

FINANCIAL IMPLICATIONS FOR SELLING IMMOVABLE PROPERTY – IS IT CLASSIFIED AS CAPITAL OR REVENUE?

South Africa aligning its maritime industry with the globe through the **Merchant Shipping Bill, 2020**

Protection from unlawful dispossession using the **spoliation remedy**

Do traditional leaders enjoy **judicial immunity?**

Is the remission of jail sentences **constitutionally unfair?**

Capital



Revenue

Taking your slice of the shareholder pie: A discussion on authorised and issued shares

Survival of alternative dispute resolution clauses in the event of fraud

Do regional courts have jurisdiction to order an assessment of parties by an expert in post-divorce proceedings?



TIME TO MAKE YOUR DREAMS YOUR REALITY.

If believe you have the potential to change the world, your journey starts here. Embark on a legal career with STADIO – higher certificates, undergraduate and postgraduate degrees.

- Bachelor of Laws (LLB)
- Bachelor of Commerce In Law
- Higher Certificate in Paralegal Studies

STADIO

FORMERLY

SBS

STADIO.AC.ZA | 087 158 5000 | HELLO@STADIO.AC.ZA

Stadio is a registered private higher education provider.

11	FINANCIAL IMPLICATIONS FOR SELLING IMMOVABLE PROPERTY – IS IT CLASSIFIED AS CAPITAL OR REVENUE?	22
16	South Africa aligning its maritime industry with the globe through the Merchant Shipping Bill, 2020	13
24	Do traditional leaders enjoy judicial immunity?	18
20	Taking your slice of the shareholder pie: A discussion on authorised and issued shares	
26	Survival of alternative dispute resolution clauses in the event of fraud	

FEATURES

11 Financial implications for selling immovable property – is it classified as capital or revenue?

When calculating a taxpayer's taxable income, determining whether a receipt or an accrual is 'capital' or 'revenue' in nature, is probably the most common issue that arises in income tax litigation. With the current financial climate prompting many people to restructure their financial arrangements, legal practitioner, **Lulama Lobola**, explains that this has meant contemplating the sale of immovable property.

13 Is the remission of jail sentences constitutionally unfair?

Under the Constitution everyone has the right to equality and equal benefit of the law. This includes those who have been incarcerated or serving sentences within the system of Community Corrections. Chief Operations Officer, **Brenda Wardle**, discusses the remission of sentence granted by President Cyril Ramaphosa in 2019 and argues that the President unfairly discriminated against a number of categories of offenders.

Regular columns

Editorial 3

Letters to the editor 4

Practice management
• Inspection of accounting records 5

Practice notes
• The dichotomy of a VAT benefit for welfare organisations 7
• Parking in sectional title schemes 8
• The restraint of trade clause and entrepreneurs in contemporary South Africa 9

The law reports 28

Case notes
• Can information be requested in terms of the Mineral and Petroleum Resources Development Act? 35
• Which Act should legal practitioners rely on when applying for admission to practice on or after the commencement of the LPA? 36
• An absolute or flexible restriction: Can prohibited practices be prosecuted three years after the practice ceased? 37
• Taxation review – taxing master ignoring court order 39

New legislation 41

Employment law update
• Constructive dismissal as a result of bullying 44
• Unlawfulness v unfairness 45

Recent articles and research 46

FEATURES CONTINUED

16 South Africa aligning its maritime industry with the globe through the Merchant Shipping Bill, 2020

Legal practitioner, **Nicholaas Kade Smuts**, examines the Merchant Shipping Bill 2020 and discusses how the South African government aims to align the South African maritime industry with that of the international markets by promoting inclusive growth, prioritising local industry, while continuing to meet its international obligations and conventions.

18 Do regional courts have jurisdiction to order an assessment of parties by an expert in post-divorce proceedings?

Advocate, **Danie van der Merwe**, questions whether regional courts have jurisdiction to order the parties and minor child – post-divorce – to submit themselves to be assessed by an expert with the view of obtaining evidence in support of the applicant's quest to obtain a variation of an existing order pertaining to the primary care and residence of the minor child.

20 Taking your slice of the shareholder pie: A discussion on authorised and issued shares

Authorised shares in a company are the maximum amount of shares that the company is authorised by its memorandum of incorporation to issue to shareholders. Junior company secretary, **Nomathamsanqa Nkomo**, writes that the difference between the two is that authorised shares are still in the possession of the company and issued shares are in the possession of the shareholders.

22 Protection from unlawful dispossession using the spoliation remedy

During the COVID-19 pandemic some tenants may have wanted to evade paying their rent and some lessors – frustrated by the delay with regard to evictions – may have wanted to cut off the tenant's electricity or water. Senior magistrate, **Mohammed Moolla**, warns that before lessors attempt something so drastic, they should think carefully about their actions.

24 Do traditional leaders enjoy judicial immunity?

Judicial immunity is a common-law concept and is a form of protection afforded to judicial officers. One of its objectives is to encourage judges to act in a fair and just manner. Legal practitioner, **Sipho Tumelo Mdhuli**, writes the principle of immunity has been the reason for the effectiveness of Traditional Courts that is until the conviction and sentencing of the King of the AbaThembu nation, His Majesty Dalindyebo.

26 Survival of alternative dispute resolution clauses in the event of fraud

More and more parties are opting for alternative dispute resolution methods to settle contractual disputes. Therefore, these clauses have become prevalent in agreements as they offer parties an expeditious dispute resolution process. Candidate legal practitioner, **Tshepo Mokoana**, asks can such survival provisions survive the cancellation of a contract which was cancelled due to fraud?

EDITOR:

Mapula Sedutla
NDip Journ (DUT) BTech (Journ) (TUT)

PRODUCTION EDITOR:

Kathleen Kriel
BTech (Journ) (TUT)

SUB-EDITOR:

Kevin O'Reilly
MA (NMU)

NEWS REPORTER:

Kgomotso Ramotsho
Cert Journ (Boston)
Cert Photography (Vega)

SUB-EDITOR:

Isabel Joubert
BIS Publishing (Hons) (UP)

EDITORIAL SECRETARY:

Shireen Mahomed

EDITORIAL COMMITTEE:

Giuse Harper (Chairperson), Peter Horn,
Maboku Mangena, Mohamed Randera

EDITORIAL OFFICE: 304 Brooks Street, Menlo Park,
Pretoria. PO Box 36626, Menlo Park 0102. Docex 82, Pretoria.

Tel (012) 366 8800 Fax (012) 362 0969.

E-mail: derebus@derebus.org.za

DE REBUS ONLINE: www.derebus.org.za

CONTENTS: Acceptance of material for publication is not a guarantee that it will in fact be included in a particular issue since this depends on the space available. Views and opinions of this journal are, unless otherwise stated, those of the authors. Editorial opinion or comment is, unless otherwise stated, that of the editor and publication thereof does not indicate the agreement of the Law Society, unless so stated. Contributions may be edited for clarity, space and/or language. The appearance of an advertisement in this publication does not necessarily indicate approval by the Law Society for the product or service advertised.

De Rebus editorial staff use online products from:

- **LexisNexis** online product: MyLexisNexis. Go to: www.lexis-nexis.co.za; and
- **Juta**. Go to: www.jutalaw.co.za.

PRINTER: Ince (Pty) Ltd, PO Box 38200, Booyens 2016.

AUDIO VERSION: The audio version of this journal is available free of charge to all blind and print-handicapped members of Tape Aids for the Blind.

ADVERTISEMENTS:

Main magazine: Ince Custom Publishing

Contact: Dean Cumberlege • Tel (011) 305 7334

Cell: 082 805 1257 • E-mail: DeanC@ince.co.za

Classifieds supplement: Contact: Isabel Joubert

Tel (012) 366 8800 • Fax (012) 362 0969

PO Box 36626, Menlo Park 0102 • E-mail: classifieds@derebus.org.za

ACCOUNT INQUIRIES: David Madonsela

Tel (012) 366 8800 E-mail: david@lssa.org.za

CIRCULATION: De Rebus, the South African Attorneys' Journal, is published monthly, 11 times a year, by the Law Society of South Africa, 304 Brooks Street, Menlo Park, Pretoria. De Rebus is circulated digitally to all practising legal practitioners and candidate legal practitioners free of charge and is also available on general subscription.

NEW SUBSCRIPTIONS AND ORDERS: David Madonsela

Tel: (012) 366 8800 • E-mail: david@lssa.org.za

SUBSCRIPTIONS:

Postage within South Africa: R 1 990 (including VAT).

Postage outside South Africa: R 2 100.



