LAW SOCIETY OF SOUTH AFRICA

DE REBUS

THE SA ATTORNEYS' JOURNAL

DECEMBER 2020

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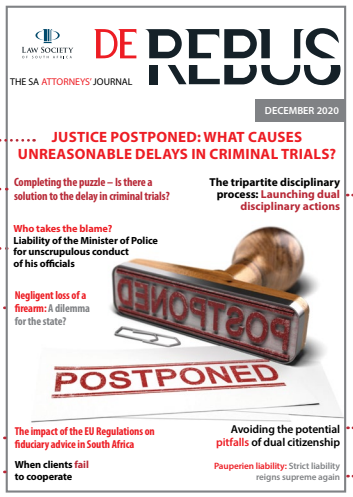

FEATURES

Regular columns

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How does the Law Society of South Africa fulfil its functions?

In the November Editorial, 'What does the Law Society of South Africa do?' 2020 (Nov) *DR* 3, I wrote about the functions performed by the Law Society of South Africa (LSSA) for the enhancement of the legal profession. The LSSA performs its duties through the different departments it has, below is an overview of its different departments.

Legal Education and Development (LEAD)

The LSSA's legal education division, LEAD, offers Practical Vocational Training (PVT) programmes to candidate legal practitioners, through the PVT Schools and the 23-day PVT short course to prepare candidates in PVT contracts for the attorneys' admission examinations. In addition, LEAD also offers post-admission training programmes to practising legal practitioners to keep abreast of developments in the profession and to ensure the standards of practice in the profession are maintained and enhanced.

The recent lockdown, due to the COVID-19 pandemic, interrupted most, if not all, of the LEAD training programmes. This has required LEAD to come up with a new mode of training that would address the 'new normal' in the training space. At some of the PVT Schools based at universities around South Africa, access to campuses was only recently allowed. In an endeavour to remain relevant and continue offering quality training programmes to legal practitioners, LEAD will be presenting webinars and online training. LEAD can present courses at a reduced rate through its online portal called eLeader.

PVT Programmes: All the programmes that were interrupted during lockdown are now presented through blended learning, which is a combination of online and reduced contact sessions.

Registration for programmes: Due to the pandemic, LEAD received a few requests from legal practitioners who said they could not afford to pay the total fee on registration. LEAD allowed them to pay a minimum amount for registration (this varied per applicant, based on their motivation) and pay the balance over a few instalments. This gesture was appreciated by the applicants.

De Rebus

The *De Rebus* journal, which is available free of charge to legal practitioners, has been published digitally since March 2019. This change, which the legal profession has met with positivity, can be seen by the number of articles received and the circulation statistics during the pandemic. Its goal is to be an independent and questioning observer of the legal profession. Its editorial content is authoritative, frank and sometimes contentious. It strives to present a comprehensive overview of developments in the legal profession.

Above all else, the main goal of *De Rebus* is to be an educational tool for the profession and to be used for research purposes confirming its longevity in the hands of its reader. Because *De Rebus* is a journal, it means that readers refer to it more than once for research purposes. The digitisation of the journal makes researching articles in the journal easier for the profession and allows for immediate release of information that is of importance to the profession.

Professional Affairs

The LSSA's Professional Affairs Department coordinates and supports the activities and representations of the LSSA's 35 specialist committees. The committee members are practising legal practitioners and experts in their fields of practice. The department initiates and comments on issues and legislation that affect the legal profession and the public. The department liaises with Parliament and other stakeholders and also coordinates special projects for the benefit of the legal profession.

Is there a need for the LSSA?

As can be seen from the November and current editorial, there are many functions that are performed by the LSSA, which the legal profession would surely miss should they no longer be fulfilled. Legal practitioners may not be aware of all the hard work performed by the LSSA in the background. However, the effects of this hard work is felt when engagements with stakeholders bears fruits or when legal practitioners utilise the many legal education avenues provided by the LSSA, which includes the *De Rebus*, which you are currently reading. The question is, will legal practitioners survive without the LSSA?

Mapula Sedutla – Editor

The De Rebus Editorial Committee and staff wish all of our readers compliments of the season and a prosperous new year.

De Rebus will be back in 2021 with its combined January/ February edition, which will be available at the beginning of February 2021.

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 2 000 words.
- Upcoming deadlines for article submissions: 18 January and 15 February 2021.

When clients fail to cooperate

By Thomas Harban

It is often said that legal practitioners are creatures of client instructions.

At the core of the vast ecosystem that makes up legal practice is the relationship between a legal practitioner and their respective clients. The relationship between the legal practitioner and their clients is mutually beneficial. The differences between other principals and agents, include the risks and consequences.

In carrying out the mandate of a client, the legal practitioner must, in many instances, make undertakings to third parties on the strength of representations and instructions from their clients. These undertakings and representations go to the core of the professional and ethical duties of a legal practitioner and, in the event of default, can expose the legal practitioner to liability or regulatory scrutiny.

To use common parlance, as a legal practitioner you must avoid putting your own skin in the game ahead of (or instead of) that of a client, no matter how entrenched the trust relationship may be between you and your client. At the end of the day, the progress in achieving your mandate is dependent on the cooperation of your clients and the latter must meet their respective obligations and undertakings in order for the mandate to be effectively carried out.

Many legal practitioners who practised before the current electronic payment system, may have experienced instances where inquiries into clients regarding outstanding amounts for overdue fees or even payments to third parties, were met with the common response that 'the cheque is in the mail'. When the expectation that the cheque would eventually arrive – even taking the slow pace of mail delivery into account – ended in disappointment, the myth in 'the cheque is in the mail' response became apparent. In the interim, the legal practitioner concerned may have made undertakings to third parties to whom payment was due. At the end of the day, as is still the case today, the legal practitioner may in some cases need to use their own resources to settle the indebtedness of their clients to those third parties or carry the loss in respect of their own fees and disbursements. Many legal practitioners can relate to tales of the enormous resources spent (and frustrations experienced) in chasing up unpaid amounts due by clients and the potential damage to their own reputations when undertakings to third parties were not met.

A common occurrence is when there is a duty on a client to carry out certain obligations by a certain date. The client defaults on their obligation, but gives their legal representative undertakings that they will remedy the breach and requests an extension of the due date for performance. Such undertakings, which are not always made in writing, can therefore be difficult to prove later if there is a dispute. The legal practitioner, in giving renewed undertakings for performance, could be exposed to risk and allegations of unethical conduct from third parties to whom the performance is due. Be very careful not to damage your good reputation with other members of the legal profession, who may be wary to accept undertakings from you in future, based on the prior lack of compliance by your clients with their obligations which is, unfortunately, sometimes unfairly attributed to the legal practitioner.

Undertakings in respect of instructions

Expressions such as 'the legal practitioner is awaiting instructions' or a withdrawal 'due to a lack of instructions', depending on the context, are widely understood to be a reference to a lack of funds or cover for fees from a client. In this article, the expression 'lack of instructions' is used in the sense that the legal practitioner is awaiting information from a client in respect of a mandate being undertaken. It can be gleaned from the information obtained in investigation of professional indemnity (PI) claims brought against legal practitioners that, in many instances, the legal practitioner concerned could not make progress in the matter as they were waiting for information or an instruction from their client(s). In some instances, the legal practitioner spends months or even years chasing up the client but the latter, despite numerous undertakings, did not provide the required instructions. The date by which an offer is to be accepted or some other option may expire while the legal practitioner awaits an instruction from a client. The latter may later seek to hold the legal practitioner liable for losses suffered as a result thereof.

A delay in receiving instructions may result in a deadline for action by or on behalf of a party not being met or a prescription date being missed. The clients concerned then pursue PI claims against their erstwhile legal practitioner alleging that the latter either breached their mandate or a duty of care in not meeting the deadline. Needless to say, the failure by the client to provide the necessary instructions is not mentioned as a contributing factor in the actions and the fault is laid squarely at the door of the legal practitioner.

Commonly, in a litigious matter a client consults with a legal practitioner and it becomes apparent that certain information is, or documents are required in order to pursue the claim or the defence, but that these are not immediately available. Some investigation on the part of the client may be required in some cases. The client will undertake to obtain the documents, witnesses or information and to furnish these to the legal practitioner but they are either tardy in carrying out their undertakings in this regard or they do not furnish the required information at all. The result is that the claim (if the client is the plaintiff or applicant) or the defence (in the event that the client is the defendant of respondent), as the case may be, can either not be pursued timeously or at all. This exposes the party involved to risk, which they may later attribute to their legal representative.

Many legal practitioners can also recount instances where clients do not make themselves available to timeously sign an important document, which puts the pursuit or finalisation of the instruction in jeopardy.

Mitigating the risk

Legal practitioners are well advised to inform clients clearly of what information and other instructions (documentary, financial or otherwise) they require as early as possible after the mandate is undertaken or when the need to obtain the instruction arises. This must also be followed up in writing with the full details and the date by which the instructions due are recorded. Any follow-ups or change in the due date or progress reports must also be recorded in writing.

The practice adopted by some legal practices to simply keep diarising a file where information is awaited from a client is unhelpful as it may amount to simply postponing a matter that can lead to a potential claim or even a complaint to the Legal Practice Council (LPC). A preferred approach would be to write to the client to record the delay and explain the consequences of their non-compliance and what the implications thereof are. Where necessary, the legal practitioner can consider formally terminating the mandate due to non-compliance by the client with the latter's undertakings. A prudent approach is to highlight to the client what steps need to be taken to pursue the matter and, in that case, the date by which the next steps must be undertaken. For example, if a date for either prescription, the date of a hearing, the filing of a response or some other step that potentially puts the client at risk is looming, this should be pointed out to the client.

Staff in the firm must be empowered and encouraged to escalate defaulting clients to a senior member of the team who must follow up with the clients concerned. Where the client is a juristic entity, you would also be well advised to escalate the matter to a senior responsible person at that entity.

The written record of the advice to clients regarding their obligations to furnish instructions will assist the legal practitioner in the defence of a claim by the client, a third party or even in responding to a complaint to the LPC. The failure to comply with undertakings cannot always be attributed to the legal practitioner, but this will not prevent parties from trying to do so.

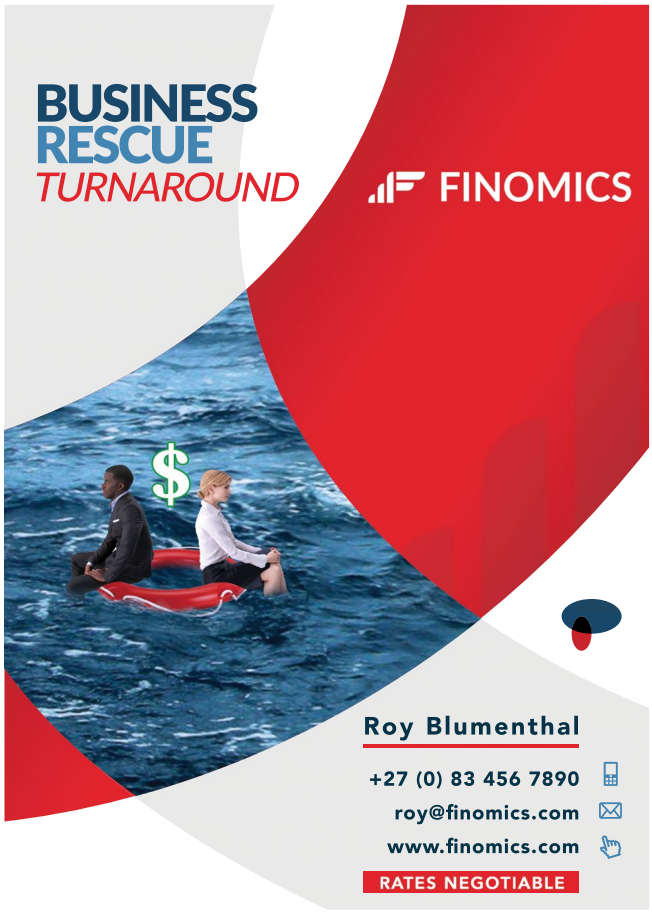
Never place yourself and your practice at risk by giving an unqualified undertaking to perform an obligation on behalf of a client that is outside of your control. In the event that you do, the Legal Practitioners' Indemnity Insurance Fund NPC (the LPIIF) will not indemnify the practice, as such undertakings are excluded from the Master Policy (see clause 16(j)). A copy of the Master Policy can be accessed at www.lpiif.co.za.

Conclusion

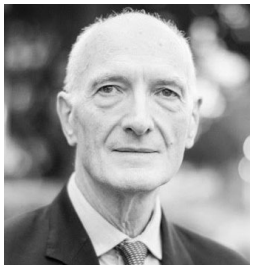
A final word on the subject is to ensure that the client is at all times aware that the success of the legal practitioner and client relationship is ultimately dependant on both parties pulling their proverbial weight. The failure by the client to uphold their end of the obligations is a red flag that must be addressed as soon as possible after it becomes apparent in order to mitigate serious risks potentially emerging later.

At the end of day, as a legal practitioner, you are only as good as your instructions to carry out your mandate.

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



Justice postponed: What causes unreasonable delays in criminal trials?



By Edwin Cameron, JJ du Toit and Alexia Katsiginis

South Africa (SA) has a widely admired Constitution with a Bill of Rights that embeds human dignity and sets out minutely detailed protections for those arrested on criminal charges (s 35(1)), for those detained and sentenced (s 35(2)) and for criminal accused (s 35(3)).

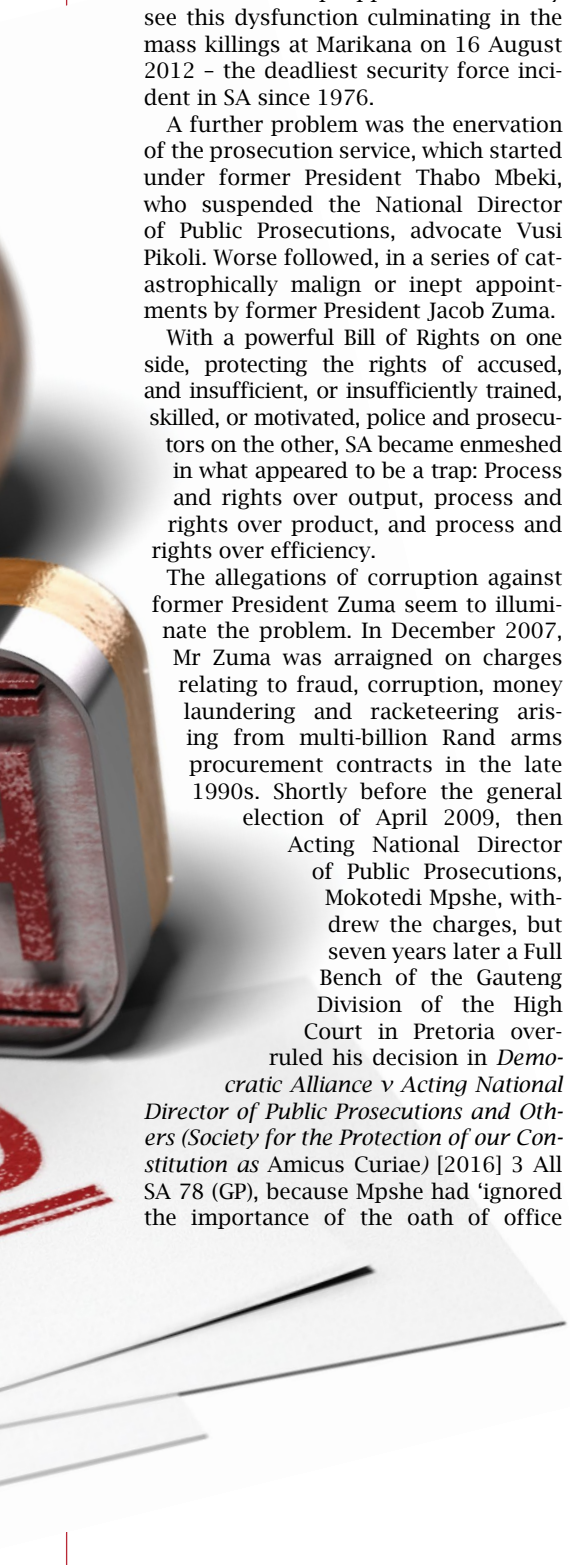
These provisions came into force at the very time that the administration of justice was beset by considerable challenges in the wake of Apartheid. On the one hand, the new democratic government faced significant challenges to its legitimacy. Though backed by overwhelming democratic support, it had yet to establish its authority. On the other, it faced a crisis of personnel and effective functioning.

Picture source: Gallo Images/Getty

In the first years of democracy, a large cadre of skilled detectives left the police force (A Altbeker *The Dirty Work of Democracy: A Year on the Streets with the SAPS* (Johannesburg: Jonathan Ball 2005) at 261). This enervated the service's response, detection and arraignment capacities. That proved to be just one of the problems besetting the new South African Police Service (SAPS), whose dysfunction and inefficiency was, thereafter, exacerbated by a series of disastrous top appointments. Many see this dysfunction culminating in the mass killings at Marikana on 16 August 2012 – the deadliest security force incident in SA since 1976.

A further problem was the enervation of the prosecution service, which started under former President Thabo Mbeki, who suspended the National Director of Public Prosecutions, advocate Vusi Pikoli. Worse followed, in a series of catastrophically malign or inept appointments by former President Jacob Zuma.

With a powerful Bill of Rights on one side, protecting the rights of accused, and insufficient, or insufficiently trained, skilled, or motivated, police and prosecutors on the other, SA became enmeshed in what appeared to be a trap: Process and rights over output, process and rights over product, and process and rights over efficiency.



The allegations of corruption against former President Zuma seem to illuminate the problem. In December 2007, Mr Zuma was arraigned on charges relating to fraud, corruption, money laundering and racketeering arising from multi-billion Rand arms procurement contracts in the late 1990s. Shortly before the general election of April 2009, then Acting National Director of Public Prosecutions, Mokotedi Mpshe, withdrew the charges, but seven years later a Full Bench of the Gauteng Division of the High Court in Pretoria overruled his decision in *Democratic Alliance v Acting National Director of Public Prosecutions and Others (Society for the Protection of our Constitution as* Amicus Curiae*)* [2016] 3 All SA 78 (GP), because Mpshe had 'ignored the importance of the oath of office which demanded of him to act independently and without fear or favour' (para 92). Dismissing the appeal, the Supreme Court of Appeal (SCA) ruled in *Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another* [2017] 4 All SA 726 (SCA) at para 84 that discontinuing the prosecution was 'inimical to the preservation of the integrity of the NPA'. The charges were eventually reinstated on 16 March 2018.

Since then, Mr Zuma's defence has requested, and been granted, a number of postponements, on various bases, and has brought a number of interlocutory applications to defer the trial. In May 2019, his defence contended that he had been unfairly prejudiced by repeated delays and approached the KwaZulu-Natal Division of the High Court for a permanent stay of his prosecution.

Commentators have characterised this defence strategy as a 'Stalingrad strategy'. This involves a well-resourced accused, over a protracted period, postponing or frustrating the trial process. This is done by deploying every possible legal argument and stratagem to thwart the prosecution. Once enough time has passed, it may become possible to contend that delay itself has violated the accused's right to a fair trial, and that a permanent stay should be granted.

Like the military strategy, which seeks victory in the destruction of everything, to the last standing brick, 'Stalingrad' litigation attacks every aspect of the criminal justice system, regardless of collateral damage, with the intention or hope that the prosecution will ultimately surrender. But even without surrender, the attack on rationality, justice and basic fairness leaves the system weaker.

When an accused engineers the delay as primary agent, the right to a fair trial is exploited as a form of 'lawfare', which fundamentally erodes the criminal justice system.

This not a general accusation as to the defence process in South African criminal courts. Most legal practitioners perform their duty conscientiously and to the best of their ability.

The system depends, for its efficient operation, on the active cooperation of all – police, prosecutors, defence and the Bench. It is the duty of the prosecutor as commander of the process (*dominus litis*) to promote this cooperation. Doing this should continue to be part of training.

At the same time, it is the duty of the presiding judicial officer to assist the prosecutor in this – while also promoting efficiency by adhering conscientiously to all available court hours. This, too, should be part of training.

The Criminal Procedure Act 51 of 1977 (CPA) makes provision for the careful identification of issues at the outset, but few prosecutors or judicial officers engage this power properly.

Presiding officers in trial courts should apply the procedural rules justly and fairly, yet firmly – and appellate courts should in their turn encourage this fair but firm conduct. Though presiding judicial officers can achieve much through firm management of trials and parties, in some cases legislative amendments may be essential.

For the criminal justice system to perform its educative, palliative and conflict resolution functions, the public must be able to rely on it to act swiftly. That is the message that must be ingrained in all who serve it. From every perspective, justice delayed is justice denied.

Everyday dysfunctions and delays

The principle is clear. Expeditious conclusion of criminal proceedings is central to a fair trial. In *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), the Constitutional Court (CC) set out the principles establishing when delay may warrant permanent stay of prosecution.

Kriegler J stressed that the right to a trial within a reasonable time is designed to protect the accused (who bears the burden of repeated postponements and adjournments) from delayed-prejudice. That need not relate only to the trial itself. It extends to the fact that, while the charges are undetermined, the presumption of innocence may be threadbare protection against the fact that the accused's name and reputation are sullied by the very fact of the charges.

The right to a trial within a reasonable time, the court explained, seeks to mitigate 'the tension between the presumption of innocence and the publicity of trial' by acknowledging that the accused – although presumed innocent – is nevertheless 'punished' – and, when remanded in prison, that punishment is severe (*Sanderson* at para 24).

What is 'a reasonable time'? This is a value judgment by the court. It considers the kind of prejudice suffered, the nature and complexity of the case and the lack of state resources that might have hampered the investigation or prosecution.

Mr Zuma's own case elicited second exposition, when he sought a permanent stay of prosecution on the grounds of unreasonable delay in the start of his trial (*S v Zuma and Another and a related matter* 2020 (2) BCLR 153 (KZD) at para 114). A Full Bench of the High Court dismissed the application. It ruled that the seriousness of the charges outweighed the potential prejudice that Mr Zuma claimed he would suffer if the trial proceeded.

Constant and prejudicial delays can, themselves, thus become grounds of defeasibility of a criminal prosecution. Though protection from unreasonable

delays is key to respecting the accused's right to procedural fairness, when a defence lawyer seeks tactical postponements this may pose an insidious threat to justice.

