool that provides insights throughout the contract lifecycle. It includes Scarlett, Exigent's proprietary AI-based auto-extraction tool that has unlimited applications across many industries and departments. Scarlett is powered by machine learning trained by legal professionals, financial experts and data scientists, which ensures faster and more accurate extraction and input of contract data. Data that has been smartly selected is automatically placed in a data pool, providing around the clock accessibility to important data in a universal format to ensure consistency throughout one's legal practice or business. Exigent's impressive list of clients have already put Scarlett to work in contract review, London Inter-bank Offered Rate (LIBOR) transitions and compliance. Additionally, Scarlett provides searching features beyond traditional keyword searches by using pattern recognition and placing words in context. Scarlett promises to provide all phrases, sentences and paragraphs relevant to the user's search within milliseconds, providing faster answers, minimised risks, and time effective searches, which eliminates human error and oversight mistakes.

Apart from Scarlett, Exigent also offers Chameleon DocBuilder, Exigent's customised document automation tool. The solution is designed and built based on each client's requirements and allows users to build a legal template, which is then filled in and completed based on the answers provided to simple, plain language questions, allowing for the automatic generation of contracts and legal documents that are fully customisable based on a user's specific needs or requirements. One of the key features of Chameleon is the fact that it provides so called 'quick data population', capturing

all information and data required to complete a contract and document, making it easily accessible should it be needed for another contract or legal document. Chameleon can be fully integrated with DocuSign, which allows for the signing, sending and receiving of fully executed contracts without using a printer, pen or manual scanner. Both Scarlett and Chameleon's price is based on the user's needs, with Exigent providing bespoke pricing based on individual firm and company needs, ensuring the provision of cost effective services of the highest legal quality possible (see www.exigent-group.com).

Conclusion

The cost and time saving benefits of the legal technology discussed above is a minimal amount to pay to reap the benefits and rewards in meeting the instant gratification expectations of clients, exceeding billable hour targets and utilising data to drive real actions and ensure the growth of one's legal practice and service offerings.

The legal technology mentioned herein is only representative of a few of the many key players that are shaking up the traditional practice of law, saving time and costs in legal service offerings and ultimately preparing the legal field for the future of law and legal practice, which is a definite certainty, despite the uncertain and extraordinary times we currently find ourselves in.

Kristi Erasmus BCom Law (UJ) LLB LLM (cum laude) (Stell) Post Graduate Diploma in Futures Studies (Stell) is the Head of the Futures Law Faculty and the Director of the Institute of Legal Practice Development and Research in Cape Town. □



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By
Sujata
Balaram

Mental health and the workplace: The role of the employer

Mental health has been an issue that has been of concern for some time now, but since the start of the COVID-19 pandemic around the globe, attention to this issue has increased. According to an online survey conducted in April by the South African Depression and Anxiety Group (SADAG) on COVID-19 and Mental Health, 59% of the surveyed people suffered from stress prior to the lockdown and 65% felt stressed during the lockdown (www.sadag.org). These statistics point to the reality that almost every person will experience some sort of mental illness during their lifetime. The worrying issue is not the fact that people suffer from mental illnesses but rather the stigma that is attached to it, which can hamper the way forward to help those who suffer from such an illness. The workplace plays an important role when it comes to building a way forward, and the need for both employers and employees to be able to create and develop understanding is vital.

According to a 2017 study, conducted SADAG on 'Mental Health and Stigma in the Workplace', 72% of the surveyed people said that mental illness was affecting their work performance and that their attempts to seek an understanding from their superiors were generally futile since 69% of them displayed indifference and a negative attitude (www.sadag.org). Such attitudes need to change if employers want a healthy and progressive environment for their workers. Cases over the years have pointed to this need and have created a kind of precedent that mental illness is not to be taken lightly and should not be a ground for discrimination and exclusion. Furthermore, employers will have to be comprehensive in their inquiry/investigation regarding the link between the mental health and performance of their employee before they decide to take a drastic step such as dismissal.

In *Independent Municipal and Allied Trade Union obo Strydom v Witzenburg Municipality and Others* [2012] 7 BLLR 660 (LAC) the court held that a thorough investigation was not carried out by the employer in order to conclude that it was

unable to adapt to the employee's working conditions so as to accommodate the incapacity (mental illness) or that it was unable to offer the employee a suitable alternative position. The dismissal of the mentally ill employee was, therefore, unfair added to the fact that the employer did not actively take steps to eliminate the stressors that contributed to the mental illness of the employee. In *L S v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 2205 (LC) the court similarly held that the dismissal of an employee who suffered from a mental illness was unfair because the employer failed to investigate the performance of the employee. The court went on to state that mental illness is not a wilful denial by the employee to perform but rather their inability or incapacity to perform, and such needs an approach of understanding from the employer.

Marsland v New Way Motor and Diesel Engineering [2008] 11 BLLR 1078 (LC) brought to light that the discrimination of a person based on mental illness can impair the fundamental dignity of a person as a human being or affect them in a comparable, serious manner. The recent case of *Jansen v Legal Aid South Africa* [2019] JOL 42192 (LC) held the same and further stated that the employer had knowledge of the employee's disability (mental illness) and, therefore, was under a duty to reasonably accommodate such an employee but failed to do so.

The first two cases saw mental illness as being an incapacity, while the second two cases saw it as being a disability. Regardless of the manner in which the court decides to view a case, it is evident that the courts do not tolerate slackness by an employer when it comes to understanding, accommodating and investigating the position of an employee's mental health. Reasonable steps will, therefore, need to be taken by the employer. Such steps cannot be dictated by law as the needs of every employer differs, however, should any matter reach the courts, each situation will be decided on its own merits.

In order for employers to ensure that the stigma associated with mental illness is eliminated and reasonable attempts to

assist their mentally ill employees are made, the following can be done:

- Create a workplace environment that promotes the reality and acceptance of mental illness and breaks the negative associations attached to it.
- Provide education to management and human resources on how to understand, manage, support and assist mentally ill employees.
- Promote assistance programmes (such as mental health awareness, stress management and counselling) to employees.
- Refer mentally ill employees to mental health care practitioners or programmes.
- Implement flexible working hours or allow for temporary remote working when it may be needed.

With the rate of mental illnesses climbing due to the lockdown and the general COVID-19 situation (as illustrated in the statistics mentioned above), it is vital that employers find a way to balance the needs of business and the needs of its employees to ensure that productivity is maintained and mental health is supported.

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DR

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- **Suicide Helpline**
0800 567 567 or 0800 456 789
- **Substance Abuse Helpline**
0800 12 13 14.



By
Carl
Holliday

Accounts receivable: Cash flow analysis

Cash is the lifeblood of business. Accounts receivable refers to the unpaid accounts for work done by the law firm. An analysis of the composition of these accounts reveals profound insights into the financial health of the practice.

Depending on the nature of an attorney's practice, the composition of individual accounts receivable can vary greatly. Often a good mix of disbursements and fees occur on a single account, but an account composed exclusively of fees is also possible. Advocate accounts are simple in this regard: Fees only, no disbursements.

Management accounting is quick to provide guidelines concerning the tracking of financial performance, with the emphasis on average invoice values, reducing debtor days (which deals with clients, not proceedings dealing with s 65 of the Magistrates' Courts Act 32 of 1944) etcetera. Most of this advice ignores a simple yet powerful truth, which is, unlike an advocate, an attorney by definition is an agent, working simultaneously for own account and covering costs on behalf of a client. An attorney's practice is largely unique in the world of management accounting and failure to appreciate this fundamental difference, flaws many management models, financial reporting systems and cash flow management techniques.

Identifying disbursements

A disbursement has two unique identifying characteristics:

- First, it is defined by a source document. A disbursement is invariably paper based and there will always be an invoice from which the amount can be verified.
- The second defining characteristic is the cash flow incurred: The attorney is invariably out-of-pocket for the value of the disbursement, and any payment received only constitutes a refund.

The arbitrary nature of fees and *spes* (an expectation) of payment

A professional fee, on the other hand, is an arbitrary value placed on work done,

where payment is subject to negotiation, and typically still at a future date. At the time a fee is charged to an account, no payment has been received, but a hope of payment is created with the client, a mere *spes*. In a certain sense, the fee has not cost the firm, and any cash flow implication is at a future date. If a discount is given, an attorney merely reduces their hope of future payment, they do not suffer any immediate cash flow implications.

Common items charged to client accounts are often considered disbursements, when these are in fact fees. Consider a charge for travel: Where an invoice is available for travel, this should be recovered directly as a disbursement. Where the value of the travel is arbitrary, such as an attorney who drives their own vehicle, the appropriate charge is as a fee for travel time. The value of this travel is subjective and arbitrary. Since there is no underlying invoice on which to found the cost of the travel, this must of necessity be a fee. However, in the event of air travel or using a ride hailing service, such as Uber, there is always a source document as proof of the value, and nature of the disbursement. The invoice is not arbitrary. The same applies to photocopies: Where an invoice exists from a third party printing company, this is recoverable as a disbursement, if no invoice exists, the charge for producing photocopies is arbitrary and raised as a fee. Expenses such as fuel, rent, salaries etcetera cannot be directly recovered from any client as a disbursement. Any item not invoice based and recovered from a client forms part of the service rendered and constitutes a fee, subject to VAT.

Failure to distinguish fees and disbursement have serious implications for determining profitability and general financial success.

For example, an attorney charges R 400 for professional services.

On invoice one an additional R 100 for a common disbursement, such as service by the Sheriff, is reflected. On receiving payment, the turnover on the account amounts to R 500. The R 100 disbursement constitutes only a refund, while the fees amount to R 400.

On invoice two, however, the disbursement amounts to R 1 600. The turnover

on the account amounts to R 2 000, with fees remaining at only R 400.

Confusing disbursements with fees ignores the refund nature of the disbursement, and undermines the profitability of the firm. Partially the problem starts with the terminology employed. Referring to any charge raised against a client account as a 'fee' does not provide clarity as to the nature of the transaction. A fee should only be charged for work done. Disbursements reflected, should be clearly identified by direct payments, such as electronic fund transfers or cheque payments from trust or business accounts, or by an agent's journals where a business journal entry is used to debit the client and credit the creditor. The Sheriff may indeed charge a fee in his books for the service required, but in an attorney's books, the Sheriff's charge is not a fee, but a disbursement. The use of clear, unambiguous terminology, supported by accurate transaction processing that enforces this model will provide greater clarity as to the nature of charges raised and the attorney's potential cash flow implications.

There is a hidden danger in a low fee transfer environment. For the majority of Value Added Tax (VAT) vendors, VAT becomes payable as soon as an invoice has been issued, regardless of when payment is received. This, of necessity, implies that VAT payments to the South African Revenue Service would have to take place before the fee revenue is realised, exacerbating an already precarious cash flow crisis.

Spending cash is only derived from fees. Where expenses exceed fee revenue, it would become impossible to cover all obligations. Profit is derived from fee revenue, less expenses.

Trust transfer analysed

Based on a proper understanding of the nature of fees and disbursements, a clear picture may be formed of the nature of current and future cash flow analysis. An attorney's custom accounting solution provides fast, accurate trust to business transfer mechanisms, to balance client business and trust ledgers. These transfer functions allow ledger entries on multiple accounts and a single interbank account transaction (compare accounting r 54.14.12 from the Final

rules as per ss 95(1), 95(3) and 109(2) of the Legal Practice Act 28 of 2014), reducing the risk of processing errors and bank charges. To continue the examples above, the disbursement portion of a trust transfer are not available as cash, the very refund nature implies that an attorney has not earned new cash, but has merely been repaid that what was formerly spent. The fee portion of the transfer is not a refund, but constitutes free, available cash. This free cash is what is applied to cover expenses: Rent, salaries, Internet etcetera. Where the fee revenue falls below the budgeted expenses, some expenses must remain unpaid. Whereas disbursements merely imply a refund, fee revenue is applied towards expenses. Expenses reduces a firm's profit, and are not directly recoverable from a client.

In addition, where professional remuneration is based on revenue derived from fees, this confusion erodes the

firm's profits. Consider remuneration calculated on invoice two above: Calculating remuneration on turnover of R 2 000 implies that the cash value of R 1 600 refunded, will be applied towards remuneration. This means that cash, which is effectively unavailable, is applied towards paying the salary expense. Not only is the firm out-of-pocket for the value of the disbursement, this value is now allocated to an expense. Imagine the disappointment and confusion after signing off on a major trust to business transfer and realising the expected cash is not available in the account.

Money, which does not exist, cannot be paid out.

Any sophisticated attorney's accounting system should provide for a clear breakdown of fees and disbursements on a transaction level. It should also be able to analyse a trust to business transfer to indicate the individual ledger accounts

involved and the individually separate and distinct amounts transferred as either fees or disbursements. Additional management reports, identifying those accounts subject to disbursement transfers and a breakdown of cash flow down to expense level should be expected.

Cash flow analysis should start with individually separate and distinct transaction processing, followed by accurate trust to business transfer analysis, to separate fee revenue from disbursement refund. The analysis should continue to allocate available cash to budgeted expenses and finally determining profit.

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By
Ruan
Botha

The circular definition: Sars' civil judgment for recovery of tax debt

In a string of recent judgments dealing with the South African Revenue Service (Sars) appointing agents to collect outstanding tax debts, the case of *Barnard Labuschagne Inc v SARS and Another* (WCC) (unreported case no 23141/2017, 15-5-2020) (Mantame J) sheds some light on taxpayer's recourse prior to the granting of a 'civil judgment' in terms of s 174 of the Tax Administration Act 28 of 2011 (the Act).

It has become a common occurrence when taxpayers are not in a position to pay their tax debt for Sars to appoint agents to collect the outstanding tax debt. The Act was promulgated with the motive of efficient and effective collection of tax and, therefore, enables Sars, in terms of s 172 – to file with the clerk or registrar of a competent court – a certified statement setting out the amount of tax payable. This certified statement may, in turn, be treated as civil judgment, lawfully given in favour of Sars, who will then utilise the certified statement to recover the taxpayer's tax debt.

When the legal practitioner in you thinks that the aggrieved taxpayer must apply for a rescission of the civil judgment

– you will certainly tumble down the rabbit hole.

The dispute

In the case of *Barnard Labuschagne Inc* the applicant brought a rescission application to the High Court against the respondent for a recovery judgment obtained in the same court, based on the applicant's tax debt comprising of value added tax (VAT), pay as you earn (PAYE), unemployment insurance fund (UIF) and skills development levies (SDL). It was not the applicant's contention that notice was not given of the tax debt or recovery proceedings, but rather that the certified statement filed by Sars constituted a civil judgment in the ordinary sense.

It was further submitted by the applicant that they may approach the court in terms of s 105 of the Act read with r 31(2)(b) and r 42 of the Uniform Rules of Court for the judgment to be rescinded. Lastly, and on a constitutional point, the applicant submitted that should the court find that they do not have jurisdiction to rescind judgments granted in terms of ss 172 and 174 of the Act, these sections should be declared constitutionally invalid. The applicant's constitutional

argument stemmed from their rights, as set out in ss 34, 165 and 169 of the Constitution, which enables the applicant to approach the same court that granted a judgment for relief.

The respondents, on the other hand, submitted that the applicant ought to have followed the dispute resolution process as contemplated in ch 9 and s 104 of the Act before approaching the High Court. It was further submitted by the respondents that the court did not have jurisdiction to rescind the civil judgment in that it lacked the determining character of a judicially issued judgment, as the tax debt may be subsequently altered, amended, erased or withdrawn as contemplated by ss 174, 175 and 176 of the Act. The respondents argued that the judgment itself was not a civil judgment in the ordinary sense and, therefore, not subject to rescission.

On the constitutional point, the respondents advanced the argument that no prejudice or unfairness was suffered by the applicant, as they failed to pay their tax liabilities and did not comply with the procedures as set out in the Act. Should the applicant have fully ventilated their tax position through the ch 9 pro-

cedures, they would, should they have wished to do so, have been able to approach the court.

The judgment

The court held that it was Sars' mandate to collect tax debts and for the taxpayer to comply with the Act, which was 'promulgated for the cultivation of tax compliance other than to oust the jurisdiction of the Courts as alleged'. On the question of whether the High Court has jurisdiction to rescind a civil judgment granted in terms of ss 172 and 174 of the Act, there must firstly be a civil judgment of the court in existence. It was determined that ss 172 and 174 of the Act constitutes a lawful enforcement mechanism and that there is no finality to this enforcement mechanism as it cannot be accorded a status of a judgment.

The certified statement filed does, therefore, not constitute a civil judgment nor is it a civil judgment as is evident from ss 172 – 176 of the Act. It only serves as an enforcement of an assessment issued by Sars. Instead of adopting the 'pay now, argue later' principle, the submissions made by the applicant created the impression that the taxpayer downplayed the fact that the tax debt needed to be resolved, whereas the dis-

pute could have been properly ventilated prior to filing of its papers in the court. It is thus clear that there was no judgment to be rescinded by the court.

In analysing the constitutionality of ss 172 and 174 of the Act, the court applied the common law wherein the party seeking rescission must present 'sufficient cause' and/or 'good cause' in a case where the judgment given is final. As stated above, s 174 only breathes life into the certified statements to the point where it is treated as a civil judgment, lawfully given for purposes of recovering a tax debt. The applicant could not prove that the judgment had final effect and the rescission under the common law, therefore, had no merit. The court further held that the applicant could not rely on r 42, which deals with the variation and rescission of orders as there is no judgment to be rescinded.

The applicant also prayed that should the judgment not be rescinded, the court should declare ss 172 and 174 constitutionally invalid, as it impacted the applicant's access to court. The applicant's constitutional challenge failed as it was clear to the court that these sections cannot be unconstitutional and cannot impact on the constitutional rights contained in ss 34, 164 and 169 of the

Constitution in instances where the applicant disregarded the provisions of the Act and chose its own jurisdiction by applying to the High Court.

The taxpayer's recourse

The taxpayer has the full arsenal of ch 9 of the Act at their disposal, which includes objections, appeals, application to the Tax Court and the Promotion of Administrative Justice Act 3 of 2000 reviews to the High Court. Only when all avenues have been exhausted in terms of the Act, may the taxpayer approach the court – it is thus not for the taxpayer to choose the platform for adjudication where another recourse is available.

In essence, a certified statement obtained by Sars from a court with competent jurisdiction over the taxpayer will be treated as a civil judgment for purposes of recovery of a tax debt. As such, it does not constitute a judgment in the ordinary sense this cannot be rescinded.

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By Dr
Ciresh
Singh

Simultaneous or separate: A relook at *Absa v Mokebe* and the provision for hearing monetary judgment and executability applications simultaneously or separately

The execution process in South Africa (SA) has always followed five simple steps, namely –

- sending a letter of demand;
- serving a summons;
- granting a monetary court order;
- obtaining a warrant of execution; and
- proceeding to a sale in execution.

Rule 46 of the Uniform Rules of Court added a new sub-step during the execution of immovable property, as it requires a plaintiff to seek a court order declaring immovable property specifically executable. In addition to adding a new sub-step, r 46 also added an extra level on judicial oversight into the execution process (for a review on r 46 see Ciresh Singh 'To foreclose or not to fore-

close: Revealing the "cracks" within the residential foreclosure process in South Africa' (2019) 31.1 SA Merc LJ 145 and Ciresh Singh 'A critical analysis of home mortgage foreclosure requirements and procedure in South Africa and proposals for legislative reform' (unpublished PhD thesis, University of KwaZulu-Natal, 2018). The decision in *Absa Bank Limited v Mokebe and Related Cases* 2018 (6) SA 492 (GJ) further changed the process for executing against immovable property. In this case, the Full Bench of the Gauteng Local Division of the High Court, Johannesburg held that an application for monetary judgment and an order of execution against immovable property must be brought simultaneously before

the court. The judgment was followed by the Western Cape Division of the High Court in *Standard Bank of South Africa Ltd v Hendricks and Another and Related Cases* 2019 (2) SA 620 (WCC) and was further supported thereafter by several Practice Notes and Directives by various divisions of the High Court. The recent decision of *Changing Tides 17 (Pty) Ltd NO v Frasenburgh* (unreported case no 19353/2019, 2-7-2020) (Rogers J) the WCC has questioned this new process. These three decisions will be considered below.

The Mokebe case

In the *Mokebe* case, the Full Bench sought to resolve the issue of whether an appli-

cation for a monetary judgment and an order of execution against immovable property must be brought simultaneously or separately before a court. The court considered the history of the foreclosure process and expressed concern over the lack of consistency and clarity. This lack of clarity resulted in different approaches by creditors for the enforcement of their claims. In particular, while some creditors initially proceeded to obtain a monetary judgment against their debtors, and after some months proceeded to obtain an order of execution (ie, separately); other creditors proceeded to obtain monetary judgment and execution in a single application (ie, simultaneously). The court held that there was a need for certainty and consistency in practice and stated that an application for a monetary judgment and an order of execution must be brought simultaneously. The court confirmed that the monetary judgment is an intrinsic part of the cause of action in foreclosure cases and it is inextricably linked to the claim for an order of execution. It was thus both necessary and desirable for these issues to be heard simultaneously and not piecemeal. The court further confirmed that it was the duty of the creditor to bring its entire case, including monetary and execution claims, before the court in a single proceeding.

The Hendricks case

A few months after the *Mokebe* decision, the Full Bench of the Western Cape Division delivered judgment on its interpretation of r 46A in the *Hendricks* case. The court followed the *Mokebe* judgment and held that monetary orders and orders of execution against immovable property must be brought simultaneously, and not on a piecemeal basis. The court found that while the Constitution and r 46A require judicial oversight during the foreclosure process, the manner and extent of such oversight is treated differently by different courts. Such diver-

gence in views (opinions and practices by legal practitioners, creditors, academia and the court) and lack of consistency between judges has the potential to harm the dignity and integrity of the courts. The Western Cape Division found that there was a great need for clarity to be established in foreclosure, and directed that the Practice Manual for the Division be amended to establish a uniform approach. The court further held that there was a need for national uniformity among the provincial divisions.