LAW SOCIETY
OF SOUTH AFRICA

© Copyright 2021:

Law Society of South Africa 021-21-NPO

Tel: (012) 366 8800



Member of
The Audit Bureau of
Circulations of Southern Africa



Member of
The Interactive
Advertising Bureau



De Rebus subscribes to the Code of Ethics and Conduct for South African Print and Online Media that prescribes news that is truthful, accurate, fair and balanced. If we do not live up to the Code, contact the Public Advocate at (011) 484 3612 or fax: (011) 484 3619. You can also contact our Case Officer on khanyim@ombudsman.org.za or lodge a complaint on the Press Council website: www.presscouncil.org.za

Driver's licence and own vehicle no longer an employment requirement

As 2021 begins amidst the second wave of the COVID-19 pandemic, South Africa (SA) was moved back to Adjusted Alert Level 3, on 29 December 2020, in order to curb the spread of COVID-19. The over two million worldwide lives lost – due to COVID-19 – is an indication of the devastation the pandemic has had on the world, including its economy. As SA attempts to build back its economy, the legal fraternity was not immune to the economic impacts of COVID-19 and will have to grapple with working under the guide of the 'new normal'. New entrants into the legal job market, candidate legal practitioners, will be applying for positions as the year progresses.

The issue of candidate legal practitioners having a driver's licence and their own vehicle, as a requirement for acquiring employment, has been a hot topic on a number of occasions in the pages of the *De Rebus* journal, see –

- Clement Marumoagae 'Preparing for the future – University law clinics training candidate attorneys' 2013 (Sept) *DR* 34;
- Clement Marumoagae 'Driver's licence: A barrier preventing entry into the attorneys' profession' 2017 (Nov) *DR* 42;
- Boitumelo Moshugi 'Life through the lens of a candidate legal practitioner' 2020 (Oct) *DR* 7;
- Mapula Sedutla 'What does the Law Society of South Africa do?' 2020 (Nov) *DR* 3; and
- Mashudu Monica Mulaudzi 'Hard work, low pay: A need for a prescribed minimum wage for candidate legal practitioners' 2020 (Nov) *DR* 47.

The Legal Practice Council (LPC) has answered the age-old question by amending its rules and on 9 December 2020, the LPC amended the Rules made under the authority of ss 95(1), 95(3) and 109(2) of the Legal Practice Act 28 of 2014 (as amended) in the following manner:

By the insertion of a new r 22.1.11 relating to candidate attorneys reading as follows:

'22.1.11 Prohibited provisions in advertisements, interviews and practical vocational training contracts

It is misconduct on the part of:

22.1.11.1 an attorney seeking to employ a candidate legal practitioner to stipulate in an advertisement that it is a requirement that an applicant must be, or to enquire of an applicant whether he/she is, in possession of a valid driver's licence, or owns or has access to the use of a vehicle for use in the course of his/her prospective employment as a candidate legal practitioner;

22.1.11.2 a principal to enter into a practical vocational training contract with a candidate attorney which incorporates any unreasonable or unusual terms, which terms may include, without limitation, a requirement that the candidate attorney be in possession of a valid driver's licence, or owns or has access to the use of a vehicle for use in the course of the latter's service under the contract.'

By the insertion of r 22.2.9 relating to pupils reading as follows:

'22.2.9 Prohibited provisions in interviews and practical vocational training contracts

It is misconduct on the part of a training supervisor:

22.2.9.1 to enquire of an applicant for a practical vocational training contract whether he/she is in possession of a valid driver's licence, or owns or has access to the use of a vehicle for use in the course of his/her prospective employment as a candidate legal practitioner;



Mapula Sedutla – Editor

22.2.9.2 to enter into a practical vocational training contract with a pupil which incorporates any unreasonable or unusual terms, which terms may include, without limitation, a requirement that the pupil be in possession of a valid driver's licence, or owns or has access to the use of a vehicle for use in the course of the latter's service under the contract.'

In these trying times, the above rule changes will be a welcomed change by candidate legal practitioners. In adherence to the rule changes, *De Rebus* and Classifieds advertisers will no longer be permitted to stipulate the requirement of a driver's licence and ownership or access to the use of a vehicle in advertisements.



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: 15 February, 22 March and 19 April 2021.

LETTERS TO THE EDITOR

PO Box 36626, Menlo Park 0102 • Docex 82, Pretoria • E-mail: derebus@derebus.org.za • Fax (012) 362 0969

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

Dominance in the legal fraternity

The Constitution is the supreme law of the land and thus serves as a cornerstone of our democracy. An effective judiciary is essential to achieve economic development in the society it serves. However, gender equity enshrined in s 9 of the Constitution still remains a central issue, which has to be addressed. The same goes without saying that there is no judicial transformation without the necessary checks and balances of gender equity or dominance in the field. Although the judiciary, among others, advocates for gender equity and women empowerment in the field – by appointing more female judges to the Bench – a lot still needs to be done. Special attention is still required to create opportunities for aspirant judges and lawyers to pursue a career in the legal sector.

The entry of female judges into spaces from which they had historically been excluded, is a positive step from judiciaries and makes the judiciary more transparent, inclusive and representative of the people whose lives they affect.

The presence of female judges enhances the legitimacy of the court and sends a powerful message that they are open and accessible to those who seek a recourse to justice.

President of the International Association

of Women Judges, Judge Vanessa Ruiz, says the judiciary will not be trusted if it is viewed as a 'bastion of entrenched elitism, exclusivity, and privilege, oblivious to changes in society and to the needs of the most vulnerable' (www.unodc.org, accessed 27-11-2020). Indeed, citizens will find it hard to accept the judiciary as the guarantor of law and human rights if the judiciary is not broadly representative. That is why the presence of women is essential to the legitimacy of the judiciary.

Achieving equality for women judges, in terms of representation at all levels of the judiciary and on policy-making judicial councils, should be our goal, not only because it is right for women, but also because it is right for the achievement of a more just rule of law. Female judges are strengthening the judiciary and helping to gain the public's trust.

Female judges throughout the world have earned the necessary credentials, gained accomplishments and otherwise met the standards for judicial selection. But they do, after all, live their lives as women, with all the social and cultural impacts women face, which include complex family relationships and obligations. Female judges bring lived experiences to their judicial functions, experiences that tend toward a more comprehensive and empathetic perspective. A perspective that not only encompasses the legal

basis for judicial action, but also creates awareness of the consequences on the affected people.

In order to expediently achieve the goal for gender equity dominance, South Africa might also need to consider:

- Global comparative analysis on the appointment of female judges.
- Collective data that promotes gender equality.
- Monitor participatory gender audits and assessments.
- Combine the expertise of different sectors and improve collaboration for gender mainstreaming among various sectors.
- Effective mechanisms for mainstreaming gender in organisational processes.
- Implementation of learning methodology for ensuring that good gender policy intentions do not fail to be followed through in organisational practice.

Sipho Tumelo Mdhuli

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

Some notes

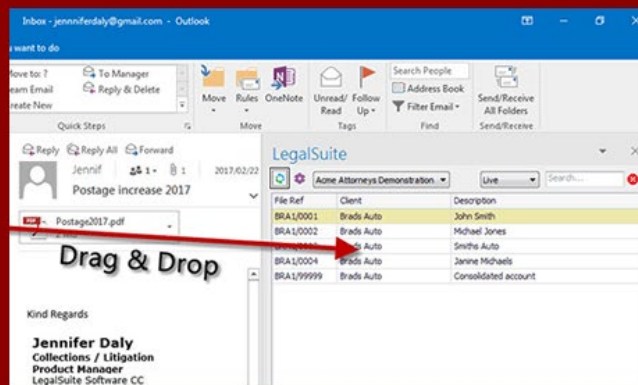
I refer to the article by Juniours Moremi 'Are tenants being robbed of their rental deposits?' 2020 (Nov) DR 8. The author

Get control of your Inbox!

LegalSuite's new Outlook add-in allows you to manage your emails from within Outlook.



www.legalsuite.co.za



- Reply to & send emails to your Clients from within Outlook
- Drag & drop emails onto a Matter
- Make File Notes, Fee Notes & Reminders in Outlook
- An incredible time-saver for busy Attorneys!

refers to the Rental Housing Amendment Bill B56 of 2013.

I would like to point out that the Bill was replaced by the Rental Housing Amendment Act 35 of 2014, which as far as I am aware, has not yet come into operation (see www.gov.za).

The article by Alex Abercrombie and Razaan Johardien 'Mortgage of immovable property – a first step to aliena-

tion?' 2020 (Oct) *DR* 16 is a repeat of the article published in March 2011. The republished article has just caused confusion due to the Chief Registrar's Circular 1 of 2020, which suspended the previous Registrar's Circulars and these are to be referred to the next Registrar's Conference for formal withdrawal. The current position is, therefore, that 'mortgaging' is no longer regarded as an 'alienation'.

This was clearly a case of closing the stable door after the horse had already bolted.

Siegfried Heiriss *BProc (UFS) LLB (Unisa)*
Certificate in Real Estate is a non-practising legal practitioner, conveyancer and notary at SK Heiriss Inc Attorneys in Durban.



By
Rampela
Mokoena

Inspection of accounting records

In the article 'Handling of trust money – dealing with the obligations of a trust account legal practitioner' 2019 (May) *DR* 6, I suggested that the Legal Practice Act 28 of 2014 (LPA) and the Final rules as per ss 95(1), 95(3) and 109(2) (the Rules) create various obligatory requirements expressly or by necessary implication which a trust account legal practitioner must comply with.