Sanderson (at para 33) warned that an accused who has either sought numerous postponements, or delayed the prosecution in less formal ways, cannot later invoke those very delays. Equally, an accused who has constantly consented to postponements, even if not initiating them, could find it hard to establish delay-prejudice.

Wild and Another v Hoffert NO and Others 1998 (3) SA 695 (CC) echoed this. There, repeated postponements resulted in three years' delay between arrest and trial. Scrutinising each delay, the court concluded that the accused themselves were in part responsible. Permanent stay was refused.

When the defence invokes important rights with the intention – oblique or direct – of thwarting the criminal justice system, abuse of the judicial process supervenes.

Tactics include meritless applications, failing to appear and applying for unnecessary postponements. Sometimes, 'stunt' withdrawals by defence lawyers, or the accused's 'stunt' dismissal of a defence team, feature. To expose these tactics may be difficult, but suspicion often exists that some criminal legal practitioners collude with clients to use supposed unavailability to get postponements.

Weaponisation of the criminal justice process is becoming less unfamiliar. Radovan Krejcir has used various tactics to delay his trials. In November 2013, he was arrested and charged with attempted murder, kidnapping and drug dealing. Following a protracted two-year trial, during which he lodged repeated applications for postponement, he was convicted on all counts.

However, repeated changes in Mr Krejcir's legal team protracted the sentencing process, resulting in a seven-month delay. Finally, Lamont J drew the line (*S v Krejcir and Others* (GJ) (unreported case no SS26/2014, 24-8-2015) (Lamont J)). He refused to allow Mr Krejcir more time to 'consult with his lawyers' after he claimed that his legal practitioner had failed to appear before the court because he was busy with another case.

Eventually, Mr Krejcir was sentenced to 35 years' imprisonment. His attempts to appeal to both the SCA and the CC failed.

Mr Krejcir is, again, on trial in the High Court for murder. Typically, the trial has been in progress since 2015, delayed by bail applications, changes of legal representation, the accused's claims of poor health, conflicts in his legal teams' diaries and various other roadblocks.

Msimeki J has chastised Mr Krejcir for his role in this, and has set strict time limits in dealing with his counsel, recognising the tendency to remove them frequently. Five years later, the murder trial has yet to be concluded.

More recently Gary Porritt and his spouse, Susan Bennett, appear to have invested huge effort and expenditure in preliminary tactics to delay their trial (*S v Porritt and Another* (GJ) (unreported case no SS40/2006, 23-5-2019) (Spilg J)). They face more than 3 000 charges of fraud, racketeering and contravention of the Income Tax Act 58 of 1962, the Companies Act 61 of 1973 and the Stock Exchanges Control Act 1 of 1985. Though they were arrested in 2002 and 2003 respectively, their criminal trial commenced only in September 2016.

Since then the prosecution has proceeded agonisingly slowly. Both accused appear to have intentionally delayed proceedings with applications and appeals that appear to have had little chance of success.

The case has twice reached the SCA. It is now being managed by a third judge, Spilg J, who in response to what he considered stalling tactics withdrew Mr Porritt's bail.

The cost to the system

At present, remand detainees constitute a third of SA's prison population. In April 2020, it was recorded in the Department of Correctional Services report titled 'Reduction of remand detention during lockdown: Briefing of Judicial Inspectorate of Correctional Services' that 4 027 remand detainees had spent more than two years in detention. Backlogs exacerbate an already overcrowded prison system. An over-burdened criminal justice system threatens the rights of every accused, imposing systemic delay on all.

In *Zanner v Director of Public Prosecutions, Johannesburg* 2006 (2) SACR 45 (SCA) at para 21 the court stressed that:

'[T]he right of an accused to a fair trial requires fairness not only to him, but fairness to the public as represented by the State as well. It must also instil public confidence in the criminal justice system, including those close to the accused, as well as those distressed by the horror of the crime'.

Dysfunction in the criminal justice process thus damages, and undermines the rule of law, by appearing to cast ridicule on the entire legal system.

In part 2, we consider what to do.

Edwin Cameron is Chancellor of the University of Stellenbosch and Inspecting Judge of Prisons at the Judicial Inspectorate for Correctional Services in Pretoria. Johan du Toit *BIur LLB (UFS)* is an advocate, retired Deputy Director of Public Prosecutions at the National Prosecuting Authority and former team leader and trial attorney at the International Criminal Tribunal for the former Yugoslavia in The Hague, Netherlands. Alexia Katsiginis *BCom Law (UP) LLB (UP) LLM (London School of Economics and Political Sciences)* is a PhD candidate (Sciences Po Law School) and Law Clerk to the Inspecting Judge of Prisons at the Judicial Inspectorate for Correctional Services in Pretoria. ❑

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Completing the puzzle – Is there a solution to the delay in criminal trials?

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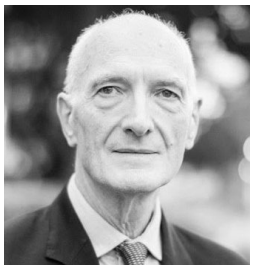

By Edwin Cameron, JJ du Toit and Alexia Katsiginis

In the first part of the article, we considered the delays that dog the South African criminal justice system – some systemic, some lawyer- and accused-instigated. Are there possible fixes?

How to build accountability

The constitutional dispensation introduced important protections for accused and awaiting trial detainees. Calculated deployment of these rights, to thwart or incapacitate process so as to elude just determination, cannot be permissible in a fair and just system.

Some part of the solution must involve the firming up of institutional discipline. Stunt withdrawals and postponements, by the accused, sometimes with their legal practitioner's connivance, must be firmly and justly handled – and presiding judicial officers should be supported up the chain of the judicial hierarchy.

The inherent power of a trial court to manage its roll should entail sufficient authority – supported on appeal – to refuse postponements and to impose appropriate sanctions on errant or negligent legal practitioners.

Change in appellate support for firmer management of trial-court delays may prove pivotal. Appellate courts should consider stronger backing for lower-court judges who refuse postponements they conclude are illicit or designed to frustrate the prosecution.

In addition, the code of conduct for judges and magistrates, and the efforts that the Minister of Justice and Correctional Services has made to regulate and monitor court schedules, are in point.

Enforcing this approach, robustly where justly necessary, will help curb 'stunt' or collusive legal team withdrawals.

California's Rules of Professional Conduct do not allow a defence attorney an automatic right to withdraw from a criminal defence. A withdrawal of representation is permitted only once the attorney has taken 'reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel' (The Rules of Professional Conduct at r 1.16(d)).

Fresh approaches may invite reconsidering judicially-enforced protocols and rules applicable when an attorney is permitted to abandon a case. Part VI of the Legal Practice Council's Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities (at para 60.2) prohibits a legal practitioner from deliberately protracting the duration of a case before the court. But to give this rule power, firm enforcement plus penalties for infringement are essential.

Requiring the court's permission before a defence team withdraws may, on the one hand, bulwark an accused against undue prejudice, while, on the other, guard the criminal justice system against 'Stalingrad' tactics.

None of this, in the age-old saying, is for sissies. Trial legal practitioners have the power, when undertaking a defence, to secure advance cover for fees. A later claim of not being paid may have to be approached with scepticism. Justice may, in a suitable case, entail that legal practitioners in private practice be obliged to proceed with a defence even when not remunerated.

Again, the court will have to strike a balance between the interests of the legal practitioner concerned, the possible prejudice to which the accused will

be exposed as a result of the proposed withdrawal, and the harm to the rule of law and criminal justice system that suspect or unwarranted tactics inflict.

This will require coordinated change – in professional rules and discipline, in trial-level firmness, and in wise appellate backing.

Time limits to trials

Time limits may, in suitable cases, be placed on the start and finalisation of criminal trials. In many jurisdictions, this is the norm.

In international criminal law, the nature of the offences can easily result in inordinate delays. Time limits become essential.

At the International Criminal Tribunal for the former Yugoslavia (ICTY), presiding judges imposed strict time limits for prosecutors to present their cases (*Assessment and Report of Judge Carmel Agius, President of the ICTY, provided to the Security Council pursuant to para 6 of Security Council resolution 1534 (2004)* S/2017/1001 (2017) at p 74 para 116).

First, the prosecutor had to provide the court with a short summary of every witness's testimony, the time needed for the evidence in chief – and eventually how much time would be needed to present the entire prosecution case.

The court allocated the prosecution specified hours. At the end of each week, the prosecution was informed of how much time it had used and how much it had left.

This also applied to the defence, which was allocated additional time for cross-examination. The presiding judge might, for example, allocate six hours of cross-examination for a specific witness in a multi-accused case, and then leave it to the various counsel to decide how much time and in which order they would cross-examine.

On application, from either prosecution or defence, the court could extend the allocation.

The ICTY dealt with genocide and crimes against humanity – serious contraventions of international humanitarian law. In their nature, these cases took both prosecution and defence months to present (see PM Wald 'The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court' (2001) 5 *Wash. U.J.L. & Pol'y* 87 at 100-102).

Trial time limits have been used in some domestic jurisdictions to eliminate unnecessary trial delays and disruptions (see American Bar Association *Criminal Justice Section Standards*, sd 12-1.2). This innovation forms part of the right to a fair trial. It involves, as in the ICTY, judicial limits to the number of hours each litigant has to present their case. This can help short-circuit unreasonable delay (Constitution s 35(3)(*d*)).

We do not propose holus-bolus importation of ICTY or American rules and principles. In appropriate instances, however, these procedures might be beneficially introduced. This will take hard-driven determination on the part of presiding judicial officers, practitioner bodies and legal practitioners committed to the rule of law. Those less committed may require firm guidance.

Time limitations have been praised for forcing litigants to be more selective in the evidence they choose to present, and have proved critical in securing just, speedy and inexpensive trials (*Tersigni v Wyeth-Ayerst Pharm* 2014 WL 793983 at 1).

They have also been criticised. Critics have warned that time restrictions force courts to assess how to divide trial time between the parties – plus they can be susceptible to inequitable application (NF Engstrom 'The Trouble with Trial Time Limits' (2018) 106 *Georgetown Law Journal* 933 at 972-974). Additionally, severe limits can impair procedural justice by limiting sufficient and meaningful opportunities for participation.

To guard against these drawbacks, time restrictions should be imposed only when, without them, unreasonable delays will result. Moreover, they should be imposed only on consideration of vital factors, including the complexity of the issues, the burden of proof and the nature of the evidence. Allocations should be founded, always, on reasoned justification.

In appropriate cases, it may be beneficial for the presiding officer to receive a summary of the case from the prosecutor, which should include a brief outline of each witness's testimony, the time needed for the evidence in chief and an estimation of the time needed to present the entire prosecution case. This requirement could promote the more efficient management of cases and assist the presiding judicial officer in deciding how trial time should be divided fairly between the parties. This would, by corollary, encourage the prosecution to be better prepared when the trial commences and can help the court's roll planners in drafting the court's schedule.

Paradoxically, time limits may themselves be abused by unscrupulous litigants, who employ excessive objections, unresponsive witnesses and strategically prolonged examinations. Here, as before, courts should be alert to parties who weaponise legal procedure, and take appropriate disciplinary action when needed.

Undue constraints on the prosecution can lead to miscarriages, while undue delay by the defence erodes justice. Because of these pitfalls, trial time limitations undoubtedly demand careful assessment and scrupulous implementation.

That there is no positive law and little practical experience in setting time limitations is a challenge. Perhaps a pilot project may direct certain prosecutions to proceed within strict timelines.

Selecting which categories should be subjected to timelines may be hard. What categories? Rape and murder? Crimes against women and children? Corruption or fraud? Farm attacks? Controversy is certain.

But action is indispensable. Improvement in current delays, and sufficient resources are essential if our high promises to ourselves are to be fulfilled.

Conclusion

For any legal system to work efficiently, all involved must exhibit propriety, ethics and honesty. Sometimes this is not enough. Our suggestions attempt to identify some procedural innovations that can be considered in appropriate cases for better management of the trial process.

It has been more than two decades since South Africa became a constitutional democracy and enacted sweeping criminal justice reforms. Our criminal justice system has reached legal maturity. But it is creaking badly. And it is time for us to do something about it.

A broad view demands rigorous evaluation of how legal practitioners, professional bodies, presiding and appellate judges can properly help realise hard-won constitutional protections.

Reforms that promote and enhance the accountability of defence legal practitioners should equip judges at all levels of the court hierarchy with important bulwarks against actors who mobilise constitutional rights to undermine a system designed to protect the weak and the defenceless.

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The tripartite disciplinary process: Launching dual disciplinary actions

By Nicholas Mgedeza and Sipho Mahlangu

Picture source: Gallo Images/Getty

An employer has the prerogative to institute disciplinary action against an employee who has committed misconduct. This article is based on the backdrop wherein the parties enter into a tripartite agreement in terms of which the employer, the employee and the Bargaining Council/Commission for Conciliation, Mediation and Arbitration (CCMA) undertakes that an arbitrator will be appointed for the process of disciplinary hearing against the employee. In principle, through this process, the employer agrees to bypass the internal disciplinary process and accelerate the disciplinary process to the stage of the arbitration hearing ordinarily applicable in the post-dismissal stage. This process is legislated under s 188A of the Labour Relations Act 66 of 1995 (LRA). In practice, there are many cases wherein the parties agree to conduct the disciplinary proceedings under s 188A (the tripartite agreement) and the employer subsequently institutes internal disciplinary proceedings unilaterally. In most cases, the employee tends to seek an urgent interdict to halt the parallel disciplinary proceedings imposed on them.

Purpose

In the tripartite agreement process between the employee, the employer and the Bargaining Council/CCMA, the arbitrator steps into the shoes of the employer and assumes the right – which is normally considered to be an element of the managerial prerogative – to exercise discipline, including the right to dismiss an employee.

The benefit for all the parties involved is the elimination of the duplication that occurs when court-like in-house hearings are inevitably followed by an arbitration hearing conducted on a *de novo* basis.

An arbitration award made in terms of s 188A is reviewable in terms of s 145 of the LRA. This means that an arbitration award under that section may be reviewed for either –

- unreasonableness of its outcome; or
- for a defect in the proceedings.

The defect in the proceedings may, as provided for in s 145 of the LRA, relate to misconduct, gross irregularity or exceeding their powers by the arbitrator (see *Mudau v Metal and Engineering Industries Bargaining Council and Others* (2013) 34 ILJ 663 (LC)).

In essence, the parties involved enter into a tripartite undertaking to expedite the dispute resolution by by-passing the application of the internal disciplinary process and accelerate the disciplinary process to a platform of an arbitration hearing. This process is advantageous to the employee in the sense that the employer may not impugn the chairperson's decision in favour of the employee. Instead, the employer may impugn the decision of the arbitrator who conducts the pre-dismissal hearing.

Legal principle

Section 188A provides that:

'(1) An employer may, with the consent of the *employee* … request a *council*, an accredited agency or the Commission to appoint an arbitrator to conduct an inquiry into allegations about the conduct or capacity of that *employee*.

(2) The request must be in the *prescribed* form.

(3) The *council*, accredited agency or the Commission must appoint an arbitrator on receipt of –

(*a*) payment by the employer of the *prescribed* fee; and

(*b*) the *employee's* written consent to the inquiry'.

In essence, this is a combination of disciplinary hearings. Furthermore, the employee is not compelled to attend to pre-dismissal arbitration and must consent to partake in such a process.

The matter of *Rabie v Department of Trade and Industry and Another* (LC) (unreported case no J515/18, 5-3-2018) (Nkutha-Nkontwana J) pertained to an opposed urgent application for an order, firstly, staying the internal disciplinary inquiry insti-

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tuted by the first respondent, the Department of Trade and Industry (the DTI), against the applicant, Mr Rabie, pending the finalisation and outcome of the pre-dismissal arbitration proceedings instituted by agreement between the parties and held at the General Public Service Sectoral Bargaining Council (the GPSSBC) under case number GPBC615/2017. Secondly, for an order interdicting the DTI from instituting any further disciplinary inquiries against Mr Rabie pending the finalisation and outcome of the pre-dismissal arbitration proceedings instituted by agreement between the parties and held at the GPSSBC under case number GPBC615/2017.

The parties agreed to a pre-dismissal arbitration in terms of s 188A of the LRA under the auspices of the GPSSBC. Consequently, on 30 January 2018, Mr Rabie was served with another notice to attend an in-house disciplinary inquiry on charges of dishonesty and misrepresentation. Nkutha-Nkontwana J held at para 24 that the respondents' intention was 'clearly to use the in-house disciplinary [inquiry] to parachute from the pre-dismissal arbitration aircraft, so to speak. It stands to reason that, once parachuted, it would be impossible to go back to the pre-dismissal arbitration. In essence, the dismissal of Mr Rabie consequent the in-house disciplinary hearing would render the pre-dismissal arbitration moot'. Furthermore, the court concluded that 'the DTI is divested of its power and prerogative to institute any in-house disciplinary [inquiry] against Mr Rabie, including dismissing him consequent to those proceedings, in terms of the section 188A agreement; alternatively, in terms of the doctrine of election. Likewise, in the absence of any right by the DTI to unilaterally institute the in-house disciplinary [inquiry], Mr Rabie [was] entitled to the relief he [sought]' (see also *Kubheka v Member of the Executive Council: Human Settlements (Gauteng Provincial Government) and Another* (LC) (unreported case no J280/20, 5-5-2020) (Nkutha-Nkontwana J) wherein the applicant sought an urgent declaration that the second and parallel in-house disciplinary hearing instituted against him, while there was a pending pre-dismissal arbitration in terms of s 188A of LRA, was unlawful. The court held that the Department (respondent) exercised its election to consent to the pre-dismissal arbitration in terms of s 188A of the LRA and consequently waived its prerogative to institute the parallel in-house disciplinary hearing pending the determination of the averments before the pre-dismissal arbitration. Accordingly, the court granted the declaratory order.

Exceptional circumstances

When a party (the employee in particular) impugns the parallel disciplinary process, the Labour Court (LC) is brought in to intervene on the inchoate disciplinary process. This raises the vital issue as to whether such an intervention is countenanced. Section 157(5) of LRA provides that: 'Except as provided for in section 158(2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act or any employment law requires the dispute to be resolved through arbitration'. Furthermore, s 158(1) of LRA confers on the LC the power to grant urgent interim relief in respect of disputes that must be determined by arbitration. The LC is not vested with powers to intervene in an incomplete disciplinary hearing.

The LC will only intervene in uncompleted disciplinary proceedings if truly exceptional circumstances are shown to exist. Three reasons have been postulated for the LC's disinclination to intervene in incomplete disciplinary inquiries:

- First, an employer has the prerogative to institute disciplinary proceedings against its employees. Understood in this way, interdicting ongoing workplace disciplinary proceedings constitutes an illegitimate intrusion into the employer's disciplinary jurisdiction.
- Secondly, if the LC routinely intervenes in workplace disciplinary and pre-arbitration proceedings, it would effectively undermine the statutory dispute resolution system.
- Thirdly, such intervention would frustrate the expeditious resolution of a labour dispute.

Pertinently, the case of *Jiba v Minister of Justice and Constitutional Development and Others* [2009] 10 BLLR 989 (LC) para 17, the LC held that 'although the court has jurisdiction to entertain an application to intervene in uncompleted disciplinary proceedings, it ought not to do so unless the circumstances are truly exceptional. Urgent applications to review and set aside preliminary rulings made during the course of a disciplinary [inquiry] or to challenge the validity of the institution of the proceedings ought to be discouraged. These are matters generally best dealt with in arbitration proceedings consequent on any allegation of unfair dismissal, and if necessary, by this court in review proceedings under section 145'. See also *Booysen v The Minister of Safety and Security and Others* [2011] 1 BLLR 83 (LAC) at para 44 where the Labour Appeal Court was categorical that the court may only interdict unfair conduct in the course of disciplinary proceedings in 'the most exceptional of circumstances, where a grave injustice or a miscarriage of justice might otherwise occur'. The trampling on the applicant's contractual rights arising from the *volte-face* contrived by the DTI in the *Rabie* case falls within the ambit of exceptional circumstances, warranting the granting of urgent interim relief staying the workplace disciplinary proceedings (see *Rabie* (*op cit*)).

Doctrine of election

The law of contract confers the right to the contracting party to repudiate by reasons of fraud or misrepresentation, the one having that right must elect whether to affirm the contract or to repudiate it and that once they have elected their option they are irrevocably bound by the election, except in a case of continuing or repeated breach. Relatively, if the parties enter into an s 188A of LRA agreement, one cannot blow hot and cold as each party is bound by the doctrine of election. The conduct of the employers of instituting an internal disciplinary process while the parties have entered into an agreement in terms of s 188A leaves much to be desired (see *Hlatshwayo v Mare and Deas* 1912 AD 242 at 259).

As a matter of principle, in the circumstance where the employer parachutes the disciplinary process from the pre-arbitration mode (in terms of the tripartite agreement) to the internal disciplinary process, such exercise is tantamount to a breach of contract (see *Mchuba v Passenger Rail Agency of South Africa* [2016] 6 BLLR 612 (LC)). Furthermore, once the parties consent to refer the matter for determination of misconduct or incapacity to the pre-arbitration hearing in terms of s 188A, and the accredited agency or CCMA accedes to the request, the employer undertakes to accelerate the disciplinary process to the stage of the arbitration hearing. Notably, despite the breach of contract, when the employer decides to resile from the contract in terms of s 188A by instituting an internal disciplinary hearing, the employee is substantially prejudiced in that they will suffer the double jeopardy of attending to parallel processes. Furthermore, such processes have negative financial implications to the employee as one will seek legal assistance on both processes.

This cannot be ameliorated by the fact that the employee is on precautionary suspension or still receives the emoluments. One needs to understand as to what generally triggers employers to institute internal disciplinary processes while there is a pending pre-dismissal arbitration. Firstly, most employers believe that they have an absolute prerogative to institute parallel internal disciplinary process.

Secondly, in some instances matters referred to pre-arbitration process tend to drag quite slowly. In *Stokwe v Member of the Executive Council: Department of Education, Eastern Cape and Others* [2019] 6 BLLR 524 (CC) the Constitutional Court held that any procedure to discipline the employee should be expedited. We have no doubt in our minds that this is the material purpose of an s 188A agreement, to wit, to accelerate the disciplinary process.