The Fransenburg case

On 2 July, the Western Cape Division once again considered the issue of whether an application for monetary judgment and executability must be brought simultaneously before the court. Rogers J criticised the finding in *Mokebe* in that the judgment failed to allow the court the discretion to grant a monetary order and postpone the order for executability against the immovable property. In the *Fransenburg* case, the homeowner was due to receive a pay-out on an investment in May 2021, the proceeds of which would easily settle the outstanding mortgage balance. Rogers J found that under such circumstances it would be just to grant the plaintiff a monetary order, but postpone the order of executability until May 2021.

Rogers J held there was nothing in the court rules that compelled a mortgagee to seek an order of executability and its failure to do so did not amount to it losing its security against the mortgage property. Referring to *Gundwana v Steko Development CC and Others* 2011 (3) SA 608 (CC) and *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 (4) SA 314 (GNP), the court found that it was competent for the court to grant monetary judgment in favour of a creditor without ordering an order of special executability (see *Fransenburg* at para 35). This would naturally be the case where the r 46 assessment reveals

that there are other assets or alternatives that can be exercised to satisfy the plaintiff's claim.

Conclusion

The *Mokebe*, *Hendricks* and *Fransenburg* judgments expose a severe lack of consistency in the foreclosure process and in particular the application of r 46. It has been a long established practice that a creditor must first seek monetary judgment against a debtor, and only thereafter, seek execution against the debtor's immovable property. The *Mokebe* and *Hendricks* judgments appear to have changed this practice, as they require both monetary and execution applications to be brought simultaneously.

I am not in favour of the approach that monetary and execution applications must be brought together. While it is accepted that this may reduce the litigation costs attached to foreclosure applications, it places the debtor at a disadvantage, as the court will only hear their matter once. In other words, if monetary and execution applications are brought separately, judicial oversight takes place twice, providing more judicial protection to the debtor and further reduces the chances of abuse of process. The *Mokebe* and *Hendricks* approach appears to be contrary to the objective and spirit of the Constitutional Court decisions in *Jaftha v Schoeman and Others*; *Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) and *Gundwana* and ss 26 and 34 of the Constitution. The decision in *Fransenburg* is thus much welcomed as it directs the court to actively consider whether there are alternatives to execution and to order the execution against immovable property as an absolute last resort.

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The slow rise of women in the legal profession

By
Patrick
Bracher

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When I read that the United Kingdom (UK) is celebrating a centenary of women being able to enter the legal profession in 2020 it got me thinking about our own lamentable beginnings and where we are now.

The first woman to appear in the law reports seeking to be admitted as an attorney was Sonya Schlesin (*Schlesin v Incorporated Law Society* 1909 TS 363) who had been articulated to Mr Gandhi. Based on some convoluted reasoning, the Transvaal Supreme Court held that because the word 'attorney' had always referred to people 'of that class who have always been capable of being attorneys', namely men, Bristowe J went on to say that admitting women as attorneys could also lead to them being admitted as advocates 'a change which would mean an enormous difference in the practice of the courts in this country' and he clearly did not mean a positive change. Ms Schlesin was turned away and had to pay the law society's costs of the application. Presumably hoping for more liberal justice in the Cape Supreme Court, Madeline Wookey, sought to compel the Incorporated Law Society to register her articles of clerkship with an attorney and notary practising in Vryburg (*Wookey v Incorporated Law Society* 1912 CPD 263). She was right. Maasdorp JP found that because there was no positive law in existence disqualifying women from being enrolled as attorneys, her application succeeded. Maasdorp JP came to the conclusion that women were equally entitled with men to be enrolled

as attorneys on giving proof of the necessary qualifications. The laws, he held, made enrolment compulsory except for good cause shown. As no good cause had been shown why women should not be entitled to sign articles and to become attorneys once they attained the required qualifications, the application was granted.

But Madeline Wookey failed on appeal in front of three judges of the Appellate Division (*Incorporated Law Society v Wookey* 1912 AD 623) whose remarks in the judgment are still quoted in Constitutional Court judgments today as examples of prejudice. Judge Innes who was the Acting Chief Justice spent pages examining Roman, Roman-Dutch, foreign and South African law only to come to the conclusion that where the law referred to 'persons' being admitted as attorneys it referred only to male persons. At the same time as expressing 'real regret', he found that the 'question is not whether this lady is likely, adequately, and satisfactorily to discharge the duties of a legal practitioner'. The position was 'simply' that she was not a 'person' referred to in the Cape Charter of Justice of 1883. The court said: 'If it was rightly answered in the court below, the result will be materially to widen the area of women's economic activities, though that be done by opening to a host of new

competitors the doors of an already congested profession. If it was wrongly answered, then the law of the country will be denying to one-half of its citizens, on the mere ground of sex, the right of employing their natural abilities in the pursuit of an honourable calling'. Innes ACJ held that the Cape court was wrong. His fellow judge, Solomon J, also expressing regret, held that 'the central fact which we have to bear in mind, in approaching the consideration of these enactments, is that from time immemorial men only had been admitted and enrolled as attorneys of the Court'. This seems to me to be an expression of regret similar to that of the Walrus in Lewis Carroll's poem 'The Walrus and the Carpenter' where, after eating all the oysters he said to them "I weep for you," ... "I deeply sympathise" (Lewis Carroll *Jabberwocky and Other Nonsense* (Penguin Classics 2014)). Solomon J also found against the applicant Ms Wookey 'mainly on the ground of the immemo-

rial practice of centuries’ of excluding women from the attorney’s profession. De Villiers JP, concurring, held that a woman was not a ‘person’ for the purposes of the Charter. Extraordinarily he reasoned: ‘Accordingly we find that, *inter alios*, boys under 17 years of age were excluded from the profession of attorneys or advocates, as also women, the deaf, and the blind. The later Christian Emperors introduced further restrictions, which were also adopted into Dutch practice: Pagans, Jews, pronounced heretics, persons, for example who deny the Trinity. ... Some of these restrictions are undoubtedly obsolete. It would be difficult to maintain that a blind person duly qualified in other respects cannot be admitted as an attorney on the ground that he cannot see and, therefore, cannot pay the proper respect to the Magistrate. The prohibitions, too, based on race or religion are notoriously obsolete. Can the same be said of the prohibition based on sex? I am of the opinion that the answer must be negative.’ Despite admitting that many of the legal disabilities under which women had laboured in the past had been abolished, this judge relied on the fact that from Roman times down to his own day the profession of an attorney had been exercised exclusively by men and, therefore, the law must refer to men only.

Ms Wookey lost her appeal.

This was followed by some obnoxious outpourings in the South African Law Journal. RPB Davis in ‘Women as Advocates and Attorneys’ (1914) 31 SALJ 383 (who subsequently became Mr Justice Davis, presumably with the emphasis on ‘Mr’) poured out his prejudiced thoughts by quoting a 40-year-old US judgment (*Matter of Goodell* 20 Am Rep at 42) which said that ‘person’ could not include females: ‘We cannot but think the common law wise in excluding women from the profession of the law. The profession enters largely into the well-being of society; and to be honourably filled and safely to society, exacts the devotion of life. The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the world, and their maintenance in love and honour. And all life-long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of law, are departures from the order of nature; and when voluntary, treason against it.’ The US judge continued that public policy did not expect the court ‘to tempt women from the proper duties of their sex by opening to them duties peculiar to [men]’ because ‘[t]here are employments in life not unfit for female character’. The article is worth reading in full to understand the extent of prejudice expressed by the US judge. Davis said, in his 1914 article, that the words

of the US judge were ‘as fresh today as when they were uttered close upon forty years ago’ and suggested the remarks should be considered by the legislature if it ever thought of changing the law.

Not to be outdone, the former Chief Justice of the Orange Free State, Melius de Villiers wrote an equally prejudiced article ‘Women and the legal profession’ (1918) 35 SALJ 289. After taking for granted ‘for the sake of the argument, that intellectually the average woman will be at least as capable as the average man’ to be an attorney or advocate and that ‘the administration of justice will be greatly benefited by women’ being admitted he went on to say, relying on the ‘interest of the community at large’, that the ‘point is that of Motherhood’. He justified this by saying: ‘For the sake of perpetuation of the race, ... women are by nature what they are; if in the part assigned to women by nature an injustice is done to them or a hardship is inflicted upon them, these are none of man’s doings, nor can he with the best wishes in the world do anything to make things otherwise. A revolt against nature by women may be successful, but it is the community at large that would have to suffer for it. And a revolt against nature is involved in any proposal to allow women to enter into the legal profession as practising members thereof.’

Their entrance into the profession is incompatible with the idea and duties of Motherhood. Women who practise as lawyers will either have to remain unmarried, or to marry on the condition of having no children, or to marry and under normal conditions have children, in which last case a woman will practise at such a tremendous disadvantage to herself, her clients and her offspring for some time before and after giving birth to children that she ought to be precluded from practising’.

Worse was to come: ‘In this country especially, with a native black population increasing at an alarming rate, is it desirable that there should be checks on the normal increase of a native white population?’ De Villiers CJ, then mused over whether women who were no longer capable of motherhood should be allowed into the profession but thought it ‘questionable’ whether at that period of time a woman would care to start a legal practice.

To the credit of Parliament they ignored all these views and showed themselves to be good examples of what De Villiers CJ had condemned as ‘doctrinaire liberalism’, ignoring the suggestion that it was against common sense and a common danger to let women into the profession.

On 10 April 1923 the Women Legal Practitioners Act 7 of 1923 was promulgated by publication in the *Government Gazette* (*The Union of South Africa*

Government Gazette Extraordinary Vol. LII: 10 April 1923: No. 13). It is perhaps fitting that it was a *Government Gazette Extraordinary*.

The Women Legal Practitioners Act, 1923 is short and sweet. Succinctly the law says: ‘Women shall be entitled to be admitted to practise and to be enrolled as advocates, attorneys, notaries public or conveyancers in any province of the Union, subject to the same terms and conditions as apply to men, and any law in force in any province of the Union regulating the admission or enrolment of persons as advocates, attorneys, notaries public or conveyancers shall henceforth be interpreted accordingly’.

Despite the fact that we are only three years away from celebrating the centenary of the admission of women into the profession it has taken a long time to get where we are and we are still not anywhere near where we should be, having women leading in sufficient numbers in all branches of the profession. I have quoted extensively from my sources of information because I suspect that there are still men who would prefer the views of RPD Davis and Melius de Villiers to those of the Parliament of 1923. We need to take stock over the next three years of exactly where we are and how we can get far beyond where we have limped to. We need to take into account of what François Poullain de la Barre, a little-known 17th-century feminist, said: ‘All that has been written about women by men should be suspect, for the men are at once judge and party to the lawsuit’ (Deirdre Bair *Simone de Beauvoir – a biography* (Simon & Schuster 1990)). As artificial intelligence enters and changes the legal profession we have to be alert to the fact that everything that is downloaded into the electronic system will have been written overwhelmingly by men because of the system that has kept women out of the legal profession in large numbers. In addition, the programming of artificial intelligence is being done mostly by men because that is the current state of the electronic world. Past ingrained prejudices about issues involving women both as professionals and as women subject to the legal system must not be perpetuated by lack of vigilance.

I hope that the Legal Practice Council has made a note of that date, 10 April 1923, so that when the centenary comes around we celebrate the date and commit ourselves to true equality in this and in all other respects relating to our profession.

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The fine line between freedom of expression and hate speech

By
Kathleen
Mukheibir



There is a fine line between the freedom of expression and expression that constitutes hate speech. In our society there is a constant battle as to what can and cannot be said and the consequences the offending nature of one's expression may cause. This was discussed in the case of *Qwelane v South African Human Rights Commission and Another (Freedom of Expression Institute and Another as Amici Curiae)* [2020] 1 All SA 325 (SCA) where the Supreme Court of Appeal (SCA) had to determine the constitutionality of s 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Act) insofar as it relates to the regulation of freedom of expression and hate speech.

Background

The *Qwelane* case came before the SCA from the Gauteng Local Division of the High Court in Johannesburg. The matter came before the court *a quo* when 'an admittedly offensive article' written by Jonathan Qwelane, was published in the *Sunday Sun*. The article was captioned 'Call me names - but gay is NOT okay'. The content of the article illustrated Mr Qwelane's alleged disdain for the homosexual group as a whole. The content of the article caused a substantial outcry, in that text that constituted hate speech could be published. Complaints made to the SAHRC alleged that the article intended to be hurtful, cause harm and promote an element of hatred. It was claimed that the article infringed

on multiple human rights conferred on homosexuals.

The South African Human Rights Commission (SAHRC) has a constitutional duty - in terms of s 184(1)(b) of the Constitution - to 'promote the protection, development and attainment of human rights' and has a subsequent power 'to take steps to secure appropriate redress where human rights have been violated'. Section 2(f) of the Act states that the object of the Act is 'to provide remedies for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been infringed' in terms of s 20(1)(f) of the Act the SAHRC may institute proceedings.

On this basis, the SAHRC instituted proceedings between Media24 and Mr Qwelane, alleging that they had contra-



vened s 10(1) of the Act. Both Media24 and Mr Qwelane instituted proceedings in the High Court with an application to have s 10(1) read with ss 11 and 12 of the Act declared unconstitutional based on the grounds that they are inconsistent with s 16 of the Constitution. A settlement agreement was reached between Media24 and the SAHRC, as a result, Media24 withdrew its application. The proceedings against Mr Qwelane continued in the Equality Court and were subsequently joined to the proceedings in the High Court.

The court *a quo* found the statements made by Mr Qwelane to be hurtful, to have incited harm and generated hatred and, therefore, the content constituted hate speech. Moshidi J dismissed Mr Qwelane's application. He held, *inter alia*, that s 10(1) entailed an objective test and that if subss 10(1)(a) – (c) were read in conjunction with one another, they are in accordance with s 16 of the Constitution. Based on this judgment, Mr Qwelane appealed to the SCA.

The SCA

It must be determined whether ss 10 and 12 of the Act are in fact unconstitutional as Mr Qwelane's application was based

on this ground. The SCA stated that 'a decision in relation to the constitutionality of section 10(1) is foundational to the outcome of this appeal'.

Mr Qwelane's argument was that s 10 of the Act limits the application of s 16 of the Constitution without justification in that the sections of the Act that were applied against Mr Qwelane were stretched far beyond the scope of s 16(2).

The court relied on *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC) to determine the importance of allowing freedom of expression in a democratic state, where it was held that 'freedom of expression is one of a "web of mutually supporting rights" in the Constitution. It is closely related to freedom of religion, belief and opinion (s 15), the right to dignity (s 10), as well as the right to freedom of association (s 18), the right to vote and to stand for public office (s 19) and the right to assembly (s 17). ... The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial.'

The case of *S v Mamabolo (E TV and*

Others Intervening) 2001 (3) SA 409 (CC) was also relied on in this respect where the court held '[f]reedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression – the free and open exchange of ideas – is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought control, however respectably dressed.'

Therefore, as seen from the *Qwelane* case, as well as from the two aforementioned cases, there is great importance in preserving one's freedom of expression, however, that does not mean that the protection of freedom of expression outweighs the significance of other fundamental rights. Our courts illustrated

this in the case of *Mamabolo* above, where the court held: 'With us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression. How these two rights are to be balanced, in principle and in any particular set of circumstances, is not a question that can or should be addressed here. What is clear though and must be stated, is that freedom of expression does not enjoy superior status in our law.'

The limitation of s 10 of the Act

There was never a question of whether s 10 of the Act limits the right of freedom of expression as provided for in s 16 of the Constitution. The question is whether the section in the Act reaches beyond the scope of s 16(2) of the Constitution and, if so, can this be justified? In the *Qwelane* case, the court stated that s 10 does extend beyond the scope of s 16(2). When interpreting the infringements of rights, the test to be applied is an objective one. Therefore, the first question to be asked will be 'was the expression of hatred displayed based on one of the prohibited grounds?' Thereafter, the subsequent question will then be 'did the expression of hatred provoke the causing of harm?' The SCA applied the objective test in terms of s 10 'in relation to the exercise envisaged by section 10(1) of [the Act], one commences by considering whether a person published, propagated, advocated or communicated words based on one or more of the prohibited grounds against any person and then looks to see whether the words complained of could "reasonably be construed to demonstrate a clear intention to be hurtful, harmful or to incite harm, promote or propagate hatred" – as provided for in subsections (a), (b) and (c) of section 10(1) of [the Act].'

What is interesting to note is that the SAHRC, the Minister of Justice and Correctional Services and the Psychological Society of South Africa all conceded that the subsections of s 10 were to be read individually. Because of this, the sub-

sections are applied in the alternative and not conjunctively and so, it could be quite possible that the expression displayed can be found not to be hate speech. The SCA held that this application of the subsections could in fact entail an infringement on the very right the provisions are trying to protect.

The SCA makes reference to Cathi Albertyn, Beth Goldblatt and Christopher Roedere (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (Johannesburg: Witwatersrand University Press 2001) who are of the opinion that the provisions of the Act as a whole are quite frankly, 'exceptionally difficult to understand' and due to this, the average person is in no position to understand what conduct is expected of them.

The court then avers a viewpoint on the problem of curtailing freedom of expression in that 'besides the question of how control could be exercised jurisprudentially in respect of hurtful words, daily human interaction produces a multitude of instances where hurtful words are uttered and thus, to prohibit words that have that effect, is going too far. So, too, a host of jokes might be hurtful to those who bear the brunt of them. Are we to entertain complaints that extend to jokes that are not within the limitations of s 16(2)(c) of the Constitution?'

Judgment

It was determined that s 10 of the Act does reach further than the scope provided for in s 16(2) of the Constitution. Section 10 of the Act was declared inconsistent with s 16 of the Constitution and is therefore, unconstitutional. The SCA held that 'we should be allowed to be firm in our convictions and to differ on the basis of conscience. What we are not free to do is to infringe the rights of others and we certainly are not free to inflict physical or psychological harm on others'.

The court has a responsibility in terms of s 172(1) of the Constitution, once finding that a provision is unconstitutional, to make an order in respect of the particular provision by limiting the retrospective effect and declaring invalid-

ity for a period in order for the relevant body to correct the provision. The court subsequently made the necessary temporary amendments, giving Parliament 18 months to remedy the provision from the date of 29 November 2019. In accordance with s 172(2)(a) of the Constitution, the order of constitutional invalidity was referred to the Constitutional Court for confirmation and their final decision is yet to be handed down.

Conclusion

The SCA made mention of the article by Pierre de Vos 'Why the hate speech provisions may be unconstitutional' (<https://constitutionallyspeaking.co.za>, accessed 4-8-2020) where it was stated that '[i]n a vibrant democracy which respects difference and diversity – also diversity of opinion – it would be dangerous to ban all speech that could be construed as intending to be hurtful to another person merely because of that person's race, sex, sexual orientation, religion, language, ethnicity, culture or age. Some of us remember all too well how the Apartheid government tried to censor our thoughts and our speech. Do we really want to go back to a situation where we are so scared to express our deeply and sincerely held and honest opinions that we shut up because we fear we might be found guilty of hate speech?'

The above extract illustrates that while the regulation of hate speech is important, it must not detract one from the importance that freedom of expression gives an individual. Both rights are equally important, and one does not enjoy superiority over the other. However, one cannot be too quick in finding a form of expression constituting hate speech as what are the implications on one's rights when they feel voiceless?

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

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The fall of SAA: A wage increase demand during economic strain

Picture source: Gallo Images/Getty



By Koshesayi Madzika and Zimbini Mnono

On 15 November 2019, a strike instituted by the National Union of Metalworkers of South Africa (NUMSA) and the South African Cabin Crew Association (SACCA) began at South African Airways (SAA). The strike

resulted from two separate but collateral issues, namely:

- A dispute over a wage increase with the trade unions demanding an 8% increment while SAA only offered 5%, which was not an immediate increase. The wage increase dispute came as a

surprise as the airline had not been able to make a profit since 2011. The unions, however, contended that the mismanagement of the airline should not bear consequences on the employees.

- The second cause of the strike was the announcement by SAA management to restructure the airline and consequently retrenched a large number of employees during the process.

It was reported that the strike casted doubt on the survival of the airline, which had not been profitable for close to a decade (Alexander Winning and Emma Rumney 'Strike pushes South African Airways to brink of collapse' (www.reuters.com, accessed 13-8-2020)). Following a series of negotiations, it was agreed that the wages would be increased by 5.9% over a period of time but that would not be done immediately. However, the possibility of a wage increase being actualised remains obscure as SAA lost about R 50 million a day due to the strike, which thereby worsened SAA's financial crisis.

An analysis of the situation whereby

employees demand wage increases, while the workplace is under economic strain and the possibility of retrenchment for operational reasons is considered herein.

The process of increasing wages under the Labour Relations Act

Previously, neither the Basic Conditions of Employment Act 75 of 1997 (BCEA) or any other law stipulated minimum wages for employees. However, minimum wages are now governed by the National Minimum Wage Act 9 of 2018. In addition, wages are determined in collective agreements or ministerial and sectoral determinations. Under the Labour Relations Act 66 of 1995 (the LRA), wages form part of the terms and conditions of a work contract and form an essential part of the contract. The alteration or increment of wages is normally dealt with through collective bargaining. When there is a failure to reach an agreement through collective bargaining, the parties may resort to conciliation or arbitration. The parties may also resort to industrial action, but they may not do both. In the case of SAA, we submit that the strike option might have caused more harm in deterring the wage increment as a result of the losses incurred than actually increasing the chances of a wage increment.