In Simthandile Kholelwa Myemane's article 'The increased importance of maintaining proper and accurate trust accounting records' 2020 (July) *DR* 6, she makes reference to the fact that the LPA, empowered both the Legal Practice Council (LPC) and the Board, through s 87(2)(a), to inspect the accounting records of any trust account practice in order to satisfy itself that the provisions of s 86 and subs 87(1) are complied with. 'The LPC or Board may achieve this by conducting inspections itself or through its nominee.'

Myemane (*op cit*) further highlights that these new powers of the Board will require that instances be clearly determined when the Board may require to conduct inspections at trust account practices. It also mentions that '[t]o achieve this and for the Board to fulfil its responsibility in respect of these inspections, the Fund is developing systems that will collate information and assist with the profiling of trust account practices and/or legal practitioners. Profiling of trust account practices and legal practitioners will consider a wide spectrum of issues, including how trust accounts are managed in trust account practices, which may point to elevated risks to the Fund. Risks to the Fund are risks relating to theft or misappropriation of trust funds and professional negligence that is covered through the Legal Practitioners' Insurance Indemnity Fund (LPIIF).'

This article expands on those provi-

sions dealing with the inspection of accounting records. These provisions simply in the view of the Legal Practitioners' Fidelity Fund (LPFF), also creates certain obligatory responsibilities for trust account practices – albeit indirectly in some instances. They are also contained in ch 7 of the LPA.

The Attorneys Act 53 of 1979 empowered only the council of a law society to inspect the accounting records of an attorney. In terms of s 70(1) the council could do so for the purposes of an inquiry under s 71, or to determine whether such an inquiry should be held. The council could also, in terms of s 78(5) by itself or through its nominee and at its own cost, inspect the accounting records of any legal practitioner in order to satisfy itself that the provisions requiring an attorney to open and conduct separate trust and business accounts and to keep proper accounting records (and other requirements) are being observed.

As alluded to above, the LPA (s 63(1)(e)) now empowers the Board of the LPFF to make rules relating to the inspection of trust accounts of trust account practices. The section recognises that '[i]n addition to the powers conferred upon it in this Act, and in the furtherance of the purpose of the Fund' the Board may, as determined in the rules, 'inspect or cause to be inspected the accounts of any attorney or an advocate referred to in section 34(2)(b).' Rule 50, titled 'Inspections of accounting records', was published under GenN401 GG41781/20-7-2018.

In addition, s 87(2)(a) of the LPA makes provision for the Board (or the LPC) – or through a nominee – at the LPC or Board's own cost, to inspect the accounting records of any trust account practice in order to obtain satisfaction that the provisions of ss 86 and 87(1) are being complied with. If on an inspection it is found that the provisions have not been complied with, the LPC or the Board may

write up the accounting records of the trust account practice and recover the costs (from the legal practitioner of the firm concerned) of the inspection and the writing up of the accounting records.

Discussion

The Board appoints an inspector and issues them with a certificate of appointment signed by the Board's Chief Executive Officer, to be produced at inspection. It contains certain prescribed details – including the extent of the inspector's power to inspect. An inspection may be conducted by one or more inspectors. The firm may be required to complete a pre-inspection questionnaire to allow for more efficient planning and conducting of the inspection.

Inspections may only be conducted during normal business hours, on not less than seven days' notice in writing, unless circumstances dictate otherwise. Inconvenience and disruption to the firm and its staff must be avoided as much as possible. The person in charge of the firm, or their nominee, shall be entitled to be present and to observe the inspection, but the failure of that person to be present at the inspection shall not prevent the inspector from proceeding with the inspection. The procedure for an inspection will be determined on a case-by-case basis by the inspector.

The inspector may –

- enter and inspect at any reasonable time and on reasonable notice where appropriate, any premises where the trust account practice is being conducted;
- in writing direct a person to appear for questioning at a time and place they determine;
- order any person who has or had any document in their possession or under their control relating to the accounting records of the firm to produce that document or to furnish the inspector,

at the place and in a manner determined by the inspector, with information in respect of that document;

- require reasonable assistance from any person on the premises to use any computer system on the premises, to access any data contained in or available to that computer system, and to reproduce any document from that data;
- examine or make extracts from, or copy, any document in the possession of the firm or any other person, which is relevant to the inspection or, against the issue of a receipt, remove that document temporarily for that purpose; and
- against the issue of a receipt, seize any document obtained as contemplated above which, in the opinion of the inspector, may constitute evidence of non-compliance with the provisions of ss 86 and 87 of the Act or of the rules.

The trust account practice must provide reasonable assistance to the inspector. No warrant is required for the purposes of an inspection in terms of the rules. An inspector may request the firm to provide to the Board with such additional information or documentation relating to the subject matter of the inspection.

If an inspector, having complied with any other reasonable requirements, is not immediately given admission to the premises or access to documentation relating to the firm's accounting records, the Board may apply to court for an order that the inspector be admitted to the premises to enable the inspection to be carried out. If the firm wishes to object to making disclosure of documentation or information, which is called for by the inspector, the firm must set out its objection in writing, with detailed grounds of the objection, and the matter shall be determined by the executive officer of the Board.

The firm must make such facilities available to the inspector as may reasonably be required for the purpose of conducting the inspection.

Unless otherwise stipulated or ordered

by a court, the firm must produce documents as they are kept in the normal and ordinary course of business, or must otherwise organise and label the documents to correspond to the categories in the request. If the request does not specify a form for producing electronically stored information, the firm must produce the information in a form(s) in which it is ordinarily maintained or in a reasonably usable form.

At the conclusion of the inspection the inspector prepares a report to the Board on the findings of the inspection, a copy is made available to the firm. If the firm objects to any of the findings it must do so in writing to the Board, outlining the basis of the objection. The Board shall consider the objections and shall take such further action in relation thereto as the Board considers appropriate.

Conclusion – duty to cooperate

The firm or legal practitioner must cooperate with the inspector who has been authorised by the Board or the LPC, in the performance of the inspection. The legal practitioner must recognise and respect the power granted to these institutions to inspect the accounting records, which they have been granted in the interests of the protection of the clients and of the public in general. In *Mothuloe Incorporated Attorneys v The Law Society of the Northern Provinces and Another* (GP) (unreported case no 67128/2014, 18-9-2015) (Louw J) at para 13, the court held: 'The applicant's reason for refusing to produce his records for inspection by the respondent is, in my view, misconceived. ... The applicant appears to believe that the respondent should simply accept Mr Mothuloe's explanation for not repaying the trust creditors as valid, and that it should therefore not execute its statutory duty to investigate complaints which are *prima facie* serious. This is clearly an erroneous view'.

In *Mothuloe Incorporated Attorneys v Law Society of the Northern Provinces and Another* (SCA) (unreported case no

213/16, 22-3-2017) (Shongwe JA (Cachalia, Wallis and Dambuza JJA and Mbatha AJA concurring)) at para 16 the Supreme Court of Appeal said: 'The appellant voluntarily became a legal practitioner and thus became a member of the Law Society. He was free to choose a profession, but could not opt out of the consequences of his choice. Every institution has rules and such rules must be observed at all times. The Law Society is empowered by law to direct that a practitioner produce for inspection records and books in pursuance of its duty to protect the interests of the public. On the undisputed facts of this case the appellant was not justified to respond to the request by imposing conditions before complying with the directive. It may be so that the appellant had issues with Koikanyang attorneys, – but those issues cannot provide him with a free pass to the directive and may not prejudice the trust creditors who *bona fide* paid money for purposes of purchasing property.'

The cooperation shall include complying with any lawful request, made in pursuance of the Board's or LPC's authority and responsibilities under the LPA, including a request to –

- provide access to, and the ability to copy, any accounting record in the possession, custody or control of the firm or of that person; and
- provide information by oral interviews, written responses or otherwise.

Any person who refuses or fails to produce a book, document or any article for purposes of an inspection, or obstructs or hinders any person in the performance of their functions in conducting the investigation, shall be guilty of an offence.

The obligation to provide information and documentation is not affected by confidentiality rules.

Rampela Mokoena BProc (University of Zululand) is a curatorship officer at the Legal Practitioners' Fidelity Fund in Centurion. □

Deceased Estate Administration Services



Specialists in the administration of estates under Power of Attorney, focusing on:

- **Intestate and Testate Deceased Estate Administration**
- **Insolvent Deceased Estate Administration**

Call us at 086 100 5161 to discuss our service offerings

Find out more www.fdpadmin.co.za

E-mail: info@fdpadmin.co.za



By
Deoran
Bobby
Wessels

The dichotomy of a VAT benefit for welfare organisations

COVID-19 has caused mass financial turmoil to virtually all entities. Welfare organisations, in particular, are suffering as philanthropic donations have significantly decreased during this time. Accordingly, it is necessary for welfare organisations to leverage all the benefits that are purposefully provided for by legislation. To this end, the value-added tax (VAT) regime in South Africa (SA) can be extremely beneficial for welfare organisations.

The Value-Added Tax Act 89 of 1991 (the Act) does not have the same, more commonly known reference to public benefit organisation, as used for income tax purposes and rather refers to 'welfare organisation'. Welfare organisations qualify for special treatment in terms of the Act, provided they are eligible to register as such.