However, the use of the shield of delay as a pretext or unilaterally bailing out from the pre-dismissal agreement is unmeritorious and unjustifiable (see *Angehrn and Piel v Federal Cold Storage Co Ltd* 1908 TS 761). Furthermore, the interference by the LC to the incoherent disciplinary process (two parallel processes) is allowed as it is an exceptional circumstance. Moreover, by the doctrine of election, the employer is bound by the s 188A agreement and is not allowed to unilaterally withdraw from such a contract by instituting an internal disciplinary hearing.

Conclusion

The weight of authority buttresses the view that the process of a dual disciplinary process cannot be countenanced. The recourse is through urgent relief sought from the LC.

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Picture source: Gallo Images/Getty

Avoiding the potential pitfalls of dual citizenship

By Chris Watters

Since the COVID-19 lockdown, there has been a significant uptake in the number of South Africans who are considering emigration. All too often though, the emigrants are not looking to cut all their ties with South Africa (SA), and they want to retain their emotional and other links with SA. Legal practitioners are frequently engaged to assist and support their clients with their emigration related requirements. This trend highlights the need for South Africans to be made aware of and be alerted to several challenges involved should they acquire citizenship in their new 'homeland'. This article will address a few key issues that South African expatriates need to be alive to.

In terms of s 26B(*a*) of South African Citizenship Act 88 of 1995 (the Act), a South African citizen must travel out of and into SA using their South African passport. It is a criminal offence not to. While s 26B came into effect on 15 September 2004, the Department of Home Affairs (the Department) only really began to apply it with effect from 1 January 2013. This was the date on which the South African Citizenship Amendment Act 17 of 2010, came into operation. At that point, ports of entry would issue warnings to transgressors about this requirement. But increasingly of late, the Department is prosecuting persons for contraventions of s 26B(*a*). If the person has dual citizenship, they are allowed to use whatever other passport they have when entering or leaving any other country. But they must enter and leave SA on their SA passports.

It is important to note that the requirements of s 26B(*a*) do not apply to minors.

Another issue to be aware of is that s 26B(*b*) of the Act requires that when in SA the South African holding dual citizenship is not allowed to use that second citizenship in order to 'gain an advantage or avoid a responsibility or duty'. This is primarily intended to stop South Africans who have dual nationality from acts such as reclaiming value added tax (VAT).

A more significant issue is that as s 6(1)(*a*) of the Act provides, when a South African citizen acquires the citizenship of another country through a 'voluntary and formal act' they cease to be a South African citizen. It is not uncommon for South Africans to learn of this requirement after the fact. Section 6(1)(*a*) also does not apply to minors.

It is important to be aware that this loss of citizenship is not a decision that is taken by the Department. Rather, and as the Department applies the Act, the loss happens automatically, by operation of law.

If the South African citizen is not aware of this requirement of the Act, the supposed dual citizen may only become aware that they have lost their South African citizenship when they apply to renew their South African passport at their local South African Embassy. It is now standard practice at all South African Embassies that when a South African citizen applies to renew their South African passport, they must simultaneously apply for a determination of their South African citizenship.

Should the Department determine that the person has indeed lost their South African citizenship, the erstwhile dual citizen will get a letter from the Embassy advising them of this outcome. The letter will also record the date on which the person is deemed to have lost their South African citizenship. This will be the date when they were registered as a citizen of the second country – and not the date on which the determination was made.

If the erstwhile citizen was born in SA, the Embassy letter will also advise them that as a result of their birth in the country they are now deemed to be a permanent resident in SA. The ex-citizen will need to surrender their identity document (ID) and any South African passports they may have. They will need to apply for a new ID, which will reflect their new ID number as a permanent residence holder.

If or when the ex-citizen then travels back to SA they must enter on their foreign passport. The Embassy letter would also have to be shown at the port of entry to ensure that the ex-citizen is landed in the country as a permanent resident.

Section 25(1) of the Immigration Act 13 of 2002 provides that a permanent resident has all the rights and duties of a citizen except for those that are reserved

to citizens by the Constitution or any other law. One of those reserved rights is that South African passports are only available to South African citizens.

If the ex-citizen was not born in SA, this permanent residence 'dispensation' or 'birth-right', does not apply. If they wish to visit or return to SA, it will be as an ordinary visitor. The Immigration Act will then apply to the visa they will need.

If the ex-South African who enjoys that birth-right, returns to the country for the purposes of living in SA permanently, in terms of s 13(3)(*a*) of the Act, they can apply for the resumption of their South African citizenship. In terms of reg 8(2) of the Act, the resumption application must be accompanied by proof that the person has been resident back in SA for at least one year. In the interim they must keep their visa valid because it is not guaranteed that their application will succeed.

All of this unfortunate trauma is entirely avoidable. In terms of s 6(2) of the Act, the intended expatriate and potential dual citizen can apply, prior to them being registered as a citizen of another country, to be allowed to retain their South African citizenship. This permission must have been obtained in writing before they are registered as a citizen of the second country. In their 'retention' application, the expatriate must identify the country where they will seek citizenship. A person cannot apply for a 'blank cheque', as it were, to acquire other citizenships. The retention permission must be obtained again if the expatriate wishes to apply for a third or any further citizenships and still retain their South African citizenship.

As is evident from social media, over the years quite a number of South Africans have found themselves running afoul of s 6(1) of the Act. This has raised the issue of whether s 6(1) is constitutional.

This article does not consider the constitutionality argument – that must be for another time. The article, rather confines itself to identifying and highlighting a few aspects of the complexity of the issue. It is not as straightforward as might appear.

The primary argument in favour of unconstitutionality is that s 6(1)(*a*) contravenes s 20 of the Bill of Rights – that '[n]o citizen may be deprived of citizenship'. The counter to this contention is that it is not the Department or s 6(1) of the Act that is depriving a person of their South African citizenship. Rather, the argument goes if contentiously, that the law is the law and it is the expatriate who is depriving themselves of their South African citizenship. This is as a result of their own 'voluntary and formal act'. A further challenge for the argument in favour of 'unconstitutionality' is the relative ease by which a person may apply for the resumption of their citizenship and the limited prejudice there is in the interim period. But a challenge for both sides of the debate is whether this loss of citizenship constitutes a 'decision' as contemplated in the Promotion of Administrative Justice Act 3 of 2000. If it is not a 'decision' a further question is whether s 6(1) might then fall foul of s 34 of the Bill or Rights – the right of access to court. It is worth noting that an application has been launched in the Gauteng Division of the High Court in Pretoria, to challenge the constitutionality of s 6(1) of the Act. There is no indication at this time when this matter might be heard by the court.

It needs to be borne in mind that in matters concerning the acquisition and loss of a South African citizenship, there are two broad principles:

- The first is that as a general statement as regards the acquisition of a South African citizenship, a person's citizenship is determined by the citizenship of either or both of their parents as at the date of that person's birth.
- The second principle is that the loss of a South African citizenship is invariably a complex question dictated by the various iterations of the legislation and accompanying department policy on issues such as what constitutes a 'formal and voluntary act'.

Accordingly, what is set out here constitutes general guidance only. Everything depends on the facts of the client's circumstances.

As will, therefore, be evident, there are several potential 'landmines' to which the attention of intended expatriates, must be drawn – along with the prospects of remedial measures that may exist.

Chris Watters *BA LLB (Rhodes)* is a legal practitioner at Chris Watters Attorneys in Johannesburg. ❑

Fact corner

- A condition of attaining dual citizenship for all South African citizens aged 18 or older is that they must apply and be granted permission to retain their South African citizenship prior to the acquisition of a foreign citizenship.
- South African citizens under the age of 18 are exempt and do not require to apply for dual citizenship, as long as they acquire the foreign citizenship before their 18th birthday.

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Who takes the blame? Liability of the Minister of Police for unscrupulous conduct of his officials

By Maboku Mangena

The judgment of *Mahlangu and Another v Minister of Police* [2020] 2 All SA 656 (SCA) (see Merilyn Rowena Kader 'Law Reports' 2020 (Aug) *DR* 26) raises an important issue regarding the duty of the police towards the court, as well as the consequences of their failure to perform their constitutional obligations.

It is common cause that police play an important role in the administration of justice in any society. South Africa's (SA's) Constitution specifically mandates the police to prevent, combat and investigate crime, maintain public order and generally to protect and secure both citizens and non-citizens in the country.

In the performance of their duties, the police are required to uphold and enforce the law, including the Constitution, which is the supreme law of the land.

Section 35(1) of the Constitution provides that:

'(1) Everyone who is arrested for allegedly committing an offence has the right –

(*a*) to remain silent;

(*b*) to be informed promptly –

(i) of the right to remain silent; and

(ii) of the consequences of not remaining silent;

(*c*) not to be compelled to make any confession or admission that could be used in evidence against that person;

(*d*) …

(*e*) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and

(*f*) to be released from detention if the interests of justice permit, subject to reasonable conditions'.

The above provisions make it clear that as an agency entrusted with the investigation of crimes committed against the inhabitants of SA, the police play a significant role in the realisation of the constitutional rights of the arrested person.

Failure to observe the provisions of s 35 may, in criminal proceedings and under certain circumstances, result in the exclusion of the evidence tendered. This may result in the acquittal of a person who is otherwise guilty of a horrendous crime. Equally it may result in a lengthy and unjustifiable detention (such as in the *Mahlangu* case) and in certain cases, subsequent conviction of an innocent person.

It is, therefore, important that the police – as the investigators of crime – take their constitutional duties seriously and place all relevant and necessary facts before the court for the proper administration of justice. Police officers should be morally upright, honest and diligent in the performance of their duties. Generally, it should be easy to trust that a police officer will not break the law, will not manufacture evidence against innocent people, nor will they conspire and connive with criminals to defeat the ends of justice.

Sadly, in this case, the investigating officer failed to observe the constitutional provisions regarding the rights of the arrested person, namely, Mr Mahlangu and his co-accused. The investigating officer violated Mr Mahlangu's rights by torturing him and ultimately forcing him to 'confess' to a crime that he did not commit. In the process of torture and in an attempt to protect himself from further pain, Mr Mahlangu implicated another person.

The 'confession' was discussed with the prosecutor, who indicated to the court on the day of Mr Mahlangu's first court appearance that he would oppose bail. The matter was remanded several times until the charges against Mr Mahlangu were withdrawn. The withdrawal of charges only came after the real perpetrators were found and later tried and convicted.

Subsequent to the withdrawal of the charges, Mr Mahlangu instituted civil proceedings against the Minister of Police (the minister) where he claimed, among others, damages relating to unlawful arrest and detention for the entire period he was kept in prison while awaiting trial.

The basis of Mr Mahlangu's claim for detention (accounting for the entire period, including after his court appearance) was anchored around the fact that the investigating officer knew at the time he handed the docket to the prosecutor that bail would not be granted because of the 'confession' obtained in violation of Mr Mahlangu's constitutional rights. The action of the police was, according to Mr Mahlangu, the proximate cause of

his further detention even after his first court appearance.

The minister denied liability for Mr Mahlangu's detention post the first court appearance and averred that the detention was at the instance of the court and, consequently, he should not be liable for any damages for that period as he is not vicariously liable for actions of the officials of the Department of Justice and Constitutional Development.

The plea found favour with the court *a quo* and was confirmed on appeal to the Full Bench of the Gauteng Division of the High Court in Pretoria. The Supreme Court of Appeal (SCA) delivered a split judgment where the majority agreed with the minister. The majority held that failure to apply for bail was fatal to Mr Mahlangu's claim for detention post his first court appearance, regardless of the conduct of the investigating officer. The reason was that the remand by the magistrate constituted an intervening act, resulting in the break of the unlawfulness caused by the action of the investigating officer.

The minority, per Van der Merwe JA (Petse DP concurring), was of the view that the conduct of the investigating officer played a critical role in Mr Mahlangu's detention and was the reason for his further detention regardless of whether he applied for bail or not. According to the minority judgment the conduct of the investigating officer was the source of the unlawfulness and the continuous detention notwithstanding the failure to apply for bail. When the investigating officer acted unlawfully and continued to place incorrect information in the docket, the investigating officer knew that the prosecutor would act on the information and base their request for detention on that information. There was, therefore, no break in causation. I agree. To argue that had Mr Mahlangu applied for bail, the magistrate would have found that the confession was obtained unlawfully and released him, was in my view, to promote form over substance. A confession is an unequivocal admission of guilt and anyone with experience in bail applications involving sch 5 and 6 offences in terms of the Criminal Procedure Act 51 of 1977 will know how difficult it is to secure bail where there is a confession.

It is, however, the conduct of the investigating officer that I would like to comment on, as well as the duty that I think police officers owe to the court in the performance of their duties.

An investigator's role in the administration of justice is to gather all the facts of the case, so that the court hearing the bail application will be able to make the decision on whether the accused should be granted bail or not. The prosecutor presenting the case on behalf of the state relies heavily on the information given to them by the investigating officer. It is this information, which the prosecutor will use to update the victim of the crime on the status of the case, as well as the reason why an arrested person is released even when they are not charged. It is, therefore, imperative that an investigating officer should be honest, diligent and above reproach in the performance of their duties. An investigating officer who has taken an oath to uphold the law and defend the constitution should not fabricate a case against another person and should equally not withhold information or facts favourable to the accused from the prosecutor.

Commenting on the role of the police in society, the Constitutional Court stated in the matter of *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) at para 52 that:

'Our Constitution mandates members of the police to protect members of the community and to prevent crime. It is an important mandate which should quite legitimately and reasonably result in the trust of the police by members of the community. Where such trust is established, the achievement of the tasks of the police will be facilitated. In determining whether the minister is liable in these circumstances, courts must take account of the importance of the constitutional role entrusted to the police and the importance of nurturing the confidence and trust of the community in the police in order to ensure that their role is successfully performed'.

It, therefore, follows axiomatically that a court should be able to rely on the facts placed before it by the investigating officer regarding whether the interests of justice permits the release of an arrested person or not. This is not to say that the facts presented will not be assessed by the presiding officer for the execution of their judicial duties.

In this regard I align myself with the views expressed by Toni AJ in *Sibuta and Another v Minister of Police and Another* (ECG) (unreported case no 3709/2016 and 3710/2016, 15-1-2020) (Toni AJ) where the court dealing with the issue relating to police conduct the judge said:

'Police officers have, in keeping with public policy considerations, a public law duty to assist a detained person by advising him or her of his or her right to bail on his first appearance and inform the court of circumstances that militate in favour of granting a detained person bail to ensure that their right to a fair trial enshrined in the constitution is not infringed. This is the basic tenet of the rule of law which the fair trial principle is heir to. It should be adhered to at all times. By their failure to uphold their public law duty, police officers make themselves, and so their employer, vulnerable to delictual liability on the ground of causation which could have been avoided had they acted lawfully and within the bounds conferred upon them by the law and the Constitution'.

It was as Toni AJ was answering the debate raging at the hallowed chambers of the SCA in Bloemfontein regarding Mr Mahlangu's failure to apply for bail, when he said:

'There is nothing more a magistrate who is not privy to police investigation and is therefore bereft of the intricate details of the case could do if no information was placed before him upon which he could have reasonably exercised his discretion. A magistrate can only exercise a discretion properly if he or she is possessed of information which would place him or her in a better position to do so by the police and the prosecutors'.

I, therefore, find it startling that the majority judgment found it legally justifiable to limit the unlawfulness of police conduct to the period until the first court appearance, despite the fact that there was clear evidence to the fabrication and manufacturing of evidence. The investigating officer was, in my view, deceitful and his conduct deserved censure. Fabrication of evidence is not a small matter given the scarcity of resources in SA for the protection of the rights of the accused persons.

It is an undisputed fact that there are people who appear in South African courts with no or inadequate legal representation. It is equally true that there are people in South African correctional facilities who are serving sentences for the crimes they did not commit. The administration of justice system in SA is not always able to give those people their remedy due to the scarcity of resources, including the requirements for preparation of records for appeals, as well as the costs associated with it. We, therefore, cannot as a country afford to have unscrupulous police officers investigating crimes and in the process manufacturing evidence against innocent people.

In my view, the minority judgment properly accounted for the evidence tendered and placed a requisite premium on the role of the investigating officer to assist the court in the determination of the decision whether to release an arrested person or not.

Given the judgment of Toni AJ in the *Sibuta* case, the SCA may still have an opportunity to reconsider its decision on whether judicial remand constitutes an intervening act sufficient to break the chain of causation where there is a deliberate and malicious unlawful police conduct in violation of the constitution.

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The impact of the EU Regulations on fiduciary advice in South Africa

By Dr Eben Nel

Picture source: Gallo Images/Getty

The increased tendency of South Africans to establish geographically diversified estates – whether as a result of cross-border travelling, studying, work or business opportunities – has complicated not only their own lives, but also those of their fiduciary advisers. Many potential complexities may arise when multiple jurisdictions are applicable during the planning process; one being the tension between freedom of testation and the principle of forced inheritance. In South Africa (SA) we possessively guard the right to give away property by way of a last will and testament, while the right to receive an inheritance is as important in many European jurisdictions. Another substantial difference between many jurisdictions is the concept of joint assets of a married couple.

Central to the fiduciary planning process is the law of succession and the consequences of the applicable matrimonial property regime. Various attempts have been made to unify or harmonise the substantive law and clarify the private international law principles. South Africa is one of the 44 contracting states to the Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions (www.hcch.net, accessed 9-11-2020), in terms of which a disposition by will shall be valid if its format complies with the internal law of the jurisdiction regulating at least one of the following connecting factors – *situs* of property, the place where the will was made, or where the testator had his last domicile or habitual residence. These factors are, however, not the only factors to consider, as further investigations are sometimes necessary to determine whether the relevant countries have different laws governing succession to moveable and immovable assets. Although other Hague Conventions followed, they still only produced treaties and have no legislative powers, with many jurisdictions never officially adopting the international agreements.

The European Union (EU), however, may promulgate regulations and directives for its member states, although individual member states may elect not to accept it. Two of the most recent attempts have dealt with the regulation of succession and matrimonial property matters. The EU Succession Regulation (also called Brussels IV) is aimed at the alleviation of some issues linked to succession in the EU and the need to govern a family's worldwide estate by way of a single will, while the Council Regulation (EU) 2016/1103 of 24 June 2016 (EU Matrimonial Property Regulation) aims at providing international couples with more legal certainty regarding jurisdiction and the recognition and enforcement of property matters – also in the case of death. The fiduciary advisor should be aware of the potential impact of the succession-law concepts in an applicable jurisdiction, as well as international law, on their client achieving their wishes. The advisor should also consider the various administrative processes, such as the winding-up of the deceased estate, in different jurisdictions and how that interplays with the terms of the will or multiple wills. Some jurisdictions do not recognise the concept of formal estate administration by an executor, while others prescribe a very specific process.

EU Succession Regulation

The Regulation deals with aspects such as jurisdiction, recognition, enforcement, applicable law, the validity and admissibility of wills, and succession agreements. It also established the European Certificate of Succession, which enables individuals to prove their status and rights as beneficiaries and regulates the administration of certain estates in an EU jurisdiction. Certain aspects, such as in community of property-regimes, life insurances, pension plans, joint ownership and the creation, administration and dissolution of trusts, falls outside the scope of the Regulation.

The Succession Regulation applies to all deaths on or after 17 August 2015, aimed at simplifying it for EU citizens to deal with the legalities and consequences of multi-jurisdictional wills and succession matters. The Regulation, however, applies to any person who has property in an EU jurisdiction and not only EU citizens. Although the basic test applied to both movable and immovable property is that of last habitual residence of the deceased person, with only member states being guaranteed subsidiary jurisdiction, it is not limited to EU citizens and may have an effect on any testator with assets in at least one of the applicable EU countries (excluding Denmark, Ireland and the United Kingdom (UK)). As the Regulation applies to all persons with property situated in the EU, a South African national may specify in their will that South African law is to apply to their assets situated in an EU state. This election will prevent interpretive uncertainty and protect against forced heirship laws, which may be applicable in the particular EU state where the asset is situated. Where the deceased habitually resided outside the EU, the courts of a member state in which assets of the estate are located, will have jurisdiction to rule on the succession if the deceased had nationality of that member state or had their previous habitual residence in that member state. Although the general rule is that the jurisdiction whose succession laws apply, will also have the power to administer the estate of the deceased, the Regulation makes provision for a country to refuse application of the law that is incompatible with its own public policy.

EU Matrimonial Property Regulation

In terms of Regulations 2016/1103 and Council Regulation (EU) 2016/1104 of 24 June 2016, a competent court and rules regarding the determination of the national laws applicable in case of divorce or death, were established. These Regulations became operative on 29 January 2019 and adopt common rules on jurisdiction, applicable law and the recognition and enforcement of decisions in the area of the property regimes of international couples, covering both marriages and registered partnerships, in cases of death and divorce. Although it does not deal with succession matters *per se*, it does provide international couples with some legal certainty regarding jurisdiction and the recognition and enforcement of property matters, including prenuptial agreements drafted on or after 29 January 2019, in another EU country. Matters on the applicable law, apply to marriages concluded on or after 29 January 2019, except if the spouses have made a choice of law applicable to their matrimonial property regime before that date.

The Regulation makes provision for universal application in terms whereof the designated law applies, even if it is not the law of a member state, as well as the principle of unity of the applicable law. Spouses may, therefore, choose the law applicable to their matrimonial property regime, regardless of the nature or location of the property. They may elect any jurisdiction, even in a non-EU state, with which they have a close link, such as habitual residence or nationality. This principle of unity of the applicable law enables married couples to have their various related procedures handled by the courts of the same state. Advisors should encourage couples, where possible, to align their matrimonial property regime with their respective successions in accordance with the Succession Regulation.

Fiduciary practitioners in SA should take cognisance of these regulations, taking into consideration habitual residence, nationality and all other connections the spouses may have with any EU jurisdiction.

Conclusion

The Succession Regulation simplifies probate in cases of cross-border deceased estate administration and an executor in a non-member state will as a general rule be in a stronger position than they were before the introduction of the Regulation. The Regulation, unfortunately, only addresses this issue by way of a European Certificate of Succession, within the context of member states, and does not alleviate the difficulties experienced by practitioners in non-member states, like SA, in which case an Apostille certificate needs to be issued. To benefit from the Regulation the applicable choice of law should be clearly stated in each will, and preferably also the domicile and/or habitual residence of the testator. Drafters of wills must carefully consider the implication of revocation and/or variation clauses.