SAA on life support

SAA confirmed its decision to embark on a restructuring process on 11 November 2019. Out of an approximate 10 000 employees employed by SAA, approximately 944 employees are likely to be affected. The decision to embark on a restructuring process follows a number of years after the airline reported that it has been under financial distress. SAA incurred accumulated losses of R 31,64 billion since reporting as a corporatised entity in 2000 until 31 March 2017. By this time, the debts of SAA exceeded its assets by R 17,802 billion, thus rendering the airline technically insolvent. SAA's road to liquidation was cut short by the government through its financial support. Government recapitalised the Airline by R 10 billion for that fiscal year and by another R 10 billion early in 2018. Despite these efforts, it can be argued that SAA has taken a few steps back on its road to profitability as evidenced by the losses incurred preceding the strike that took place in 2019. Furthermore, according to Hassan Isilow 'S. African Airways suspends int'l flights over COVID-19' (www.aa.com.tr, accessed 14-8-2020)) the position of SAA on non-profitability has recently been exacerbated by COVID-19, resulting in the company's operations being suspended until further notice.

The retrenchment process under the LRA

Section 189 of the LRA allows an employer to dismiss employees due to operational reasons, such as the financial well-being of the business. The crucial question to be determined is whether SAA will be able to fairly dismiss some of its employees in accordance with s 189A of the LRA and to ascertain the borderlines to dismissals authorised under s 189A of the LRA.

Under s 213 of the LRA, situations necessitating dismissal for operational reasons include the financial well-being of the business, the implementation of new technology that essentially makes certain positions redundant or requires employees to adapt to new technology or changes in the organisational structure of the business. SAA must prove the existence of a need to embark on retrenchments and that such need is sufficiently important to justify the dismissals. One predominant requirement necessitating dismissals of employees from SAA is an economic one, namely the need to ensure the continued operation and long-term survival of SAA. Considering the recent decision subjecting SAA to business rescue, the inability to fulfil its salary obligations on time due to cash flow problems, the estimated R 50 million that SAA lost per day due to the industrial action, in addition to debts it accumulated since the year 2000. All the above factors would suffice to show that dismissals are operationally justifiable on rational grounds.

It is evident from the above factors that retrenchments are required for sound economic reasons. In *National Union of Metalworkers of South Africa and Others v Aveng Trident Steel (A Division of Aveng Africa (Pty) Ltd) and Another* [2019] 9 BLLR 899 (LAC) the Labour Appeal Court (LAC) accepted the decline in sales volumes and an increase in base costs as a sound economic reason. Additionally, seeing that the industrial action in support of wage increment put a nail in the coffin, in *SACWU and Others v Afrox Limited* [1998] 2 BLLR 171 (LC), the court found that even operational requirements caused by a protected industrial action may justify a dismissal. In *NUMSA v Driveline Technologies (Pty) Ltd and Another* [2000] 1 BLLR 20 (LAC) the court accepted the employer's inability to pay for transport allowances as an economic necessity falling under the scope of operational requirements.

Apart from the duty to ensure that operational requirement dismissals are implemented in a fair manner, for operational reasons, SAA has the duty to ensure that the employees are retrenched in accordance with the strict provisions of the LRA. Section 189 of the LRA sets the procedure for dismissals for op-

erational requirements and requires a notice to be issued, disclosing all the relevant information including the reasons for the proposed dismissals, any alternatives that SAA considered before proposing dismissals and the reasons for rejecting each of the alternatives. A notice must also contain a date on which the consultation will take place.

Selection criteria

In selecting employees to be dismissed, SAA would have to make use of the methods agreed on during the consultation process. If there were no selection criteria that was agreed on, then SAA would be obliged under s 189(7)(b) of the LRA to conduct the selection according to a method that is fair and objective, namely, *inter alia*, considering factors such as 'the last in, first out' principle, special skills, experience, length of service, qualifications etcetera. Failure to use a fair selection criterion will result in the dismissal being unfair.

Severance pay negotiation

Given the reports that SAA was unable to fulfil its salary obligations, s 41 of the BCEA makes provision for payment of not less than one week's remuneration for every year the employee has worked for the employer. Additionally, the selected employees would be entitled to other benefits including notice pay and to receive any accrued leave.

Consequences of strikes on the South African economy as a whole

Section 23(2)(c) of the Constitution provides every worker with a right to strike. This makes the right to strike a fundamental right entrenched in the South African constitutional democracy. A strike is protected when the dispute at hand has been referred to the Commission for Conciliation, Mediation and Arbitration or a bargaining council and a certificate has been issued stating that the dispute remains unresolved for a period of 30 days or any extension of that matter as agreed by the parties. Employment strikes have had an impact on the South African economy.

During the SAA strike, the company lost about R 50 million per day. When considering that the company has been relying on the government to continue with its operations, and that it will continue to rely on the government to recover its losses, it can be said that there is a detrimental consequence of the SAA strike on the South African economy.

While strikes are firmly protected in the Constitution, strikes especially in the mining sector have recently been shown to cause unintended consequences to the economy. During the Sibanye-Stillwater gold mine strike over the extension of a

collective agreement by a majority union, the mine suffered daily losses and R 2 billion in total over the course of five months (see *Association of Mineworkers and Construction Union and Others v Sibanye Gold Ltd t/a Sibanye Stillwater and Others* [2019] 8 BLLR 802 (LC)). The strike by the SAA employees caused losses of close to R 200 million in total. With these types of losses, one wonders whether new measures or labour laws may need to be put in place to balance the right to strike while not destabilising the economy and minimising the losses incurred by companies during strikes.

Recommendations

Since SAA is currently under voluntary business rescue, the business rescue practitioner acting in terms of s 136 of the Companies Act 71 of 2008 may as part of its business rescue plan retrench SAA's employees, however, such retrenchments must be consistent with s 189 of the LRA and other relevant employment legislations as stated in *Solidarity obo BD Fourie and Others v Vanchem Vanadium Products (Pty) Ltd and Others; In re: NUMSA obo Members v Vanchem Vanadium Products (Pty) Ltd and Another* (LC) (unreported case nos J385/16; J393/16, 22-3-2016) (Lagrange J) where the court found that a business rescue practitioner can embark on a retrenchment exercise provided that it complies with the LRA and it can prove that the retrenchments are fair and justifiable on operational grounds.

One may recommend the strategy adopted in the *Aveng* case. In the *Aveng* case, Aveng experienced a decline in profitability, it realised that its operational issues required more than reducing the number of its staff members. It adopted a strategy of changing the job descriptions, combining functions into single positions, effectively declaring certain jobs redundant. In *CWIU and Others v Algorax (Pty) Ltd* [2003] 11 BLLR 337 (LC), the court held that the notion of operational requirements includes the

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desire to reduce cost without it being necessary to do so. Therefore, SAA, as a cost saving measure, may demand that its employees work short time.

With regard to strikes causing dire economic consequences to the South African economy it is suggested that the government put in place effective measures to safeguard against unintended economic losses. In *NUMSA and Others v Bader Bop (Pty) Ltd and Another* 2003 (2) BCLR 182 (CC), O'Regan J strongly emphasised that the right to strike must not be unnecessarily limited. Keeping this judgment in mind, however, we submit that strikes should not be permitted to bring the South African economy into a downturn.

We recommended that when it comes to strikes, the ballot system must be reconsidered as well. This is because trade union representatives might act in their own interests or decide on strikes, which not everyone supports. This could be seen by the way some workers of SAA wanted to work while others were striking. Therefore, in order to avoid confusion, the balloting system must be amended back into the LRA. At the time of writing this article, the aspect of secret balloting was under discussion with the probability of an amendment to the LRA, which includes such balloting. Lastly, we recommended that the system of majority in the workplace be made less

stringent so that among other things, strikes do not affect those employees from minor unions who do not consent to striking but may be forced to do so because of majority rule.

Conclusion

In conclusion, there are no specific laws that govern a situation where the employees of a workplace demand a wage increase at the verge of the company's liquidation or were there are clear economic difficulties. However, the law permits dismissals for sound economic reasons, such as a company failing to make a profit over a long period of time and as held in *Afrox Limited*, even operational requirements caused by a protected strike may justify a dismissal. This means the dire economic losses suffered by SAA due to the strike coupled with their dependency on the government, their inability to realise a profit for close to a decade and the recent suspension on the airline's operations can justify dismissal of their employees based on operational requirements. We submit that a common-sense approach would lean on the conclusion that workers or trade unions and employers should negotiate such matters for the benefit of all parties, instead of taking measures that might worsen the situation. We submit that trade unions must always serve the best interests of the employees. As retrenchment seems inevitable during the present time, we submit that SAA should follow the correct procedures when resorting to such retrenchments.

- See also Ntsako Reginald Makhubele 'COVID-19 impacting the workplace: Outlining retrenchments in good faith' 2020 (Aug) DR 7.

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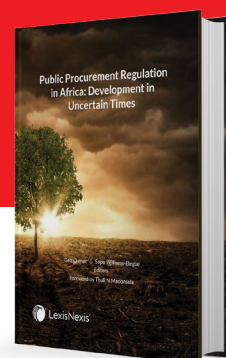
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Confirmation or rubber stamping? *Understanding the surrogate motherhood agreement requirements*



By
Natalie
Meyer

Surrogacy can be described as a woman (the surrogate mother) carrying a foetus for a couple or a single parent (the commissioning parents) until the birth of the child (Caroline Nicholson and Andrea Bauling ‘Surrogate motherhood agreements and their confirmation: A new challenge for practitioners?’ (2013) 46 *DJ* 510). Chapter 19 (ss 292 – 303) of the Children’s Act 38 of 2005 regulates surrogacy and surrogate motherhood agreements. Section 1 of the Children’s Act defines such agreement as one between the surrogate mother and the commissioning parents to artificially fertilise the surrogate mother, with the aim of bearing a child for the commissioning parents. *Ex Parte WH and Others* 2011 (6) SA 514 (GNP) described such agreement as a ‘contract of a special kind, unique if regard is being had to its subject-matter’ (para 71). Once the agreement is concluded between the parties, it is brought before a High Court for

cumstances under which a High Court will confirm an agreement. This article aims to explore these circumstances, and to provide clarity to legal representatives when bringing an application before the High Court, in view of the provisions of the Children's Act and especially case law.

Requirements for the confirmation of an agreement in view of case law and legislation

• *Consideration of the best interests of the (unborn) child*

The first reported judgment on surrogacy, namely *In re Confirmation of Three Surrogate Motherhood Agreements* 2011 (6) SA 22 (GSJ), was reported in 2011. In that case, the court emphasised that detail in ensuring the best interests of the surrogate child must be present in the application:

'Judges are duty-bound to ensure that the interests of the child, once born, are best served by the contents of the agreement, which we are requested to confirm' (para 16).

Section 295(e) of the Children's Act also emphasises this principle as being an integral factor in deciding on whether a court should confirm an agreement.

The consideration of the best interests of the child was particularly the focus in *Ex parte CJD and Others* 2018 (3) SA 197 (GP). In this case, the court doubted whether the agreement would be in the best interests of the child due to the facts of the case, and the psychologist's report on the commissioning parents, being a same-sex couple. Initially HN (the second applicant) did not want a child (identities of parties remain anonymous in surrogacy applications, in view of Practice Directive 5 of 2011 (Application for Confirmation of Surrogacy Agreements in terms of s 295 Children's Act)). HN further hid his sexual orientation as he feared it might affect his medical practice, and thus the couple did not live together (para 4). Further, the court held that neither the affidavit, nor the supplementary affidavit dealt with the best interests of the child, and how the circumstances and attitude of HN might affect the child, as well as the fact that the child's parents would not be living together (para 9). The court argued that 'it is difficult to comprehend a notion where a child is conceived by way of a process of surrogacy on the basis that, from the start, its parents won't be living together as a family unit or sharing a common household' (para 21). In emphasising its role as upper guardian of all children, the court ultimately denied the confirmation of the agreement, as the interests of the child have to take

precedence over that of the (commissioning) parents' rights (para 10). This case set precedent for the fact that legal representatives need to ensure that the best interests of the unborn child are adequately and thoroughly addressed in the application and the agreement.

• *Suitability of commissioning parents and the surrogate mother*

An agreement creates a certain standard, which must be complied with by the commissioning parents and the surrogate, as is detailed by s 295 of the Children's Act. The court held in *In re Confirmation of Three Surrogate Motherhood Agreements* that a court must be given sufficient detail on 'who the commissioning parents are, what their financial position is, what support systems, if any, they have in place, what their living conditions are, and how the child will be taken care of' (para 17). Further, details on the permanent and irreversible condition of the commissioning parents need to be given (para 20), and a detailed assessment by a psychologist, namely one which is not 'superficial and unreliable' (para 21). In the *Ex Parte WH and Others* matter, the court further held that there should be 'details of previous criminal convictions' (para 69). Therefore, 'proper and full' details need to be provided, to ensure that a decision can be made on the fitness of the commissioning parents (*In re Confirmation of Three Surrogate Motherhood Agreements* at para 24).

Regarding suitability of the surrogate mother, the court in *Ex Parte WH and Others* held that extensive detail must be given on the surrogate mother's 'background as well as her financial position' (para 67). Both the psychologist's report and medical reports must be provided, which would assist the court in deciding whether the surrogate mother is suitable in terms of both mental and physical health, and thus whether she will be able to handle the potential trauma of handing the baby over at birth, whether she has any medical diseases and/or if the pregnancy will pose any danger to her health (para 67). However, it was argued in the *Ex Parte WH and Others* case that when the question of the best interests of the child comes into play, the court must be careful in not 'setting the bar too high for parents whose only option is to have a child by way of surrogacy' (para 63). The court ultimately concluded that an objective test must be applied when deciding on the suitability of any person involved, based on the information provided in the affidavit and reports, and in view of the extent of care the child will be provided with (para 70).

The case of *Ex Parte KF and Others* 2019 (2) SA 510 (GJ), is the most recent

confirmation (s 292(e) of the Children's Act), prior to the surrogate being artificially fertilised.

Even though unregulated surrogacy has existed since biblical times (Genesis 16:1 – 15), regulated surrogacy is a relatively new concept in South Africa's (SA's) legal sphere (Peter R Brinsden 'Gestational Surrogacy' (2003) 9 *Human Reproduction Update* 483), and therefore there are, to date, only seven reported judgments on surrogacy in SA. Thus, there is some uncertainty as to the cir-

reported judgment on surrogacy, and dealt with a similar issue as was discussed in *Ex Parte WH and Others*, being the suitability of the surrogate mother. In *Ex Parte KF* the court was concerned whether the surrogate would be able to properly appreciate the ‘consequences of her decision’ to become a surrogate mother (para 20), specifically due to her financial situation, age and the fact that she had had a teenage pregnancy. The court further acknowledged the ‘need to develop further the guidelines and the requirements set out in *Ex Parte WH*’ (para 20), as well as s 295(c)(ii) of the Children’s Act (para 17). The court in *Ex Parte KF* thus went further than the *Ex Parte WH and Others* case, and set out precise factors, which must be contained in an application when dealing with the suitability of a surrogate mother, these factors being ‘the personal clinical assessment’ of the surrogate mother, as well as her current circumstances, being supported by ‘other collateral information’ (para 27). This type of information includes whether the surrogate is in a state of good physical health to carry the child, has an agreement in place with the commissioning parents regarding ‘selective reduction’, is in a state of good mental health and has no ‘history of substance abuse’ (see paras 27.1 – 27.4).

The court in *Ex Parte KF* further emphasised the importance of the surrogate mother having emotional support (para 28). Therefore, the emotional resources that the surrogate might need or that are currently in place, the ‘quality and stability’ of the current emotional support structures, and whether the relationships supporting the surrogate mother are stable enough to allow the ‘fulfilment of the surrogacy agreement’ must also be supplied in a report (para 28). The court further held that the surrogate mother must understand the nature and importance of the decision to become a surrogate mother (para 29). Therefore, in view of this, the court in *Ex Parte KF* held there must be a further report indicating what ‘psycho-social support structure’ is in place for the surrogate mother, whether her family, spouse/partner and friends understand and accept the decision she has made and will thus not influence her to terminate or breach the agreement. Further, whether there is an understanding that the child will belong to the commissioning parents, and whether the surrogate mother will be supportive towards her own child/children (see paras 29.1 – 29.6) – this is especially important because the Children’s Act does not make provision for the support that the surrogate’s children could need during this process.

• Use of a surrogacy agency

The use of an agency in the surrogacy

The best interests of the child principle acts as an integral factor in whether the court will confirm an agreement. Along with this, courts in surrogacy cases regularly request further information, affidavits or reports, and thus legal representatives should always be ready in the event of such a request. The court emphasised that a strict screening process must be relied on in surrogacy applications.

process is not directly dealt with in the Children’s Act, however, s 301, and specifically s 301(1), implicitly deals with the use of such an agency. In the *Ex Parte WH and Others* case, the court held that there would be a potential for abuse if an agency is involved, and could lead to the exploitation of surrogate mothers (para 64). Therefore, the court emphasised that where an agency is involved, the affidavit must clearly state that no fee was paid to the agency, full particulars regarding the agency must be set out, including whether the surrogate received compensation from the agency (see para 66). Similarly, in *Ex Parte HPP and Others* 2017 (4) SA 528 (GP) the court had to decide whether the use of a surrogacy facilitator (from a surrogacy agency) would infringe on s 301 of the Children’s Act, and thus lead to commercial surrogacy. The court emphasised the importance of legal representatives disclosing in the affidavit all amounts, which were paid to such agency, this being due to the fact that the court has to be able to rely on the good faith of the legal representatives in *ex parte* applications (para 9). The court further held that ‘the attorney in a surrogacy application should file an affidavit confirming that as far as he/she could ascertain no payments were made to anyone apart from those provided for in the Children’s Act’ (para 33).

In *Ex Parte HP and Others*, the court was wary to approve the payments made to the facilitator (para 19). The court examined the *Ex Parte WH and Others* judgment, and emphasised that the use of an agency may lead to commercial surrogacy, and commercial surrogacy leads to the potential for abuse of, especially, underprivileged women (para 26 and 33). In grappling with the issue

of surrogate facilitators, the court suggested that a regulatory framework be set up, being a database with the names of potential surrogate mothers (para 39). However, as no such database exists, any party involved in the surrogacy process, being the surrogate facilitator or the surrogate, must file an affidavit disclosing all facts and particulars. The court should also be able to ask for further information if needs be, and each court will have to utilise its discretion and act on a case-by-case basis (para 39).

Conclusion

In view of the above it is clear that the best interests of the child principle acts as an integral factor in whether the court will confirm an agreement. Along with this, courts in surrogacy cases regularly request further information, affidavits or reports, and thus legal representatives should always be ready in the event of such a request. The court in *In re Confirmation of Three Surrogate Motherhood Agreements* emphasised that a strict screening process must be relied on in surrogacy applications, and that ‘[i]n matters where the interests of children are paramount ... the applicants must supply proper and full details regarding themselves’ (para 25). Therefore, if insufficient detail is provided in an application, the court will not confirm the agreement, as a court is not a ‘rubber stamp’ for these applications (*In re Confirmation of Three Surrogate Motherhood Agreements* at para 25). In drafting such applications the legal representatives must ‘take care to draft papers in a proper manner, and not to just shoddily copy and paste other applications’ (*In re Confirmation of Three Surrogate Motherhood Agreements* at para 5). The confirmation of these agreements results in much excitement and happiness for the commissioning parents, and thus when a legal representative ensures that the application is thoroughly and correctly drafted and granted, this will be rewarding in itself.

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Are the stringent COVID-19 lockdown regulations unconstitutional and unjustifiable?



By
Dr Willem
van Aardt

On 15 March, the South African government declared a national state of disaster in terms of the Disaster Management Act 57 of 2002 (the Act). On 23 March, President Cyril Ramaphosa announced that South Africa (SA) would enter a nationwide lockdown for 21 days with effect from midnight on 26 March.

To ensure that measures announced were implemented, President Ramaphosa also announced the deployment of the South African National Defence Force to support the South African Police Service.

On 27 April, United Nations High Commissioner for Human Rights, Michelle Bachelet, denounced 15 countries in the world for unacceptable human rights violations and a 'toxic lockdown culture'. South Africa was singled out as one of the worst perpetrators (Emma Farge 'U.N. raises alarm about police brutality in lockdowns' (www.reuters.com,

accessed 8-2-2020)). Around the globe, many newspapers and news agencies reported that SA had some of the strictest lockdown rules and regulations in the world (Associated Press 'South Africa eases one of world's strictest coronavirus lockdowns' *Los Angeles Times* 1 May 2020 (www.latimes.com, accessed 8-2-2020)).

On 1 May, level 4 came into effect and on 1 June, level 3 came into effect. South Africa's level 4 was significantly more stringent and invasive than the full lockdown regulations imposed by most countries around the globe. Many of the lockdown regulations, such as specified times as to when one was allowed to run or walk, where one was allowed to walk, the curfew that was in place between 8 pm and 5 am, and that retail stores were only being allowed to sell certain items but not others, including the ban on the sale of alcohol and cigarettes seemed to be nonsensical arbitrary rules that have



violate the South African Constitution or whether it is a justifiable infringement in an open and democratic society based on dignity, equality and freedom.

It is, therefore, necessary to set out what the Constitution provides with regard to the limitation of fundamental human rights. As fundamental rights are not absolute, but subject to restriction by other rights and the legitimate needs of society, not all infringements are unconstitutional (Willem van Aardt *State Responsibility For Human Rights Abuses Committed By Non-State Actors Under the Constitution* (LLD thesis, NWU, 2004) at 378). An infringement that takes place in line with a valid ratio, which is recognised as a legitimate justification by the Constitution, will not be regarded as illegal (Van Aardt (*op cit*) at 379). The suspension of fundamental human rights during a declared state of emergency must also be distinguished from the ordinary limitation of rights in terms of s 36 of the Constitution. The latter is continuously applicable while derogation in terms of s 37 applies only in times of public emergency. Since the South African Government did not declare a State of Emergency, but a State of Disaster in terms of the Act, s 36 applies.