Registration for VAT holds significant benefits for welfare organisations. Any entity that is regarded as a 'welfare organisation' in terms of the Act can make use of this benefit. In essence, the benefit provides that an input tax deduction will be allowed for goods and services supplied to it, while these entities are only required to levy output tax when there is a charge for the supply of any goods or services by it. Thus it is entirely possible for a welfare organisation to qualify for a VAT refund and thereby benefitting from registration.

Welfare organisations

The Act defines 'welfare organisation' as any public benefit organisation that has been approved in terms of s 30(3) of the Income Tax Act 58 of 1962. These welfare organisations must carry on or intend to carry on any 'welfare activities' contemplated in the GN112 GG27235/11-2-2005. The following activities are broadly covered –

- welfare and humanitarian;
- health care;
- land and housing;
- education and development; and
- conservation, environment and animal welfare.

In this regard, there is somewhat of an overlap between public benefit activities, as used for income tax purposes, and 'welfare activities'. Importantly where a

public benefit organisation performs activities, which are not regarded as 'welfare activities', they will not be classified as welfare organisations and thus cannot claim this VAT benefit.

Registration for VAT

Registration for VAT is required to utilise the benefit offered. Section 23 of the Act provides two requirements before an entity can register for VAT. Firstly, the entity must be regarded as carrying on an enterprise. The definition of 'enterprise' in s 1 of the Act makes provision for certain activities to be automatically included. Subsection (b)(ii) of that definition provides that an enterprise includes 'the activities of any welfare organisation'. Notably therefore, in granting 'welfare organisations' this specific inclusion in the 'enterprise' definition, the first requirement for registration will automatically be satisfied for welfare organisations.

The second requirement for VAT registration is entirely based on a monetary requirement. Welfare organisations are offered a compromise though. In terms of s 23(3)(a) an organisation can apply for VAT registration even when it does not meet the minimum monetary requirements, provided that the organisation qualifies as an enterprise in terms of subs (b)(ii) of the definition of 'enterprise'.

Thus, 'welfare organisations' can voluntarily register for VAT purposes. These exceptions created by the Act are important as they extend the benefits to 'welfare organisations' by allowing them to register for VAT where they otherwise might not have qualified.

Output tax

Certain goods and services supplied by a VAT vendor qualify as zero-rated supplies, which require vendors to levy output tax at a rate of zero percent in making said supplies. In terms of s 11(2)(n), 'welfare activities' (performed by welfare organisations) are zero-rated. The effect of this is simply that the supply of welfare activities by welfare organisations does not create an output tax levying obligation for welfare organisations. This does not, however, extend to all supplies made by welfare organisations. Supplies

made by welfare organisations that do not comprise welfare activities would still be subject to carry the standard rate (15%) of output tax.

Input tax

In terms of s 17(1) of the Act, an input tax deduction is allowed on goods or services acquired by a vendor for the use, consumption or supply in the course of making 'taxable supplies'. The definition of 'taxable supply' in s 1 includes the supply of goods or services that are charged at a rate of zero percent under s 11. Accordingly, the benefit that exists for welfare organisations is that all their 'welfare activities' are regarded as taxable supplies, even though they are zero-rated. Where a welfare organisation, therefore, incurs certain costs in respect of goods or services, which they intend to use in the course of making taxable supplies (viz the rendering of welfare activities) and VAT was charged on those supplies to the 'welfare organisation', that VAT registered 'welfare organisation' will be allowed an input tax deduction equivalent to the VAT paid. This notwithstanding, s 17(1)(i) still applies. Therefore, where entities do not make more than 95% taxable supplies, the input tax deduction must be apportioned.

Furthermore, welfare organisations are also entitled to deduct input tax in respect of soliciting donations as this activity is regarded as an integral part of conducting the welfare activities and thereby falling within their enterprise; yet another example of where legislation has adopted a supportive stance towards welfare organisations. However, where the actual donations received by a welfare organisation are not made in the furtherance of an enterprise, the welfare organisation will be denied an input tax deduction.

Apportionment of input tax

Where the goods or services are used partly for making taxable supplies and partly for non-taxable or exempt supplies, the input tax deduction must be apportioned to the extent that it is used for taxable supplies. The turnover-based method is the only standard method that

has been approved by the South African Revenue Services and which may be used for apportioning input tax without prior approval provided that the method is fair and reasonable.

Exempt supplies

An input tax deduction will not be allowed on the goods or services acquired to make exempt supplies. This raises the importance for welfare organisations to be aware of the exempt supplies as listed in s 12. Welfare organisations should pay attention to the effect of s 12(b), which could deem their welfare activities to be exempt supplies as opposed to zero-rated supplies. In terms thereof any supply by that association of any donated goods or services or any other goods made or manufactured by such association may result in those goods or services being deemed exempt supplies, if at least 80% of the value of the materials used

in making or manufacturing such other goods consists of donated goods.

Importantly where more than 80% of the funds generated by public benefit organisation's consist of donations, it could mean that the supplies of that organisation are regarded as exempt supplies. As a result, the input tax deduction cannot be apportioned and, therefore, no input tax can be claimed on any of those costs incurred by the welfare organisation. It is important for welfare organisations to take note of this provision to avoid an erroneous claim of the input tax deduction.

VAT benefits

The legislature evidently recognised the need to provide VAT benefits to welfare organisations to establish much needed financial relief. In effect, they benefit from qualifying automatically to register for VAT purposes. Considering that the

supply of welfare activities qualifies as a zero-rated supply, it enables welfare organisations to claim input VAT, without having to levy output VAT on their qualifying activities.

The financial burden placed on welfare organisations has been exacerbated during the recent trying financial times. Considering the pivotal role that they play in spearheading activities which support the upliftment of communities and the environment, they must be aware and make use of the fiscal stimulus provided by through the VAT benefits mentioned above.

Deoran Bobby Wessels BAcc LLB (Stell) is a tax consultant at AJM Tax in Cape Town. □

By
Raymond
Meyer

Parking in sectional title schemes

In my experience as a conveyancer, since the early days of sectional titles schemes, and also as an owner, parking and more particularly, the use and abuse of demarcated parking areas is one of the biggest sources of dissatisfaction in sectional title schemes and, for that matter, other communal housing schemes.

Since the inception of sectional title ownership by the promulgation of the original Sectional Titles Act 66 of 1971 (the 1971 Act) in 1973 there have been three 'generations' of sectional title legislation governing such schemes; namely that Act, the replacement Sectional Titles Act 95 of 1986 (STA), which took effect in 1988 and the Sectional Titles Schemes Management Act 8 of 2011 (STSMA) promulgated in October 2016, which took over the governance functions of schemes from the STA in 2016, leaving the former as an enabling Act.

In its infancy under the original Act, no provision was made for the allocation of an exclusive use area and nor could an open area such as a parking bay or a semi-enclosed carport form part of a section.

This difficulty was overcome by the compilation by developers of rules (almost invariably the so-called South African Property Owners Association (SAPOA) and the subsequent Associa-

tion of Building Societies of South Africa rules) to replace the more cursory statutory rules. The substituted rules made provision for exclusive use areas to be allocated to individual owners by reference to an attached plan and an accompanying allocation schedule.

The rules protected an owner's right to use an allocated exclusive use area in that they usually formed part of the sch 1 Rules, now termed Management Rules, which could not be changed without a unanimous resolution of the body corporate and further required the consent of an owner whose proprietary rights were adversely affected by the resolution.

The rules usually made provision for the owner having the use of the area to pay an additional levy. These rules, if enforced, have worked adequately in practice and still form part of the un-amended rules of many older schemes.

The STA formalised the allocation of an exclusive use area by providing in s 27 for the demarcation of exclusive use areas on the sectional plans and for the conveyance of such rights to owners by means of a notarial cession.

The rights to an exclusive use area shown on the sectional plans, therefore, take the form of servitude real rights, which are capable of being mortgaged and which can be ceded to a successor or in some circumstances to other owners

(but not to a non-owner). It is still advisable to have rules governing the usage of these areas and specific provision was made in statutory Management Rule 31 of the rules prescribed under the STA for additional levies to be paid for the use of an exclusive use area to cover defined expenses.

The difficulty experienced was that to survey off and demarcate the exclusive use area, as well as to register such an area at the deeds office by way of a certificate of real right involved additional expense and developers regrettably took shortcuts by omitting to demarcate them on the plans.

This difficulty was overcome by amending legislation in 1997, which re-introduced the less formal allocation of exclusive use areas in the rules in s 27A of the STA, now repealed, largely the same as was the case in the substituted rules under the 1971 Act.

As mentioned, the STSMA took over the governance provisions of the STA, including the provision for rules based exclusive use areas under ss 10(7) and (8).

Thus two forms of allocation of an exclusive use area exist, namely -

- sectional plan based; and
- rules based areas in terms of ss 27 of the STA and 10 of the STSMA respectively.

As can be deduced, the latter form

does not convey real rights and is not capable of being ceded or mortgaged.

Both types involve the payment of additional levies to cover expenses pertaining to them and are protected from appropriation by third parties.

A third option adopted by some schemes and recommended by experienced sectional title administrators is to retain parking spaces as part of the unallocated common property and for the body corporate to lease these spaces to owners. This would likely not be suitable where parking is section specific, such as a carport abutting a dwelling.