The Matrimonial Property Regulation provides common rules to apply to the marriages of international couples, and advisors should appreciate the potential advantages thereof at death of a client.

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Negligent loss of a firearm: A dilemma for the state?

By
Louis
Radyn

Picture source: Gallo Images/Getty

South African courts are not exactly overcrowded with prosecutions of persons who allegedly 'lost a firearm negligently' and are in contravention of s 120(8) of the Firearms Control Act 60 of 2000 (the Act). Accordingly, the aim of this article is an attempt to highlight some of the challenges, which a court may have to ponder on and to seriously consider the question as to whether the state has succeeded in presenting admissible evidence in its aspiration to prove a contravention of the section.

Often these prosecutions arise from and are solely reliant on the written statement made by the accused when they report the loss of their firearm to the South African Police Service (SAPS). The question may well be posed – is that very statement admissible against the accused in the adjudication of the case proffered against them?

The infringement of certain rights pertaining to the accused is relevant in such circumstances. This involves, *inter alia*, the right to remain silent, the right to be presumed innocent and the right against self-incrimination (ss 35(3)(*h*) and 35(3)(*j*) of the Constitution).

An article by PR Msaule 'The duty to produce one's firearm for inspection in terms of the Firearms Control Act: The right to silence under siege?' (2018) 21 *PER* states that an important question to be answered is whether the phrase 'any right in the Bill of Rights' extends the rights in subss (1), (2) and (3) of s 35 of the Constitution to suspects. Sight must never be lost of the fact that an accused was not a suspect neither a detainee nor person accused of anything at the stage when they deposed to their affidavit. They were simply a person reporting the loss of their firearm, which they are compelled to do in term of s 120(11) of the Act. Hence they did not enjoy the protection of the rights afforded in s 35(3) of the Constitution.

A comparatively strong argument may be formulated around speculation that an accused might have attained the status of a suspect the moment when they reported the loss. In reflecting on whether suspects can rely on the trial rights tabulated in s 35(3) of the Constitution one must carefully consider the following judgments:

- *S v Sebejan and Others* 1997 (1) SACR 626 (W) at 635: This matter dealt with the admissibility (or not) of a statement to the police for purposes of cross-examination. The statement, in the form of an affidavit was not properly commissioned. The court held that such statement, despite the fact that it was not a properly sworn statement, was admissible in this instance. It was nonetheless emphasised that no statement by an accused could be admitted in evidence unless the prosecution proved beyond reasonable doubt that it was made freely and voluntarily.
- *S v Orrie and Another* 2005 (1) SACR 63 (C): During the investigation of the case, a statement was taken from the accused while his right to remain silent was not explained to him. Nonetheless, the fact that it might have been an exculpatory statement was held to be prejudicial to the accused and should be treated with the understanding that the accused had recruited to give evidence against himself. Resultantly the court said the statement was held to be inadmissible against the accused. Moreover it was determined that the police, in taking the statement undoubtedly conveyed to the accused that he was a suspect.
- *S v Mthethwa* 2004 (1) SACR 449 (E): Magid J, with whom Nicholson J concurred, held that the right to remain silent was not applicable (in 1997 when the interim Constitution was still in place) to any person who had not yet been arrested or detained.
- *S v Langa and Others* 1998 (1) SACR 21 (T): MacArthur J and Mynhardt J dealt with the issue of whether a person is entitled to be informed of their rights prior to the stage when they are arrested. The court highlighted the fact that the accused had not been arrested or detained by the police at the time she made an incriminating statement to them. Consequently the court found that the requirements of s 25(2) of the Interim Constitution were not applicable.
- *S v Ndlovu* 1997 (12) BCLR 1785 (N): The court found that the right to remain silent in terms of s 35(1) of the Constitution was not to the avail of a suspect in a criminal case. Be that as it may, after an evaluation of the facts, the court established on the facts that the statement made by the accused had to be excluded on the foundation that the Judges Rules were disobeyed and consequently the trial would be rendered unfair if it was admitted.

Equally one should be acquainted with the ruling in *S v Van Der Merwe* 1998 (1) SACR 194 (O) where the court determined a statement to be admissible against the accused based on the spontaneity thereof and because the accused was not a suspect at the time when he made the statement, it is doubtful whether a person can be said to be spontaneous when he performs an action required by law.

Furthermore, due consideration should be given to the Constitutional Court (CC) decision in *S v Zuma and Others* 1995 (2) SA 642 (CC) at para 14 where it was held that legislation must be interpreted 'in a manner that promotes the spirit, purport and objects of the Bill of Rights' (Msaule (*op cit*)). Such an approach may well require that s 35(3) be interpreted to include that suspects are entitled to the protection afforded by s 35(3) of the Constitution.

The corollary of such a conclusion will demand further scrutiny in determining whether the state is entitled to present the contents of the accused's statement as evidence against them in a subsequent trial. This would probably necessitate a two-fold inquiry, namely –

- whether the impugned legislation is reasonable and justifiable in an open and democratic society thereby falling within the ambit of the limitation clause of s 36 of the Constitution; and
- if it is not, whether the unconstitutionally obtained evidence is nevertheless admissible in terms of s 35(5) of the Constitution.

Care should be exercised not to ignore the fact that fundamental rights are also limited. No right in the Bill of Rights (Chapter 2 of the Constitution) is absolute (see s 7 of the Constitution, as well as *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (1) SACR 414 (CC) at para 27).

The following dictum by the CC in the *Manamela* judgment may be of assistance:

'Thus, regulatory statutes dealing with licensed activity in the public domain, the handling of *hazardous products*, or the supervision of dangerous activities, frequently impose duties on responsible persons, and then require them to prove that they have fulfilled their responsibilities. *The objective of such laws is to put pressure on the persons responsible to take pre-emptive action to prevent harm to the public*' (my italics).

It was held in *South African Hunters and Game Conservation Association v Minister of Safety and Security* 2017 (2) SACR 288 (GP) that firearms are hazardous and that possession and ownership must be strictly controlled. In addition, it was held that a licence holder's failure to comply with the Act exposes the public to potential harm.

The legislature foresaw that it would be impossible for the authorities to check on a daily basis whether each licensee is still in possession of their licensed firearm. The only approach to monitor this is to impose a duty on the owner to report the loss of the firearm. This proactive approach limits the chances of the licensed firearm being used in the commission of crime. Everyone must ensure that legal firearms are utilised responsibly and do not fall into the hands of criminals. The burden placed on the gun owner to report loss, theft or destruction of the firearm seems to be justifiable, even in the Constitutional era where the burden of proof is taken off the shoulders of an accused.

The fact that s 120(11) of the Act places a duty on the holder of a firearm licence to report the loss, theft or destruction of said firearm within 24 hours, does not *per se* render the use of the statement as evidence against the accused unfair. I qualify this declaration having the following in mind:

- The holder of a licence to possess a firearm is on a different footing before the law (in relation to firearms) as opposed to an 'ordinary' person, because the licence holder has passed a competency test when, among others, they were educated on what the law required of a responsible firearm owner (see s 9(2)(*q*) of the Act).
- Licensees are aware that in preparation for the competency test that should their firearm be lost, destroyed or stolen, the law requires of them to report such event to the police, thereby limiting their right to silence and self-incrimination as envisaged in s 35(3) of the Constitution.
- Holders of a licence to acquire a firearm are aware of the responsibilities pertaining to the licensed firearm and are, therefore, not lay people for purposes of the law pertaining to firearms.

- The licence holder's decision to enter into this 'agreement' is, therefore, an informed one and the individual cannot rely on the right to remain silent (and thus not incriminate themselves).
- The CC has upheld limitation of fair trial rights, which are far more invasive than the provisions of s 120(11) of the Act.

If one does not conclude that the violation of the rights are in accordance with the limitation clause and one decides that the infringement is not justified by s 36 of the Constitution, one must still consider whether the contents of the statement (that was unconstitutionally obtained) may nevertheless be admissible in terms of s 35(5) of the Constitution. What must be borne in mind is that unconstitutionally obtained evidence is only inadmissible if it renders the trial unfair or is otherwise detrimental to the administration of justice.

The CC has held that an accused's right to a fair trial requires fairness to the accused, as well as the public, as represented by the state. It has to instil confidence in the criminal justice system with the public (see *S v Jaipal* 2005 (1) SACR 215 (CC) at para 29).

The issue of whether the rights, as stipulated, were violated will have to be determined in a trial-within-a-trial. It is common cause that when parties are *ad idem* that the rights were violated, there will be no need for a trial-within-a-trial and the court may decide on the issue after hearing argument.

The burden of proving that the accused had a right and that the right was violated seems to be on the accused (see *S v Naidoo and Another* 1998 (1) SACR 479 (N) and the *Sebejan* case).

In deciding whether the admission of the unconstitutionally obtained evidence will be detrimental to the administration of justice, the following factors should be considered –

- the seriousness of the offence;
- the public interest;
- inevitable discovery;
- spontaneous statement;
- the reliability of the evidence, and
- any other relevant factor.

The court must be aware of the different offences created by s 120(8)(*a*) and (*b*) of the Act. The former is applicable if the perpetrator was not in direct control of the firearm, whereas the latter applies to circumstances where they were in direct control of it.

In the absence of any reported case implying the contrary it must be accepted that the term 'direct control' does not solicit any other interpretation than the dictionary portrayal of what 'direct control' is. It may be established with a measure of certainty that a person who placed a firearm under their pillow was not in direct control of it and thus s 120(8)(*a*) of the Act would be applicable instead of s 120(8)(*b*) of the Act.

In the scenario where a policeman has no other evidential material than the self-incriminating statement by the accused as mentioned above, such a police officer may of course resort to s 106(1)(*c*) of the Act and request the suspect to produce the firearm in question, the failure on which the suspect may be charged under that section. Such action by the police would, however, amount to a gross injustice, because the suspect can certainly not produce something, which the police officer knows beforehand was lost by the very same person and cannot be produced.

The SAPS can of course also settle their quandary by relying on the presumptions created in s 118(1) of the Act. It is doubtful whether this section will pass the test of constitutionality, because of the requirement that the onus is on the state to prove its case. The other feature regarding any presumption is that it should be referred to in the charge sheet, and the implications should be explained to an accused by the court before they are required to plead.

The court must be alive to the fact that the contents of the statement could be false and that they lost the firearm in a fashion, which they have chosen not to disclose, for example at a place where alcohol was served and while they were in a state of intoxication. In such an event, the contents of the statement must be presented to prove that they were not truthful and if that was the only evidence against the accused they would have to be acquitted despite the fact that they had very clearly lost a firearm negligently.

Experience has revealed that police sometimes obtain a statement from the spouse of the accused in order to corroborate the arguably inadmissible statement deposed to by the accused. In this regard the court should be receptive to the fact that the spouse of an accused cannot be compelled to testify for the state against the accused.

I submit that prosecutors should be discouraged from disposing of these matters by way of alternative dispute resolution. Due consideration should be given to the seriousness of the offence and the serious potential consequences in the event of a negligently lost firearm landing in the wrong hands.

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THE LAW REPORTS

October [2020] 4 All South African Law Reports (pp 1 – 318); October 2020 (10) Butterworths Constitutional Law Reports (pp 1173 – 1296)

By Merilyn Rowena Kader

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
ECG: Eastern Cape Division, Grahamstown
ECP: Eastern Cape Local Division, Port Elizabeth
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
ML: Mpumalanga Division, Middelburg
WCC: Western Cape Division, Cape Town

Citizenship

Legal status – interpretation of statutes: The applicants in *Chisuse and Others v Director-General, Department of Home Affairs and Another* 2020 (10) BCLR 1173 (CC) were persons born outside of the Republic of South Africa (RSA) to a South African parent before 1 January 2013, the date when the South African Citizenship Amendment Act 17 of 2010 came into effect. The 2010 Amendment amended the South African Citizenship Act 88 of 1995, *inter alia*, by effecting amendments to its s 2(1). At the instance of the applicants a High Court had declared s 2(1)(*a*) and (*b*) of the amended Citizenship Act unconstitutional and invalid. Those provisions read:

'(1) Any person –

(*a*) who immediately prior to the date of commencement of the South African Citizenship Amendment Act, 2010, was a South African citizen by birth; or

(*b*) who is born in or outside the Republic, one of his or her parents, at the time of his or her birth, being a South African citizen,

shall be a South African citizen by birth.'

The High Court ordered that the words 'or by descent' were to be read-in following the word 'birth' in s 2(1)(*a*) and the words 'or was born' were to be read-in following the word 'born' in s 2(1)(*b*). This order was made to address two alleged constitutional infringements, which the applicants pointed out. The first was that the provisions in question automatically stripped away the citizenship of those persons who were entitled to acquire citizenship 'by descent' under s 3 of the Citizenship Act in its pre-amendment form. The second was that the amendment had the effect of depriving of citizenship to those persons who had a vested right to citizenship by descent, that is, persons who fulfilled the requirements set out in s 3 in its pre-amendment form, but who, for reasons beyond their control could not register their birth to a South African parent in terms of the relevant legislation. The High Court's order also directed the Director-General of the Department of Home Affairs to issue the necessary documents recognising the first and the third to fifth applicants' citizenship. The High Court found that evidence established that those applicants were indeed born to a South African parent outside of the RSA.

The matter came before the CC for confirmation of the High Court's declaration of invalidity.

The CC, per Khampepe J (Jafta, Madlanga, Majiedt, Mhlantla, Theron, Tshiqi JJ, Mathopo and Victor AJJ concurring), declined to confirm the declaration of invalidity, because it found that the provisions in question could be construed in a constitutionally compliant manner.

The judgment set out a comprehensive exposition of the proper approach to and the principles applicable to the interpretation of statutes.

The court found that on a proper interpretation of s 2(1) of the Citizenship Act, those provisions retained citizenship for those who were citizens by birth on 31 December 2012. Apart from the narrow category of citizens by descent who were also citizens by birth in terms of s 2(1)(*c*) of the Citizenship Act, citizens by descent generally would not have been considered to be citizens by birth as at 31 December 2012. This, however, did not necessarily render the provisions unconstitutional, as long as s 2(1)(*b*) could be interpreted so as to include the remaining categories of persons who had previously acquired South African citizenship. In regard to s 2(1)(*b*), a purposive interpretation of the words 'who is born' construed those words as applying to those born both before and after the commencement of the 2010 Amendment. It was incorrect to interpret the words 'who is born' as operating prospectively only. The court accordingly declined to confirm the High Court's declaration of invalidity. However, it made an order declaring that first and third to fifth applicants were South African citizens; and directing the Director-General of the Department of Home Affairs to register their births; enter their details into the population register; assign them South African identity numbers and cause identity documents and birth certificates to be issued to them.

Civil procedure

Exception to particulars of claim: In an application in terms of r 23(1) of the Uniform Rules of Court, the defendants in the main action sought an order that the plaintiffs' particulars of claim be struck out and the plaintiffs be offered an opportunity to deliver amended particulars of claim failing which the claim be dismissed with costs. The plaintiffs in *Cape Concentrate (Pty) Ltd (in liquidation) and Others v Pagdens Incorporated and Others* [2020] 4 All SA 61 (ECP) had claimed payment in the sum of R 23 000 000. The defendants raised various grounds of exception, claiming that the particulars of claim were vague, embarrassing and lacking in averments necessary to sustain a claim against them.

Case law makes it clear that when a question of insufficient particularity is raised on exception, the excipient undertakes the burden of satisfying the court that the declaration as it stands, does not state the nature, extent, and grounds of the cause of action. The excipient must make out a case of embarrassment by

reference to the pleadings alone. The pleading must be embarrassing in that it cannot be gathered from it what ground is relied on by the pleader. A pleader's initial duty is to allege the facts on which they rely on, and their second duty is to set out the conclusions of law which, according to them follow from the pleaded facts.

The first exception averred that the particulars of claim lacked the averments necessary to sustain a cause of action against the second to seventh defendants. The joint and several liability of the second to seventh defendants was premised on the basis that the second to seventh defendants were attorneys and directors of the first defendant (a private company). The Attorneys Act 53 of 1979 was applicable at the time the payments of the amount claimed were allegedly paid into the trust account of the first defendant. Section 23(1)(*a*) of the Act was peremptory and stipulated that the directors of a private company are only held jointly and severally liable with the company for the debts and liabilities of the company, which were contracted during their periods of office. In this matter, there were no allegations or averments made by the plaintiff as to whether the second to seventh defendants were directors of the first defendant at the time the money was deposited.

The next three exceptions, dealing with lack of particularity around the impugned payments were also sustained. The court, per Makaula J, held that relevant information should have been pleaded to enable the defendants to know which case they had to plead to.

The final exception was that the plaintiffs did not plead any basis, arising from fact or law, creating an entitlement to *mora* interest. The payment date relied on by the plaintiffs was found not to be proven. The exception was accordingly upheld.

The particulars of claim were struck out and the plaintiff was given an opportunity to deliver amended particulars of claim within 15 days, failing which the claims were dismissed with costs.

Consumer law – consumer rights

Credit providers and court jurisdiction: In *FirstRand Bank Ltd v Mostert and Another and related matters* [2020] 4 All SA 126 (ML) there were several cases before the court and the question to be considered was whether the matters should have been instituted by the plaintiffs in the present court, or in the relevant magistrates' courts that had jurisdiction over the persons of the respective defendants/respondents in the matters.

Brauckmann AJ held that the many defendants who are sued by credit providers and financial institutions out of the present court lived in the countryside towns and on farms surrounding the seat of the Mpumalanga Division in Middelburg, as well as the main seat in Mbombela. When the financial institutions decide to take to the courts to enforce its rights in terms of the agreements, the defendants are normally in arrears with their obligations for some reason. Some defendants were indigent people, and often very poor.

The court stated that everybody should have access to the courts and the protection it offers through the capable judicial officers manning it, applying the law and upholding the Constitution. However, many citizens were being deprived of equal access to the courts by credit providers instructing their attorneys to institute legal proceedings in matters based on the National Credit Act 34 of 2005 in the country's High Courts as court of first instance, and not in the lower courts as was the intention of the legislator when it drafted the Act. When sitting as unopposed, the present court was inundated with cases, issued by the Registrar, falling within the monetary jurisdiction of the magistrates' courts, most of which had its cause of action to be found in the Act. In some of the matters the quantum involved was far below R 50 000, matters that could more cost effectively have been dealt with by the magistrates' courts. The court stated that the National Credit Act and the Magistrates' Courts Act 32 of 1944, with reference to jurisdiction, had in mind that, in as far as matters involving the National Credit Act are concerned, such matters should be issued, and tried in the magistrates' courts. The court highlighted the difficulties posed for consumers, particularly indigent persons, in expecting them to access the High Court instead.

Corporate and commercial

Provision in insurance policy for indemnification against business interruption: In *Café Chameleon CC v Guardrisk Insurance Company Ltd* [2020] 4 All SA 41 (WCC) the applicant, which conducted the business of a restaurant, sought a declaratory order that the respondent insurance company was obliged to indemnify it as policyholder, in terms of the 'Business Interruption' section of the policy, for the loss suffered as a result of the interruption caused by the COVID-19 pandemic and the resultant promulgation and enforcement of the Lockdown Regulations made by the Minister of Cooperative and Traditional Affairs under the Disaster Management Act 57 of 2002. In seeking the relief in question, the applicant explained how the regulatory regime put in place to counter the pandemic impacted on its business.

The court, per Le Grange J, held that an insurance policy has to be interpreted so that its provisions receive fair and sensible application, and a restrictive consideration of words without regard to context has to be avoided. The policy under consideration could not be interpreted with reference to other policies or on the basis of generalised concerns about the impact of COVID-19 on the insurance industry at large, of which the applicant had no knowledge. The policy instead had to be considered on the contractual terms to which both parties had assented, in a sensible manner, which underpinned sound commercial sense, and not have an un-business-like result.

The main points taken by the respondent were that the applicant's loss, if any, was not insured under the Infectious Diseases Extension clause in the policy; and that there was no causal link between the Lockdown Regulations and the Infectious Diseases Extension. Properly interpreted, insofar as the indemnity, it was conditioned upon a 'human infectious or human contagious disease, an outbreak of which the competent local authority has stipulated shall be notified to them', COVID-19 fell substantially within the ambit of the Notifiable Disease Extension.

The court then turned to the issue of causation. A claim in terms of an insurance contract requires a claimant to prove not only the peril and the loss or occurrence as described in and covered by the contract, but also a causal nexus or link between the two. The question was whether the applicant had established that the regulatory regime that was imposed on its business from 27 March 2020 was directly caused by the COVID-19 outbreak, within the permitted radius of its premises, and as a result thereof it suffered a loss. The court accepted that there was a clear nexus between the COVID-19 outbreak and the regulatory regime that caused the interruption of the applicant's business. Factual causation was thus established by the applicant. In determining the presence of legal causation, the question was whether, having regard to the considerations alluded to, the harm was too remote from the conduct or whether it was fair, reasonable and just that the respondent be burdened with liability. That question was answered against the respondent.

The respondent was, therefore, liable to indemnify the applicant in terms of the Business Interruption section of the policy.

Criminal law and procedure

Housebreaking with intent to rob and robbery – sentencing: The State alleged that on 25 January 2016 the appellant in *Bam v S* [2020] 4 All SA 21 (WCC) broke into the home of the complainant and robbed him of a television set, a cell phone and an amount of cash. The appellant pleaded not guilty to the charge and elected not to provide any plea explanation. At the end of the trial, he was

convicted as charged. The trial court imposed a sentence of seven years' imprisonment in respect of the housebreaking, and 15 years in respect of the robbery. The latter sentence was the prescribed minimum sentence applicable to a first offender who is convicted of robbery with aggravating circumstances, unless there are other substantial and compelling circumstances present. In order to ameliorate the cumulative effect of the sentences, the magistrate directed that the sentence, which was imposed in respect of the housebreaking, was to run concurrently with that which was imposed in respect of the robbery. Effectively therefore, the appellant was sentenced to 15 years' imprisonment.