Typically, the analysis of a Constitutional violation under ch 2 takes the form of two steps. In the first stage, the applicant is required to demonstrate that their ability to exercise or enjoy fundamental human rights have been violated. The applicant must then further show that the law or governmental action in question actually impedes the full enjoyment and exercise of the fundamental human rights in question by demonstrating that the law or governmental action either expressly intends to restrict the right, or effectively restricts the exercise of the right. If the court finds that the governmental action in question infringes the exercise of fundamental human rights, the analysis may move to the second stage. In the second stage, the government will be required to prove that the infringement is justifiable under s 36.

If the government wishes to demonstrate that the restriction of the fundamental human right is constitutionally justifiable, s 36(1) requires that the government must answer at least two questions satisfactorily. The first, is the restriction taking place in terms of law of general application? Secondly, is the limitation reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation and whether there are less restrictive means to achieve the purpose (s 36(1)(a) – (d)).

For a law to be recognised as ‘a law of general application’ it must be general and apply to government and citizens alike. It must further also be accessible to the public. The last-mentioned requirement also means that the law must be precise and not vague (Van Aardt (*op cit*) at 372). The law of general application test, therefore, requires generality, non-arbitrariness, publicity and precision (Woolman *Constitutional Law* 1ed (Cape Town: Juta 1996) at 12-18).

Given the arbitrary nature of many lockdown regulations, frequent amendments and uncertainty regarding the application and enforcement of such regulations, it is highly unlikely that the government will be able to meet this requirement.

Once the determination has been made that the law in question is a law of general application, then the court must consider whether the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors set out in s 36(1)(a) – (d) (*S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 23; *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC) at para 33).

• Section 36(1)(a): The nature of the right

Fundamental human rights differ in weight. Rights that are of particular importance to the Constitution’s ambition to create an open and democratic society based on human dignity, freedom and equality, will carry a great deal of weight in the proportionality exercise (Dennis Davis, Halton Cheadle and Nicholas Hayson *Fundamental rights in the Constitution: Commentary and cases* (Cape Town: Juta 1997) at 319). It will, therefore, be more difficult to justify the limitation of such rights. The proportionality test requires that the harm done by the state’s action or law should be weighed against the benefits that the state’s action, or law seeks to achieve (Van Aardt (*op cit*) at 379).

It is my view that the state’s draconian lockdown regulations violate approximately 59 million citizens’ right to human dignity and freedom in the most pervasive manner in living memory. Citizens are treated like naughty children with the government making various paternalistic and arbitrary rules and regulations in an attempt to curb the spread of a disease that has a survival rate of 99,9% (see Dr Scott W. Atlas ‘The data is in — stop the panic and end the total isolation’ (www.thehill.com, accessed 14-8-2020)).

It is simply unjustifiable to violate the fundamental human rights of 99,9% of the population, and in the process destroy the livelihoods of millions, increas-

had no basis or justification in law, science or epidemiology.

In ch 2 of the Constitution, citizens are guaranteed certain inalienable fundamental human rights, which include –

- the right to human dignity (s 10);
- the right to freedom and security of the person (s 12);
- freedom of assembly and the right to protest (s 17);
- freedom of movement (s 21);
- the right to education (s 29); and
- the right of cultural, religious or linguistic communities to enjoy their culture, and practice their religion (s 31).

The sections referred to above should also be read with s 7(2), which provides that ‘[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights’.

A pertinent question arising from this, is whether the regulations to combat the COVID-19 pandemic and which infringe on various fundamental human rights,

ing hunger and the chances of starvation, in an attempt to protect 0,1% to 1% of the population.

• **Section 36(1)(b): The importance of the purpose of the limitation**

Reasonableness requires that the limitation of a fundamental right must serve a purpose. Justifiability requires that it must be important in a constitutional democracy. The limitation of rights, which does not serve the purpose of and contribute to a society based on human dignity, equality and freedom cannot be justifiable (Cheadle Haysom (*op cit*) at 319). A limitation must also serve a legitimate purpose that all reasonable citizens would agree to be of sufficient importance to infringe the fundamental human rights as referred to above (Johann de Waal, Iain Currie and Gerhard Erasmus *Bill of Rights Handbook* 4ed (Juta and Lansdowne 2001) at 158; Nico Steytler *Constitutional Criminal Procedure* (Durban: LexisNexis 1998) at 23). If the state action, inaction or law does not serve the purpose it intends to serve, then it cannot be a reasonable limitation (De Waal, Currie and Erasmus (*op cit*) at 161 and Steytler (*op cit*) at 23). If the state action, inaction or law only marginally contributes to achieving its purpose or fails to achieve its purpose, it will not be adequate to qualify as a legitimate limitation (*Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC) at para 20 – 22; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at para 59).

It is my view that while the initial lockdown may have been justified and has served the purpose of ‘flattening the curve’ in order for the health care system to prepare, the continued draconian lockdown measures can no longer be justified. Data setting out daily new cases indicate that the stringent lockdown in SA between 26 March and 1 May had little or no effect on the daily infection rate. In fact, on 1 May the infection rate

was significantly higher than it was on 26 March 2020 after more than four weeks of the most draconian lockdown rules in the world (www.worldometers.info).

On 6 May in Rustenburg, Dr Zweli Mkhize himself admitted that extending the lockdown would not make much of a difference in flattening the curve for South Africa (‘Extending lockdown would not delay South Africa’s coronavirus peak by much: Mkhize’ (<https://business.co.za>, accessed 2-8-2020)). Numerous recent international studies have showed that the lockdown has little or no effect on the rate of infection or the death rate (Greg Piper ‘University researchers find “no additional decline” in coronavirus infection rate from lockdowns’ www.thecollegefix.com, accessed 2-8-2020). The mortality rate suggested by the Stanford study would put COVID-19 on par with the deadliness of the seasonal flu, which has a yearly mortality rate around 0,1% for the vast majority of the population (see JD Rucker ‘BREAKING: Stanford study shows 50-85 times more people infected by coronavirus’ (<https://noqreport.com>, accessed 14-8-2020)).

• **Section 36 (1)(c): The nature and extent of the limitation**

This consideration requires that the governmental restriction must impair the right as little as reasonably possible. To determine whether the limitation does more damage than is reasonable for achieving its purpose requires a factual assessment of the extent of the limitation (De Waal, Currie and Erasmus (*op cit*) at 160 and Van Aardt (*op cit*) at 379).

The harm being done to millions of South Africans includes widespread and pervasive infringement of citizens’ fundamental human rights to dignity and freedom of movement. National Treasury is predicting a loss of R 285 billion in revenue and that between 1,5 to 3 million jobs will be lost, which would lead to wide scale poverty and death as a result of hunger in an attempt to protect citizens against a disease with a mortality rate similar to that of seasonal flu (see Rucker (*op cit*)).

• **Section 36(1)(d): Less restrictive means to achieve the purpose**

The limitation of fundamental human rights must achieve benefits that are proportional to the cost of the limitation. The infringement will not be considered proportional if there are less restrictive, but equally effective means to achieve the same purpose (*Manamela* at para 96-97).

Over the past three months it has become clear that there are numerous countries and states around the world that implemented significantly less costly and restrictive lockdowns than SA, yet achieved the same or better results than SA. The most pertinent example is Sweden, which controversially never implemented lockdowns or deployed its army to enforce lockdowns, nor committed human rights violations on a grand scale yet achieved satisfactory results in its battle against COVID-19. In fact, many European countries, which enforced lockdown had significantly worse infection rates and death rates than Sweden (Soo Kim ‘Sweden COVID-19 Death Rate Lower Than Spain, Italy and U.K., Despite Never Having Lockdown’ (www.msn.com, accessed 14-8-2020)). The World Health Organisation (WHO) lauded Sweden as a ‘model’ for battling COVID-19 as countries lift lockdowns. WHO Health Emergencies Programme, Executive Director, Dr Michael Ryan, said there are ‘lessons to be learned’ from the Scandinavian nation, which has largely relied on citizens to self-regulate (Jackie Salo ‘WHO lauds lockdown-ignoring Sweden as a “model” for countries going forward’ (<https://nypost.com>, accessed 2-8-2020)).

It is my view that many of the arbitrary lockdown regulations are unconstitutional and unjustifiable.

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The reach of the Constitutional Court: Piecemeal litigation and the principle of *res judicata*

By
Derek
Harms SC



The simple difficulty with the plenary jurisdiction argument is that it avoids the most important word in s 167(3)(b)(ii) of the Constitution, viz 'if'. In short, the conditional clause 'if' means that the Constitutional Court (CC) is confined to matters qualified by the clause. In 'Does the Constitutional Court have plenary (unlimited) appeal jurisdiction?' 2017 (April) *DR* 13, I concluded that: 'The con-

ditional clause in this section introduces two conditions, which must be present if the CC were to consider the grant of leave to appeal in a non-constitutional matter: "The matter raises an arguable point of law" of "general public importance which ought to be considered". This obviously voids the plenary jurisdiction argument.'

While writing the February update of Harms Intellectual Property Law Reports, I came across an interesting judgment

where the CC ventured in a patent matter into intellectual property territory in *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others* 2020 (1) SA 327 (CC).

The judgment was a deadlock in that ten CC judges presided over the matter. Five judges were of the view that the appeal must be dismissed and the other five judges were not in agreement.

Consequently, it was held that this meant that the original judgment and

order handed down by van der Westhuizen J of the Gauteng Division of the High Court in Pretoria, remains in place.

The facts

The invention, namely, the subject matter of the patent, was an anti-parasitic formulation. In June 2011, the applicant, Ascendis Animal Health (Pty) Ltd, filed an application for the revocation of the South African Patent 1998/10975 (the 1998 patent) against Merck Sharp Dohme Corporation and Merial Ltd on a number of grounds including lack of novelty and inventiveness.

During the exchange of pleadings and relevant documents between the parties in the revocation proceedings Merck Sharp Dohme Corporation and Merial Limited, instituted proceedings against the applicant for infringing the 1998 patent.

The revocation proceedings turned on the validity of the 1998 patent in light of the disclosure in a separate patent registered in 1992; whereas the infringement action turned on the unauthorised use, and transgression, of the 1998 patent.

Nonetheless, underpinning both proceedings, albeit in different contexts and with different forms of relief sought, was the question of the validity of the 1998 patent.

Teffo J, revoked the 1998 patent for lack of novelty, in light of the disclosure of the 1992 patent in March 2014. Then in 2016, Louw J, in interim interdictory proceedings between the parties, held that it is trite that generally, piecemeal litigation is to be avoided. He found that the applicant was attempting to retry the matter by amending its pleadings in the infringement proceedings and this amounted to piecemeal litigation. The judgment of the High Court (given in 2019 by van der Westhuizen J) concerned two amendment applications made in the patent infringement proceedings. He dismissed the applications and refused to grant leave to appeal against the dismissal of the applicant's applications to amend its pleadings.

All of these judges were sitting as Commissioners of Patents in the Gauteng Division of the High Court in Pretoria. The Supreme Court of Appeal (SCA) dismissed an application for leave to appeal against van der Westhuizen J's order. The applicant then 'knocked on the doors' of the CC seeking to overturn the judgment and order of the High Court and judgment under discussion was given on 24 October 2019.

The issue

The crisp issue that was considered by van der Westhuizen J was whether or not the validity of a patent may be challenged and attacked on the various grounds listed in the Patents Act 57 of

1998 in a piecemeal fashion. He held that a party may elect to rely on one or more of these listed grounds, but this does not mean that they can rely on all of them all in a piecemeal fashion.

In his judgment, van der Westhuizen J discussed the requirements for a successful reliance on the doctrine of *res judicata*, namely: '(i) same parties (the parties are the same); (ii) the same cause of action (the invalidity of the 1998 patent); (iii) the same relief (the revocation of the 1998 patent); and (iv) a final judgment (the [SCA] judgment)' and '[certifying] that all the claims of the 1998 patent are valid in accordance with s 74 of the [Patents] Act'.

Van der Westhuizen J held that the requirements were, indeed, fulfilled.

Section 167(3) of the Constitution reads as follows:

- '(3) The Constitutional Court –
- (a) is the highest court of the Republic; and
 - (b) may decide –
 - (i) constitutional matters; and
 - (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and
 - (c) makes the final decision whether a matter is within its jurisdiction.'

The CC's judgment

• The first judgment

The first judgment in the *Ascendis* matter was written by Khampepe J and was concurred in by Froneman J, Ledwaba AJ, Nicholls AJ and Theron J.

In short, the first Bench brought the matter within the ambit of s 167(3) by holding, *inter alia*, that: 'It is well established that *res judicata* implicates the rights contained in s 34. However, the High Court, as will become evident later, extended the application of *res judicata* and, as a result, adversely affected the right by denying the applicant an opportunity to raise a defence, which potentially taints the fairness element of the hearing. This *prima facie* extension of *res judicata* interferes with the applicant's constitutional right to have the merits of the separate, undecided causes of action heard in court and thus gives this court jurisdiction to decide the matter. ... The High Court found that the case was *res judicata* and that the grounds listed in s 61 are a single cause of action. These findings may have significant, adverse ramifications for future potential litigants who might be interested in bringing a revocation case. As will be seen later, there are also reasonable prospects of success on the question of whether the High Court extended and misapplied the principle of *res judicata*. Therefore, this

matter begets an arguable point of law.'

In the end this cluster of judges found that the application of *res judicata* was wrong.

• The second judgment

The second judgment in the *Ascendis* matter was written by Cameron J and was concurred by Mogoeng CJ, Jafta J, Madlanga J and Mhlantla J. Cameron J held otherwise on this issue (obviously agreeing that the CC has jurisdiction): 'This approach the first judgment grounds in an analysis of the Act that finds that each ground of revocation – absence of novelty; non-inventiveness or obviousness; and lack of usefulness or inutility – is a separate statutory cause of action entitling the challenger to raise each one, at will, in either revocation proceedings or later in defending an infringement claim. ... The question is this. Should the courts countenance multiple-stage defences in patent disputes – first bite at revocation, second bite when sued for infringement? I think not. This is not how enforcement of patents should most fairly and efficiently work. ... If an alleged infringer, who fails to make a successful case for revocation, is permitted to raise further invalidity defences when later sued for infringement, there can be no principled reason to preclude it from launching a fresh revocation claim, on any new ground. When that failed, the patent-holder would have to initiate yet a further damages claim. To which the alleged infringer could respond with further new defences. And on and on. The resulting dissonance in the two sets of patent litigation seems calculated to produce not only incoherence, but also to affront directly our long-held judicial caution against piecemeal litigation. ... In my view, that question – the patent's validity – has been conclusively determined between these parties. In lawyer-speak, it is *res judicata*.'

Put differently, you cannot have your cake and eat it too, that is how the English would put it. Personally, I have always found this saying to be an oxymoron, namely, a figure of speech in which apparently contradictory terms appear in conjunction.

So there you have it, per Cameron J (and the other gathering of concurring CC justices), you may have a patent but if someone tries to steal one slice of your patent's validity in revocation proceedings and do not succeed, the remainder they cannot eat.

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Fighting with your shadow – understanding the concept of non-executive and shadow directors



By
Nokubonga
Fakude

Before I discuss the concept of a shadow director and a non-executive director, I must first explain what a director is. Section 66 of the Companies Act 71 of 2008 (the 2008 Act) sets out what a director is by stating that the affairs of a

company must be managed by its board, which has the authority to exercise all power and perform any of the functions of the company, except to the extent that the Companies Act or the company's Memorandum of Incorporation (MOI) provides otherwise. The 2008 Act goes on further to prescribe the number of directors required for each type of company. This definition of director provides that a person who is appointed as a director of a company must be involved in the active management of the company's affairs. There is also a level of authority conferred on the director to exercise their powers and to make binding decisions on behalf of the company within the requisites of the 2008 Act and the company's MOI.

With regard to non-executive directors, the Companies Act 61 of 1973 (the 1973 Act), which was repealed by the 2008 Act made a distinction between an executive director and a non-executive director. Section 269A(4)(b) of the 1973 Act defined a 'non-executive director' as a director who 'is not involved in the

day to day management of the business and has not in the past three financial years been a full-time salaried employee of the company or its group'. The 2008 Act, however, does not have such a distinction, but s 200 refers to an executive director and defines it as a director who may be appointed by the Takeover Regulation Panel (the Panel) to perform the functions of the Panel. In addition, the executive director may appoint other officers and employees as may be required for performance of the functions of the Panel. From this definition of executive director, it is safe to conclude that the major or only difference between a director in terms of s 66 of the 2008 Act and an executive director in terms of s 200 of the same Act is that the executive director has an additional function as stated in the latter section. Apart from this, an executive director remains a director in terms of s 66.

The 2008 Act, in addition to defining what a director and an executive director is, provides for *ex officio* directors. Section 66(4)(a)(ii) states that a company's

MOI may provide for the appointment of a person as an *ex officio* director by virtue of the office that that person holds. For example, the Chief Executive Officer of a company may be regarded as an *ex officio* director. An *ex officio* director is, therefore, a director for all intents and purposes. As such, the *ex officio* director exercises ostensible management/power concerning the affairs of the company, which consequently warrants their appointment as director (*ex officio*). There is, therefore, a management and authoritative function that makes one's office capable of being that of director as envisaged in s 66. I, therefore, submit that in absence of a clear description of the functions of a non-executive director in statute, the functions of a non-executive director are exclusively left to be decided through a contract between the company and the non-executive director.

Although the contract between a non-executive director and the company may provide clarity as to the role of the non-executive director within the company; can a contract then confer on the non-executive director the powers and functions of a director as defined in s 66 of the 2008 Act? If this is answered in the affirmative, should the company not then appoint a director in terms of s 66 rather than appoint a non-executive director, who has no ostensible management function apart from what would be set out in the contract, but could nevertheless be provided for in the company's MOI where one is to be appointed as a director in terms of s 66? Furthermore, could it be that the distinction that was drawn between a non-executive director and an executive director in the 1973 Act was intentionally left out in the 2008 Act because of it being redundant? I am compelled to answer this in the affirmative.

The King IV Code on Corporate Governance (the Code) echoes the same definition of a non-executive director, which was defined in the 1973 Act. Principle 7 of the Code recommends that the board of a company must comprise of 'the appropriate balance of knowledge, skills, experience, diversity and independence for it to discharge its governance role and responsibilities objectively and effectively'. To achieve this, the principle recommends that a company should invite competent persons to serve as non-executive directors and take part in board meetings in order to provide impartial and independent contributions into the affairs of the company and, also mitigate risk in the company's decision-making process. I, however, submit that although this presents good intention and may, in the unique circumstances of a company prove practical, it still raises doubts as to the true nature of a non-executive director. As a non-executive director is not involved in the day-to-day

management of the company, it means that a non-executive director, falls short of the definition of director as contained in s 66 of the 2008 Act, namely that a director must be involved in the management of the company. Perhaps the non-executive director may perform certain powers in terms of the company's MOI and appointment contract, but I am not convinced that a 'director' who is not involved in the day-to-day management of the company may have sufficient knowledge about the affairs of that company to be able to make justified, independent contributions to the board. Instead, such a person depends on the information provided to them by the executive directors of the company. If this is the case, it thus cannot be said that a non-executive director can independently and with 'sufficient' knowledge contribute to making decisions for the company, because this perceived independence may most likely be tainted by the non-executive director's reliance on information and records provided to them by those directors who are involved in the day-to-day management of the company. Furthermore, because the non-executive director, by definition, is not involved in the management of the company and probably has a function set out only in contract, I submit that a non-executive director is a metaphor, and the true role of a non-executive director is that of a professional adviser, whose advice may or may not be implemented by the company. So just like the shadow director, a non-executive executive director is no director at all. This now takes me to the discussion of a shadow director.