With the passage of time, parking in communal schemes has become more of an issue. The advent of two and multiple car families and the increase in the size of vehicles has resulted in competition for inadequate parking and parking in contravention of established rights and rules.

In many schemes inadequate penalties exist for the transgression of rules and recourse must be had to the relief offered in terms of s 39 of the Community Schemes Ombud Service Act 9 of 2011, which although effective, can be a drawn out process.

The tendency of many bodies cor-

porate not to protect such rights or to enforce the payment of levies, whether by apathy or design, has aggravated matters.

In my experience it is better for developers at the outset to demarcate the parking areas on the sectional plans and to convey title to the areas to owners who must pay for such areas and their usage. They will then have a greater sense of ownership of their exclusive use rights in the event of them being threatened.

Their rights can further be protected by strong management rules, which comply with principles of administrative justice and make provision for penalties for non-compliance (neither penalties nor reference to the protection of exclusive use rights are dealt with in the Management Rules prescribed under the STSMA).

It is possible for the body corporate – authorised by unanimous resolution of owners – to demarcate exclusive use area retrospectively in terms of s 27(2) of the STA and s 5(1)(e) of the STSMA, the cost of which can be apportioned among benefitting owners.

It would be even better in my opinion if the legislation in the STA relating to the creation of schemes were to

be amended to enable parking and any other EUA to be included as part of an adjoining sectional title unit to which they are allocated, although I realise that this will not be suitable for all schemes.

This would involve the definitions of a section and the common property in the STA being re-visited and no doubt other issues such as the differential levying of parking and dwelling components of a section, but these are obstacles that can surely be overcome.

A benefit that comes to mind is that the additional expense of the notarial cession of an exclusive use area to a new owner would be avoided. It would also overcome the vexed question of whether it is necessary to get a rate clearance certificate in order to cede an exclusive use area.

The process of establishing a new scheme, the conveyance of ownership and the administration and enforcement of the rules of sectional title schemes could hopefully likewise be simplified and improved.

Raymond Meyer BCom LLB (UKZN)
is a legal practitioner at Browne Brodie Attorneys in Durban. □



By
Gilles
van de
Wall

The restraint of trade clause and entrepreneurs in contemporary South Africa

The current economic climate in South Africa (SA), especially considering the consequences that COVID-19 has had on the possible economic capabilities of a multitude of South Africans, some may ponder the wealth and riches that entrepreneurial endeavours could provide them and may save them from total economic ruin. But how does one go about this safely and legally? The purpose of a restraint of trade clause, most typically, is to prevent and/or oblige employees to refrain from competing with their previous employer for the business and/or commerce of such an employer. But how does one enter the market as an entrepreneur in the industry for which one is trained and educated without unlawfully competing with your previous employer?

It is important to note that in South African law there is no codified legal principle of restraint of trade. The concept of restraint of trade is, therefore, birthed from the principle of unlawful competition and codified in a contract through a restraint of trade clause. Since restraint of trade clauses are founded on the principle of unlawful competition, one should study what constitutes unlawful competition as it plays out in the employment environment. The founding principles of all labour laws in SA, are found in the Constitution. Section 18 of the Constitution affords each South African citizen the right to freedom of association and s 22, the right to choose their trade, occupation, or profession freely. In terms of s 23, each South African citizen has the right to fair labour practices. The Competition Act 89 of 1998 (the

Act) does not provide a clear definition of unlawful competition but proposes to prohibit same through its purpose. The Act further prevents horizontal and vertical practices between firms, the definition of which includes a natural person, such as an employee, if such practices have the effect of substantially preventing or lessening competition in the market. However, if a party to the agreement can prove that any technological, efficiency or other pro-competitive gain, resulting from the agreement, outweighs the effect, such horizontal and vertical practices can be allowed.

The Labour Court, in *ABSA Insurance and Financial Advisors (Pty) Ltd v Jonker and Another*, *ABSA Insurance and Financial Advisors (Pty) Ltd v Jonker and Another* (LC) (unreported case no C741/17 and C742/17, 17-11-2017) (Steenkamp

J) confirmed that South African law recognises two forms of unlawful competition, being –

- unfair use of a competitor's fruits and labour; and
- the misuse of confidential information in order to advance one's business interests and activities at the expense of a competitor.

In *Waste Products Utilisation (Pty) Ltd v Wilkes and Another* 2003 (2) SA 515 (W) at 571 F – G the elements, which a claimant needs to satisfy to prove the existence of unlawful competition were summarised as follows –

- the claimant must have an interest in the confidential information, but such interest does not have to be ownership;
- the information in which the claimant has an interest is of a confidential nature;
- a relationship must exist between the claimant and the defendant, on whom the claimant seeks to impose a duty to preserve the confidence of information imparted to them, such as the relationship between an employer and an employee;
- the defendant must have knowingly appropriated the confidential information;
- the defendant must have made improper use of that information, whether

as a springboard or otherwise, to obtain an unfair advantage for themselves; and

- the claimant must have suffered damage as a result of such improper use.
- Of importance to restraint of trade clauses in instances of entrepreneurial endeavours, is the concept of trade connections. In the matter between *Rawlins and Another v Caravantruck (Pty) Ltd* [1993] 1 All SA 389 (A), the Appellate Division held that an employee could be found liable for damages in a claim based on unlawful competition, if the employee used the trade connections of their previous employer in an improper manner, to advance their own agenda. By example, where the entrepreneur approached the clients of a previous employer, prior to establishment of their own company and/or leaving the employ of their employer, as the court might infer that the entrepreneur improperly used the trade connections, which include its customers, to further their own business interests. This is furthermore substantiated by the judgments in the *Waste Products, Jonker and Forwarding African Transport Service CC t/a FATS v Manica Africa (Pty) Ltd and Others* [2005] 1 BLLR 104 (D), and the principle of the reasonable person, as same would result in contravention of the provisions contained in ss 22 and 23 of the Constitution.

Based on the provisions of ss 18, 22 and 23 of the Constitution, as well as the judgments of *Waste Products, Jonker and FATS*, an entrepreneurs' previous employer will not be able to restrain them from continuing with starting their own company, if the business is carefully considered not to be in violation of the principles set out in the judgments above. In essence, if the entrepreneur does not make improper use of that information gained from previous employment, whether as a springboard or otherwise, to obtain an unfair advantage for themselves; and the previous employer does not suffer damage as a result of such use (therefore, the use is not improper), a litigant will have difficulty to enforce the restraint of trade. A restraint of trade should, therefore, not be used to prevent the entrepreneur from entering into the economic trade again, but rather to proportionally protect the interests of the previous employer against improper use and abuse by the ex-employee.

Gilles van de Wall BA Law LLB (UP) is a legal practitioner at Johanette Rheeder Incorporated in Centurion.



A niche market insurance brokerage

for Legal, Medical, Insolvency, Fiduciary and Business Rescue Practitioners

WE SEE IT



At ShackletonRisk we specialise in...

Surety Bonds for:

- Liquidators
- Executors
- Curators
- Trustees
- Tutors

Professional Indemnity, Fidelity Guarantee and/or Misappropriation of Trust Fund Insurance for:

- Medical Practitioners
- Legal Practitioners
- Fiduciary Practitioners
- Insolvency Practitioners
- Business Rescue Practitioners

Your service advantages with SRM

- 48 hour turnaround for Professional Indemnity quotations
- 48 hour turnaround for Facility approvals
- 24 hour turnaround for bonds
- Monitoring of Insolvency appointment lists
- Issuing of letters of good standing for Annual Renewal for Master's Panel
- Dedicated liaison teams in each region to assist with lodging of documents and queries
- Qualified and efficient brokers
- Experienced admin staff
- Access to decision makers
- First class support and claims team

If you would like more information on any of the above products, please email info@srisk.co.za

Represented throughout South Africa | info@srisk.co.za | www.shackletonrisk.co.za

Financial implications for selling immovable property – *is it classified as capital or revenue?*

By
**Lulama
Lobola**



Whether a receipt or an accrual is 'capital' or 'revenue' in nature, in calculating a taxpayer's taxable income, is probably the most common issue that arises in income tax litigation. With the current financial climate prompting many people to restructure their financial arrangements, for some this has meant contemplating the sale of their immovable property. Due consideration must be given to the tax implications of such a transaction and whether the resulting profits would be subjected to tax by the South African Revenue Service (Sars) as part of the taxpayer's gross income or capital gains tax calculation. Such a finding can have different financial impli-

cations for the taxpayer and their cash flow. The purpose of this article is to provide insight into some of the considerations one should bear in mind when contemplating such a transaction by outlining the test of when such profits will be revenue in nature and form part of the taxpayer's gross income calculation.

'Gross income' definition

The starting point in determining a taxpayer's taxable income is the definition of 'gross income'. Section 1 of the Income Tax Act 58 of 1962 (the Act) defines gross income 'in relation to any year or period of assessment, ... -

(i) in the case of any resident, the total amount, in cash or otherwise, received

by or accrued to or in favour of such resident; or

(ii) in the case of any person other than a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such person from a source within the Republic, during such year or period of assessment, excluding receipts or accruals of a capital nature'.