It was held by Sher J (Bozalek J concurring) that the appellant's explanation of events surrounding his conviction was correctly rejected by the trial court. In the absence of any credible explanation as to how he came to be dealing with the television set a day after the robbery, the obvious and only reasonable inference to be drawn was that the appellant was one of the persons who had robbed the complainant of it. In South African law housebreaking, *per se*, is not a crime on its own, unless it is accompanied by an intention to commit an offence. Where an offender commits a housebreaking in accordance with the requisite elements and, thereafter, proceeds to engage in further criminal conduct, which was facilitated by it, and which was the object of it, he commits a further, and separate offence. The consequences of an accused being indicted in one rolled-up, namely, composite charge of housebreaking with intent to commit an offence, and the offence itself, may in certain instances appear to be anomalous, or may at times result in what appears to be counter-intuitive or an inconsistent decision. But on analysis, this can best be understood if the underlying purpose of the practice in relation to the charging of housebreaking offences *viz* the avoidance of a duplication of convictions and punishments is borne in mind. The trial court correctly pointed out that housebreaking with intent to rob and robbery were two separate offences which, for practical reasons, are usually combined. However, the court erred in going on to state that as they were separate offences they should be punished separately, because the appellant was only convicted on a single, composite charge. In doing so the magistrate improperly split the charge in two, which effectively resulted in a duplication of convictions and punishments, for what essentially amounted to a single criminal course of conduct. The double sentence imposed constituted a material misdirection, warranting interference on appeal. The sentence was replaced with a sentence of 12 years' imprisonment, antedated to 21 June 2017.

Constitutional rights of children in cannabis related offences: The case of *S v LM and Others* [2020] 4 All SA 249 (GJ) arose from an urgent review concerning four children, which came before magistrates for diversions in terms of s 41 of the Child Justice Act 75 of 2008. The children were alleged to have committed offences referred to in sch 1 of the Child Justice Act. They had all tested positive for cannabis, which tests had been performed at school. They were accordingly alleged to have been in possession of cannabis, which constitutes an offence in terms of sch 1 of the Child Justice Act. The children and their parents appeared before the magistrates who were all, individually and separately, handed draft court orders in terms of s 42(1) of the Child Justice Act, and agreements in terms of which the children and their parents agreed, among other things, to undergo diversion programmes. As the children had allegedly not complied with the diversion agreements, the prosecutor sought to invoke more onerous diversion programmes as contemplated in terms of s 58(4)(*c*) of the Child Justice Act. It was then ordered that the children undergo compulsory residence at youth centres. Those orders were subsequently set aside by the court.

The two issues which arose were whether it is still a criminal offence for children to use or be found in possession of cannabis, and whether it is permissible for a child to be referred to the criminal justice system after failing a drug test administered by the child's school.

The court, per Opperman J (Mokgoatlheng J concurring), held that this case was not about the legalisation of cannabis for children, but about decriminalising its use and/or possession so that other, more appropriate assistance may be rendered to children. An offence that criminalises actions for only certain groups of people, most commonly because of their religion, sexuality or age, is referred to as a 'status offence'. Status offences (and in this regard, the criminalisation of cannabis-related offences specifically) violate the constitutional rights of children in the South African context. Children are the individual bearers of rights and enjoy the right to have their best interests considered of paramount importance. Several children's rights are directly violated by the criminalisation of cannabis-related offences on account of the (alleged) offender's age. The criminalisation of the relevant offences infringed the right to equality and violated the best interests of the child.

Section 28(1)(*g*) of the Constitution guarantees the right of every child not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under ss 12 and 35, the child may be detained only for the shortest appropriate period of time and has the right to be kept separately from detained persons over the age of 18 years and treated in a manner, and kept in conditions, that take account of the child's age.

It being established that the criminalisation of cannabis-related offences *vis-à-vis* children limited the rights of children, the next question was whether such a limitation was justifiable.

The court issued a declaration that s 4(*b*) of the Drugs and Drug Trafficking Act 140 of 1992 was inconsistent with the Constitution and invalid to the extent that it criminalises the use and/or possession of cannabis by a child. A moratorium was declared, preventing any child from being arrested and/or prosecuted and/or diverted for contravening the impugned provision. It was also declared that s 53(2) read with s 53(3) of the Child Justice Act does not permit, under any circumstances whatsoever, for a child accused of committing a sch 1 offence to undergo any diversion programme involving a period of temporary residence.

Education

Provisions for re-opening early childhood development services during national lockdown: The applicants in *Skole-Ondersteuningsentrum NPC and Others v Minister of Social Development and Others* [2020] 4 All SA 285 (GP) sought a declaration that in terms of the amendment to the Regulations issued by the Minister of Co-Operative Governance and Traditional Affairs (the second respondent) in terms of s 27(2) of the Disaster Management Act 57 of 2002 and published in GN608 *GG*43364/28-5-2020 (the Alert Level 3 Regulations), all private pre-school institutions offering Early Childhood Development services (Grade R and lower) were entitled to re-open immediately.

The application concerned the rights and interests of private preschool institutions, which were not affiliated with schools and which offered Early Childhood Development (ECD) education to children in Grade R and lower. By way of the GenN302 *GG*43372/29-5-2020, the Minister of Basic Education (the third respondent) gave directions to provide for arrangements for a phased return of educators, officials and learners to school and offices. That, however, only applied to a 'school' as defined in the South African Schools Act 84 of 1996.

The court, per Fabricius J, found no rational and justifiable ground, when interpreting the Regulations, on which it was envisaged that schools offering ECD programmes, including Grade R and lower, which formed part of schools as defined in the Schools Act (which include both public and independent schools), were permitted to re-open from 6 July 2020 in terms of the directions, but that other private preschools offering ECD educa-

tion for children, in Grade R or lower were not permitted to open or simply left in a vacuum.

It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. The question whether a decision is rationally related to its purpose is an objective one. The court held that the actions of the third respondent (and by implication the first respondent, who was following her lead) lacked legal certainty and caused trauma and distress to children, parents, teachers, employees, principals, and owners of educational and childcare facilities.

The court granted the relief sought by the applicants and ordered the first respondent to pay the costs of applicants and the *amicus* on an attorney-and-client scale.

Breach of constitutional and statutory duty in terms of National School Nutrition Programme: In *Equal Education and Others v Minister of Basic Education and Others* [2020] 4 All SA 102 (GP) the applicants, on an urgent basis, sought declaratory orders against the Minister of Basic Education and the Members of the Executive Council (MEC's) of Education in eight provinces of South Africa declaring that they were in breach of their constitutional and statutory duty to ensure that the National School Nutrition Programme (NSNP) provided a daily meal to all qualifying learners whether they were attending school or studying away from school as a result of the COVID-19 pandemic.

The court, per Potterill ADJP, held that the first question was whether there was a factual basis for the application, as there had never been a refusal by the Minister and MEC's to roll out the NSNP. In the replying affidavit, the applicants sought to establish a new factual foundation, that not all qualifying learners were yet receiving daily meals. The court described the change on tack as impermissible litigation by ambush. The purpose of pleadings, or in applications the affidavits, is for the opposition to know what case they are to meet.

The importance of the feeding programme was acknowledged by the court. The COVID-19 pandemic had the devastating effect of denying nine million school-going children of at least one nutritious meal a day, leaving many children hungry and unfed while attempting to learn. For many years the Department of Education had taken on the duty to educate children and addressed the right to basic nutrition through the NSNP. It was thus evident that the state, through the Department and the NSNP, had exercised it supplementary role to provide basic nutrition. In failing to roll out the NSNP from June 2020, the Minister and MEC's had not complied with their constitutional and statutory duties.

The court granted the declaratory relief sought, as well as a supervisory interdict.

Other cases

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

- delict and factual and legal causation;
- gambling and wagering and the issue of casino licences;
- insurance law and Bloodstock Insurance Policy;
- international law and international agreements;
- law of contract and interpretation of contracts;
- medicine and the control of medicine and substances;
- radio and television and the regulation of broadcasting services; and
- rights and obligations of asylum seekers.

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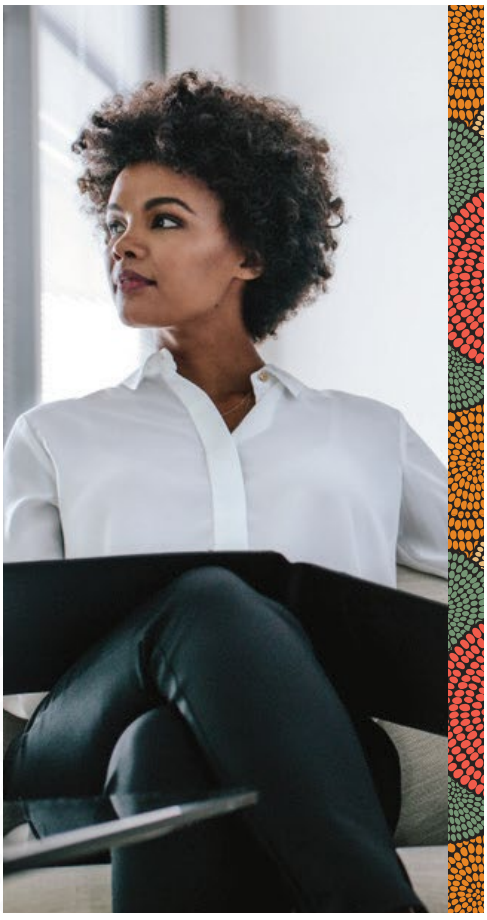

By Kgomotso Ramotsho

Regulation 35(4) of the Pension Funds Act regulations is declared invalid and unenforceable

Southern Sun Group Retirement Fund v Registrar of Pension Funds and Others (SCA) (unreported case no 215/2019, 2-11-2020) (Navsa JA (Zondi, Van der Merwe and Nicholls JJA and Unterhalter AJA concurring))

In the case of *Southern Sun Group Retirement Fund* the Supreme Court of Appeal (SCA) had to decide whether reg 35(4) of the Pension Funds Act 24 of 1956 (PFA), was beyond the powers assigned to the Minister of Finance (third respondent). In a letter dated 9 January 2015 the Registrar of Pension Funds (first respondent) rejected the Southern Sun Group Retirement Fund's (the Fund's) 2010 actuarial valuation report, in terms whereof the Fund sought to release a portion of the funds it held in respect of unclaimed surplus benefits. The Fund asserted that it was entitled to release funds held, in terms of s 15B(5)(*b*) of the PFA, on the basis that the beneficiaries are unlikely to ever claim them. It also sought to release funds, so it said, held in terms of s 15B(4)(*b*), in respect of members whose benefits could not be calculated on an individual basis due to poor data. The Fund contended that there was nothing in law that prevented the release of those funds. The Financial Sector Conduct Authority (FSCA) did not agree.

The Registrar, referred to the preceding paragraph, which set out the basis for the rejection:

'[I]n terms of s 15B(5)(*b*) of the PFA and thus to hold a lesser liability for these s 15B surplus benefits … The release of s 15B surplus is, at least in part, a contravention of regulation 35(4) … The PFA and the regulations do not give the Fund discretion to hold a lesser liability even if the Fund is of the opinion that it would be unlikely that untraced members would ever claim their s 15B(5)(*b*) benefits. The valuator's assumptions and recommendations in this regard are therefore contrary to law and [on] this basis the valuation report must be rejected in terms of s 16(9), read with s 15(3) of the PFA, as it does not correctly reflect the financial condition of the Fund.'

As in two related cases, the Fund lodged an appeal against the Registrar's decision in terms of s 26 of the PFA. The appeal included a challenge to the validity of reg 35(4). Because the FSB appeal board was not empowered to deal with the validity of regulation, the Registrar's office was amenable to the suggestion by the Fund, that the appeal be held in abeyance, pending the finalisation of a court application by the Fund, in terms of which it would seek a review and setting aside of the regulation in question.

In its application in the Gauteng Local Division of the High Court in Johannesburg, the Fund in its founding affidavit explained why, in its view, reg 35(4) was *ultra vires* the minister's power and why it was inconsistent with the provision of the PFA. The following are relevant paragraphs:

'101. The regulation is … inconsistent with the PFA and therefore *ultra vires* because it requires a fund, such as the Fund in the present case, to establish a separate contingency reserve account and credit that account with specific amounts, when it is clear, from the definition of the term "contingency reserve account" in the definitions [section] of the PFA, that:

101.1 The establishment of the contingency reserve accounts falls within the sole discretion of the board of trustees of a fund; and

101.2 The determination of any amounts to be credited to (or be debited from) that account is a matter for the board of a fund to decide after consulting the fund's valuator.

102. Any regulation which purports to fetter the discretion explicitly granted to the board of trustees of a fund (such as the discretion granted to the board of trustees by the very definition of what constitutes a "contingency reserve account") is inconsistent with the purposes of the PFA and accordingly *ultra vires* the powers of the Minister, who, in terms of s 36, may only make regulations consistent with the PFA.'

The SCA said that it was important at the outset to have a brief meaning of an actuarial surplus. A surplus arises in a pension fund when an actuary determines that its assets exceed its liabilities. Prior to 2001, how a pension fund dealt with a surplus was determined by its rules. The Pension Funds Second Amendment Act 39 of 2001 came into effect on 7 December 2001. It was enacted to regulate the distribution of a surplus by pension funds. It became known as the surplus legislation. The surplus legislation inserted definitions relating to pension funds surpluses and also introduced ss 14A and 14B, and ss 15A to 15K into the PFA.

The Fund registered as a pension fund in terms of the PFA, was established as a defined benefit fund with effect from 1 March 1994. It later converted to a defined contribution fund but retained certain guaranteed benefits. It was, therefore, classified as a defined benefit fund at the same time that surplus apportionment legislation, which constituted amendments to the PFA, came into operation. The Registrar, holds office in terms of s 3 of the PFA and was the executive officer defined in s 1 of the Financial Services Board Act 97 of 1990 (the FSBA).

In an opposing application, the Registrar, at the outset, pointed out that the purpose of the impugned regulation was to ensure that pension funds have sufficient funds to meet the claims of every former member for whom the board has been able to determine an enhancement in terms of ss 15B(5)(*b*) or (*c*) of the PFA and that this was a legitimate government purpose. That purpose had to be viewed against the rationale for the surplus apportionment amendments, which was to undo the wrongs of the past and to ensure a fair surplus distribution. The Registrar referred to the Fund's acceptance that a former member's entitlement to be paid endured and that it could not extinguish its liability in that regard. The Registrar insisted that the Fund's assertion that the regulation resulted in a sterilization of funds was fallacious.

It was contended that there was no conflict between the impugned regula-

tion and the provisions of s 15B(5)(*e*). The regulation, so the Registrar asserted, dealt with former members whose enhancements could be calculated but who could not be traced, whereas the aforesaid subsection deals with former members for whom enhancement could not be calculated, irrespective of whether it could be traced.

The minister, in opposing the application, at the outset, raised the question of unreasonable delay in the bringing of the application. In this regard s 7 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) was referred to. The minister pointed out that 12 years had passed since the promulgation of the regulation. The minister noted that on the Fund's own version of events it had become aware of the legal opinion regarding the validity of the regulation as far back as December 2010 but only launched its application in July 2015. The minister's application submitted that condonation should be refused.

The minister in the application, referred to s 36 of the PFA, which grants wide powers to make regulations. Regulations, so the minister asserted, should promote the objects of the Act under which it was promulgated. According to the minister, the definition of 'contingency reserve account' was inserted by the surplus apportionment amendments so as to hold what would otherwise have been surplus assets available for distribution. These amounts, so the minister said, would then be used for contingencies for which they had been earmarked and would be excluded from the surplus that had to be distributed in terms of ss 15B and 15C of the PFA.

The High Court adjudicated the dispute. The court recorded that after the decision of the SCA in *Mostert NO v Registrar of Pension Funds and Others* 2018 (2) SA 53 (SCA), the Fund changed its position and now asserted that it was no longer basing its challenge on PAJA, but that the application should be viewed as a legality review.

The High Court, after referring to case law, held that the making of reg 35(4) was administrative action in terms of PAJA. In relation to the delay in bringing the application Siwendu J took into account that on the Fund's own version of events it became aware of the challenge to the validity of regulations five years before it launched the application. The High Court went on to consider whether it should extend the period in terms of s 9 of PAJA. The court, in favour of the Fund, took into account that it launched the application within 180 days of the Registrar's rejection of its valuation report. The court considered the importance of the issue and decision in relation thereto. The court, further, held that it was in the interest of justice that the time be extended. Thus, condonation was granted.

The High Court dealt with the contention on behalf of the Fund that the minister could not direct a contingency reserve account other than in terms of the PFA. The High Court accepted the submission on behalf of the minister that there was nothing in the PFA that restricted the meaning of 'contingency reserve account' and the minister's power to promulgate the regulation and directing, in terms thereof, the creation of a specific contingency reserve account. The application was dismissed without any order being made as to costs. The SCA said that it was against the dismissal of the application and the conclusion on which it was based that appeal was brought to its court.

The SCA pointed out that, counsel for the respective pension funds in each of the three appeals aligned with each other and made common cause in their quest to have the regulation set aside or declared *ultra vires* the powers of the minister. The SCA added that the counsel for the FSCA and the minister, likewise, supported each other in resisting the application brought by each of the three pension funds. The SCA said that during the oral argument the counsel representing the FSCA and the minister that, in this case, the High Court, in considering whether to overlook the delay, took into account, *inter alia*, the importance of the issue, including the nature and consequence of the impugned regulation, and had concluded that it was in the interests of justice to condone the delay; and there was no cross-appeal in relation thereto, by either of them.

It was pointed out that it would be most peculiar to decide the merits in one case and not in the other two, because condonation was not warranted, despite the fact that a finding in the one case would determine the legal position in relation to all three. After conferring, counsel on behalf of the FSCA and the minister informed the SCA that the delay should no longer be considered an issue between the disputants and that the matter should be decided on the merits in all three matters. The SCA, added that it would be recalled that the FSCA had always adopted a neutral stance on the question of delay. The SCA said in its view the concession was rightly made. That the High Court took into account all the relevant factors when it exercised its discretion in favour of the pension fund.

With regard to the merits, the SCA started by saying that it must be recognised that the surplus legislation was a milestone in pension law. That before it came into operation, as pointed out by the FSCA, the subject that exercised the mind of many pension fund legal practitioners and administrators was the following: Who owned the surplus in a pension fund at any given time? The SCA noted that the debate around this question endured for a long time before the decision of the SCA in *Tek Corporation Provident Fund and Others v Lorentz* 1999 (4) SA 884 (SCA). In that case the core conclusion was the following:

'Once a surplus arises it is *ipso facto* an integral component of the fund'.

The SCA in *Tek* acknowledged that the legislature was best placed to deal with that manner in which surpluses should be apportioned. At that stage there had already been a consultation process concerning pension fund surpluses, involving government, business and labour. The SCA said that process culminated in the surplus legislation.

The SCA pointed out that the surplus legislation is remedial in nature in that it was designed to redress past abuses of surpluses by a number of employers, but its other purpose was also to ensure fairness in the distribution of a fund's surplus on an ongoing basis. The SCA added that the surplus legislation put paid into any notion that the employer owned a surplus in a fund. The SCA noted that in s 1 of the PFA, as it stood at the time that the regulation in question came into being, 'actuarial surplus' was defined as follows:

'"actuarial surplus", in relation to a fund which is –

(*a*) subject to actuarial valuation, means the difference between –

(i) the value that the valuator has placed on the assets of the fund less any credit balances in the member and employer surplus accounts; and

(ii) the value that the valuator has placed on the liabilities of the fund in respect of pensionable service accrued by members prior to the valuation date together with the value of those contingency reserve accounts which are established or which the board deems prudent to establish on the advice of the valuator …'.

The SCA said that presently the definition of 'actuarial surplus' reads as follows:

'"Actuarial surplus", in relation to a fund which is –

(*a*) subject to actuarial valuation, means the difference between –

(i) the value, calculated in accordance with the prescribed basis, if any, that the valuator has placed on the assets of the fund, less any credit balances in the member and employer surplus accounts; and

(ii) the value that the valuator has placed on the liabilities of the fund in respect of pensionable service accrued by members prior to the valuation date plus the amounts standing to the credit of those contingency reserve accounts which are established or which the board

deems prudent to establish on the advice of the valuator, calculated in accordance with the prescribed basis, if any'.

The SCA dealt with reg 35, as proclaimed in the heading, purports to deal with 'contingency reserve funds'. It reads as follows:

'(1) By virtue of the fact that –

(*a*) the Act vests powers in boards of funds to establish contingency reserve accounts; and

(*b*) the establishment of contingency reserve accounts reduces the actuarial surplus available for apportionment and increases the possibility that actuarial surplus may be insufficient to enhance benefits previously paid to former members to the level prescribed in section 15B(5)(*b*) of the Act,

no fund may, with effect from the date of commencement of this regulation, establish any contingency reserve account under circumstances where a reasonable inference may be made that the establishment of the account is contrary to the duties of the relevant board under section 7C(2)(*b*) of the Act and motivated by bad faith.

(2) The establishment and magnitude of any contingency reserve account by a fund –

(*a*) must be motivated by the valuator in the relevant report on the statutory actuarial valuation; and

(*b*) may, where the Registrar is not satisfied with any such motivation, be rejected by the Registrar.

(3) A fund must, on any such rejection of the establishment or magnitude of the relevant contingency reserve account, take such steps in connection therewith as the Registrar determines and sets out in writing to the relevant fund.

(4) Where a board is able to determine the enhancement due in respect of a particular former member in terms of section 15B(5)(*b*) or (*c*) of the Act but is unable to trace that former member in order to make payment, the board shall put the corresponding enhancement into a contingency reserve account specific for the purpose. Notwithstanding anything in the rules of the fund, moneys may not be released from such contingency reserve accounts except as a result of payment to such former members or as a result of crediting the Guardian's Fund or some other fund established by law to include such amounts.'

The SCA said the counsel for the minister and the PFA were rightly constrained not to seek to justify the envisaged potential transfer, as it were, to the Guardian's Fund. The SCA added that in the Guardian's Fund or some other fund the money that was destined for former untraced members would be lost to them and the Fund. If it were to remain in the Fund and remained unclaimed in perpetuity that will have the effect of sterilizing the money from which past or present members could never benefit. It will be recalled that in terms of s 15A all actuarial surpluses belong to a fund.