A shadow director is defined as a person upon whose advice, direction or instruction the board of a company is accustomed to act on or follow. The concept of shadow director has an English law origin. Section 251 of the United Kingdom's (UK) Companies Act 2006 defines a 'shadow director' as a 'person in accordance with whose directions or instructions the directors of the company are accustomed to act'. The section goes on further to state that a person is not to be regarded as a shadow director by reason only that the director acts on advice given by him in a professional capacity. Although English law forms the basis of the South African common law, the concept of shadow director has not been included in the 2008 Act. Nevertheless, the concept of shadow director may still be considered in terms of the common law. The UK courts have attempted to give a clear definition of a shadow director but do not seem to have been successful. In Kathy Idensohn's article titled 'The Regulation of Shadow Directors' (2010) 22 *SA Merc LJ* 326, she discusses the guiding principles on how to identify a shadow director, as was set

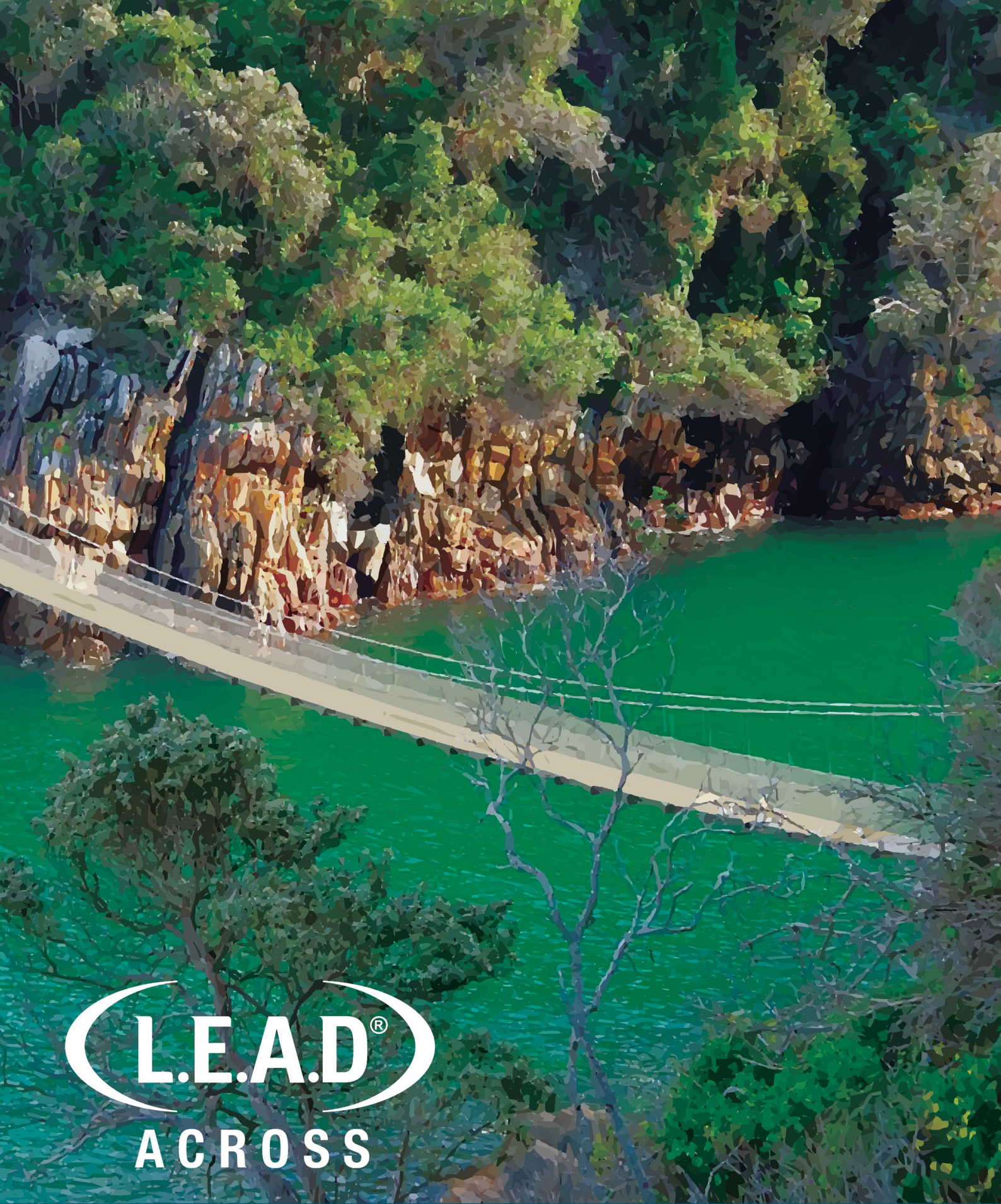
out in the UK case of *Secretary of State for Trade and Industry v Deverell* [2001] Ch 340 (CA (Civ Div)). She further alludes to the case of *Ultraframe (UK) Ltd v Fielding and Others* [2005] EWHC 1638 (Ch) where the court held that the position as to whether shadow directors are fiduciaries, and, therefore, have a unique relationship of trust with the company, which is tantamount to the relationship between the company and its board of directors is not clear. It was thus generally accepted that a shadow director is not a fiduciary and the common exceptions to this general rule is when the shadow director 'goes beyond the mere exertion of indirect influence' on the directors of the company and takes voluntary control over the company. In addition, the shadow director exercises so much control over the board of directors that the board exercises very little autonomy in making decisions. It is my submission that it is inconceivable that a competent board would at any point not exercise absolute discretion in managing the affairs of the company. And, if this were not the case, then it would significantly place doubt on the competence of the board and ultimately, the director of a company may be held accountable for actions taken negligently and without applying the skill and diligence expected of a reasonable director. This is perhaps why the 2008 Act did not include the concept of a shadow director. Idensohn (*op cit*) further suggests that perhaps the concept of 'prescribed officer', which was introduced by 2008 Act, was aimed at including shadow directors. A detailed discussion on prescribed officers may possibly, on another occasion be relevant, but for now I do not deem it necessary.

Based on the above, I again submit that, just like a non-executive director, a shadow director is a metaphor, the characteristics of which are more aligned with those of professional advisers, whose advice may or may not be implemented.

In conclusion, the South African corporate space is quite broad and interesting. It does, however, appear that certain roles such as those discussed above may only serve for statistical purposes in relation to 'independence' and employment purposes but have no ostensible practical role as pertains specifically to the role of a director of a company.

Nokubonga Fakude LLB (UJ) is a legal practitioner in Johannesburg.





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The southern coast of South Africa is home to the Garden Route National Park and its jewel is the Tsitsikamma Section (proclaimed in 1964) – one of the world's most spectacular biodiverse protected areas. It comprises of indigenous rain forests that harbour 116 types of trees such as the giant Outeniqua yellowwood (some estimated to between 600 and 800 years old) and fynbos (which covers around 30% of the park). Tsitsikamma is also the country's largest marine reserve and the oldest in Africa. One of the highlights is the 77 metre-long suspension bridge which spans the width of the Storms River Mouth. The bridge hangs just seven metres above the churning waters of the river as it enters the sea. SANParks, established in terms of the National Environmental Management: Protected Areas Act, 2003, has the primary mandate to oversee the conservation of this sensitive and valuable biodiversity, landscape and associated heritage asset.



Picture source: Gallo Images/Getty

Employee safety during COVID-19: *When does an imminent and serious risk exist?*



By
Marius
van
Staden

The Minister of Employment and Labour issued the Consolidated Direction (the Direction) on Occupational Health and Safety Measures in Certain Workplaces on 4 June.

Clauses 48 to 56 of the Direction deal with an employee's right to refuse to work due to potential exposure to COVID-19, if circumstances arise, which with reasonable justification, appear to pose an imminent and serious risk of exposure. An employee may not be dismissed, disciplined, prejudiced or harassed for refusing to perform any work under such circumstances. This article addresses the following questions:

- What would constitute an 'imminent and serious risk of exposure'?
- Is the test in assessing an 'imminent and serious risk' a subjective or objective test?

... of the refusal and the reason for the refusal. Every employer must, after consultation with the compliance officer and any health and safety committee, endeavour to resolve any issue that may arise from the exercise of the right ...

54. No employee may be dismissed, disciplined, prejudiced or harassed for refusing to perform any work as contemplated ...

55. If there is a dispute as to whether clause 49 has been contravened, the employee may refer the dispute to the Commission for Conciliation, Mediation and Arbitration or an accredited bargaining council for conciliation and arbitration ...

How must the statutory provisions be interpreted?

The Minister of Labour issued the Direction on a matter, which falls under his mandate, Occupational Health and Safety. The wording of the Direction should accordingly be construed in the context of the Occupational Health and Safety Act 85 of 1993 (the Act) (see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)).

In *Industrial Health Resource Group and Others v Minister of Labour and Others* 2015 (5) SA 566 (GP) the Act was held to be an expression of workers' right to fair labour practice in s 23 of the Constitution. In terms of s 39(1)(b) and (c) of the Constitution, a court is enjoined to consider international law, and may consider foreign law, when interpreting the Bill of Rights.

Relevant international law is the International Labour Organisation's Occupational Safety and Health Convention, 1981, where art 13 determines:

'A worker who has removed himself from a work situation which he has reasonable justification to believe presents an imminent and serious danger to his life or health shall be protected from undue consequences in accordance with national conditions and practice.'

Article 13 protects a worker only against 'undue consequences', against unwarranted or inappropriate consequences. Consequences are not excluded, but should not be unwarranted or inappropriate.

Section 23(1)(a) of the Mine Health and Safety Act 29 of 1996 (the MHS Act) uses the words 'serious danger'. The Guide-line for the Compilation of a Mandatory Code of Practice for: The Right to Refuse Dangerous Work and Leave Dangerous Working Places issued by the Department of Mineral Resources states as follows:

'Section 23(1)(a) of the [MHS Act] gives an employee the right to leave a working place if circumstances arise at that working place which, with reasonable

justification, appear to that employee to pose a serious danger to the health or safety of that employee. "Reasonable justification" is not defined in the [MHS Act], but means that the employee has some objective information that makes him or her believe there are unsafe conditions at the working place or the work to be done is unsafe to the extent that there is an imminent and serious danger to the health or safety of person ... The employee does not have to be correct in his or her knowledge or belief, but such belief should be reasonable given the information of the employee. These principles apply to both the RRDW [right of refusal to do dangerous work] and RLD-WP [right to leave a dangerous working place]."

Section 54(1) of the MHS Act empowers an inspector to halt mine operations if he has reason to believe that the mine endangers the health or safety of any person. In *Anglogold Ashanti Ltd v Mbonambi and Others* (2017) 38 ILJ 614 (LC) the court determined that the state of affairs, which would lead a reasonable person to believe that it may endanger health or safety must be established objectively. The starting point in determining reasonable grounds is the standard of safety prescribed by the MHS Act, reasonable practicality. This is not an absolute standard, it requires an objective assessment of the work concerned and the associated hazards.

Proportionality, namely balance, necessity and suitability, an element of the right to reasonable administrative action (s 33(1) of the Constitution), also plays a role in the objective establishment of reasonable grounds. The notion that one ought not to use a sledge hammer to crack a nut plays a role in the objective assessment of reasonable grounds.

Oxford Dictionary and Thesaurus defines the words 'imminent' as 'about to happen' and 'serious' as 'dangerous or very bad: Serious injury'.

Sections 44(1)(d) and (e) and 44(2) of the UK Employment Rights Act 1996 has provisions similar to that of the Direction. Matthew Sellwood and Anna Greenley in 'Returning to work - a right to refuse?' (www.devereuxchambers.co.uk, accessed 2-8-2020), state the following:

'Before being able to benefit from the protection of these sections, employees must show that there were "circumstances of danger" which the employee "reasonably believed to be serious and imminent".'

It does not matter whether such a belief was true, but rather whether it was reasonable at the time. In *Oudahar v Esporta Group Ltd* [2011] ICR 1406, the claimant was dismissed for refusing to mop an area which featured obviously protruding wires. As HHJ Richardson put it: "If an employee was liable to

- What procedure exists for an employer who does not agree with an employee's view that an 'imminent and serious risk of exposure to COVID-19' exists?

Relevant statutory provisions

Clauses 48 to 55 of the Direction, *inter alia*, determines:

'48. An employee may refuse to perform any work if circumstances arise which with reasonable justification appear to that employee or to a health and safety representative to pose an imminent and serious risk of their exposure to COVID-19.

49. An employee who has refused to perform work ... must as soon as is reasonably practicable notify the employer

dismissal merely because an employer disagreed with his account of the facts or his opinion as to the action required, the statutory provisions would give the employee little protection”.

... The contemporary question is, of course, can COVID-19 amount to a “danger” under these provisions? ... [W]e suggest the following may be relevant considerations:

... [T]he danger must be “serious”. ... A claimant is more likely to reach that threshold where a risk assessment and protective measures in line with the Government’s guidance have not been put in place Similarly, where an individual is vulnerable and/or ... comes into sustained contact with others as a necessary part of his employment, the threshold is more likely to be reached; [t]he danger must be “imminent”. Again, the circumstances of the employee’s working environment are likely to be explored. However, it is perhaps noteworthy that the ... Coronavirus Restrictions ... explicitly state that they were made “in response to the serious and imminent threat to public health” posed by coronavirus...’.

Interpretation of clauses 48 to 56 of the Direction

Clauses 48 to 56 of the Direction could be interpreted as follows:

- Provision must be made for the health and safety of employees through reasonably practicable measures (s 8(2) (b) and (d) of the Act).
- Reasonable justification means the employee or health and safety representative has some objective information that makes them believe there are unsafe conditions. The test is objective. The state of affairs must lead a reasonable person to believe that it may endanger the health or safety of persons at work.
- The employee or health and safety representative does not have to be correct, but the belief should be reasonable, given available information. The emphasis is on availability of objective information, not the correctness or not of the belief.
- The starting point in the determination of reasonable grounds is reasonable practicality. This is not an absolute standard, its nature and scope require an objective assessment of the work and associated hazards.
- Proportionality, namely balance, necessity and suitability, an element of the right to reasonable administrative action, also plays a role in the objective establishment of reasonable grounds. The notion that one ought not to use a sledge hammer to crack a nut, plays a role in the objective assessment of reasonable grounds.

If an employee works in close proximity to someone who may have the virus, or who lives with someone who does, and who is attending work against statutory prescripts, this may entail an ‘imminent and serious risk of exposure’.

- The words ‘imminent and serious risk of exposure’, literally mean a dangerous or very bad risk of exposure, which is about to happen. A distant and less serious risk would not place an employee under ‘imminent and serious risk of exposure’.

What would constitute an ‘imminent and serious risk of exposure’ and what can the employer do if the employee refuses to work?

An ‘imminent and serious risk of exposure’ is more likely where statutory measures have not been put in place.

Similarly, where an employee is vulnerable or comes into sustained contact with others as a necessary part of employment, the ‘imminent and serious risk of exposure’ could be more likely, depending on the health and safety measures implemented by the employer.

If an employee who works in the healthcare sector is not provided with appropriate personal protective equipment (PPE), this may entail the danger of an ‘imminent and serious risk of exposure’.

If an employee works in close proximity to someone who may have the virus, or who lives with someone who does, and who is attending work against statutory prescripts, this may entail an ‘imminent and serious risk of exposure’.

An employer is not entitled to terminate an employee’s services should the employee refuse to perform work, because of the ‘imminent and serious risk of exposure to COVID-19’.

An employee who refuses to perform work must as soon as reasonably practicable notify the employer of the refusal and the reason for the refusal. The employer, after consultation with the compliance officer and any health and safety committee, must endeavour to resolve any issue that may arise from the exercise of the employee’s rights in terms of clause 48.

If there is a dispute whether clause 49 has been contravened, the employee may refer the dispute to the Commission for Conciliation, Mediation and Arbitration or relevant Bargaining Council for conciliation and arbitration. However, no provision is made for the employer being able to resort to conciliation, as well as arbitration.

Clauses 48 to 56 do not preclude an employer from utilising appropriate procedures to resolve the dispute. Although the employer is not entitled to refer a dispute for arbitration, it is submitted that it is entitled to refer such dispute for conciliation. Such dispute would qualify as a ‘matter of mutual interest’ in terms of s 134 of the Labour Relations Act 66 of 1995. In *Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of South Africa and Others* [2014] 9 BLLR 923 (LC) the court was critical of a narrow interpretation of disputes of ‘mutual interest’.

Conclusion

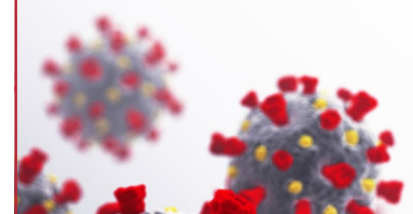
Reasonable justification means the employee or health and safety representative has some objective information that makes them believe there are unsafe conditions at the workplace. The state of affairs must be such to lead a reasonable person to believe that it may endanger the health or safety of persons.

An employer is not entitled to take disciplinary action against an employee who harbours such objective view. The employer is entitled to resort to dispute resolution mechanisms, such as referring a dispute for conciliation.

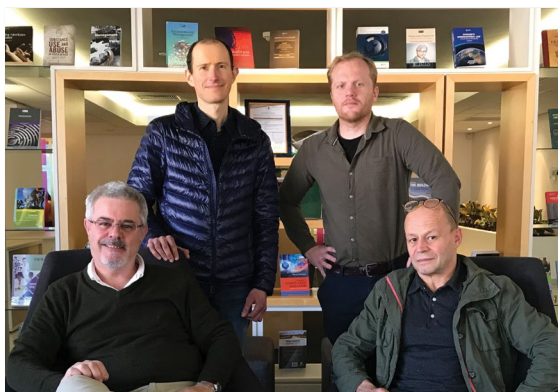
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THE LAW REPORTS



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

July 2020 (4) South African Law Reports
(pp 1 – 318); 2020 (2) South African
Criminal Law Reports (pp 1–112)

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

CC: Constitutional Court
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Administrative law

The test for the remittal of decisions that have been reviewed under the Promotion of Administrative Justice Act 3 of 2000 (PAJA): In *Kalisa v Chairperson, Refugee Appeal Board* 2020 (4) SA 256 (WCC), the applicant, a Burundian, had applied to the second respondent, the Refugee Status Determination Officer, for asylum. The application was, however, refused and the applicant's subsequent appeal to the Refugee Appeal Board was dismissed. The applicant then applied to the WCC to review the Board's decision and to substitute it with a grant of asylum.

The WCC, per Binns-Ward J, determined that the decision had to be set aside on review because the Board was non-quorate at the time of its decision-making and had, in addition, failed to properly apply its mind to the merits of the matter.

The WCC ruled, in regard to substitution of an administrator's decision, that this was only possible in exceptional cases and where it would be just and equitable, in the context, to substitute the decision. There were two distinct steps: The court first had to determine if it was an exceptional case, and then whether substitution was a just and equitable solution. In the latter inquiry, the paramount

factors were whether the court was in as good a position as the administrator to make the decision and whether the decision was a foregone conclusion. Subordinate factors included delay, bias or incompetence on the functionary's part.

The WCC also pointed out in passing that where a court was not in as good a position as the administrator but the administrator's bias or incompetence rendered it unjust to remit, the court might be required to devise a remedy not identified in s 8 of PAJA.

The WCC further held that in asylum matters the prejudicial consequences of a delay did not of itself justify the granting of asylum unless it was clear that the applicant qualified for it. If this was unclear, then any substituted order might fall short of the requirement of lawfulness applying to the decision being replaced.

The court held that substitution was not justified in the present case because the court was not in as good a position as the functionary to decide and because the decision was not foregone.

The WCC, therefore, ordered that the matter be remitted to the responsible authorities and that the applicant be allowed to make a new application for asylum.

Criminal law

The doctrine of common purpose and the common-law crime of rape: In *S v Tshabalala and Another* 2020 (2) SACR 38 (CC) the two applicants, in separate cases relating to the same incidents, applied for leave to appeal to the CC from their convictions in the GJ for rape. Their convictions arose from a violent ram-

page embarked on late one night in September 1998 when nine young men attacked nine separate homes, broke down doors and assaulted the occupants they found inside. They raped eight female occupants, some of them repeatedly by several members of the group. The youngest of the victims was 14-years-old and another was visibly pregnant. While some of the men raped the victims, other members were posted outside to act as lookouts. The members of this group, including the applicants, were also arrested and subsequently convicted of rape on the application of the doctrine of common purpose.

In the GJ, the applicants contended that the common-law crime of rape was not an offence for which an individual could be convicted through the application of the doctrine of common purpose, but the court rejected that argument in convicting the applicants who were sentenced to effective life sentences.

One of the members of the lookout group appealed to the SCA, which found that, to convict him based on his mere presence, was to subvert the principles of participation and liability as an accomplice in criminal law. The SCA ruled that it could not be proved that said member had been present at the scene of violence where rapes, assaults, housebreakings and robberies were committed, other than at one particular household, and therefore, concluded that no common purpose with the other members of the group had been established.

In the present application, the respondent supported the findings of the GJ and that the group responsible for the attacks had acted as a cohesive unit.

It contended that applying the doctrine was not out of the ordinary, but was in keeping with modern international standards. The first *amicus curiae*, the Commission for Gender Equality, also contended that the instrumentality approach adopted by the SCA was fundamentally flawed. It argued that it was both artificial and unprincipled as there was no reason why the use of one's body should be determinative in the case of rape, but not in the case of assault or murder. That approach sought to carve out crimes of a sexual nature and to exclude the application of common purpose to such crimes, and that this in turn inhibited the state's ability to prevent and combat gender-based violence.

The CC per Mathopo AJ (Mogoeng CJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Theron J and Victor AJ concurring), held that it was difficult to conclude that the rapes were unexpected, sudden or independent acts of one or more of the perpetrators, which the others neither expected nor were aware of, even after they had happened. The perpetrators had overpowered their victims by intimidation and assault, and the manner in which the applicants and the other co-accused had moved from one household to the next indicated meticulous prior planning and preparation. They made sure that any attempt at escape would be impossible.

As to whether the doctrine of common purpose indeed applied to the common law crime of rape, in reaching their decision, the court considered the relationship between rape and power. It held that to characterise rape simply as an act of a man inserting his genitalia into a female's genitalia without her consent was unsustainable in instances of group rape, where the mere presence of a group of men resulted in power and dominance being exerted over the victims. The instrumentality argument, which was embedded in the system of patriarchy, had no place in a modern society founded on the Bill of Rights, and had to be discarded. A contrary view ignored the fact that rape could be committed by more than one person when the others had the intention of exerting power and dominance over the women just by their presence. The GJ conclusion that the applicants and their co-accused had acted in the furtherance of a common purpose could therefore not be faulted.

In a separate but concurring judgment Khampepe J (Froneman J, Jafta J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ concurring) found it necessary to add that addressing rape and other forms of gender-based violence required the efforts of the executive, the legislature and the judiciary, as well as communities. The structural and systemic nature of rape emphasised that it would be irrational for the doctrine of

common purpose not to be applicable to the common-law crime of rape, while being applicable to other crimes.

Victor AJ, also in a separate but concurring judgment, considered that the common-law crime of rape was one that had to be developed to meet the obligations imposed by international law whose protocols placed an obligation on the state, including the court, to develop the domestic laws to ensure that women were protected from sexual violence. These international obligations and their constitutional duty provided the legal and logical basis to confirm the application of the doctrine of common purpose to the common-law crime of rape.

The applications for leave to appeal were granted, but the appeals dismissed.

Defence Force

Termination of service and reinstatement to service after quashed rape conviction: In *Maswanganyi v Minister of Defence and Military Veterans and Others* 2020 (4) SA 1 (CC), the applicant, Mr Maswanganyi, a member of the South African National Defence Force (SANDF), was convicted of rape and sentenced to life imprisonment. Mr Maswanganyi, however, obtained to have the conviction and sentence set aside on appeal, after which he applied to the respondent, the SANDF, for reinstatement to his former position. The SANDF refused, relying on s 59(1)(d) of the Defence Act 42 of 2002, which stipulates that a member's service terminates if they are sentenced to imprisonment.