The question that often arises from the sale of immovable property is whether the resultant profits received or accrued to a taxpayer are receipts or accruals of a capital or revenue nature. The taxpayer bears the onus to prove that the amounts in question are capital and not revenue in nature in terms of s 102 of the Tax Administration Act 28 of 2011.

Capital



Revenue



The capital and revenue divide

As noted, gross income excludes receipts and accruals of a capital nature, as such, capital receipts cannot be included under the taxpayer's gross income calculation, but could be included under a separate capital gains tax calculation in calculating the taxpayer's income. The phrase 'of a capital nature' is undefined in the Act and one must look to case law for its interpretation.

Proceeds from the sale of an asset

One of the leading authorities in determining whether an amount is of a capital or revenue nature is *Commissioner for Inland Revenue v Pick 'n Pay Employee Share Purchase Trust* 1992 (4) SA 39 (A). In this case, the then Appellate Division noted that there are a variety of tests to determine whether a receipt is of a capital or a revenue nature. These, however, are only guidelines and there is no single infallible test to apply. Ultimately, whatever guideline is used, the classification of capital or revenue must make sound commercial and good sense. With that said, the court held that the most appropriate test is whether the proceeds were the result of the realisation of a capital asset or whether it was a result of a gain made by the operation of business in carrying out a scheme of profit-making. This is the test regardless of the number of transactions carried out by the taxpayer. As to the meaning of 'a scheme of profit-making', the court explained that this means that the profit was designedly sought and worked for by the taxpayer and was not fortuitous. This will be assessed by considering the objectives of the taxpayer and what its purpose was or if there was more than one purpose, what its dominant purpose was. Consequently, the taxpayer must have the intention to trade, in order for a scheme of profit-making to be evident. A scheme of profit-making will be evident when the taxpayer buys an asset intending to sell it at a profit and with the intention to trade in that asset.

The case of *Commissioner for the SA Revenue Service v Wyner* [2003] 4 All SA 541 (SCA) illustrated the application of the test 'a scheme of profit-making'. The court applying the *Pick 'n Pay* tests evaluated the taxpayers stated intention, her *ipse dixit* that she was obliged to realise the property in order to salvage what she had invested, against the objective factors to determine whether they supported or disproved the taxpayers stated intention. On the facts, the court found that the profits were not of a capital nature and the taxpayers conduct to be a scheme of profit-making. The court found that the taxpayer had devised a scheme whereby she could make a very

large profit, and this was supported by the objective facts that revealed the taxpayer's intention.

A change of intention

The Appellate Division in *Commissioner for Inland Revenue v Stott* 1928 AD 252, shed clarity on the determination of intention and the possibility of a change in intention. In this case, the court had to determine whether the taxpayer had been carrying on a business as a person who trades in land and so treats the land as their trading stock. This would make the proceeds revenue in nature. In applying the test, the court noted that when it comes to individuals, a certain level of continuity is required for a scheme of profit-making to be evident. Furthermore, everyone is entitled to realise their investment asset to their best advantage, consequently, the mere sale of an asset at a profit is not enough to indicate a scheme of profit-making; one would need a special act to convert an asset from capital to revenue. When the court examined intention in more detail, it held that intention at the time of purchase is conclusive unless some other intervening factors show that the asset was sold in a scheme of profit-making.

In *Natal Estates Ltd v Secretary for Inland Revenue* 1975 (4) SA 177 (A) the Appellate Division was once again faced with the issue of whether proceeds from the sale of immovable property were capital or revenue in nature and whether there was a change in intention. The court held that the original intention of the taxpayer is important but not conclusive and the court will look at the totality of facts in considering whether the taxpayer was involved in a scheme of profit-making. This would take into account –

- the intention of the taxpayer at the time of purchase and sale of the asset;
- the objects of the taxpayer as a company;
- the activities of the taxpayer in respect of the land up to the time of sale either in whole or in part; and
- where land was subdivided; the planning, extent, duration, nature, degree, organisation and marketing operations of the enterprise.

On the facts before it, the court found that the taxpayer had done more than merely realising an asset as the best advantage. The taxpayer had crossed the Rubicon and had gone into the business of township development, construction and sale. The court further held that generally whether the taxpayer had crossed the Rubicon was a question of degree and a taxpayer's property dealing with one property cannot automatically extend to every transaction of the taxpayer, as every transaction must be considered on its own merits.

In *African Life Investment Corporation (Pty) Ltd v Secretary for Inland Revenue*

1969 (4) SA 259 (A) and *Commissioner for Inland Revenue v Nussbaum* 1996 (4) SA 1156 (A), the court made it clear that where a taxpayer has a main and secondary purpose, equal weight will be given to both purposes. These purposes will be evaluated considering the totality of circumstances to determine their capital or revenue nature. A secondary purpose does not mean a subordinate purpose.

A summary of the position in our law

From the above it is clear that when determining a taxpayer's gross income, only income of a revenue and not of a capital nature will be included in the taxpayers' gross income calculation. Income is of a revenue nature when it is the result of a gain made by operation of business in carrying out a scheme of profit-making, having been designedly sought and worked for by the taxpayer and is not fortuitous. This is determined by evaluating the taxpayers stated intention against objective factors to determine whether they support or disprove of the taxpayers stated intention. As everyone is entitled to realise their investment asset to best advantage, the mere sale of an asset at a profit is not enough to indicate a scheme of profit-making and a special act is required to convert an asset from a capital to a revenue asset. Furthermore, although the original intention of the taxpayer is important in this inquiry it is not conclusive, as the court will look at the totality of facts. Where there is a main and secondary purpose, both purposes will be evaluated considering the totality of circumstances to determine their capital or revenue nature.

Final remarks

A finding of whether a receipt or an accrual from the sale of immovable property is capital or revenue in nature in calculating a taxpayer's gross income can have different financial implications for the taxpayer and its cash flow. This can often be the determining factor of whether the taxpayer can weather the current financial climate, especially for those taxpayers struggling to get by. Consequently, it is imperative that before any decision to sell immovable property is taken, due consideration must be had to the tax implications of such a transaction. One such consideration being whether the resulting profits would be subjected to tax by Sars as part of the taxpayer's gross income or capital gains tax calculation in determining the taxpayer's taxable income.

Lulama Lobola BA LLB (UCT) is currently an LLM (Tax Law) candidate and a legal practitioner at Gunston Strandvik Attorneys in Cape Town.



Is the remission of jail sentences constitutionally unfair?

Picture source: Gallo Images/Getty



By
Brenda
Wardle

Apologies, if I come across as treading down the path of deliberative discourse, but one cannot ignore topical and emotive considerations. The first, evidenced by the epideictic rhetoric of Reverend Al Sharpton, when he called on the United States (US) aggressors to 'Get your knee off our necks'. His call resonated all across the globe.

And, while President Cyril Ramaphosa joined the condemnation of George Floyd's murder, in South Africa (SA), we were haunted by the brutality and savagery of the murder of Collins Khosa; we have had to witness, in recent years, fines being levied against the homeless; we were repulsed by the Marikana mur-

ders and we shuddered when a video of a naked man being evicted from his shack, went viral. All this in a country with a Bill of Rights and a supreme Constitution. Yet, in this, the most unequal society in the world, decades after Apartheid, the lives of South Africans appear to mean very little to some.

However, this article is not aimed at dealing with the socio-political ills in the country, which are inextricably intertwined with the law. Instead, I will examine, the unequal treatment of one of the most vulnerable groups in society – those who, are in conflict with the law and the extension to them, by the President, of amnesty and 'mercy', pursuant to the provisions of s 84(2)(j) of the Constitution.

In the introductory paragraphs, I commenced by alluding to aggression and indignity suffered at the hands of the state – for, it is only in that specific context, that we might best interrogate the subject matter of this article. At the core of the arguments advanced herein, is the violation of the right to equality and equal benefit of the law; the violation of the right to a fair trial, enshrined in s 35(3)(n) of the Constitution, *to wit*, the right to the benefit of the least severe of the prescribed punishments, if the punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.

The Constitutional Court (CC) in *Phaahla v Minister of Justice and Correctional Services and Another (Tlhakanye as Intervening Party)* 2019 (7) BCLR 795 (CC) held that release on parole, related to ‘punishment’ as envisaged in s 35(3)(n) of the Constitution and that consequently, when determining which parole regime finds applicability, the date of the commission of the offence and not the date of conviction or sentencing, ought to be the primary consideration. By parity of reasoning, I argue herein, that the granting of amnesty falls squarely within the provisions of s 35(3)(n) of the Constitution as it is interwoven with the sentence an offender ultimately serves. In *Paahla*, s 136(1) of the Correctional Services Act 111 of 1998, was declared invalid, as the court held that it violated the right to equality, enshrined in s 9 of the Constitution.

It, therefore, does not matter whether we –

- are guided by the doctrine of *stare decisis*;
- place reliance on the Supremacy Clause in our Constitution;
- use the interpretive principle of constitutional avoidance;
- argue that the principle of legality ought to be the determinant; or
- prefer the Rule of Lenity (a principle of statutory interpretation, where the person interpreting legal provisions, which are vague, contradictory or ambiguous, is called upon to interpret in a manner that is most favourable to the accused) as a canon or a rule of substantive law, for, in the ultimate analysis, the actions herein complained of – are unlikely, were they to be subjected to judicial scrutiny, to pass constitutional muster.