The SCA pointed out that the minister arrogated the power to deal with a surplus and to establish contingency reserve funds, to the exclusion of the board. The SCA added that in promulgating reg 35(4) the minister acted beyond the regulation making powers set by the PFA. The SCA said that the minister and the FSCA's submissions in relation to the meaning of 'contingency reserve account' in reg 35(4) are without substance. The SCA said that the impugned regulation itself speaks of a 'contingency reserve fund' but the minister and the FSCA then sought to disown the concept and the description.

The SCA pointed out that the point made on behalf of the minister and the FSCA that the setting aside of the regulation will lead to laxity on the part of boards in that they will be incentivised to expend very little or no effort to trace former members, is without substance. The SCA added that the FSCA can always question the adequacy of steps taken and issue directions in relation thereto. The SCA said in addition, the provision of s 15B(3), come into play.

The SCA added that for reasons set out the appeal must be upheld. The following order was made:

'1. The appeal is upheld with no order as to costs.

2. The order of the court below is set aside and substituted as follows:

"Regulation 35(4) of the Pension Fund regulations is declared invalid and unenforceable in that it exceeds the Minister's powers under the provisions of the Pension Funds Act 24 of 1956"'.

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

By Mdumseni Gambushe

Pauperien liability: Strict liability reigns supreme again

Van Meyeren v Cloete [2020] 4 All SA 358 (SCA)

It is a trite principle of South African law that the owner of a domesticated animal is liable for the damage caused by their animal. We also know the owner can escape liability in appropriate circumstances. In the case of *Van Meyeren*, the Supreme Court of Appeal (SCA) was called on to decide whether the negligence of the third party not in control of the animal can exonerate the owner from liability.

Facts of the case

While walking on the street passing Mr van Meyeren's (the appellant's) home, Mr Cloete (the respondent), was suddenly and viciously attacked by the appellant's dogs. The attack was so bad that the respondent's left arm had to be amputated. It was not clear how the dogs managed to escape through the allegedly locked gate thus enabling them to cause harm to the respondent. The appellant alleged that there must have been an intruder who interfered with the locks, which enabled the dogs to escape his home and to cause harm to the respondent.

The *actio de pauperie*

In the unanimous judgment, Wallis JA laid the foundation with a proper characterisation of the *actio de pauperie* in South African law. He held that the es-

sence of this principle is that 'the owner of a dog that attacks a person who was lawfully at the place where he was injured, and who neither provoked the attack nor by his negligence contributed to his own injury, is liable, as owner, to make good the resulting damage'.

The liability of the owner is based on ownership alone and fault in his part is not a prerequisite, and strict liability attaches to him by virtue of his ownership thereof. In the premises, the court provided two reasons to support its characterisation of the principle:

- Firstly, in instances where both the owner of the dog and the victim are not at fault, it is only fair that the owner makes good the damage because, by the virtue of his ownership, he is the source of the risk.
- Secondly, adoption of fault as a requirement for owner's liability would amount to the adoption of *scienter* test; this is English common law principle that provided that the strict liability for the animal's damages follows the owner if he knew of the animal's proclivity to engage in the conduct that caused damage. However, as the court held, such a qualification does not and has never been part of our law.

Be that as it may, the owner of the animal can still escape liability in appropriate circumstances. There are two defences that are intrinsic to the *actio de pauperie*, namely:

- Firstly, where the injured party was in a place where they were not entitled to be. The obvious example would be that of a housebreaker bitten by a watchdog.
- Secondly, where the injured party or a third party provoked the attack by provoking the animal and the animal acted as any animal would in the circumstance.

The onus of establishing the defence rests on the owner of the animal. It is important to note that in both defences, the owner escapes liability on the strength of someone else's behaviour directly causing the animal to inflict harm, in instances where he as the owner has no control.

The *Lever* defence

In the case of *Lever v Purdy* 1993 (3) SA 17 (A), Mr Lever left his vicious dog in the custody of a Mr Cohen, while he was on an overseas trip. Mr Cohen invited Mr Purdy to help with a television satellite. The latter asked the former to lock the dog away before he arrived, and this was not done. On his arrival, Mr Purdy was attacked and badly injured by the dog.

On Mr Lever's return from the overseas trip, Mr Purdy sued him for damages. The court had to look at whether Mr Lever could escape liability on the ground of Mr Cohen's negligence, even though he had not actively provoked the dog to attack Mr Purdy. The court held that Mr Lever could escape liability in the circumstances. Therefore, an additional exception to escape pauperien liability was approved in circumstances where the negligence of a third party in control of the animal resulted in damage.

This is precisely the defence that the appellant tried to rely on in the present case. Firstly, the appellant tried to argue that control of the animal by the third party is not a prerequisite for this defence. The court held that this submission misconstrued the purpose of pauperien liability because it does away with the essential need of a direct link between the third party's conduct and the behaviour of the animal that caused the harm in order for the owner to be exonerated from liability.

The court held that the negligent action of a third party, as was the case here, of leaving the gate open, thus enabling the dog to escape and cause damage, is an extrinsic factor that has nothing to do with the dog's behaviour and is not directly linked to it. It was further held that such negligence did not prompt the dog's vicious nature. At best it created an opportunity for the vicious nature of the animal to manifest itself but it is not intrinsically linked to it.

In the premises, the court held that the assumed intruder had no responsibility towards the appellant, and he did nothing in relation to the dogs except to create an opportunity for them to escape. Therefore, it cannot be validly argued that the responsibility for the dogs passed from the appellant to the intruder in the same way as it had passed from Mr Lever to Mr Cohen, which in the circumstances would have been a prerequisite for the appellant to escape liability.

The court went on to say that the appellant did not dispute that the requirements of pauperien liability had been satisfied, but he sought to escape liability by emphasising the basis of lack of fault in his part. Once again this does not accord with pauperien liability, which attaches strict liability to the owner for the conduct of the animal. Fault of the owner is not a prerequisite nor is it a defence to pauperien liability.

Conclusion

This case has once again reemphasised the old age principle that the owner of the dog is strictly liable for the behaviour of their dog. The court will only let them escape such liability in the clearest cases where someone else's culpable behaviour directly causes the dog to inflict harm.

Mdumseni Gambushe *LLB (UKZN)* is a candidate legal practitioner at Venns Attorneys in Pietermaritzburg. ❑

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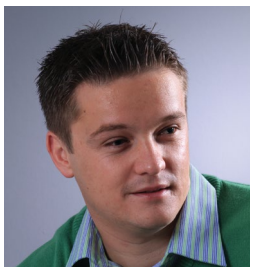

New legislation

Legislation published from 1 – 30 October 2020

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

Bills

Expropriation Bill B23 of 2020.
Division of Revenue Second Amendment Bill B24 of 2020.
Second Adjustments Appropriation Bill B25 of 2020.
Rates and Monetary Amounts and Amendment of Revenue Laws Bill B26 of 2020.
Taxations Laws Amendment Bill B27 of 2020.
Tax Administration Laws Amendment Bill B28 of 2020.
Fundraising Amendment Bill B29 of 2020.
Sectional Titles Amendment Bill B31 of 2020.

Promulgation of Acts

Civil Union Amendment Act 8 of 2020. *Commencement:* 22 October 2020. GN1108 *GG*43832/22-10-2020 (also available in isiZulu).
Judicial Matters Amendment Act 12 of 2020. Commencement: 22 October 2020. GN1107 *GG*43831/22-10-2020 (also available in Afrikaans).
Science and Technology Laws Amendment Act 9 of 2020. *Commencement:* To be proclaimed. GN1105 *GG*43829/22-10-2020 (also available in isiZulu).

Selected list of delegated legislation

Allied Health Professions Act 63 of 1982
Safety Guidelines: Ayurveda: Ayurvedic Therapies. BN126 *GG*43810/16-10-2020.
Safety guidelines: Unani-Tibb: Cupping Therapy. BN127 *GG*43810/16-10-2020.
Broad-Based Black Economic Empowerment Act 53 of 2003
Memorandum of Understanding with Companies and Intellectual Property Commission concerning cooperation. GN1077 *GG*43784/9-10-2020.
Businesses Act 71 of 1991
Transfer of the administration, powers and functions entrusted by the Act from the Minister of Trade, Industry and Competition to the Minister Small Business Development. Proc31 *GG*43862/30-10-2020.
Correctional Services Act 111 of 1998
Delegation of competencies to certain posts. GenN592 *GG*43834/23-10-2020.
Disaster Management Act 57 of 2002

- ***Education***

Directions for a national framework for tuition and accommodation fees for the academic year 2020 in the public higher education institutions. GN1057 *GG*43772/5-10-2020.
Amendment of directions regarding re-opening of schools and measures to address, prevent and combat the spread of COVID-19 in the Department of Basic Education. GenN579 *GG*43826/21-10-2020.

- ***Employment and labour***

Consolidated directions on occupational health and safety measures in certain workplaces to address, prevent and combat the spread of COVID-19 in certain workplaces. GN R1031 *GG*43751/1-10-2020.

- ***Environment, forestry and fisheries***

Directions regarding measures to address, prevent and combat the spread of COVID-19 relating to biodiversity auctions. GN1064 *GG*43778/7-10-2020 (English) and GN1144 *GG*43846/26-10-2020 (also available in Setswana).

- ***General regulations***

Amendment of regulations issued in terms of s 27(2). GN1053 *GG*43763/1-10-2020.
Directions relating to norms and standards for religious gatherings. GN1052 *GG*43762/1-10-2020 and GN1056 *GG*43771/3-10-2020.
Extension of the National State of Disaster (COVID-19) to 15 November 2020. GN1090 *GG*43808/14-10-2020.
Amendment of regulations issued in terms of s 27(2) (alert level 1 lockdown). GN1104 *GG*43825/21-10-2020.

- ***Social development***

Amendment of directions on measures to address, prevent and combat the spread of COVID-19 in social development. GN1063 *GG*43777/7-10-2020.

- ***Sports, arts and culture***

Amendment of directions on measures to address, prevent and combat the spread of COVID-19 in sport, arts and culture. GN1062 *GG*43776/7-10-2020.

- ***Transport***

Amendment of directions on measures to prevent and combat the spread of COVID-19 in the air services for alert level 1. GN1032 *GG*43752/1-10-2020.
Amendment of directions on measures to prevent and combat the spread of COVID-19 at sea ports for alert level 1. GN1033 *GG*43753/1-10-2020.
Directions on measures to prevent and combat the spread of COVID-19 in cross-border road transport for alert level 1. GN1034 *GG*43754/1-10-2020.
Amendment of directions on measures to prevent and combat the spread of COVID-19 land ports. GN1142 *GG*43843/23-10-2020.
Electricity Regulation Act 4 of 2006
Amendment of the Regulations on New Generation Capacity. GN1093 *GG*43810/16-10-2020.
Financial Sector Regulation Act 9 of 2017
Functions of the Prudential Authority and the Financial Sector Conduct Authority. GN1094 *GG*43810/16-8-2020 (also available in Sesotho).
Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972
Repeal of the amendment of the regulations relating to health messages on container labels of alcoholic beverages. GN1143 *GG*43844/26-10-2020.
Higher Education Act 101 of 1997
Language Policy Framework for Public Higher Education Institutions. GN1160 *GG*43860/30-10-2020.
Labour Relations Act 66 of 1995
Amendment of regulations (LRA Forms 3.1 and 3.2). GN R1139 *GG*43835/23-10-2020.
Landscape Architectural Profession Act 45 of 2000
Amendments to the form and type of certificates for registered persons. BN123 *GG*43784/9-10-2020.
Legal Aid South Africa Act 39 of 2014
Legal Aid Manual tabled in Parliament. GenN572 *GG*43814/16-10-2020 (also available in Afrikaans).
Magistrates' Courts Act 32 of 1944
Appointment of places within each regional division for the holding of a court for the adjudication of certain civil disputes and magisterial districts, sub-districts and areas in respect of which such shall exercise jurisdiction. GN1161 *GG*43861/30-10-2020.
National Environmental Management Act 107 of 1998
Procedures for assessment and minimum

criteria for reporting on identified environmental themes, when applying for environmental authorisation. GN1150 *GG*43855/30-10-2020.

National Environmental Management: Air Quality Act 39 of 2004

Subsequent Pollution Prevention Plan in terms of the National Pollution Plans Regulations. GenN580 *GG*43827/22-10-2020.

National Environmental Management: Biodiversity Act 10 of 2004

Extension of the commencement date of the Alien and Invasive Species Lists 2020 (from 19 October 2020 to 1 March 2021) and the Alien and Invasive Species Regulation, 2020 (from 26 October 2020 to 1 March 2021). GN1100 *GG*43818/16-10-2020.

National Qualifications Framework Act 67 of 2008

Policy and criteria for recognising a professional body and registering a professional designation. GN1054 *GG*43764/2-10-2020 and GN1061 *GG*43775/7-10-2020.

National Railway Safety Regulator Act 16 of 2002

Regulations regarding infrastructure or activity affecting safe railway operations. GenN604 *GG*43834/23-10-2020 (also available in Sesotho).

Prescribed Rate of Interest Act 55 of 1975

Prescribed rate of interest: 7,25% per annum as from 1 July 2020. GN1067 *GG*43781/9-10-2020 (also available in Afrikaans).

Public Audit Act 25 of 2004

Memorandum of Agreement between the Auditor-General of South Africa and National Treasury. GN1084 *GG*43800/13-10-2020.

Public Protector Act 23 of 1994

Amendment of rules relating to investigations by the Public Protector and matters incidental thereto. GN1047 *GG*43758/2-10-2020.

Road Accident Fund Act 56 of 1996

Adjustment of the statutory limit in respect of claims for loss of income and loss of support (R 297 877 with effect from 31 October 2020). BN129 *GG*43855/30-10-2020 (also available in Afrikaans).

Rules Board for Courts of Law Act 107 of 1985

Amendment of the Rules Regulating the Conduct of Proceedings of Supreme Court of Appeal of South Africa (r 11, 13 and 17 with effect from 1 December 2020). GN R1158 *GG*43856/30-10-2020 (also available in Afrikaans).

Amendment of Rules Regulating Conduct of Proceedings of the Magistrates' Courts of South Africa (r 5, 33, 76, 84, 86 and Part I of Table A of Annexure 2). GN R1156 *GG*43856/30-10-2020 (also available in Afrikaans).

Amendment of Rules Regulating Conduct of Proceedings of several Provincial and Local Divisions of the High Courts of South Africa (r 35, 45A and 65, 67-70). GN R1157 *GG*43856/30-10-2020 (also available in Afrikaans).

Skills Development Act 97 of 1998

Re-establishment of the Mining Qualifications Authority from 1 April 2022 to 31 March 2030. GN1131 *GG*43834/23-10-2020.

Spatial Planning and Land Use Management Act 16 of 2013

Declaration of portions of the Karoo as a region. GenN577 *GG*43822/19-10-2020.

Tax Administration Act 28 of 2011

Regulations for the purposes of para (*a*) of the definition of 'international tax standard' in s 1 of the Act, specifying the changes to the Organisation for Economic Co-operation and Development Standard for automatic exchange of financial account information. GN R1070 *GG*43781/9-10-2020.

Value-Added Tax Act 89 of 1991

Amendment of para 8 of sch 1 to regulate the exemption from VAT on the importation of goods for official use in terms of an agreement entered into by the Republic. GN R1069 *GG*43781/9-10-2020 (also available in Afrikaans).

Draft delegated legislation

- Draft South African Police Service Amendment Bill, 2020 for comment. GN1030 *GG*43750/1-10-2020.
- Amendment of the Administrative Adjudication of Road Traffic Offences Regulations, 2008 in terms of the Administrative Adjudication of Road Traffic Offences Act 46 of 1998 for comment. GN1049 *GG*43758/2-10-2020.
- Amendment of r 54.9.2.1 of the Legal Practice Council in terms of the Legal Practice Act 28 of 2014 for comment. GenN547 *GG*43784/9-10-2020.
- Amendment of r 16.10 of the Legal Practice Council in terms of the Legal Practice Act 28 of 2014 for comment. GenN548 *GG*43784/9-10-2020.
- Draft regulations to domesticate the requirements of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade in terms of the National Environmental Management Act 107 of 1998 for comment. GN1088 *GG*43802/13-10-2020.
- Exposure Draft 185 on the Effects of Past Decisions on Materiality in terms of the Public Finance Management Act 1 of 1999 for comment. BN124 *GG*43810/16-10-2020.
- Amendment of the Municipal Supply Chain Management Regulations, 2005 in terms of the Local Government: Municipal Finance Management Act 56 of 2003 for comment. GN1095 *GG*43810/16-10-2020.
- Proposed extension of the Tshwane Automotive Special Economic Zone in terms of the Special Economic Zones Act 16 of 2014. GenN574 *GG*43817/16-10-2020.
- National Code of Practice for the Training Providers of Lifting Machine Operators in terms of the Occupational Health and Safety Act 85 of 1993 for comment. GN R1138 *GG*43835/23-10-2020.
- Amendment of the Civil Aviation Regulations, 2011 (sch 1, Part 187) in terms of the Civil Aviation Act 13 of 2019 for comment. GN R1140 *GG*43835/23-10-2020.
- Draft proposal on the implementation of s 74 of the Act: Abolition of the statutory status of the Committee of University Principals, the Matriculation Board and the Committee of Technikon Principals in terms of the Higher Education Act 101 of 1997 for comment. GN1147 *GG*43851/28-10-2020.
- Amendment of the Civil Aviation Regulations, 2011 (sch 1, Part 1; sch 2, Part 1; sch 3, Part 172; sch 4 (SA CATS 141); and sch 5 (SA CATS 172)) in terms of the Civil Aviation Act 13 of 2009 for comment. GN R1159 *GG*43856/30-10-2020.

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Employment law update

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

Unfair dismissal referred to CCMA when pending automatically unfair dismissal claim in the Labour Court

In the case of *Feni v Commission for Conciliation, Mediation and Arbitration and Others* [2020] 10 BLLR 1001 (LAC), the Labour Appeal Court (LAC) considered whether the Commission for Conciliation, Mediation and Arbitration (CCMA) had jurisdiction to determine a dispute concerning dismissal for unknown reasons in circumstances where the employee had already filed an automatically unfair dismissal claim in the Labour Court (LC).

In this case, the employee was dismissed after being afforded an opportunity to make representations as to why his employment should not be terminated. He did not make any representations and was subsequently dismissed. He then referred a dispute to the CCMA. The matter was not resolved at conciliation and the employee referred an automatically unfair dismissal claim to the LC alleging that the unfair dismissal was as a result of him having made a protected disclosure. The employee then also referred a further dispute to the CCMA alleging an unfair dismissal for unknown reasons. When the matter was set down for conciliation the commissioner ruled that the CCMA did not have jurisdiction to determine the dispute as the dispute related to the same dismissal that was subject of the first referral. This ruling was upheld by the LC on review.

On appeal, the LAC had to determine whether the doctrines of *res judicata* and *lis pendens* applied to this case. It was held that *res judicata* did not apply as that only applies when a decision has already been made in relation to a matter concerning the same subject matter and cause of action. In this case, the core dispute had yet not been determined and, therefore, there had been no decision as to the subject matter and cause of action of the dispute. It was, however, held that the principle of *lis pendens* did apply. *Lis pendens* applies when the matter has not yet been decided. This principle is applicable when there is pending action involving the same subject matter before another court. It was held that in this case the dispute before the CCMA and the LC was the same as it involved the fairness of the exact same dismissal.

Reference was made to the judgment of the Constitutional Court (CC) in *Association of Mine Workers and Construction Union and Others v Ngululu Bulk Carriers (Pty) Ltd (in liquidation) and Others* 2020 (7) BCLR 779 (CC) in which the LC had held that it lacked jurisdiction on the basis of *lis pendens* because there was already a review application pending before the LC based on the same subject matter. The CC overturned the LC's decision and found that the causes of action and subject matter in the two proceedings were different. The one cause of action related to dismissal as a result of an unprotected strike and the other related to a decision regarding selective re-employment.

The LAC found that the current circumstances were distinguishable from the CC decision as in this case there was only one dismissal. The LAC remarked that if the employee was permitted to bring these two actions then it would undermine the purpose of the Labour Relations Act 66 of 1995 to achieve expeditious resolution of disputes. It was also held that –

- there would be no prejudice to the employee and if at any stage it became apparent after the referral to the LC that the matter should have been referred to arbitration then the LC may stay the proceedings and refer the dispute to arbitration; or
- with the consent of the parties, the LC may continue with the proceedings with the court sitting as an arbitrator, in which case the court can only make an award that an arbitrator would have been entitled to make.

The appeal was dismissed with costs.

Working beyond expiry date in fixed-term contract – permanent employment

In *Department of Agriculture, Forestry and Fisheries v Teto and Others* [2020] 10 BLLR 994 (LAC) the Labour Appeal Court (LAC) considered whether the termination of employees initially engaged on fixed-term contracts constituted a dismissal on the basis that the employees had become indefinitely employed when they were permitted to work beyond the expiry date in their fixed-term contracts.

In this case, the employees had been engaged on fixed-term contracts for the duration of one year, but had continued to work for the employer in their same positions performing the same tasks for another two years before their services were eventually terminated. The General Public Service Sectoral Bargaining Council found that the employees were permanent employees and had been unfairly dismissed. Reinstatement was ordered.

On review, the Labour Court (LC) held that although there was an employment relationship between the employer and the employees, the employees were not permanent employees. However, the LC was of the view that the employees had been treated unfairly as their services had been terminated abruptly and as such compensation equal to up to 12 months' remuneration was ordered. The LC set aside the award of the bargaining council and awarded payment of compensation in an amount equal to 12 months' remuneration as opposed to reinstatement.

On appeal, the employer argued that it was not the employer of the employees at the time of the termination as they were temporary employment service employees. In this regard, it alleged that on the expiry of the fixed-term contracts the employees were no longer employed by the employer and instead became employees of an agency, which paid their salaries. The evidence of the employees was that on the expiry of the fixed-term contract they had been informed that they would continue in their same positions on an indefinite basis, but their salaries would no longer be paid through the government payroll system. Instead, they would be paid through a service provider. The employer paid the agency and then the agency in turn paid the employees. The reason for this was that the employees' positions did not appear on the organogram of the employer. Importantly, there was no employment contract entered into between the employees and the agency and the employer made arrangements for their travel to

work and paid daily subsistence allowances.