This prompted Mr Maswanganyi to apply to the GP for reinstatement retrospective to the date of termination of his service, being the date of sentence. He was successful, and the court ordered that Mr Maswanganyi be reinstated retrospectively, but the SANDF obtained leave to appeal from the SCA, which upheld the appeal, causing Mr Maswanganyi to seek leave to appeal from the CC.

The CC, per Tshiki (Khampepe ADCJ, Froneman J, Jafta J, Madlanga J, Mathopo AJ, Theron J and Victor AJ concurring), found that it had jurisdiction, it granted leave to appeal, and it upheld the appeal. It ruled that once the jurisdictional fact of sentence was removed by successful appeal, that termination of service was reversed retrospectively by operation of law. The CC pointed out that if the GP's sentence was conclusive in the sense that even on successful appeal the termination would remain extant, this would negate the right of appeal to a higher court in s 35(3)(o) of the Constitution.

The CC set the SCA's order aside and replaced it with an order declaring that Mr Maswanganyi's service did not terminate under s 59(1)(d) and that he continue in the position he had been in on the date of sentence.

- See also Gideon Pienaar, Joshua Mendelsohn, Johan Botha and Simon Pieterse 'Law Reports' 2019 (Nov) *DR* 22 for the SCA matter.

Delict

The requirements for informed consent: In *Beukes v Smith* 2020 (4) SA 51 (SCA), the respondent, Dr Smith, performed a laparoscopic hernia repair on the appellant, Mrs Beukes. In the course of the surgery, her bowel was perforated. This required several further operations and a lengthy convalescence.

Mrs Beukes approached the GP with a delictual claim for damages, contending that Dr Smith's negligence was responsible for the injury and that he had failed to obtain her informed consent to the laparoscopic procedure. This consisted in his failure to fully inform her of the treatments available and of their risks and benefits. Dr Smith testified that during the consultation he informed Mrs Beukes of the nature of each of the two medical procedures open to her and the attendant material risks and benefits. He told Mrs Beukes that his opinion was that the laparoscopic procedure would be better. Thereafter, Mrs Beukes gave oral consent to the proposed laparoscopic procedure. The oral consent was confirmed in writing in the early morning of the following day, the day of the operation.

Mrs Beukes was high risk for wound infection because of her morbid obesity. At the age of 41 she at the time weighed 125,9 kg, was 1,65 m tall and, therefore, had a body mass index (BMI) of 46. She was also a smoker. Dr Smith was of the opinion that performing the hernia repair laparoscopically was the better option for Mrs Beukes because of her excessive weight, the likelihood of adhesions due to her previous operations and because she was a smoker.

Mrs Beukes alleged that Dr Smith negligently decided to perform laparoscopic surgery instead of a laparotomy despite the higher risk of bowel and vascular injury posed to obese patients by the former procedure. Mrs Beukes also alleged that Dr Smith's removal of the ovarian cyst had been unindicated and unnecessary.

In his defence, Dr Smith testified that he explained the risks and benefits of a laparoscopy as opposed to open surgery to Mrs Beukes.

The GP dismissed Mrs Beukes' claim, accepting Dr Smith's version that he had indeed sufficiently explained matters to Mrs Beukes. The GP found Mrs Beukes not to be a reliable witness, and had rejected her version that Dr Smith had already made up his mind to operate on her before the consultation.

Mrs Beukes, with the GP's leave, appealed to the SCA. There the matter turned mainly on the issue of informed consent.

The SCA, per Dambuzza JA (Navsa AP, Zondi and Mocumie JJA and Mokgohloa AJA concurring), pointed out that an appeal court had limited power to overturn factual findings by a trial court. The SCA found that Dr Smith's demeanour and diligence were more consistent with the version that he would have explained the contemplated treatment than not. The medical records tendered in evidence also supported his version. In the light of all this, Mrs Beukes' allegation that Dr Smith had from the onset decided to perform the laparoscopy was improbable.

The SCA ruled that where a patient was informed of a treatment and its material risks but consented to the treatment, and injury resulted, wrongfulness would be excluded. The consent Mrs Beukes gave for the laparoscopy was consistent with what a reasonable person would have opted for immediately prior to the surgery.

The SCA concluded that Dr Smith had in fact informed Mrs Beukes of the material risks of laparoscopy (bowel perforation) and laparotomy (infection) before she consented to the former procedure. The information imparted by Dr Smith met the applicable standard, covering the range of options available to Mrs Beukes and the associated benefits and risks. It could therefore, not be said that there was negligence in relation to the obtaining of the informed consent from Mrs Beukes. The SCA accordingly dismissed the appeal.

Intellectual property - unlawful competition

Who owns your personal information?

In the judgment of *Discovery Ltd and Others v Liberty Group Ltd* 2020 (4) SA 160 (GJ) Keightley J dismissed Discovery's attempt to block the Liberty Group from awarding wellness bonuses to its members based on their vitality status. The third applicant, Discovery Life, Discovery's insurance arm, and respondent Liberty are top rivals in the South African insurance industry. The judgment dealt, *inter alia*, with unlawful competition and trademark infringement under s 34 of the Trade Marks Act 194 of 1993.

Proceedings commenced when Discovery applied for an interdict prohibiting Liberty from what it alleged to be an unlawful infringement of its ('Discovery Vitality' and 'Discovery') trademarks. Discovery also sought damages related to unlawful competition by Liberty's use of Discovery's 'Vitality' programme.

Discovery Vitality (the second applicant) is also a subsidiary of Discovery. Its members can earn Vitality points toward obtaining a 'Vitality status': The more points, the higher the status. In this way Vitality members are encouraged to lead a healthier lifestyle, receiving in return the benefits associated with their status.

To make the system work, Discovery collects pertinent information on members' lifestyle, including their exercise and food-purchasing habits. Discovery's Life insurance arm, Discovery Life, then links its clients' Vitality status to their insurance risk, allowing it to give discounts to the healthier ones. This feature made Discovery a very popular insurer, forcing competitors to create similar offerings to compete.

Discovery argued that Liberty was infringing on its 'Discovery' and 'Vitality' trademarks in marketing its Wellness Bonus product. It saw Liberty's awarding of wellness bonuses on the basis of their vitality status as an attempt to take advantage of Discovery's 'back office' work without Discovery's permission. Discovery was particularly irked by the fact that Liberty was using its trailblazing efforts in linking insurance to wellness rather than sickness as a shortcut to making its own offering. It appeared that Liberty clients could, by attaining a high Vitality status, get up to 40% of their life insurance premiums back.

Liberty believed it was doing nothing wrong, claiming that it openly acknowledged the fact that its clients could be rewarded based on their status in outside wellness programmes. Liberty also acknowledged that it was using Discovery's trademarks without permission in advertising and selling its Lifestyle Protector Plan. Liberty denied, however, that this amounted to trademark infringement, arguing that any information its clients chose to reveal, that was relevant to their risk profile, was their choice.

In its judgment the GJ pointed out that Vitality members paid for their membership and that there was no restriction on a member voluntarily disclosing their Vitality status, even if it was to a competitor of Discovery such as Liberty. It was their personal information, which they were free to make public and to disclose to anyone they wanted. Asking for that status was, moreover, not a trademark infringement or unfair competition.

As to the alleged trademark infringement, the GJ pointed out that it had to weigh the rights of Discovery as the proprietor against those of Liberty as a competitor while at the same time considering also the rights of the public. The GJ stressed that 'deceptive-use' trademark protection (under s 34(1)(a) of the Trade Marks Act) was not designed to stifle commercial speech, particularly where the external providence of marks was made clear. Where unfair or detrimental use of a well-known mark (under s 34(1)(c) of the Act) was relied on, a complainant had to show unfair advantage to the user or significant harm to its own reputation. The GJ ruled that Discovery had not adduced case-specific facts that pointed to unfair advantage to Liberty. And Discovery's broad assertion that Liberty's use

of its mark would be to Discovery's detriment because it would lead to the sale of Liberty policies, was insufficient since it ignored Liberty's relatively limited, descriptive reference to Discovery trademarks and the prominent use of its own trademark in the same documentation. Since Discovery had failed to establish an unfair advantage to it or significant harm to Discovery's reputation that warranted the stifling of the competition between them, the applicants' complaint of an infringement under s 34(1)(c) failed.

The GJ held that although Discovery had with its Vitality programme launched a major innovation in the South African insurance industry, this did not give it a license to stifle competition. Misappropriation of a rival's performance and appropriation of goodwill did not, *per se*, constitute unlawful competition. To find Liberty's use of publicly available information to be to the detriment of a non-competitor like Discovery would entail extending the current common-law understanding of *boni mores*, which was not called for. In fact, Liberty's competition with Discovery protected Vitality members against a Discovery monopoly, which was to the benefit of the members.

The court held that no reasonable person and certainly no professional intermediary could mistake Vitality for a Liberty product. And using third-party information to calculate mortality and morbidity rates had been (known as risk proxies), has for a long time been a common feature of the life insurance industry in South Africa.

In conclusion, the GJ found, that Liberty's conduct was indeed consistent with the *boni mores* of South African society, and not wrongful. In so finding the GJ took into consideration not only Discovery's right to property and Liberty's right to trade, but also the public interest in doing with personal information as it wished.

Given its finding that Liberty's conduct neither constituted trademark infringement nor unlawful competition, the GJ dismissed Discovery's application for an interdict.

Public Protector

Power to subpoena confidential taxpayer information and adverse costs orders:

At issue in *Commissioner, South African Revenue Service v Public Protector and Others* 2020 (4) SA 133 (GP) was whether the powers of the Public Protector (the PP) extended to subpoena confidential taxpayer information; and whether the PP's conduct in this case warranted a costs order against her *de bonis propriis*. The PP, who was after taxpayer information relating to an investigation she was conducting, purported to exercise her powers to subpoena under s 11 of the Public Protector Act 23 of 1994 (the PPA) when

she directed the Acting Commissioner of Sars (the Commissioner) to appear before and provide her with requested taxpayer information. The Commissioner refused, citing non-disclosure obligations under s 69(1) of the Tax Administration Act 28 of 2011 (the TAA), which provides that 'current or former [South African Revenue Service] official[s] must preserve the secrecy of taxpayer information and may not disclose [it] to a person who is not a [South African Revenue Service] official'.

Sars and the PP agreed to jointly seek legal opinion on this issue. This opinion confirmed that there was no conflict between the two Acts – that, properly interpreted, the PP's powers to subpoena did not include the power to compel disclosure of Sars' confidential taxpayer information. The PP, who was an advocate herself, nonetheless continued to insist that her powers to subpoena under the PPA trumped the confidential status of the taxpayer information under the TAA. The PP then obtained her own legal opinion and to that effect subsequently issued the Commissioner with a second subpoena relating to the same investigation and taxpayer information. In response the Commissioner launched the present application in the GP. It was for a declaratory order that s 69(1) of the TAA constituted 'just cause' for his refusal as

contemplated in s 11(3) of the PPA and that the PP's conduct in this matter warranted that the PP pay 15% of the costs *de bonis propriis*.

As to the declaratory relief, the GP emphasised that its duty was to hold the scales evenly between the PP and the Commissioner and to declare invalid any practice, which in the absence of an Act of Parliament resulted in one Chapter 9 trying to coerce another Chapter 9 institution to act in contravention of the Constitution and the law. Confrontations between such institutions had to be avoided at all costs and civil means to resolve them, fashioned.

The GP, per Mabuse J, ruled that the phrase 'just cause' as intended in s 11(3) of the PPA simply meant 'valid grounds' or 'reasonable grounds' or 'valid reasons'. 'Just cause' existed if the underlying reason for doing or not doing something was based on or was consonant with the Constitution or the law, which meant that a person who was prevented by the law from disclosing any information, had a 'valid reason' or reasonable ground to refuse to cooperate with the PP. Here, Sars was prevented by the provisions of s 69(1) from complying with the PP's subpoena, and the PP's power to subpoena a witness to give evidence or to produce a document could not be invoked to coerce that

witness to violate the law under which such a witness operated. The PP was required to act in accordance with the law. Her powers of subpoena emanated from the PPA (and not from the Constitution) and were accordingly subject to the law. They did not trump the provisions of s 69(1) of the TAA or 'just cause' as set out in s 11(3) of the PPA. The presence of the phrase 'just cause' in s 11(3) of the PPA was evidence enough that her powers were not limitless. The Constitution itself required that the PP's powers be regulated by national legislation.

The GP then dealt with the issue of costs. It pointed out that it was expected of the PP, as a public litigant, to never act in bad faith or in a grossly negligent manner. In the present matter the PP's conduct – agreeing to seek counsel's opinion on an issue, then taking part in the identification of counsel whose opinion on the matter would be sourced and presiding over the identification of the topic, only to ultimately reject counsel's opinion and obtain a different one without involving Sars – was a textbook example of negotiating and acting in bad faith. The PP had also acted recklessly in issuing the second subpoena contrary to clear advice and without making any attempt to verify it. The GP concluded that, all things considered, the circumstances under which



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public officials may be ordered to pay costs out of their own pockets existed in the present case.

The court accordingly made an order proclaiming that Sars officials are obliged to withhold taxpayer information under the 'just cause' provision and that the PP's subpoena power did not extend to taxpayer information. The PP was ordered to pay the costs in the application.

Other cases

Apart from the cases and material dealt

with or referred to above, the material under review also contained cases dealing with –

- admiralty practice;
- adoption and rights of children;
- business rescue;
- compensation claim against the Road Accident Fund;
- competition law;
- eviction from leased property;
- expropriation;
- government procurement;
- nuisance;

- power of courts to determine moot or academic issues; and
- the review of administrative action.

Gideon Pienaar BA LLB (Stell) is a Senior Editor, Joshua Mendelsohn BA LLB (UCT) LLM (Cornell), Johan Botha BA LLB (Stell) and Simon Pietersen BBusSc LLB (UCT) are editors at Juta and Company in Cape Town.



By
Kgomotso
Ramotsho

Regulations must be interpreted in the context of the Act

National Commissioner of Police and Another v Gun Owners of South Africa (Gun Free South Africa as Amicus Curiae) (SCA) (unreported case no 561/2019, 23-7-2020) (Schippers JA (Maya P, Zondi and Plasket JJA and Eksteen AJA concurring))

In the case of the *Gun Owners of South Africa*, the appellants, the National Commissioner of Police (the Commissioner) and the Minister of Police (the Minister of Police) appealed against an urgent interim issued by Prinsloo J in the High Court, which prevents the South African Police Services (the SAPS) from applying, implementing and enforcing various provisions of the Firearms Control Act 60 of 2000 (the FCA).

Gun Owners of South Africa (GOSA), a voluntary association formed to protect the rights of lawful firearm owners in South Africa, in July 2018 launched an urgent application in the High Court against the appellants. GOSA sought an interim interdict, pending the determination of the main application in which it sought the relief set out in parts [A] and [B] of its notice of motion (the main relief).

'Directing that the SAPS as represented herein by the [first] and [second] respondents be prohibited from implementing any plans of action or from accepting any firearms for which the license expired at its police stations or at any other place, for the sole reason that the license for the firearm expired, and that the SAPS be prohibited from demanding that such firearms be handed over to it for the sole

reason that the license for such firearm has expired, and that this order will operate as an interim interdict, pending the further determination of this application as prayed for in paragraphs 3 to 3.4 *infra*;

3 That this matter then be postponed to the opposed motion roll ... for the further determination of the following relief, as prayed for by the applicant:

3.1

[A] That it be ordered that the period of validity of all licenses for firearms that were issued and those that will still be issued in terms of the Firearms Control Act, 60 of 2000, will be extended to the lifetime of the owner thereof, with due regard being had to the remaining and existing provisions of the FCA that limit the right to the owner thereof to possess the firearm,

alternatively,

that by order of court the periods as referred to in sections 27 and/or 24(1) and 24(4) of the [FCA], will be extended, in order for people that hold expired licenses to apply for the renewal thereof.

Further alternatively,

[B]

(a) The first respondent shall withdraw the circular issued by Acting National Commissioner Phahlane on 3 February 2016.

(b) The first respondent shall issue a directive that the information technology system of the Central Firearms Register be restored to a position that it is able to accept applications for renewal of licenses which are late because they are lodged inside the 90 days period envisaged in section 24(1) of the [FCA].

(c) The first respondent shall issue a directive that the information technology system of the Central Firearms Register be restored to a position that it is able to accept applications for renewal of licenses which have expired because the period of their validity contemplated in section 27 of the [FCA] has expired.

(d) Any applications for renewal contemplated in paragraphs (b) and (c) above shall still be subject to the requirement of 'good cause' as contemplated in section 28(6) of the FCA.

(e) Any applicant who has lodged an application for renewal and who has *prima facie* provided good cause in the relevant space provided on SAPS form 518(a), shall be deemed to be in lawful possession of the firearm until his application has been decided.

3.2 Alternatively to prayers 3.1[A] and 3.1 [B] *supra*, that the first respondent be ordered to provide a comprehensive and detailed security plan to the satisfaction

of this honourable court to the court, to ensure that the firearms to be collected by it, for which the licenses expired, will be safe from being lost or stolen from the SAPS ...’.

The interdict that was brought to court by GOSA disables the scheme of renewal and termination of firearm licences under the Act, by prohibiting the SAPS from demanding or accepting the surrender of firearms by licence-holders whose firearm expired, because they failed to renew their licences within the timeframe prescribed by the Act. The SCA said that it was clear from the relief sought that GOSA did not challenge the constitutionality of any provision of the Act. That the basis of the relief was an alleged infringement of the right to just administrative action, stated as follows in the founding affidavit made by Paul Oxley, GOSA’s chairperson.

In the main relief Mr Oxley had a clear/*prima facie* legal right to just administrative action that includes the rights that arise from a legitimate expectation that the authorities would have disposed of a system, which they on previous occasions admitted to as not having the capacity to administer (the provisions of the FCA as they still stand) and because they previously before the court conceded that the relevant limitation has no justification. The legitimate expectation included that –

- a legislative amendment that came into operation in 2011 in terms of which the period of validity of competency certificates was extended;
- the fact that SAPS (up to February 2016) accepted applications for the renewal of licences and approved them even though the licences expired. This is an important consideration as the impression and expectation was created that the relevant 90-day period was extended as can be justified through the application of s 24(1) read with ss 24(4), 28(6) and 28(1). For the SAPS to now hold otherwise would be tantamount to a situation of entrapment and deceit and they are bound to impressions that they created also because of the principles of estoppel.

Mr Oxley pointed out that the conduct of the SAPS was, therefore, tantamount to the rescinding of the previous message that the SAPS signalled to the courts, Parliament and the public on the matter too and becomes relevant during the protection of a procedural or substantive interest that is being threatened. He submitted that the reliance of the public on these representations was reasonable as the representations were made verbatim to both the courts and Parliament. That it would be deceitful of the SAPS to now take the position that the public was not being misled on the matter.

The application was opposed. The grounds of opposition outlined in the an-

swering affidavit by the Commissioner to mention a few submitted that –

- what GOSA was seeking was a clear breach of the separation of powers;
- the main and alternative final relief, which is sought, namely orders extending the validity of expired firearm licences in a manner inconsistent with the Act, was simply incompetent and also flies directly in the face of the unanimous judgment of the Constitutional Court (CC) in *Minister of Safety and Security v South African Hunters and Game Conservation Association* 2018 (10) BCLR 1268 (CC), decided on 7 June 2018, in which the CC upheld the system of firearm licencing and renewal, and the criminalisation of possession of an unlicensed firearm;
- the interim relief sought was plainly incompetent; and
- the main alternative main relief which GOSA sought are orders overriding of the provisions of the Act.

The Commissioner submitted that the application for interim interdict be refused.

Prinsloo J accepted what was stated in the founding affidavit, the bulk of which contained hearsay and unstained assertions by Mr Oxley, on the basis that he was an ‘experienced deponent who has been involved in these matters for 30 years.’ He also accepted the assertion in the affidavit that the circumstances which led to the application were ‘exceptional’, following the judgment by the CC in the *South African Hunters and Game Conservation Association* case, upholding the constitutionality of the Act. These circumstances were mainly that the police had started to apply pressure on firearm owners, whose licences had expired to surrender their firearms for destruction, failing which they would be arrested and prosecuted. This apparently caused anxiety among individual licence holders and security personnel.

Prinsloo J also held that the interim order did not violate the doctrine of the separation of powers by prohibiting the executive from carrying out its constitutional and statutory obligations, since it related only to ‘the police and the manner of executing [their] mandate in a more recognised and practical way’. Prinsloo J added that the interim relief was ‘in harmony with the Act and the regulations prescribing the right or the opportunity for the holder of an expired licence to apply for renewal upon good cause shown in terms of Form 518(a)’. Prinsloo J concluded that a proper case had been made out for urgent interim relief, and that GOSA, its 40 000 members and 450 000 other gun users with expired licences, had to be assisted pending the outcome of the main application or ‘perhaps the result of an amnesty being granted’. The judgment granting the interdict was delivered on 27 July 2018.

The SCA pointed out that GOSA’s counsel submitted that the interim interdict was not appealable because it was not final in effect, and the interest of justice did not require that it should be appealable since the doctrine of the separation of powers was not implicated. The SCA said that it was beyond question that the doctrine of the separation of powers was implicated in this case: The interdict instantly prohibited the SAPS from demanding or accepting the surrender of firearms with expired licences in terms of the Act, powers and duties granted to its members by the legislature. The SCA added that according to the answering affidavit, there are some 436 366 firearm licences throughout the country which have expired in terms of s 28(1)(a) of the FCA, as a result of the failure of the owners of those firearms to renew their licences.

The SCA pointed out that there is a real risk that some or many of these firearms, which are now illegally in the possession of their owners, may be stolen or lost and end up in the hands of criminals, which may injure or kill others. GOSA’s contention that this risk is not immediate, serious or irreparable needs merely to be rejected. The SCA said the interim interdict had a nationwide effect and constitutes an impermissible instruction by a court on executive authority, as explained below. The SAPS is prohibited from exercising its powers and carrying out its obligations under the Act. For that reason, the interim order was appealable.