Any attempt to interpret legislation, which has the potential of alleviating the plight of prisoners, does not always garner the needed objectivity. It was after all, Hunter S Thompson, who said that: ‘In a closed society where everybody’s guilty, the only crime is getting caught. In a world of thieves, the only final sin is stupidity.’ And, as many a Humpty Dumpty would confirm, immediately the

tag of ‘criminal accused’ lands, nothing – neither the presumption of innocence doctrine, nor an acquittal, will remove the stench of ‘guilt’.

On 16 December 2019, President Ramaphosa, granted a 24-month special remission of sentence, to certain categories of offenders in celebration of Reconciliation Day. Included among the categories who qualified for the said remission, were those who were or would have been incarcerated or serving sentences within the system of Community Corrections, on 16 December 2019.

In *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC) a salient feature of remissions became quite evident from the judgment and that is that inherent in the powers to grant ‘wholesale’ remissions of sentences, is the potential/risk that there will be persons on either side of the cut-off line, who would be excluded. Furthermore, the CC remarked *obiter* that the mere fact that the President acted in a *bona fide* manner, did not necessarily mean that the discrimination was unfair, as was alleged by Hugo.

I argue vehemently that the President unfairly discriminated against the following categories of offenders:

- Those who had been convicted for qualifying crimes, but who were still un-sentenced on 16 December 2019 and reliance for this is placed on the clear and peremptory provisions of s 35(3)(n) of the Constitution and the decision in *Paahla*.
- All persons on trial for qualifying offences, which had been committed prior to 16 December 2019, but whose criminal trials were yet to be concluded.
- All remand detainees detained within correctional centres, for qualifying offences, committed prior to 16 December 2019, including those who had contravened their bail conditions but who had been apprehended prior to 16 December 2019.

In terms of the Circular 13 of 2019/20, issued by the Department of Correctional Services, two specific categories (among others), qualified for the said remission of sentence, namely –

- those offenders who had escaped or absconded prior to 16 December 2019 and who were apprehended and identified as such, prior to 16 December 2019; and
- those offenders or probationers who were sentenced before 16 December 2019, who had been released on bail pending appeal and who would report to correctional centres, after 16 December 2019, in order to serve their sentences.

A simple comparison to make, is the one between an escapee and absconder on the one hand, who had been arrested

for a qualifying offence prior to 16 December 2019, and one who contravened bail conditions for a ‘qualifying offence’ and was apprehended prior to 16 December 2019, on the other. It ought to be borne in mind that the situation of the absconder and the escapee is more serious, as the prescribed penalties for absconding or escaping are more onerous (a period not exceeding ten years’ imprisonment, with or without the option of a fine) as opposed to three months’ imprisonment with or without the option of a R 300 fine, reserved for those guilty of contravening s 72(4) of the Criminal Procedure Act 51 of 1977 (CPA) and 12 months’ imprisonment for the contravention of s 67A of the CPA. In the case of the latter category, I argue that the ‘right’ to the amnesty would be held in abeyance, until the accused, is subsequently convicted.

On 9 April 2020, the Minister of Justice and Correctional Services, published directions pursuant to the provisions of the reg 10(2)(a), issued under s 27(2) of the Disaster Management Act 57 of 2002, to address, combat and prevent the spread of COVID-19 at all correctional centres and remand detention facilities in SA. Paragraph 3 thereof, deals with the referral of remand detainees to court for review of bail and consideration of length of detention, in a bid to assist with the reduction management of remand detainees. According to Professor Lukas Muntingh, co-founder and Project Coordinator of Africa Criminal Justice Reform there are currently approximately 163 000 inmates in South African correctional centres, 48 000 of which, are remand detainees.

The length of detention policy of the Department of Correctional Services, ordinarily kicks in at the 21-month mark. At that point, it is the duty of the department to refer those inmates who had reached that milestone, back to their respective trial courts, for a review of bail, prior to the expiry of the 24-month period. The extent to which this happens, including the extent to which there has been compliance with the minister’s direction, remains to be either quantified or seen.

It is of course indeed so that the United Nations High Commissioner, Michelle Bachelet, urged countries to reduce the number of people in detention, especially low-risk offenders, the vulnerable, the elderly and those who have health issues saying that ‘physical distancing and self-isolation in such conditions are practically impossible’.

And prior to the reader assuming that I have gone off on a discursive trajectory, the reason I deal with the responses to the COVID-19 pandemic, is premised on the fact that on 27 April 2020, President Ramaphosa, acting in terms of s 84(2)(j)

of the Constitution, read together with s 82(1)(a) of the Correctional Services Act, authorised the advancement of release dates, by 60 months for certain categories of qualifying offenders, who were or would have been incarcerated on 27 April 2020.

This time, however, those who are out on bail pending appeal, did not qualify for the said remission. So, over and above the categories, listed in the bullet points in the earlier paragraph, there is a further or additional category of persons, who too, have been unfairly discriminated against.

The President thus fails where it comes to the rationality requirement of the decision-making process. In fact, DCS Circular 10 of 2020/21, published pursuant to the president's act of 27 April 2020, is contradictory and thus void for vagueness, as in the one breath, it refers to those qualifying offenders who are or would have been serving sentences on 27 April 2020 (clearly an oft-repeated provision in all amnesties, including those granted from the era of former President Nelson Mandela going forward, and no doubt, a provision, which had routinely been included, in order to give effect to the right enshrined in s 35(3)(n) of the Constitution), yet within the same circu-

lar, and I suspect that similar provisions were included in the Presidential Act, as well, it excludes from the benefit, those who were out on bail pending appeal on 27 April 2020, as alluded to *op cit*.

By way of example, anyone who was sentenced to a straight ten-year, custodial term for a qualifying offence, on 26 April 2020, would, on 27 April 2020, qualify for placement on parole (once programmes and other pre-release requisites had been met), as placement on parole would, ordinarily, have occurred at five years (half sentence). Again, those who were convicted prior to 27 April 2020, but who awaited sentencing on the said date, would not qualify. Such discrimination is unfair and irrational, to say the very least. What the President did with this, was to cut across the rights to equality, the right to equal benefit of the law, the rights to a fair trial, and perhaps too of the said excluded categories to have their right to legitimate expectations, protected.

How this will be remedied, is something that I cannot answer. The easiest way would of course be by way of review proceedings against the President in the High Court but, that is a battle for those who are readily heard, to pursue.

For now, though, I conclude emphati-

cally that the granting of remission by the President, pursuant to the provisions of s 84(2)(j) of the Constitution, has the effect of violating the right to equality and equal benefit of the law as well as the right to the least severe of two punishments.

Where COVID-19 is concerned, the virus does not discriminate between sentenced and un-sentenced inmates and a concerted effort ought to have been made timeously (albeit rather late than never), to ensure that the prison numbers are reduced considerably, while ensuring that members of the public are not placed at risk. The review by courts of bail, ought to be prioritised, but nowhere else is inequality more rampant than within the criminal justice cluster, where some are penalized at the receiving end of unfair decisions.

Brenda Wardle *Intermediate Degree Qualification in Criminal Justice LLB LLM (Unisa)* is a Doctoral Research Proposal in Law candidate and the Chief Operations Officer at the Wardle College of Law (Pty) Ltd in Johannesburg. □

Because we know
**winding up
an estate**
has nothing to do with **clockwork!**

We speak your language when it comes to insurance.

Our skilled team can make winding up an estate go like clockwork! **We also specialise in Trustee, Executor and Liquidation Bonds, as well as related Asset insurance needs.** Visit our website for more information or contact your broker.

CourtBonds@hollard.co.za

www.hollard.co.za/business-insurance/specialist-sector-insurance/court-bonds

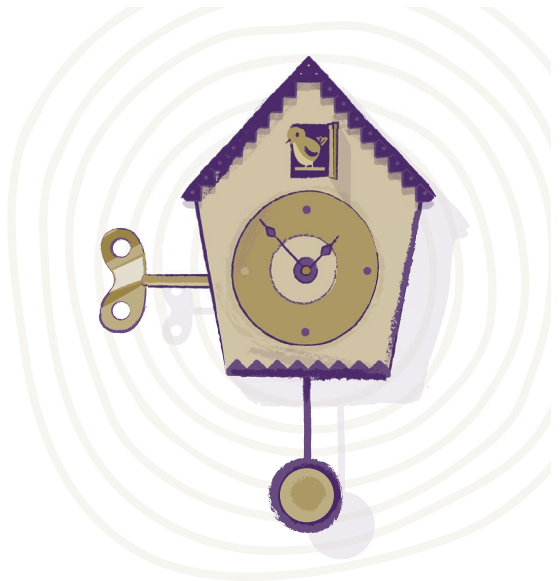
Chris Troskie cell no.: +27 82 560 5427 | Brett Hanington cell no.: +27 82 418 9473

home • car • business

Underwritten by The Hollard Insurance Company Limited (Reg. No. 1952/003004/06), a Licensed Non-life Insurer and an authorised Financial Services Provider

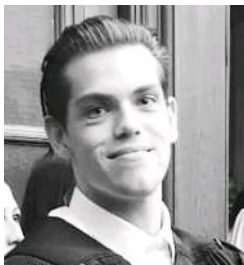
Hollard.

hollard.co.za





South Africa aligning its maritime industry with the globe through the Merchant Shipping Bill, 2020



By
Nicholaas
Kade
Smuts

The South African government aims to bring the Merchant Shipping Bill, 2020 (the Bill) into law with a view of aligning the South African maritime industry with that of the international markets by promoting inclusive growth, by prioritising local industry, while meeting its international obligations as a party to various bilateral, multilateral agreements and duly adopted conventions.