The LAC held that if an employee is initially employed on a fixed-term contract and continues to work for the employer after the fixed-term contract ends then the contract is deemed to be tacitly novated into that of permanent employment. It was accordingly held that the bargaining council had reached the correct conclusion when finding that the employees had become permanently employed and were permanent employees on their dismissal. The LAC acknowledged that some of the terms and conditions of the employees' employment had changed, for example, there had been a reduction in remuneration, but it was held that this factor is not decisive. It was accordingly held that the employees remained employed by the same employer, albeit on different terms. It was held that it would generally be assumed that the parties intended for the new contract to be of an indefinite duration unless there were facts to the contrary. Thus, the appeal was dismissed.

The employees cross-appealed against the LC's judgment alleging that they should be reinstated as opposed to being awarded compensation. As regards the cross-appeal, the LAC held that reinstatement is the default remedy if a dismissal is substantively unfair unless there are exceptional circumstances, which warrant the granting of compensation instead. The employer had not made out a case that any exceptional circumstances exist and as such the cross-appeal was upheld.

Moksha Naidoo *BA (Wits) LLB (UKZN)* is a legal practitioner holding chambers at the Johannesburg Bar (Sandton), as well as the KwaZulu-Natal Bar (Durban).

Resigning after disciplinary inquiry but before sanction handed down and Labour Court's jurisdiction to hear a claim for unlawful dismissal

Mthimkhulu v Standard Bank of SA (LC) (unreported case no J928/20, 18-9-2020) (Moshoana J).

Pursuant to the applicant employee being found guilty of certain acts of misconduct, described as gross dishonesty and fraud, the applicant tendered his immediate resignation on 21 August 2020, prior to a sanction being delivered.

Standard Bank, having reminded the applicant that he was contractually bound to serve a 30-day notice period, informed the applicant on 24 August 2020, that he had been dismissed.

The applicant demanded Standard Bank 'abandon and nullify' the sanction of dismissal on the basis that it did not have jurisdiction over him post resignation. Standard Bank's refusal to do so, prompted the applicant to launch urgent proceedings in the Labour Court (LC) for an order that his dismissal was unlawful in that he was not an employee at the time the sanction had been delivered.

Prior to determining the court's jurisdiction to determine the applicant's claim, Moshoana J saw it necessary to weigh in on the vexing question of whether an employer can discipline an employee after the employee had resigned with immediate effect.

In approaching the question of when, under the above circumstances, the termination of the employment relationship took effect, the court referred to the Constitutional Court case in *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2016) 37 ILJ 313 (CC). In this matter the majority of the court did not answer this question on the basis that, it was never an issue before the lower courts. However, writing for the minority, Zondo J, found that a valid resignation is incapable of being withdrawn, following which, once a resignation takes effect, an ex-employer has no right to discipline the ex-employee.

Even though the court *in casu* aligned itself with the approach adopted by Zondo J, which was at odds with the approach taken by the LC in *Mzotsho v Standard Bank of South African Limited* (LC) (unreported case no J2436-18, 24-7-2018) (Whitcher J), the distinguishing factor was that the employee in the *Toyota* case had resigned before their internal hearing commenced.

In this matter the applicant resigned after the disciplinary hearing was concluded and at a stage where the only thing left was for the sanction to be delivered. The court reiterated the contractual principle that an employee who does not serve their notice period, repudiates their employment contract. The employer has a right to accept the repudiation, and thereafter, make an election on whether to cancel the contract and sue for damages, or to seek for specific performance – which is what the employer did in this case.

Going further, the court stated that when electing to seek specific performance, it was not necessary to first approach a court for an order of specific performance. In making this point, the court was cognisant of the fact that its approach on this score differed from the judgment in *Naidoo and Another v Standard Bank of SA Ltd and Another* [2019] 9 BLLR 934 (LC), wherein the LC held that an employer must first obtain an order for specific performance before being allowed to discipline an employee who had resigned without serving their notice period. Moshoana J held that what keeps the employment contract alive is not an order for specific performance but rather an aggrieved party's right to elect specific performance.

Having set out the above, the court found that a resignation prior to a sanction being delivered has no legal effect if the employer, as in this case, chose to hold the employee to their notice period.

Addressing the issue of whether it had jurisdiction to set aside a dismissal, the court held:

'This court has exclusive jurisdiction in respect of all matters that elsewhere in terms of the LRA or in terms of any other law are to be determined by the Labour Court. Nowhere in the LRA is it stated that the Labour Court is empowered to determine the setting aside of a dismissal. However, in terms of the LRA, this court has powers to determine the fairness of certain types of dismissals. Of momentousness is that the Labour Court can only do so once a dispute has been subjected to a conciliation process. Significantly, this dismissal which Mthimkhulu wishes this court to set aside has not been subjected to a conciliatory process. This court lacks jurisdiction to entertain a dismissal dispute if it has not been referred to conciliation as required by the LRA.

… To the extent that Mthimkhulu alleges that his dismissal is unlawful because contractually the respondent has no powers to dismiss him, this court per Van Niekerk J in *Lt General Shezi v SAPS and Others* [unreported case no J852/2020, 15-9-2020] had the following to say:

"The effect of this judgment [*Steenkamp v Edcon*] is that when an applicant alleges that a dismissal is unlawful (as opposed to unfair), there is no remedy under the LRA and this court has no jurisdiction to make any determination of unlawfulness."'

For reasons set out above, the court dismissed the application with costs, directing the applicant to approach the correct forum should he wish to challenge the fairness of his dismissal. ❑

Recent articles and research

By Kathleen Kriel

Abbreviation	Title	Publisher	Volume/issue
Acta Juridica	Acta Juridica	Juta	(2020) 1
EL	Employment Law Journal	LexisNexis	(2020) 36.5
LDD	Law, Democracy and Development	University of the Western Cape, Faculty of Law	(2020) 24
LitNet	LitNet Akademies (Regte)	Trust vir Afrikaanse Onderwys	(2020) 17.3
SA Merc LJ	South African Mercantile Law Journal	Juta	(2020) 31.3
SALJ	South African Law Journal	Juta	(2020) 137.3
SAPL	Southern African Public Law	University of South Africa Press	(2020) 35.1
SLR	Stellenbosch Law Review	Juta	(2020) 31.2
TPCP	Tax Planning Corporate and Personal	LexisNexis	(2020) 34.5

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Electoral reform – constitutionality of the Electoral Act

By Jonathan Wright

The separation of powers are meant to restrain the exercise of state power. This doctrine forms the bedrock of the constitutional state separating law-making from law enforcement from legal interpretation and adjudication. Nothing can truly restrain the government's lust for power and control, but this is at least a mitigating factor.

The need for legislative reform is intrinsically linked to the need for electoral reform, and if either are to be recognised, the other ought to follow. In this article, I seek to present the deficiency in South Africa's (SA's) separation of powers model, briefly discuss the judgment in *New Nation Movement NPC and Others v President of the Republic of South Africa and Others (Council for the Advancement of the South African Constitution and Another as* Amici Curiae*)* 2020 (8) BCLR 950 (CC) and propose a solution that enhances democracy and accountability.

SA's separation of powers model

In theory, SA subscribes to the separation of powers doctrine. It was the Constitutional Principle VI ahead of certification of the final text of the Constitution. It was argued at the time that the chosen system permitted too much overlap between the legislature and the executive, but this was dismissed in *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) at para 108 with the court stating that there is no separation that is truly absolute. Thus, the problem of a super executive with a legislature too severely compromised to fulfil its designed role came about. That designed role was never to be a rubber stamp.

The Constitutional Court (CC) has its critics spanning a variety of issues. However, the *Certification of the Constitution* judgment ought to be one of the most important. The court thought that a total separation of powers would lead to gridlock and render government unable to perform tasks, whereas a partial separation would not do this and have the bonus of the executive being more accountable to the legislature. This can be contrasted with what the United Kingdom House of Lords held in *R (on the application of Jackson and Others) v Attorney General* [2005] 4 All ER 1253, namely that the wills of each sphere of government assists in a balance between them all, and is maintained by a respect of each other. The South African legislature, however, has very little will of its own.

There are many examples of the total structural failure and evident inadequacy of the legislature's role in the separation of powers doctrine in SA's hybrid system of partial separation. The 'Zuma years' are instructional. The *Nkandla* debacle is the most obvious example in that the legislature totally failed to first inquire into executive accountability, and secondly to hold the executive accountable, after the judgment in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (Corruption Watch (RF) NPC as* Amicus Curiae*)* 2016 (5) BCLR 618 (CC). This much was confirmed in *Economic Freedom Fighters and Others (Democratic Alliance as Intervening Party) v Speaker of the National Assembly and Another* 2018 (3) BCLR 259 (CC) at para 131. As much as there were parties in the National Assembly that tried to do these things, they were but a small part of the National Assembly and were drowned out by the African National Congress (ANC).

Until the use of a secret ballot in the 2017 motion of no confidence against President Zuma, members of the ANC had overwhelmingly rejected opposition attempts at impeachment and motions of no confidence. This was because the ANC's Members of Parliament mandate emanated from the ANC's headquarters at Luthuli House, rather than the electorate. The 2017 secret ballot attempt referred to above had 51 more votes supporting the motion than the 2016 attempt on an open ballot (see Lynsey Chutel and Khanya Mtshali 'South Africa's president Jacob Zuma has survived yet another vote of no-confidence – but only just' (www.qz.com, accessed 4-11-2020)). It showed that while some may have had a conscience, the others did not dare to openly go against their political superiors.

It is rare for ANC party members to go against the orders of Luthuli House, and this undermines the very purpose of the legislature. The reason for this is because members of the National Assembly and the National Council of Provinces (NCOP) are only indirectly accountable to voters and the burden of political instruction instead passes to the party in the belief it will enforce accountability. The ANC's role in state capture is living proof that this belief was severely in error. All political parties are vulnerable in this respect, not just the ANC.

Luthuli House leadership and Cabinet sit side-by-side with ordinary parliamentarians. They caucus together and they decide what issues are and are not important enough. Further to this, Cabinet members have a vote in a motion of no confidence, which directly affects their job, and the ANC has on several occasions shown that it is unable to distinguish between the functions of party and state. These flaws apply in equal measure to the National Assembly and the NCOP as they rubber stamp each other to fulfil the wishes of the executive and Luthuli House. To this extent, the legislature and executive are of one mind.

The *New Nation* judgment

The solution to this has been given new urgency by the decision in *New Nation*. It must be immediately noted that the court explicitly stated it would not venture into what electoral system is better, correctly leaving it to Parliament to consider (para 15). Its role is to merely consider the constitutionality of what Parliament decides, of which the current system prescribed by the Electoral Act 73 of 1998 was deemed as unconstitutional.

A distinction is drawn between the right to join or form, and the right to not join or form a political party (para 17). The judgment then states that being forced to vote for a political party, divests that person of the choice provided by the Constitution in s 19(1) to not join or form such a party (para 18). Accordingly, the Electoral Act does not stand up against the right to freedom of association due to forced association with a

political party should one wish to stand for public office.

After considering arguments that the Constitution specifically required a party based proportional representation system, the court rejected these arguments (paras 71 – 72), and conclusively stated that the party proportional representation system was only intended to exist for the first elections of the National Assembly and the Provincial Legislatures (para 102). Additionally, s 46(1)(*d*) of the Constitution requires the composition and election of members of the National Assembly to result generally in proportional representation.

The solution

I submit, in this regard, that even if the electoral system is amended (as it must now be), this does not negate the deficiencies of the South African separation of powers hybrid identified above. Rather, the *New Nation* case ought to be a catalyst for legislative reform so that SA can retain the benefits of proportional representation, while gaining the benefits of a constituency-based system as well.

The most obvious answer to making the legislature more responsive would be to adopt a constituency system in which voters directly elect their representatives. This would mean that both houses of Parliament would immediately mimic the situation in the United States Congress of two parties dominating all available seats. This sacrifices the plural character of a political system afforded by a proportional representation system. I, therefore, submit that the National Assembly should be elected through an exclusively proportional representation system. However, the NCOP should be the target of reform along the lines of a constituency basis to enhance the quality of law-making processes and accentuate the function of the legislature.

The NCOP unfortunately only has a limited benefit to SA by facilitating input of provinces on law making. When eight of the nine provinces are controlled by a single party, the issue of rubber stamping the governing party arises once more. Martin van Staden in '3 Electoral Reforms to Improve South Africa's Democracy' argues that the NCOP is essentially a federal institution in what is effectively a unitary state, and that it abdicates its duties to reflect the outcomes of the NA, making a mockery of democracy (https://rationalstandard.com, accessed 22-10-2020). I must agree with this. Democracy accordingly needs to be enhanced and the way to do this is through electoral and legislature reform of the NCOP.

Van Staden believes that the NCOP ought to be renamed and reconfigured as a Senate whose members are directly elected by voters on a first-past-the-post (FPTP) system. Of course, this means only the ANC and Democratic Alliance will probably be represented there (with an even greater ANC majority than now). It also means that voters become less beholden to political individuals they dislike, but nonetheless vote for the party that put such individuals there in the first place. I believe that a single transferable voting system ought to be considered against Van Staden's proposal for an FPTP system.

The new Senate should accordingly as the most responsive component of the legislature be entrusted with confirming decisions of the National Assembly (unless overruled by a two-thirds majority) and exclusively confirming cabinet members, heads of institutions, and judges (on recommendation of the Judicial Service Commission), following intensive hearings. It should also consider impeachment and motions of no confidence. No senator should be a member of the executive (and this can be applied to members of the National Assembly as well). Whether the Senate would be composed of only directly elected members or a hybrid thereof can be up for debate as Van Staden notes some options. I submit that a suitable compromise would be of a strictly proportional representation in the National Assembly, and a strictly constituency-based Senate.

This of course presents a bigger issue than merely amending or rewriting the Electoral Act. To realise the solutions I write of here would require an admittedly radical constitutional amendment bill that completely reconfigures Chapters 4 and 5 of the Constitution. However, I (and others such as Van Staden) believe it vital to enhance SA's democracy. Make no mistake, the *New Nation* decision is a step forward, but it ought to be a catalyst for a more thorough debate on the ideal composition of the electoral and legislative systems.

See also:

- Muchengeti Hudson Hwacha 'The Constitutional Court declares Electoral Act unconstitutional' 2020 (Oct) *DR* 33.
- Merilyn Rowena Kader 'Law reports' 2019 (Dec) *DR* 23.

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Rights and remedies: How do reality shows violate constitutional rights?

By Tshililo Mulalo

The South African Constitution and the court recognises the right of every citizen to freedom of speech and media, and the right to receive information and ideas. While these rights may be absolute, they may not be exercised to trump the constitutional comfort of others. The use of reality shows and social media platforms as instruments to expose what may be regarded as 'ill behaviour' has become the new norm in South Africa (SA), as well as in other countries. For example, in SA, reality shows such as the recently launched *Uyajola 9/9* and the notorious American television (TV) series, *Cheaters*, which was launched back in 2000. The one thing that these two TV shows have in common is that they aim to expose infidelity in intimate relationships. However, these TV shows are not only humiliating, but degrading in an inhuman manner and violate the fundamental rights, not only of the unfaithful partners, but their families, as well as their extended families. This article seeks to strike an objective balance between the rights of those involved in these TV shows, as well as to provide possible remedies, where such rights are violated by such exposure.

The law

The Bill of Rights under the Constitution provides for non-derogable rights of all people in SA, which includes the right to life, the right to dignity, privacy, and the freedom of expression, among others, and affirms the democratic values of human dignity, equality and freedom. Of all these rights, the right to dignity may be said to be the most violated right where these reality shows are concerned. In the matter of *S v Makwanyane and Another* 1995 (3) SA 391 (CC), the court emphasised the importance of dignity as a founding value of the Constitution and held that it cannot be overemphasised. The court further held that, 'recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern'.

Section 36 of the Constitution provides that the rights in the Bill of Rights may be limited in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Worthy to note is that rights, such as the right to life, dignity, the right not to be tortured in any form, and the right not to be treated or punished in a cruel, inhuman or degrading way, are non-derogable rights, which cannot be limited or suspended under any circumstances, not even under a state of disaster. These reality shows may very well be protected under the right to freedom of expression, which includes freedom of the press and other media and the freedom to receive or impact information or ideas. Yet, such a right does not extend to incitement of imminent violence and advocacy of hate that constitutes incitement to cause harm, which we have seen on the TV show.

In *Mail & Guardian Media Ltd and Others v Chipu NO and Others* 2013 (6) SA 367 (CC) the court held that 'the media play a key role in society and are not only protected by the right to freedom of expression but are also key facilitators and guarantor of the right'. This basically means that the media guarantees every individual's right to express their beliefs, thoughts, ideas and emotions about different issues, free from government interference. This right goes hand in hand with the responsibility to behave responsibly, in a manner that may not infringe on other people's rights. In *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC), the court stated that freedom of expression is not superior to other rights in the Constitution. The court found that the right to freedom of expression must sometimes take a back seat and should be interpreted in the context of the fundamental values of the Constitution, most significantly, the right to dignity.

Social issues

One can agree that the show can be very entertaining, but what the victims of this show may not be aware of is that no one should be subjected to such ill treatment and inhuman acts wherein an individual, be it a man or a woman, is man-handled in front of the whole world, shamed, and humiliated and have their personal matters aired in public without their consent. The mere fact that the aggrieved party sought assistance from the host of the show, does not necessarily mean that all parties involved have automatically consented to have their identities and personal lives aired in public. They have the right to privacy and to have their dignity protected and respected. On several occasions, it can be seen that these shows exceed the bounds of their purpose, which I would like to believe was created primarily for bringing closure to the aggrieved parties, following an allegation and/or opinion that their partners are unfaithful. There is, among other disturbing issues on the show, the destruction of property, where one partner discovers the deceitful acts of their significant other and smashes the windows of the other party's car or throws stones at the car. Also, there is the act of trespassing, which may well be regarded as an entry in the property belonging to an occupier, without the occupier's permission to be on that property, which is a punishable offence under the Trespass Act 6 of 1959.

On one confrontation, the bouncers can be seen on the scenes of the show, holding a man who was found being unfaithful, by the back of this trousers, similar to a little child whose mother was taking him for a serious beating after being mischievous. These acts are humiliating and degrading. On another occasion, the same bouncers can be seen pushing a woman on the chest, as two men were about to start a fight. These events force one to start questioning the motive behind the launch of this reality show. Is the motive to allow the aggrieved party to find closure or to degrade people's dignity and subject them to inhuman treatment?

In as much as this show provides comfort to the aggrieved party whose partner has been unfaithful, it raises the question whether the hosts and producers take into account the rights of the parties affected by such infidelity, more particularly airing the infidelity in public, or is the show aired for mere social entertainment. The psychological trauma goes beyond the unfaithful party

being humiliated and shamed on screen. Many of us have witnessed that in most cases, the third party was unaware that the unfaithful partner was married or has a current partner.

Financial inequality also plays an important role in this show, in that the manner in which they would handle a case of an individual from a poor household, will never be the same as if they were dealing with a millionaire. The host, his assistants and producers tend to take advantage of the unfaithful partner's circumstances, which in itself is a violation of the right to equality, and subsequently, their right to have their dignity protected.

Conclusion

The parties affected by such exposure should write a petition and seek signatures from the public to have the show removed from television owing to the violations of the aforesaid rights. They should also claim damages for all their losses. Most of these victims of infidelity discover the truth before they go onto the show, their acts are merely motivated by anger and revenge, in which case, their families, children and extended families are merely casualties.

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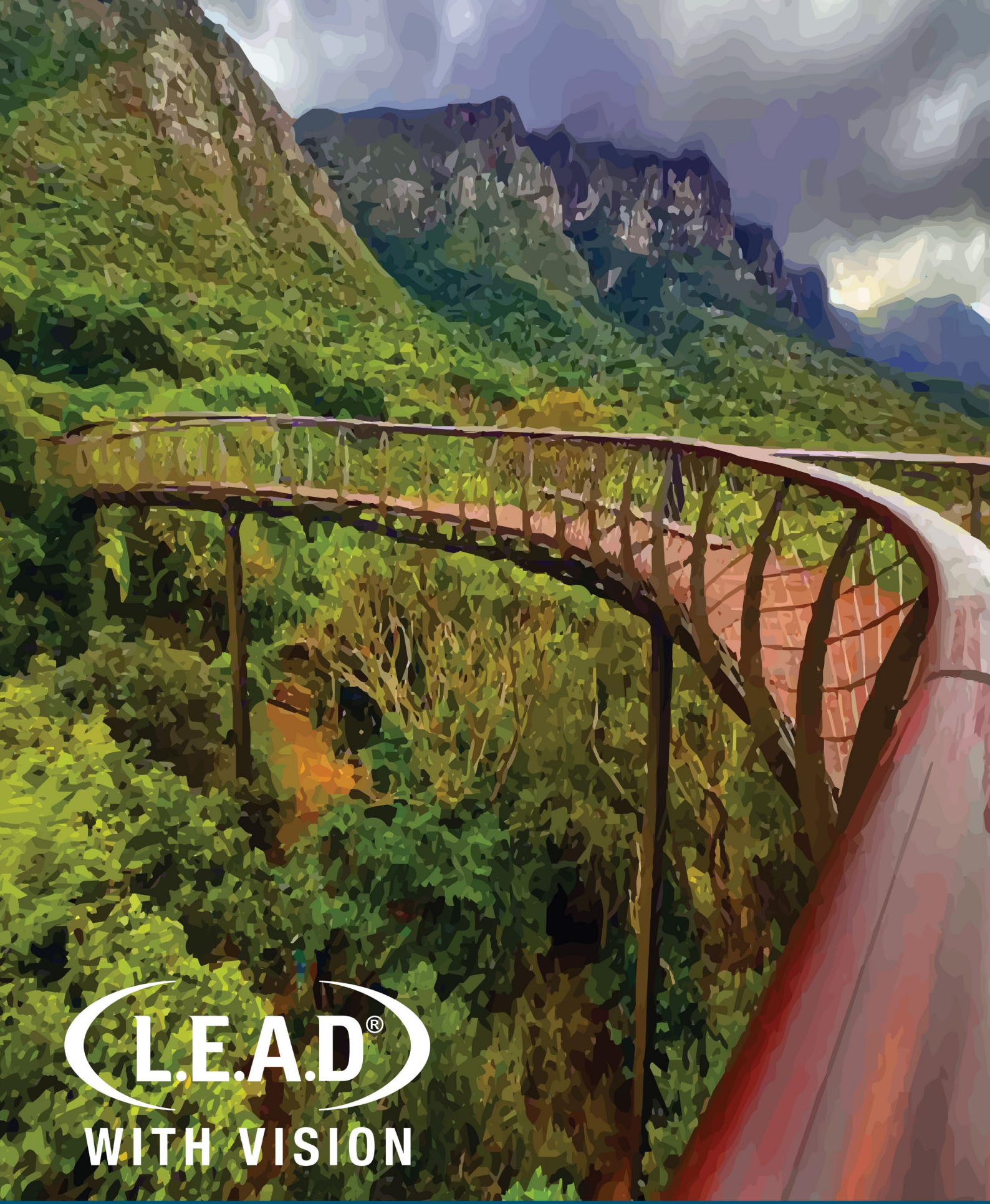

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For more information, see the 'Guidelines for articles in *De Rebus*' on our website (www.derebus.org.za).