The SCA said the appellants made it clear at the beginning of the answering affidavit that it was impossible to answer Mr Oxley’s generalised assertions concerning the conduct of members of the SAPS, which were devoid of facts or evidence, other than by a general denial. The SCA added that the ‘authentic newspaper reports’, which the courts relied on, are not proof of the truth of their contents. They are hearsay. Further, Mr Oxley, the ‘experienced deponent’ failed to set out facts within his personal knowledge, or any evidential basis, for his assertions and conclusions.

The SCA said that the obligation of the owner to renew a firearm licence could not be clearer. The SCA added that Prinsloo J, however, held that the finding by the CC ‘can be nothing more than *obiter* remarks’, because ‘it did not take into account the implications of form SAPS 518 A, and the order made did not deal with this issue at all’, is incorrect. The SCA said that regulations must be interpreted in the context of the Act and not the other way around. The SCA pointed out that GOSA failed to demonstrate that the final relief sought, namely a declaratory order to extend the periods referred to in ss 24, 27 and 28 of the FCA, so as to allow the holders of expired licences

to apply for the renewal thereof on good cause shown within a period determined by the court, has a reasonable prospect of success. The SCA added that it must be emphasised that a firearm licence comes to an end on the last day of its validity by the operation of the law.

The SCA said that regarding the requirement, GOSA alleged that the SAPS did not have the capacity to process some 450 000 firearms and 60 million rounds of ammunition safely; that ordinary citizens and security companies would be left defenceless; and that the resources of the SAPS were better spent on operational duties instead of 'mountains of paperwork being created with no real benefit'. The SCA pointed out that

the unsubstantiated assertions and opinion by Mr Oxley were outweighed by the harm to the appellants, by far.

The SCA said that in its view, the case falls squarely within the category of cases which the CC has excluded from the protection against adverse costs orders. The SCA added that GOSA brought an application, which without merit, based on assertions and inadmissible evidence, and then insisted on being heard on an urgent basis. The SCA pointed out that the application flouted the most basic rules of litigation. The litigation was conducted in a 'manifestly inappropriate' manner, thus there was no reason why costs should not follow result.

The SCA made the following order:

'Condonation of the late filing of the notice of appeal is granted. The appellants shall pay the costs of that application on an unopposed basis.

The appeal is upheld with costs, including the costs of two counsel.

The order of the High Court is set aside and replaced with the following:

"The application is dismissed with costs, including the costs of two counsel."

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



By
Sandile
Rens

What qualifies as a signature in terms of s 13(3) of the ECT Act?

Global & Local Investments Advisors (Pty) Ltd v Fouché (SCA)
(unreported case no 71/2019, 18-3-2020) (Mojapelo AJA
(Navsa, Saldulker, Makgoka and Nicholls JJA concurring))

The importance of electronic signatures cannot be taken lightly since we live in a digital age, and most recently in an era of national lockdown where contracts or any other agreements require electronic signatures. The Supreme Court of Appeal (SCA) delivered a judgment on the question of what qualifies as a signature in terms of the Electronic Communications and Transactions Act 25 of 2002 (ECT Act).

The ECT Act introduced formal legal recognition of electronic commerce. In addition to this, the ECT Act stipulated that, simply because the information is in the form of a data message, it does not mean that it is without force and effect. In South Africa, '[t]he primary functions of a signature, includes evidencing the:

- identity of the signatory;
- intention of the signatory to sign; and
- adoption of the writing signed by the signatory' (Law Society of South Africa 'Electronic Signatures for South African Law Firms Guidelines: October 2014' www.LSSA.org.za, accessed 13-8-2020).

The ECT Act recognises data as the functional equivalent of writing, or evi-

dence in writing, by guaranteeing data messages the same legal validity as messages written on paper. It states that a requirement under law that a document or information be in writing is met if the document or information is in the form of a data message and accessible in a manner usable for subsequent reference to a person who either wants to rely on the existence of a particular agreement or for record purposes.

The ECT Act defines an 'electronic signature' as 'data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature'. The ECT Act further provides at s 13(2) that: 'An electronic signature is not without legal force and effect merely on the grounds that it is in electronic form'. This clearly indicates that electronic signatures are legally recognised in South African law.

Facts of the case

On 23 November 2015 Mr Fouché, a mining consultant, gave a written mandate to Global to act as his agent and invest money with Investec Bank on his behalf. The written mandate stipulated that:

'All instructions must be sent by fax to [a designated number] or by e-mail to [a designated e-mail address] with client's signature.' The money was to be invested in a Corporate Cash Manager (CCM) account in the name of Mr Fouché.

Global opened the CCM accounts for its clients at Investec and then managed the accounts for a fee expressed as a percentage of the funds invested for the client in such accounts.

Two of the three e-mails containing the instructions to transfer money, ended with the words: 'Regards, Nick' while the third ended with 'Thanks, Nick'. None of them had attachments. In response, Global paid out a total of R 804 000 from Mr Fouché's CCM account to unknown third parties in three tranches as follows: R 100 000 on 15 August 2016, R 375 000 on 18 August 2016 and R 329 000 on 24 August 2016. Subsequently, Mr Fouché became aware of this and notified Global that the e-mails had not been sent by him. Mr Fouché claimed payment of the amounts transferred to third party accounts on the basis that Global had paid out contrary to the written mandate.

Global's main submission and defence

to the claim is that it acted within the terms of the mandate, on instructions that emanated from the legitimate e-mail address of Mr Fouché and that the typewritten name 'Nick' at the foot of the e-mails satisfied the signature requirement, when considered in the light of s 13(3) of the ECTA. Section 13(3) of the ECT Act reads as follows:

'Where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if –

(a) a method is used to identify the person and to indicate the person's approval of the information communicated; and

(b) having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.'

The High Court, found in favour of Mr Fouché. Vorster AJ stated that the mandate "specifically required the signature of the plaintiff [Mr Fouché] for a valid instruction and not merely an e-mail or fax message purporting to be sent ..." The court below stated that this is not a case where the parties agreed to accept

an electronic signature as envisaged by s 13(3) of the ECT Act. It went on to say "it is a case where the parties required a signature. No more and no less."

The SCA per Mojaelo AJA (Navsa, Saldulker, Makgoka and Nicholls JJA concurring), looked at different definitions of signature and held, '[t]he Concise English Oxford Dictionary defines "signature" as "a person's name written in a distinctive way as a form of identification or authorisation." Black's Law Dictionary ... gives the definition of "sign" and "signature", which read together bring us close to the legal meaning of signature.'

The court then analysed the mandate itself and held that the mandate required a 'signature', which in every day and commercial context serves an authentication and verification purpose. The court further held that in order to be able to resort to s 13(3) of the ECT Act, Global would have had to show that in terms of the mandate an electronic signature was required. The word electronic is absent from the mandate. The SCA accordingly held that, 'the instruction was not accompanied by such a signature and the court below correctly held that the funds were transferred without proper instructions and contrary to the mandate.' The

court accordingly dismissed the appeal with costs.

Conclusion

The judgment is one which brought legal certainty to an uncertain question of law. The judgment will definitely have far-reaching consequences, as people who have suffered damages due to Internet fraud will use this judgment as precedent to hold the respective financial institutions liable.

One important thing to take away from the judgment is that such a person must first consult the mandate (agreement) they signed with the respective financial institution. If the mandate refers to ordinary signatures and not 'electronic signatures', then reliance can be placed on the *Global* case.

This judgment also places a burden on the financial institutions to amend their agreements, so that it includes 'electronic signatures' as envisaged in the ECT Act.

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New legislation

Legislation published from 2 – 31 July 2020

Bills

Employment Equity Bill B14 of 2020.
Public Finance Management Amendment Bill B13 of 2020.

Promulgation of Acts

Border Management Authority Act 2 of 2020. *Commencement:* To be proclaimed. GN799 GG43536/21-7-2020 (also available in Sepedi).

Selected list of delegated legislation

Commissions Act 8 of 1947

Amendment of the regulations of the Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State. Proc R24 GG43563/28-7-2020 (also available in Afrikaans).

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Regulations under the Act. GN R792 GG43529/17-7-2020.

Cancellation of approved loadings of rates in terms of s 85(2). GN780 GG43528/17-7-2020.

Directive on compensation for workplace-acquired novel coronavirus disease (COVID-19). GenN387 GG43540/23-7-2020.

Increase of monthly pensions; and amendment of sch 4 (manner of calculating compensation). GN R823 GG43569/31-7-2020.

Construction Industry Development Board Act 38 of 2000

Standard for developing skills through infrastructure contracts. GenN363 GG43495/3-7-2020.

Continuing Education and Training Act 16 of 2006

Policy framework to address gender-based violence in the Post-School Education and Training System. GenN410 GG43575/31-7-2020.

Council for the Built Environment Act 43 of 2000

Scope of work for categories of registration for professions regulated by Engineering Council of South Africa. GN740 GG43495/3-7-2020.

Defence Act 42 of 2002

Extension of employment of 20 000 members of the South African National Defence Force for borderline control. GN747 GG43502/3-7-2020.

Disaster Management Act 57 of 2002

• Agriculture

Directions regarding livestock auctions: Measures to prevent and combat the spread of COVID-19. BN85 GG43571/31-7-2020.

• Education

Amendment of directions regarding the re-opening of schools and measures to address, prevent and combat the spread of COVID-19. GenN370 GG43510/7-7-2020 and GenN371 GG43511/8-7-2020. Directions regarding measures to prevent and combat the spread of COVID-19: Phased return of children to early childhood development programmes. GN762 GG43520/10-7-2020.

• Environment, forestry and fisheries

Amendment of the directions to address, prevent and combat the spread of COVID-19 in the biodiversity sector. GN822 GG43564/28-7-2020 (also available in Sesotho).

• Healthcare

Directions in respect of measures to prevent and combat the spread of COVID-19 in the health sector. GN796 GG43533/17-7-2020.

• General regulations

Amendment of regulations issued in terms of s 27(2) ('Lockdown' regulations). GN763 GG43521/12-7-2020 and GN846 GG43577/31-7-2020.

Extension of the national state of disaster (COVID-19) to 15 August 2020. GN765 GG43524/13-7-2020.

• Home Affairs

Amendment of the directions in respect of measures to prevent and combat the spread of COVID-19 in Home Affairs services. GN749 GG43504/3-7-2020 and GN843 GG43572/31-7-2020.

• Justice and courts

Directions regarding auctions and sales in execution conducted by Sheriffs of the court. GN R816 GG43553/27-7-2020 (also available in Afrikaans).

• Municipal operations and governance

Amendment of the directions to address, prevent and combat the spread of COVID-19 in municipalities and municipal entities. GN748 GG43503/3-7-2020.

• Social development

Amendment of the directions issued in terms of reg 4(5) in respect of measures to prevent and combat the spread of COVID-19 at social development facilities. GN727 GG43949/2-7-2020.

• Sports, arts and culture

Amendment of the directions to address, prevent and combat the spread of COVID-19: Sporting events, training and matches to resume, opening of libraries, museums, cinemas, theatres, galleries and archives under alert level 3. GN751 GG43507/6-7-2020.

• State of disaster

Revocation of the classification of drought as a national disaster. GN767 GG43526/16-7-2020.

• Transport

Amendment of directions on measures to prevent and combat the spread of COVID-19 in air services during alert level 3. GN726 GG43493/2-7-2020.

Amendment of the directions on measures to prevent and combat the spread of COVID-19: Determination of extension for validity period of learner's licences, and driving licence cards. GN802 GG43539/22-7-2020.

Directions on measures to prevent and combat the spread of COVID-19 in public transport services. GN801 GG43538/22-7-2020.

Amendment of the direction on measures to prevent and combat the spread of COVID-19 in air services. GN814 GG43550/24-7-2020.

Division of Revenue Act 4 of 2020

Local government conditional grant allocations, provincial government conditional grant allocations and specific purpose allocations to municipalities. GN738 GG43495/3-7-2020.

Electricity Regulation Act 4 of 2006

Determination: New generation capacity, mitigation capacity and procurement programmes. GN753 GG43509/7-7-2020.

Electronic Communications Act 36 of 2005

Policy direction on the introduction of digital sound broadcasting in South Africa. GN759 GG43514/10-7-2020.

Financial Sector Regulation Act 9 of 2017

Publication of the Financial Sector Conduct Authority Conduct Standard 4 of 2020 (RF): Minimum skills and training requirements for board members of pension funds. GN760 GG43514/10-7-2020.

Firearms Control Act 60 of 2000

Declaration of an amnesty in terms of s 139 from 1 Augusts 2020 to 31 January 2021. GN845 GG43576/31-7-2020.

Health Professions Act 56 of 1974

Amendment of fees payable to the Health Professions Council. BN88 GG43571/31-7-2020.

Legal Practice Act 28 of 2014

Amendment of the rules of the Legal Practice Council made under the authority of ss 95(1), 95(3) and 109(2) by the deletion and substitution of r 46. GenN391 GG43542/24-7-2020.

Marketing of Agricultural Products Act 47 of 1996

Establishment of a statutory measure: Registration of role-players in red meat industry. GN827 GG43571/31-7-2020 (also available in Afrikaans).

Establishment of statutory measure: Records and returns by abattoirs and other role-players in red meat industry. GN826 GG43571/31-7-2020 (also available in Afrikaans).

Merchant Shipping (International Oil Pollution Compensation Fund) Contributions Act 36 of 2013

Determination of the rate of levy for 2018 tax period and payment date (31 August 2020). GN789 GG43528/17-7-2020.

Pharmacy Act 53 of 1974

Good Pharmacy Education Standards (Occupational Qualification Framework Sub-Framework). BN78 GG43495/3-7-2020.

Restoration requirements and process for pharmacists who have been removed from the register. BN80 GG43495/3-7-2020.

Rules relating to good pharmacy practice: Minimum Standards for trading titles. BN81 GG43495/3-7-2020.

Guidance document for Continuing Professional Development (CPD). BN82 GG43495/3-7-2020.

Property Valuers Profession Act 47 of 2000

Amendment of rules. GenN408 GG43571/31-7-2020.

Public Finance Management Act 1 of 1999

Statement of national and provincial governments' revenue, expenditure and national borrowing as at 30 June 2020. GenN404 GG43567/30-7-2020.

Road Accident Fund Act 56 of 1996

Road Accident Fund Regulations, 2008: Adjustment of the medical tariff provided for in s 17(4B)(b). BN77 GG43495/3-7-2020.

South African Maritime Safety Authority Act 5 of 1998

Determination of charges. GN844 GG43573/31-7-2020.

Tax Administration Act 28 of 2011

Returns of information to be submitted by persons. GN741 GG43495/3-7-2020 (also available in Afrikaans).

Traditional Leadership and Governance Framework Act 41 of 2003

Recognition of the AmaMpondomise Kingship in South Africa. GN805 GG43542/24-7-2020.

Draft Bills

- Draft Merchant Shipping Bill, 2020. GenN369 GG43505/6-7-2020.
- Draft Correctional Matters Amendment Bill, 2020. GN803 GG43542/24-7-2020.

Draft delegated legislation

- Guidelines for the registration of persons who hold a BPharm degree as Pharmacist Assistant Post-Basic in terms of the Pharmacy Act 53 of 1974 for comment. BN79 GG43495/3-7-2020.
- Draft Films and Publications Amendment Regulations, 2020 in terms of the Films and Publications Act 65 of 1996 for comment. GenN361 GG43495/3-7-2020.
- Draft Amendment Regulations in terms of the Private Security Industry Regulation Act 56 of 2001 for comment. GenN362 GG43495/3-7-2020.
- Policy and criteria for development registration and publication of qualifications for general and further education and training in terms of the General and Further Education and Training Quality Assurance Act 58 of 2001 for comment. GN735 GG43495/3-7-2020.
- Draft control measures relating to the polyphagous shot hole borer in terms of the Agricultural Pests Act 36 of 1983 for comment. GN R742 GG43496/3-7-2020.
- Regulations regarding the scope of practice for nurses and midwives in terms of the Nursing Act 33 of 2005 for comment. GN R744 GG43496/3-7-2020.
- Notice of intention to amend the rules of the Legal Practice Council made under the authority of ss 95(1), 95(3) and 109(2) of Legal Practice Act 28 of 2014 by insertion of new r 22.1.11 and r 22.2.9 relating to candidate attorneys and pupils, for comment. GenN375 GG43514/10-7-2020.
- Notice of intention to amend the rules of the Legal Practice Council made under the authority of ss 95(1), 95(3) and 109(2) of Legal Practice Act 28 of 2014 the amendment of r 54.12 and r 54.15.3 relating to accounting records, for comment. GenN376 GG43514/10-7-2020.
- Proposed regulations regarding fees for the provision of aviation meteorological services in terms of the South African Weather Service Act 8 of 2001 for comment. GN764 GG43522/13-7-2020.
- Amendment of the procedure in applying for and deciding on an environmental authorisation for large scale wind and solar photovoltaic energy development activities when occurring in renewable energy development zones in terms of the National Environmental Management Act 107 of 1998 for comment. GN785 GG43528/17-7-2020, GN786 GG43528/17-7-2020 and GN841 GG43571/31-7-2020.
- Proposed policy and policy direction on rapid deployment of electronic communications networks and facilities in terms of the Electronic Communications Act 36 of 2005 for comment. GN800 GG43537/22-7-2020.
- Draft Regulations under the South African Citizenship Act 88 of 1995 for comment. GN R815 GG43551/24-7-2020.
- Draft amendment of the Civil Aviation Regulations, 2011 in terms of the Civil Aviation Act 13 of 2009 for comment. GN R810 and GN R811 in GG43543/24-7-2020.
- Draft National Policy on Student and Community Support Services for Community Education and Training College in terms of the Continuing Education and Training Act 16 of 2006 for comment. GN842 GG43571/31-7-2020.
- Draft Regulations for Hazardous Biological Agents in terms of the Occupational Health and Safety Act 85 of 1993 for comment. GN R824 GG43569/31-7-2020.
- Procedures to be followed in applying for or deciding on environmental authorisation for the development or expansion of gas transmission pipeline infrastructure in strategic gas pipeline corridors in terms of the National Environmental Management Act 107 of 1998 for comment. GN836 GG43571/31-7-2020.
- Procedures when applying for or deciding on environmental authorisation for development of electricity transmission and distribution infrastructure in renewable energy development zones in terms of the National Environmental Management Act 107 of 1998 for comment. GN840 GG43571/31-7-2020.





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Are you entitled to severance pay if you refuse a reasonable offer of alternative employment?

In *Lemley v Commission for Conciliation, Mediation and Arbitration and Others* [2020] 7 BLLR 676 (LAC), Mr Lemley (the employee) was employed by T-Systems SA (Pty) Ltd (the employer) in Port Elizabeth. The employer commenced a retrenchment process in which the employee was identified as potentially affected.

As an alternative to retrenchment, the employee was offered a position in East London. The employee refused the offer without providing any reasons. The employee then received a revised offer in which the employer had agreed to increase the period of payment of a rental subsidy offered to him for purposes of relocating to East London. This too was rejected by the employee. Further, as the employee was 57 years of age, the employer offered to subsidise the shortfall in the employee's pension fund up until the date of his retirement to allow him to take early retirement. This offer was similarly not accepted by the employee.

Given the employee's refusal to accept the offers afforded to him, the employee was dismissed, as a result of the employer's operational requirements without payment of a severance package. Aggrieved by the decision, the employee referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA Commissioner found that the employee was not entitled to severance pay because he had refused a reasonable offer of alternative employment. On review, the Labour Court (LC) agreed with the Commissioner's decision and dismissed the employee's review application.

On appeal to the Labour Appeal Court, the issue to be determined was whether the Commissioner's finding that the employee was not entitled to severance pay was reasonable. In this regard, the employee contended that the Commissioner had erred in finding that he had

unreasonably refused the alternative position offered to him by disregarding his age and personal circumstances, which rendered it impossible for him to relocate. The employer, however, contended that the offer of alternative employment was reasonable, even more so on the basis that the employee did not communicate to the employer the reasons as to why he could not accept the offer. The employee was the only individual to reject the offer of alternative employment.

The court noted that s 41 of the Basic Conditions of Employment Act 75 of 1997 requires an employer to pay at least one-week's remuneration for each year of completed service as severance pay to an employee who is retrenched, unless the employee unreasonably refuses to accept an offer of alternative employment. The court found that the purpose of this section is clear, an employee is not entitled to insist on being paid severance pay where they unreasonably refuse to accept the employer's offer of alternative employment. There are compelling reasons why the payment of severance pay has been limited in this manner. Not only does it incentivise an employer to provide alternative employment, but it also seeks to limit job losses through retrenchment.

In the present matter, the employer had taken steps to avoid retrenching the employee. The employee, in turn, had made no effort to engage with the employer regarding the difficulties he had faced in accepting the alternative position. Instead, he elected to refuse the initial and revised offers of alternative employment without advancing reasons. When the issue of his age and personal circumstances was later raised, no further steps were taken by him to detail these circumstances or discuss the matter further with the employer.

The court held that the employee's approach to the offers made by the employer was obtuse and unreasonable in the circumstances. His age and personal circumstances did not alter the fact that he unreasonably refused the offers of alternative employment made to him. In the circumstances, the Commissioner's finding that the employee had unreasonably refused an offer of alternative employment and was not entitled to severance pay was reasonable and the LC had

correctly declined to review the Commissioner's award.

The appeal was dismissed.

Drinking on duty

In *Duncanmec (Pty) Ltd v Williams Itumeleng NO and Others* [2020] 7 BLLR 668 (LAC), the employee was employed by Duncanmec (Pty) Ltd (the employer) as a welder. While on duty, the employee was allegedly found to be under the influence of alcohol. The employee denied that he had consumed alcohol and refused to take a breathalyser or blood test. In the circumstances, the employer inferred that the employee was intoxicated and, following a misconduct hearing, the employee was dismissed.