The *De Rebus* Editorial Committee and staff wishall of our readers compliments of the season and a prosperous new year.

***De Rebus* will be back in 2021 with its combinedJanuary/February edition, which will be available from the beginning of February 2021.**

De Rebus has launched a CV portal for prospective candidate legal practitioners who are seeking or ceding articles.

How it works?
As a free service to candidate legal practitioners, *De Rebus* will place your CV on its website. Prospective employers will then be able to contact you directly. The service will be free of charge and be based on a first-come, first-served basis for a period of two months, or until you have been appointed to start your articles.

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A joint publication of the Legal Practitioners' Fidelity Fund and the Legal Practitioners' Indemnity Insurance Fund NPC
(A Non Profit Company, Registration No. 93/03588/08)

RISKALERT

DECEMBER 2020 NO 6/2020

IN THIS EDITION

Legal Practitioners' Indemnity Insurance Fund: Thomas Harban, General Manager, 1256 Heuwel Avenue, Centurion 0127• PO Box 12189, Die Hoewes 0163 • Docex 24, Centurion • Tel: 012 622 3900 Website: www.lpiif.co.za • Twitter handle: @AIIFZA

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DISCLAIMER
Please note that the Risk Alert Bulletin is intended to provide general information to legal practitioners and its contents are not intended as legal advice.

Legal Practitioners' Indemnity Insurance Fund NPC
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LEGAL PRACTITIONERS' FIDELITY FUND
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RISK MANAGEMENT COLUMN

SCAM ALERT

The increase in cybercrime incidents in 2020 is well documented. Locally and abroad, legal practitioners and their staff working remotely as a result of the COVID-19 lockdown measures have been identified as one of the the economic sectors targeted by the cyber scammers. People working from home, it has been said, may have lower alertness to cyber risks. In some instances, the required information technology (IT) security and other risk management measures implemented in the office environment may not have been deployed in the homes of staff working remotely. Some legal practices had to make hasty arrangements to ensure that their operations could continue remotely, and IT security considerations may not have received the appropriate attention. The result is that cyber security vulnerabilities have been aggravated in some instances.

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Cybercrime related claims make up the highest number of excluded claims reported to the Legal Practitioners Indemnity Insurance Fund NPC (the LPIIF). Since the beginning of 2020, the LPIIF has been notified of 194 cybercrime related claims with a total value of R130 128 918.

RISK MANAGEMENT COLUMN continued...

The constant flow of cybercrime related notifications is a serious cause for concern as it shows the extent to which South African legal practitioners continue falling victim to cybercrime.

It will be remembered that cybercrime related claims are excluded from the LPIIF Master Policy (see clause 16(o)).

The extent of cyberattacks against law firms, globally, is highlighted in the article entitled '*Law Firms' Reported Cyberattacks Are 'Tip Of The Iceberg*' by Xiumei Dong (accessible at https://www.law360.com/cybersecurity-privacy/articles/1326001/law-firms-reported-cyberattacks-are-tip-of-the-iceberg-?nl_pk=83d7c2b1-2452-4854-9241-be7d92c6812d&utm_source=newsletter&utm_medium=email&utm_campaign=cybersecurity-privacy). As noted by the author, many of the cyberattacks go unreported. The article highlights the cybersecurity vulnerabilities in remote working and the fact that the full extent of the attacks may be more severe than currently reported.

As we approach the end of 2020, cybercrime may increase as cybercriminals seek ill-gotten windfalls ahead of the festive season. The cybercriminals, primarily, seek access to the finances and data held by legal practitioners. Several legal practices have also been targets of other forms of cyberattacks such as ransomware attacks.

Everyone in the legal practice must have a heightened alertness to cyber related scams and other scams. Cybercriminals succeed when the guard is lowered – do not let your guard down!

A lot can be written on scams, but, for present purposes, I will highlight just three of the many variations of scams targeting South African legal practitioners.

Scam 1 – The fraudulent change of banking details

This is the most common of the scams targeting legal practitioners and is sometimes called business email compromise (BEC) scam. Put briefly, the legal practice will receive an email purporting to be from a person to whom a payment is due. The email will provide details of a fraudulent bank account and give an instruction that the funds must be paid into that account. Conveyancers, in particular, have been the target of these scams. In some instances, one character in the email address of the intended recipient of the funds is changed and, unless special attention is paid to the communication, the recipient will be induced into believing that the fraudulent email constitutes a legitimate payment instruction. There have also been instances where an email purporting to be from the law firm is sent to a third party giving fraudulent bank details purporting to be those of the firm. In this instance, funds due to be paid to the practice are paid to the fraudsters.

No payments should be made without a verification of the banking details of the recipient.

Further information on this scam can be obtained from the following sources:

- The Bulletins published in November 2019, August 2019 and August 2018. Copies of these Bulletins can be accessed at https://lpiif.co.za/risk-management-2/risk-management/. Those editions of the Bulletin also provide suggestions of measures that legal practices can implement in their practices to mitigate the risks arising from this scam.
- The judgements delivered in ***Fourie v Van der Spuy and De Jongh Inc. and Others*** (65609/2019) [2019] ZAGPPHC 449; 2020 (1) SA 560 (GP) (30 August 2019), ***Jurgens and Another v Volschenk*** (4067/18) [2019] ZAECPEHC 41 (27 June 2019), ***Galactic Auto (Pty) Ltd v Venter*** (4052/2017) [2019] ZALMPPHC 27 (14 June 2019) and ***Lochner v Schaefer Incorporated and Others*** (3518/16) [2017] ZAECPEHC 4 (24 January 2017); and
- Michele van Eck, '*A framework for professional duties and liability of legal practitioners in the payment of trust monies*', 2020 TSAR 846

Scam 2 – The Fidelity Fund overpayment of audit fee refunds

The *modus operandi* of this scam is that a fraudulent cheque is deposited into the legal practice's bank account. The deposit is followed by a phone call from a fraudster purporting to be from the Legal

RISK MANAGEMENT COLUMN continued...

Practitioners' Fidelity Fund (the Fidelity Fund).The fraudster alleges that the Fidelity Fund has made an overpayment of the firm's trust audit fees and demands a refund of a substantial portion thereof. As a "sweetner", the fraudster may "authorise" the firm to retain part of the purported payment as fees, though the firm would not have rendered any legal services to earn such a fee. A fraudulent document purporting to be a deposit slip or other form of proof of payment will be sent to the firm on a fake Fidelity Fund letterhead. The perpetrators of the scam will put pressure on the firm to make the 'refund' as soon as possible. This is an attempt to get the firm to make the payment of the 'refund' into the fraudsters bank account before the firm receives a notification from the bank that a fraudulent cheque has been paid into the firm's bank account.

The Fidelity Fund will never make payments in this way and neither will it make such a demand for repayment. Practitioners must not make any payment to the fraudsters in these circumstances.

For more information on this scam see:

- The November 2019 edition of the Bulletin; and
- The warning from the Legal Practice Council (the LPC) and the Law Society of South Africa (LSSA) published at https:// lpc.org.za/warning-against-fraud-statement/

Neither the Fidelity Fund nor the LPIIF will indemnify practices for losses suffered in this scam.

Scam 3 – The 'cat fishing' scam

The most common *modus operandi* of this scam involves the legal practitioner being approached by a party purporting to be either a so-called 'middleman' or some other participant in a purportedly lucrative commercial transaction. The practitioner will be lured into the scam with a promise that a large amount of money will be paid into the firm's trust account. The idea is usually that the trust account will be used as a conduit through which the funds will be passed for onward payment to third parties. Lucrative commissions will then purportedly be earned by the 'middleman' and the practice. Some versions of this scam include a narrative involving the sale of some or other precious metal, foreign exchange or some other offshore transactions. In the face of the COVID-19 pandemic, the transactions involving large amounts of personal protective equipment (PPE) have also been touted.

The narratives to the legal practitioners may vary. At the end of the day, the legal practitioner's trust account will be used as a conduit. Parties who have participated in these schemes and suffer losses, may later turn to the legal practitioners involved in an attempt to recover their losses. Such transactions also expose the practitioners to regulatory action in terms of the Financial Intelligence Centre Act 38 of 2001 or even criminal prosecution in terms of Prevention of Organised Crime Act 121 of 1998. The risk of regulatory action by the LPC also exists. The precautions relating to anti-money laundering are well documented in a variety of freely available literature.

Taking things with the proverbial pinch of salt, applying professional scepticism, being street wise, that old adage that if something sounds too good to be true then it probably is and all the other related words of warning will be well applied by legal practitioners faced with scams.

Though it has been adapted over the years, this scam is not new as will be noted from the facts of ***Hirschowitz Flionis v Bartlett and Another*** (546/04) [2006] ZASCA 23; 2006 (3) SA 575 (SCA) ; [2006] 3 All SA 95 (SCA) (22 March 2006)

Practitioners facing claims arising out of this scam will not be indemnified by the LPIIF as no legal services would have been rendered by the firm. Regard must also be held to clauses XX, 1, 16 (e), (f), (j), (k) and (m) of the LPIIF policy, each of which may apply to a claim arising out of the scam.

Educate all members of staff on the common scams, implement the appropriate internal controls to mitigate the risks associated with scams and constantly monitor that the measures are being implemented.

GENERAL PRACTICE

CLEAR VISION BEYOND THE CLOUD

By: Simthandile Kholelwa Myemane
Practitioner Support Manager
Legal Practitioners' Fidelity Fund

The world finds itself in a cloud that has been caused by the coronavirus, commonly referred to as COVID-19. The future looked even more blurry when the pandemic hit and killed a high number of people before the spread could be contained. While certain countries have seen a second wave of the pandemic, South Africa is currently experiencing relatively stable infection rates from the first wave, with the second wave currently uncertain.

Though the virus was not foreseen, it impacted our lives and businesses. We are still living with the pandemic and expected to do so for an unknown period into the future. As we all know, at the time that the virus was first detected in South Africa, we had already seen the damage it was causing in other parts of the world and could therefore put responses in place to deal with it in order to mitigate its potential catastrophic effect. These responses included declaration of a state of national disaster and a hard lockdown that our government introduced to curtail the spread of the virus. This gave time for government to prepare and improve the conditions at our health care facilities in order to deal with the expected numbers of infections.

Legal practices, as businesses, have also been hit hard by this pandemic and have had to respond appropriately. A number of legal practitioners have lost their lives due to the virus. In certain instances, due to being infected with the virus, some legal practices have not been able to reopen even after the economy opened for business. There are legal practices that have had to seek emergency funding following the hard lockdown that was imposed by the government. The question then arises: if we were to experience a second wave that may necessitate some form of stricter lockdown regulations, would the legal profession be prepared? How will legal practices ensure that they are resilient? In this article I attempt to explore various ways in which legal practices can prepare themselves for the event that the second wave materialises, with an anticipated emergence of stricter regulations.

One of the ways to prepare for an eventuality and ensure that one stays afloat is by assessing and, where necessary, changing one's attitude towards technology. We have seen numerous articles around technology and the benefits as well as risks of invest-

GENERAL PRACTICE continued...

ing in technology. COVID-19 has proven the importance of investing in technology. Since March 2020, businesses that were able to trade virtually have survived the storm. However, enterprises that required their operations to be physically carried out from their usually business premises have struggled, with only some surviving. While closure of legal practice for economic reasons has always taken place, this pandemic has exacerbated the situation as some could not have a clear vision beyond the cloud.

This takes me to the point of business resilience, and I challenge legal practices to develop appropriate resilience. Resilience of a business goes beyond just using technology, but technology is central to whatever mechanisms one explores, especially now. One of the definitions that the Merriam Webster dictionary gives for resilience is that it is 'an ability to recover from or adjust easily to misfortune or change'. Simply put, it is the ability of the organisation to quickly adapt to all situations and be able to push through. Resilience therefore requires that legal practitioners be agile, both in mindset and methodology.

The legal profession still heavily relies on face-to-face consultations with clients and manual processes for storing client information. Legal practices need to invest in technology that allows virtual consultation with their clients, such as Microsoft Teams, Zoom or other similar technological solutions. These capabilities can also be accessed via various electronic devices, thus enabling the clients to meaningfully participate. In respect of client files, legal practitioners still open physical files for their clients, make notes on the files etc. This often requires of a legal practitioner to have access to the physical file to ascertain the status of a matter and to be able to do further work on the file. We have been hearing of the technological future that is coming and that future has arrived now. Legal practices can still open and maintain files for each client, but this can take place in a digital space instead of a physical file.

One of the advantages of digitisation and automation is that if a mandate, for instance, is concluded and payments relating to that mandate become due, these should not wait for one to go to the office to make the payments. The workflow that would have occurred at the office should still occur away from the office. The person assigned to sign-off a file should be able to do so off-site. A notification can be sent to the person responsible to initiate payment, who will follow the internal payment processes and payment can be affected without compromising any of the internal controls. Should the second wave materialise, legal practitioners should be well positioned to continue servicing their clients as if they are at their operating premises, and in that way the client remains happy. This also ensures that the legal practice and legal practitioners remain relevant.

Investing in and using technology should not be seen to suggest that people stop applying logic to situations. There are risks that come with technology, and legal practices and practitioners should ensure that they employ the necessary security measures to protect themselves from attempts to defraud them.

CONCLUSION

Legal practitioners need to ensure that their practices are resilient and can stand the test of time.

THE EXCESS PAYABLE IN TERMS OF THE LPIIF POLICY EXPLAINED

By: Thomas Harban,
General Manager
LPIIF

The limits of indemnity afforded to insured legal practitioners under the Legal Practitioners Indemnity Insurance Fund NPC (the LPIIF) Master Policy were explained in the November 2020 edition of the Bulletin. As indicated in that edition, various aspects of the LPIIF cover will be explained in a series of articles published in the Bulletin. In this edition, the focus is on the excess payable (also called the deductible).

The payment of an excess is a common requirement in short-term insurance policies when a claim is paid. The LPIIF Master Policy is no exception in this regard.

When is the excess payable under the LPIIF policy?

The excess becomes payable where indemnity has been afforded to the insured legal practitioner and the latter is found liable to compensate the claimant. The amount of the liability could be set out in the terms of a judgement handed down by a court or in the terms of a settlement agreement. In the latter instance, the settlement agreement will set out the amount of the liability and specify that the insured is liable to pay the excess (and the amount thereof).

The excess will then become payable at the point the LPIIF needs to make payment of the claim.

The excess is the first amount payable in respect of the claim. The insured practitioner will be required to pay the excess directly to the claimant or the latter's legal representative. The LPIIF will require proof that the excess has been paid (if already paid) or a pledge signed by the insured undertaking to pay the excess.

No excess is payable where:

- The claim is successfully defended
- The LPIIF makes a payment of approved costs
- The LPIIF only pays the defence costs in respect of a claim

Who is liable to pay the excess?

Remember that the indemnity is afforded to the legal practice and the legal practice is thus liable to pay the excess. With single practitioners it will be clear that the sole practitioner will be liable for the excess. In practices with more than one principal (see the definition of principal in clause XXIII of the policy) a dispute sometimes arises between the partners/directors in the firm with regards to whether the partner/ director who dealt with the underlying matter and thus exposed the firm to the liability is solely responsible for the payment of the excess or whether the all the partners/directors are liable to pay. The partners/directors are jointly and severally liable for the liabilities of the practice and the excess is one example of such liability. The LPIIF, to the extent provided in the policy, indemnifies the practice as a whole in respect of the liability for the claim. How the excess is split between the partners/directors is an internal matter that does not involve the LPIIF or the claimant.

The liability to pay the claim may arise at a time when the constitution of the firm has changed or even where the firm no longer exists. It not uncommon that the relationship between the former partners/ directors may, in the interim, have deteriorated to the extent that there is little, if any, civil

GENERAL PRACTICE continued...

communication between them and they may have become belligerent and uncooperative towards each other and thus dispute who is liable to pay the excess. Such a dispute may delay the finalisation of the claim while the squabble drags on. Interest on the claim could be running and thus the liability of the practitioners will be increasing. The claimant and the LPIIF cannot be prejudiced in perpetuity by such an internal dispute.

One measure of mitigating this risk is to address liability for the excess in the partnership agreement. This will also provide certainty to the principals in the practice. In this regard, see the suggestions in the article "Until a claim do us part: Does your partnership agreement address the event of a claim against the firm?" published in the October 2017 edition of De Rebus (http://www.derebus.org.za/claim-us-part-partnership-agreement-address-event-claim-firm/ accessed on 30 October 2020). In that article it was noted that:

'A partnership of practitioners (as with any other partnership) is based, inter alia, on good faith between the participants in that relationship to the achievements of the objects of the partnership. In addressing attorneys in various forums, I have often likened the partnership agreement entered into by practitioners to an antenuptial contract (ANC) entered into by parties about to enter a marital relationship. All the terms of the relationship should be carefully set out so that, in the unfortunate event of a dissolution, the rights and obligations of the respective parties to the 'fruits and the spoils of the union' are clearly recorded. I surmise that for so long as the partnership relationship peacefully persists and all the parties thereto are deriving the associated benefits, it would be improbable that any of the participants would feel the need to regularly have regard to the contents of the underlying agreement. (I suppose that, similarly, a married couple would hardly find a need to refer to their ANC contract while their union is a happy one.) However, when the relationship ends, or faces the threat of termination (whether, for example, in the unfortunate event of the demise of one of the partners or the threat of a claim against the partnership), the parties may suddenly then find a need to have careful regard to the contents of the agreement. At that stage it may be too late to seek to address any gaps in the agreement.

…[A] Number of questions [arise], which practitioners should consider addressing.

What if, for example –

- *a claim against the partnership arises only after the partnership has been dissolved;*
- *a claim is made against the partnership, but the underlying circumstances of the claim arose when the practitioner concerned was part of a previous entity; or*
- *one partner, facing a claim, either joins the other(s) or institutes action against them for a contribution?*

A response that "we simply did not consider these questions" may not assist when the partnership is faced with a claim.

My suggestion to practitioners is that it would be prudent to address issues relating to professional indemnity (PI) claims and other forms of potential liability in the partnership agreement. A claim for PI, misappropriation of funds or some other liability may arise after the partnership has been dissolved. In many instances, practitioners moving between firms may take the files they have worked on (or are currently working on) with them. What will happen in the event that there was breach of mandate, while the practitioner was still with the previous firm? Against which firm will the claim lie? In many partnership agreements, substantial emphasis is placed on how the financial rewards will be shared between the partners/directors but little (if any) attention is paid to how liabilities will be addressed.

The [LPIIF] is often notified of claims against firms, which no longer exist in the form they had existed, when the circumstances giv-

GENERAL PRACTICE continued...

ing rise to the claim arose. In some instances, the relationship between the former partners has degenerated to the extent that they are belligerent towards each other.'

Simply put, the liability of the partners/directors for the deductible in the event of a claim should be addressed in the partnership agreement by prudent practitioners. The agreement should also deal with circumstances where the liability arises from the conduct of an associate, candidate attorney or other member of staff working under the supervision of one or more of the principals. Setting out the terms in relation to the payment of the deductible will create certainty and protect the principals against each other.

What is the amount payable?

As with the amount of cover, the applicable excess is determined by the number of partners in the practice on the date that the cause of action arose (see the previous edition of the Bulletin). Remember that:

(i) advocates practising with Fidelity Fund certificates are regarded as sole practitioners and will thus have to pay the amount applicable practices with one partner; and

(ii) Any person publicly held out as a partner/director by the firm will be considered as such for purposes of calculating the excess.

(See clauses XXIII and 10-15 of the policy.)

The schedule for the applicable excesses is set out in the Master Policy and is as follows:

SCHEDULE B: Period of Insurance: 1st July 2020 to 30th June 2021 (both days inclusive)

No of Principals	Column A Excess for prescribed RAF* and Conveyancing Claims**	Column B Excess for all other Claims**
1	R35 000	R20 000
2	R63 000	R36 000
3	R84 000	R48 000
4	R105 000	R60 000
5	R126 000	R72 000
6	R147 000	R84 000
7	R168 000	R96 000
8	R189 000	R108 000
9	R210 000	R120 000
10	R231 000	R132 000
11	R252 000	R144 000
12	R273 000	R156 000
13	R294 000	R168 000
14 and above	R315 000	R180 000

The applicable **Excess will be increased by an additional 20% if **Prescription Alert** is not used and complied with.*

***The applicable **Excess** will be increased by an additional 20% if clause 20 of this policy applies.*

It will this be noted that:

- A higher excess is payable for prescribed Road Accident Fund (RAF) and conveyancing claims (see Column A);
- A 20% loading will be added to the applicable access where the claim arises out of circumstances where dishonesty conduct is involved, including:

(a) the witnessing (or purported witnessing) of the signing or execution of a document without seeing the actual signing or execution; or

(b) the making of a representation (including, but not limited to, a representation by way of a certificate, acknowledgement or other document) which was known at the time it was made to be false. (in this regard see the definitions of dishonest and innocent insured in clauses XI and XV, respectively.)

- A 20% loading will be added in the event of a prescribed RAF claim where the underlying claim was (a) not registered with the Prescription Alert Unit, or (b) alerts from that unit have not been complied with.

The Prescription Alert system is a backup diary system on which practitioners can register all time-barred matters. Practitioners are encouraged to register all litigious matters with the Prescription Alert unit. That unit sends alerts and reminders to practitioners of the looming prescription date. Queries relating to the Prescription Alert unit can be addressed to alert@LPIIF.co.za

Queries in respect of the LPIIF policy in general can be addressed to info@LPIIF.co.za