Aggrieved by the decision, the employee referred an unfair dismissal dispute to the relevant bargaining council. During the arbitration proceedings, the employer's witnesses testified that –

- the employee had been found napping in the toilet;
- when approached he smelt strongly of alcohol and had bloodshot eyes;
- his movements were uncoordinated; and
- he had acted aggressively.

The employee, on the other hand, testified that he was busy working at the workshop when he was called in by the employer's safety officer to be tested for being under the influence of alcohol. He was upset about this and denied that he was intoxicated or unsteady on his feet. He, however, conceded that his eyes were bloodshot as a result of an injury he sustained at work.

Faced with two irreconcilable versions, the Arbitrator found the employee's version to be more credible on the basis that the employee's evidence was not challenged by the employer's legal representative in cross-examination. As the employer did not prove that the employee was unsteady or smelt of alcohol, a negative inference could not be drawn from the employee's refusal to undergo tests. The Arbitrator accordingly found the employee's dismissal to be unfair and reinstated the employee with back pay.

Dissatisfied with the outcome of the award, the employer took the award on review. The Labour Court (LC) found that the Arbitrator's award fell within the

range of reasonableness and accordingly dismissed the employer's application.

On appeal to the Labour Appeal Court, the employer contended, among other things, that the Arbitrator could not simply reject its version on the basis that the employer's representative failed to put its version to the employee in cross-examination. The court noted that the test on review is not whether the Arbitrator had made errors, but whether the outcome of the arbitration proceedings was reasonable. Reasonableness is, therefore, the yardstick against which an arbitrator's award must be assessed. The issue in the present matter was whether the employee was under the influence of alcohol.

The court found that the witnesses who testified on behalf of the employer were diverse and had no reason to conspire against the employee. Furthermore, they were consistent in their testimony that the employee was under the influence of alcohol. The only reason the Arbitrator had rejected the employer's version

was that its legal representative had not put aspects of the employer's version to the employee in cross-examination due to pressing family commitments. In this regard, the court held that the failure to cross-examine the employee could not be detrimental to the employer as the employee had been well aware of the employer's version throughout the proceedings.

The court held further that the Arbitrator's finding that the employee was not under the influence of alcohol was unreasonable. The employee had not explained why he had refused to submit to a breathalyser or blood test, in circumstances where he had done so in the past. The Arbitrator had also assumed that the employee's bloodshot eyes were not a sign of intoxication because his eyes were red when he appeared at the arbitration proceedings, without inviting a response to that observation from the employer or any of the parties present at the arbitration.

The court stressed that this was one

of the many cases in which employees and employers alike rush to court on technicalities, which obscure the real issues. The gist of this matter was whether the employee was under the influence of alcohol. But for the fact that the employer did not put forward its version in cross-examination, the Arbitrator would have found in the employer's favour. It is, however, the duty of an arbitrator to be fair not technical. In the present matter, the overwhelming weight of evidence showed that the employee was under the influence of alcohol, which warranted dismissal because the employer had a zero-tolerance policy against consumption of alcohol on duty for safety reasons.

In the circumstances, the court found that the LC erred in finding that the decision of the Arbitrator was reasonable. The court was satisfied that the appropriate sanction in the matter was that of a dismissal.

The appeal was upheld.



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Substance over form

Pelindaba Workers Union v SA Nuclear Energy Corporation and Others (LAC) (unreported case no JA73/2018, 25-6-2020) (Sutherland JA with Davis JA and Savage AJA concurring)

At the centre of this matter was the correct categorisation of a dispute, which came before the Commission for Conciliation, Mediation and Arbitration (CCMA). Additionally, the correct categorisation of the dispute had a direct impact on the CCMA's jurisdiction to hear the matter.

By way of collective bargaining the employer and the majority union, the National Education, Health and Allied Workers' Union (NEHAWU), negotiated a 7,5% remuneration increase for employees within band A of the employer's structures. The employer took a decision to extend the same increase to em-

ployees in band B, however, only granted employees in band D an increase of 5,5%.

Unhappy with the disparity in respect of increases between the different bands, the appellant trade union, (a minority and unrecognised union) referred an unfair labour practice dispute on behalf of its members who were employed within band D.

The union, Pelindaba Workers Union (PWU) described the employer's conduct as an unfair act or omission involving unfair conduct relating to the provisions of benefits to an employee.

At the onset the employer challenged the CCMA's jurisdiction to hear the matter – according to the employer the dispute was not one relating to benefits and for this reason, the CCMA lacked jurisdiction to entertain the referral.

The arbitrator found that the dispute related to benefits thus invoking CCMA's jurisdiction to hear PWU's claim. This finding was later set aside by the Labour Court on review.

PWU approached the Labour Appeal Court (LAC) on appeal.

The LAC noted that the dispute before the arbitrator was to firstly ascertain the true nature of the dispute. Moreover, and axiomatic to this approach, the arbitrator would have addressed the issue of jurisdiction – if the true nature of the dispute was one relating to benefits – then the CCMA would have jurisdiction to hear the matter if, however, the true nature of the dispute did not relate to benefits, then it would follow that the CCMA did not have jurisdiction to continue with the matter.

The LAC reiterated the test to adopt when determining the true nature of a

dispute, was to examine the substance of the dispute and not the form of the dispute or how the referring party has categorised the dispute (see *Coin Security Group (Pty) Ltd v Adams and Others* (2000) 21 ILJ 924 (LAC) and *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another* (2003) 24 ILJ 305 (CC)).

Having made this point, the task before the LAC was to determine whether the dispute referred by the trade union, satisfied the meaning of benefits as contemplated in s 186(2)(a) of the Labour Relations Act 66 of 1995 (LRA).

As to what constitutes a 'benefit' for purposes of an unfair labour practice, the court referred to the decision of *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 1120 (LAC), wherein the LAC in that matter stated:

'In my judgment "benefit" in s 186(2)(a) of the Act means existing advantages or privileges to which an employee is entitled as a right or granted in terms of a policy or practice subject to the employer's discretion.

...

On the other hand, where an employee wants to use the same remedy in relation to the provision of benefits such an employee has to show that he or she has a right or entitlement sourced in contract or statute to such benefit'.

Returning to the jurisdictional ruling, the arbitrator's reasoning for accepting the matter related to benefits (and hence the CCMA had jurisdiction to hear the matter), was as follows –

- no collective bargaining took place in respect of employees on band D;

- thus the increase of 5,5% to employees in band D was a unilateral act of the employer;
- this unilateral decision made by the employer was in terms of a 'policy' of the employer;
- the 'policy' in question was the employer's decision to apply a sliding scale to wage increases for that year; and
- therefore, the increase in wages constitute a benefit as envisaged in s 186(2) (a) of the LRA, which in turn, meant the CCMA had jurisdiction to hear the dispute.

Expressing its views on the arbitrator's findings, the LAC held:

'The reasoning is fundamentally flawed. It constitutes, in part, a series of *non sequiturs*. The elevation of an *ad hoc* decision to grant different percentage increases into a "policy" is fatuous. The approach seems to have been influenced by the decision in *Apollo*, which articulates the idea that a benefit as contemplated by section 186(2)(a) is something

which can be conferred pursuant to a practice or policy. It does not follow that a "policy" decision of the management to grant differential wages increases in a particular year is a "policy" in the sense of a practice or a policy as described in *Apollo*. Moreover, the notion that a benefit can form part of remuneration, itself uncontroversial, seems another influence; but plainly, that notion cannot be harnessed to support the conclusion reached on these facts. ... Lastly, it may be that the critical element in the flawed reasoning is that the commissioner seemingly equated a decision made in consequence of a discretion reserved to management as the antithesis of collective bargaining and ergo, if giving money to employees is not the result of collective bargaining, it must follow that it is a benefit. Plainly that is incorrect; a grant of a "benefit" is not the flip-side of a collective agreement derived from collective bargaining'.

Before the LAC, PWU persisted with a similar approach as the one adopted

by the arbitrator. It argued that the employer took a unilateral decision to extend a wage increase, which increase was a product of collective bargaining in respect of employees in band A, to other bands of employees but not to employees in band D. This according to the union demonstrated that the employer's decision not to extend the same increase to employees in band D was arbitrary, capricious and inconsistent, which in turn triggered the protection afforded to employees in terms of a s 186(2)(a) of the LRA. The court rejected this argument. The conclusion or rationale reached by PWU did not necessarily follow the logic of its argument. The court concluded that the meaning of a benefit had been confined to a meaning prescribed in binding authority and against which, the union's argument fell short.

The appeal was dismissed with no order as to costs.



By
Kathleen
Kriel

Recent articles and research

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

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Abbreviation	Title	Publisher	Volume/issue
<i>LDD</i>	Law, Democracy and Development	University of the Western Cape, Faculty of Law	(2020) 24
<i>LitNet</i>	LitNet Akademies (Regte)	Trust vir Afrikaanse Onderwys	(2020) 17.2
<i>Obiter</i>	Obiter	Nelson Mandela University	(2020) 41.1
<i>SA Merc LJ</i>	South African Mercantile Law Journal	Juta	(2019) 31.2
<i>SAJCJ</i>	South African Journal of Criminal Justice	Juta	(2020) 33.1

Administrative law

Mujuzi, JD 'Electricity theft in South Africa: Examining the need to clarify the offence and pursue private prosecution?' (2020) 41.1 *Obiter* 78.

Company law

Kilian, N 'What is a legal interest as required for derivative actions? A brief look at *Lewis Group Limited v Woollam and Others* [2017] 1 All SA 192 (WCC)' (2019) 31.2 *SA Merc LJ* 356.

Consumer law

Biggs, L 'The franchise agreement as the cause of tensions between the franchisor and franchisee: Has the Consumer Protection Act resolved the tensions?' (2019) 31.2 *SA Merc LJ* 163.

Brits, R 'Parate executie clause in mortgage bond versus post-default authority to sell – *Business Partners Limited v Mahamba* (4568/2016) [2019] ZAECGHC 17 (26 February 2019)' (2020) 41.1 *Obiter* 175.

Reddy, N 'National Credit Regulator v Standard Bank of South Africa Limited: Common-law right of set-off excluded from credit agreements under the National Credit Act' (2019) 31.2 *SA Merc LJ* 341.

Contract law

Van Eck, M 'Limitation of liability in private security contracts: National interest or private contractual engagement?' (2019) 31.2 *SA Merc LJ* 321.

Criminal law, litigation and procedure

Anderson, A 'Criminal law' (2020) 33.1 *SAJCJ* 213.

Freedman, W 'Constitutional aspects of criminal justice' (2020) 33.1 *SAJCJ* 257.

Reddi, M 'Criminal procedure' (2020) 33.1 *SAJCJ* 225.

Terblanche, SS 'Sentencing in South Africa: Dominated by minimum sentences' (2020) 33.1 *SAJCJ* 4.

Whitear, N 'Law of evidence' (2020) 33.1 *SAJCJ* 239.

Customary law

Maithufi, M and Maimela, CA 'Teaching the "other law" in a South African university: Some problems encountered and possible solutions' (2020) 41.1 *Obiter* 1.

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Kathleen Kriel *BTech (Journ)* is the Production Editor at *De Rebus*. □

By
HCJ
Flemming

Repeal of r 60(9) of the Magistrates' Court Rules

The Rules Board for Courts of Law (the Rules Board) was regrettably inspired by *Kondlo v Eastern Cape Development Corporation* [2014] 2 All SA 328 (ECM) to create an undesirable r 60(9) in the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa, which reads: 'The court may, on good cause shown, condone non-compliance with these rules'.

The judgment was given on appeal against the granting of summary judgment for rentals in arrears under a written lease. The contract was not attached to the summons (r 6(6)) or to the affidavit in the summary judgment application (r 14(2)(c)). After recording the history of the litigation, the court stated: 'The question is whether or not Rule 60 of the Magistrates' Court Rules confer a general power of condonation on Magistrates' Courts'. However, the defendant had not lodged an r 60 application. Nor was 'condonation' asked by the plaintiff. The plaintiff's argument was suitable for r 60A opposition. The plaintiff argued that the non-attachment caused no prejudice and is thus 'technical' in a setting where no defense on the merits of the rental claim was put up. (A lease in the file seen by the judges may even have been handed up to the magistrate?)

There was also no need to bother with r 6(6). However, r 14(2)(c) was crucial. Despite the plaintiff's pleading that he had lost the document, if the liquid document is not attached to the affidavit the matter does not qualify for summary judgment. End of story. The plaintiff would have to prove the letting and its rentals in ordinary procedures.

In any event, the court was wrong in mixing r 60 and r 60A. Prior to r 60A a stream of r 60 applications served harassment and fees but none of the ideals of r 1(2). Rule 60A counteracts that in all 'irregular proceedings' (non-compliance

with r 14 was not made an 'irregular proceeding'). Understanding r 60A correctly, the court's discretion will be guided by the curing of prejudice. (In the Pretoria Magistrates' Court case 21601/2016, *inter alia*, the contract was not attached to the summons. Evidence proved that the defendant insurance company realised which contract was involved and had the original in its records. The court, in its judgment, found that the non-compliance should not bar the matter from proceeding to trial and directed the defendant to deliver its plea within 20 days.) The court may make 'any such order as it deems fit'. The outcome can be the same as pronouncing 'condonation'.

Rule 60 is for seeking completion, any party forces their opposite number to do what will take the case further towards readiness for trial; r 60A is designed to seek destruction, the defendant wants the setting aside of a past defective step. Rule 60 deals with what you did not do (timeously or at all); and r 60A deals with what you did do (issue summons) but did so defectively (for example, not attaching the lease). Rule 60A stands independently when an 'irregular proceeding' is involved.

In referring 'the trial' back to the magistrate's court, and subjecting it to both rules, the court was perhaps wrongly inspired by the peculiar practice in Mthatha.

The court saw the need for a condonation rule in a problem that did not arise in the case before it and, about which the court's reasoning was wrong and its remarks were *obiter*. The court foresaw the 'startling' result that the plaintiff is non-suited if the contract is not available to be attached. One must be cautious about discovering a *lacuna* that has been undetected by thousands for 76 years. The alleged problem is no worse than in the case of a plaintiff not knowing the name of the shop assistant who acted for the defendant when concluding a sale. The plaintiff is not non-suited. The law does not require a positive court response to

the frivolous or technical (see *Hainard v Estate Dewes* 1930 OPD 119 at 121).

Secondly, law does not compel the impossible. The plaintiff had pleaded loss of the document.

Thirdly, if the wide discretion of r 60A is properly applied, the court could order for example, that a document-less plaintiff is allowed to amend the summons appropriately. The plaintiff who operates with standard terms can allege that the terms were the same as that of the document (or part thereof) now newly attached to the summons or the plaintiff can additionally plead the precise wording of the crucial terms that the plaintiff wants the court later to find proved.

Fourthly, the court underrated that the summons stood as a completely valid summons until set aside. The mere refusal to set aside has the same outcome as a magisterial blessing in the legal formula of 'condonation'.

By way of overview, r 60(9) is open to objection.

Rule 60(9) operates without any 'application' as defined. It does not even require notice. The position of the parties is altered midstream by mere discretion.

Rule 60(9) gives no guidance about 'good cause'. Does a purely procedural deviation now require adjudicating the prospects of success of plaintiff's claim? Is more required than 'I did not read the rule and my client should not suffer for it'.

Rule 60(9) is unnecessary. As demonstrated, there are two types of decisions by a court that create the same result as condonation. The rule creates uncertainties. It confuses the structured scheme of the rules. The case for repeal is clear.

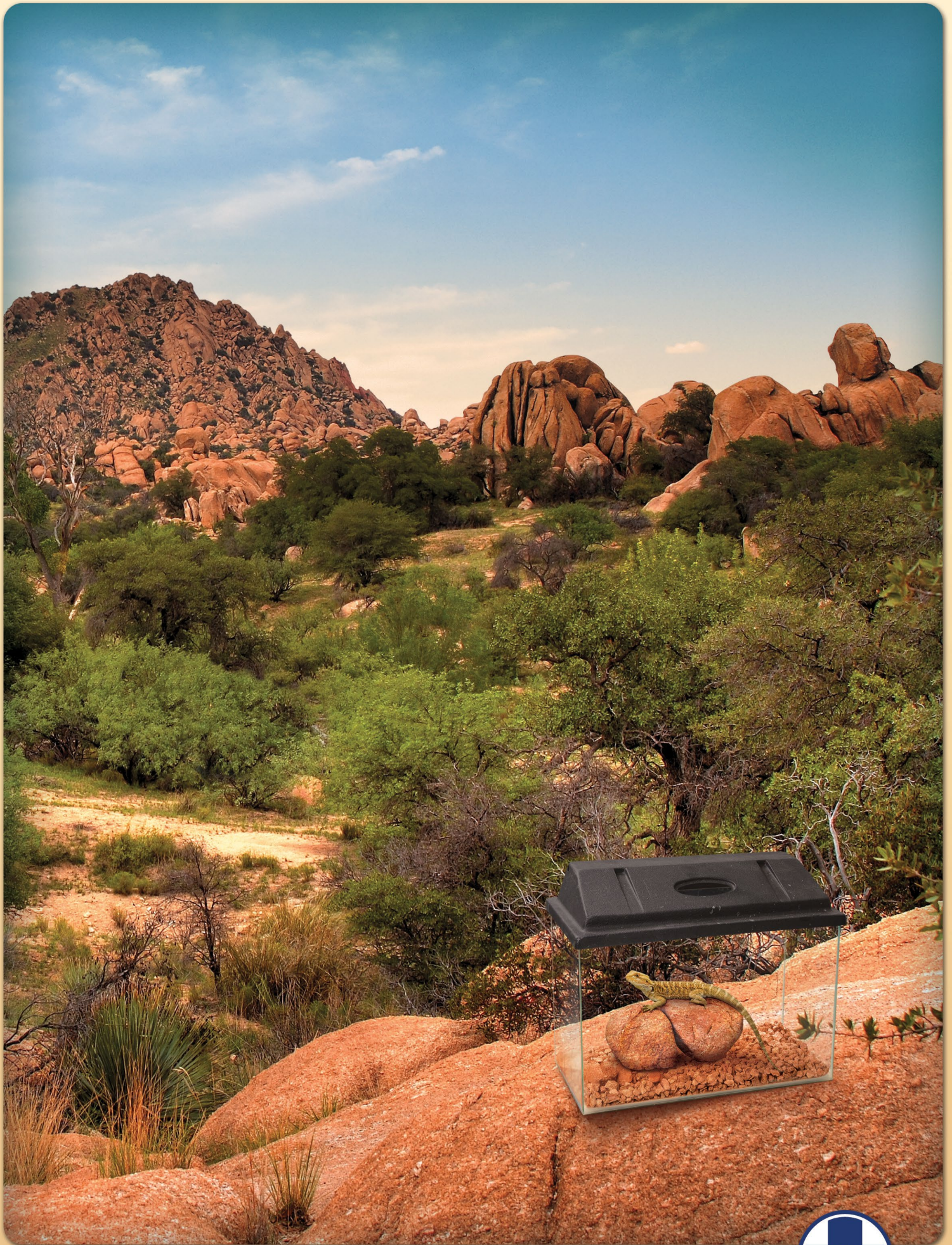
HCJ Fleming BCom LLB (UFS) is a retired judge from Johannesburg. □

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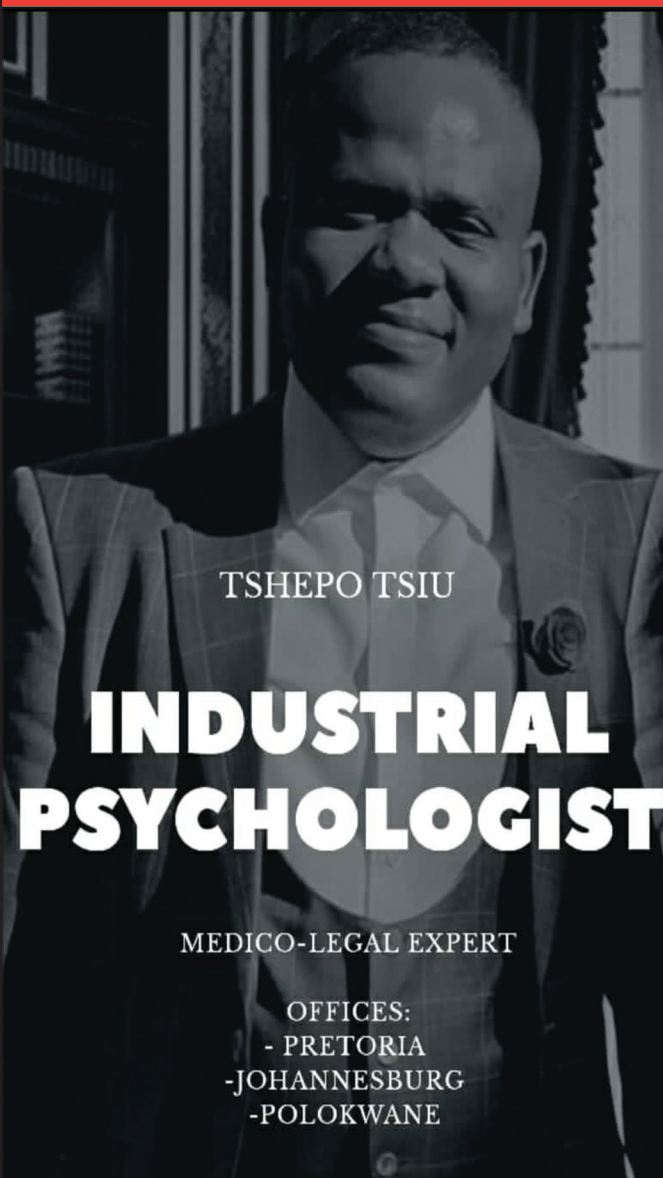
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