Pleasure crafts are watercrafts that are used for personal recreation and naval ships are used for military purposes. These contrast with a merchant ship, merchant vessel, trading vessel, or merchantman, which are watercrafts that transport cargo or carry passengers for hire. Considering the important function of merchant ships, the South Afri-

can government believed that there was a need for the regulation of such transportation.

In 2017, the Comprehensive Maritime Transport Policy (CMTP) was approved as an all-inclusive policy to guide the integrated governance, regulation and development of the ocean economy, and in particular the maritime transportation in South Africa (SA). Currently, all merchant shipping and matters incidental thereto are governed by the Merchant Shipping Act 57 of 1951 (the Act). Keeping in line with the aims of the CMTP, the Act will soon be repealed by the Bill, which aims to address the key issues faced by the maritime industry, which not only affects the international maritime sector, but also the local maritime sector in SA. The Bill aligns with the shipping provisions of the CMTP. The Bill was presented and

discussed by stakeholders in meetings convened nationally by the Department of Transport during 2018 and 2019. The Bill was tabled and approved by the Directors General Cluster of International Cooperation, Trade and Security Cluster and the Economic Cluster.

The Merchant Shipping Bill will be amended to realise the vision of government, which is primarily aimed at reviving the maritime transport sector and enhancing its contribution to the growth and radical transformation of the South African economy. South Africa has typically been regarded as having the potential to become an essential contributor and powerhouse to the international maritime industry. The government's primary course of action in this regard is to align national legislation with various international conventions to which SA is party to as well as the aims of the international community as a whole.

The Merchant Shipping Bill aims to –

- provide for the powers and duties of the minister and the South African Maritime Safety Authority in the administration of the Act;
- provide for the registration and licensing of ships in South Africa;
- provide for the application of the prevailing labour laws to seafarers, the conditions of employment of seafarers and the health and well-being of seafarers on board vessels;
- promote the safety of life at sea and to establish inspection and enforcement mechanisms, including those for marine casualties and crimes committed on ships;
- provide for the regulation of marine traffic and for legal proceedings and jurisdictional matters; and
- recognise and incorporate international conventions to which SA is bound in terms of the provisions of the Constitution and ensure its incorporation into law in terms of laws repealed by the Act.

Once approved the Bill aims to effectively amend and repeal several related marine laws including the following –

- repeal the Act;
- repeal the Marine Traffic Act 2 of 1981;
- repeal the Ship Registration Act 58 of 1998;
- amend s 1 of the National Ports Act 12 of 2005; and
- repeal Annexure 1 of the Ports Rules GN255 GG31986/6-3-2009.

It is, therefore, anticipated that a more than 400-page document is likely to draw significant comment from a wide spectrum of industry sectors ahead of the promulgation process.

Despite the attendance at the Johannesburg and Cape Town sessions being low, some stakeholders say that the document deserves significant scrutiny

and question whether it will pass in its current form.

Some concerns have been raised regarding the aim of government to boost future economic growth underpinned by an inclusive maritime sector warning that legislation should not be drafted at the expense of the nation and with narrow interests in mind.

The government believes that SA needs to play a bigger role in shipping transport in terms of its exports and imports, emphasising the need for additional tonnage on the South African ships' registry.

To this end, the Bill seeks to re-integrate the Ship Registration Act and provides for a number of new provisions in this regard including:

- The Chief Executive Officer of the South African Maritime Safety Authority will become the Ships' Registrar.
- The introduction of a tonnage based ship registration fee system.
- Mortgage as a security for a loan.
- Mortgagee will not be deemed the owner of the ship.
- Mortgagee has absolute power to dispose of the ship or share subject to a limitation where there must be concurrence with other mortgagees.

Coastal shipping

The Bill states: 'No ship, other than a South African owned ship ... , is permitted to engage in coastwise traffic' for the conveyance of goods between ports in SA. It further states that ships engaged in coastal shipping need to apply for a licence to do so and that this licence will be issued for a period of ten years.

If and when the Bill in its current form comes into effect, foreign vessels will need to choose one port of call in SA to offload all cargo destined for SA irrespective of its ultimate destination within the country. The government believes that this will help stimulate opportunities for local ship owning along the country's coast – and ultimately within the region of the Southern Africa Development Community.

Ultimately this means that cargo may not be transhipped via a coastal shipping network and may end up being diverted to trucks and rail for onward moving. The government has conceded that more studies relating to the implications for ports and logistics will need to be undertaken to ensure adequate planning in this regard – and highlights that a cabotage regime could only be fully implemented over a number of years.

Concerns have been voiced regarding further bureaucracy and market hurdles which may ultimately deter international markets and destroy local ports despite the 'good intentions' on the part of the state.

Seafarer employment

Another section of the document that will most likely receive significant scrutiny is the chapter relating to seafarers. Given the global nature of the shipping sector, provision for seafarers to access the Commission for Conciliation, Mediation and Arbitration and the Labour Court, as well as the legal right to strike will draw some comment from industry.

Some discussion in this regard has already taken place highlighting a few grey areas that will necessarily need to be addressed in terms of wording specifically relating to discipline and offences.

Promulgation

The Bill was published in GenN148 GG43073/6-3-2020. All interested persons were requested to submit their written comments in connection with the draft Bill within 60 days (ie, by 5 May 2020), and was extended on 6 July 2020 for an additional 30 days from the date of the publication of the notice in the *Government Gazette*. Stakeholder and public meetings in this regard were scheduled to be held in March 2020, however, these meetings had to be postponed due to the lockdown regulations caused by the COVID-19 pandemic. The initial deadline had been extended to the end of May 2020 (for public consultation) and to the end of June 2020 (for members of the Maritime Law Association of South Africa).

These comments will be reviewed over the period of one month after the submission deadline and the revised Bill, along with the comments, is likely to be sent to the state advisers by the end of June. The advisers will have at least 40 days to consider the revisions and the comments before the document is passed on to the Director General Cluster and finally to Cabinet. The Bill will likely only be tendered to Parliament in early 2021.

Considering the broad ambit of the Bill that aims to repeal three previous Acts in full, the industry will have to mobilise effectively to ensure that the final product meets the needs of current and the future potential landscape envisioned for the maritime industry (<http://maritimereview.co.za>, accessed 2-12-2020).

Nicholaas Kade Smuts LLB (Unisa)
LLM Shipping Law (UCT) is a legal
practitioner in Cape Town. □



Do regional courts have jurisdiction to order an assessment of parties by an expert in post-divorce proceedings?



By Danie
van der
Merwe

The question addressed herein is whether the regional court has jurisdiction to – post-divorce, on the substantive application of a party to the divorce – order the parties and minor child born of the marriage (and in respect of whom the other party has been awarded the primary care and residence in the divorce order), to submit themselves to be assessed by an expert with the view of obtaining evidence in support of the applicant's quest to have the child's primary care and residence be awarded to him.

This question was answered in the positive by the Western Cape Division of the High Court, in an appeal from the regional court in the matter of *S v K* (WCC) (unreported case number A162/2019, 25-10-2019) (Baartman J (Parker J concurring)).

The facts relevant to the issue decided on appeal, can be summarised as follows:

- S and K were married to each other and a minor child, M was born of the marriage. The marriage ran into trouble and they were divorced, the order incorporated a deed of settlement, which extensively dealt with the care and residence of S and K's rights pertaining to M.
- M's primary care and residence were awarded to the mother S, subject to, *inter alia*, K's rights of access. Some years after the divorce K launched motion proceedings in the regional court for the variation of the decree of divorce and sought to be awarded M's primary care and residence. The application was opposed and was later referred to trial.

After the matter was referred to trial, K launched a substantive application in the regional court seeking the following relief relevant to this article:

- Dr V be appointed to specifically conduct a forensic assessment in respect of the minor child M, as well as the parties, the paternal grandparents, the maternal grandfather and the minor child's minor half-brother E.
- Dr V investigate the best interest of M with specific reference to the allegations of sexual abuse, primary residency and contact rights in respect of the non-resident parent.
- Dr V provide the court with a written report of his findings and recommendations.

S opposed the application on the basis

of the regional court's lack of jurisdiction to grant the relief, on the following grounds:

- The regional court was not the upper guardian of the minor M and is not vested with inherent jurisdiction as relied on by K.
- The regional court as a creature of statute was not enjoined to order the parties and the minor M to submit themselves to the assessment post-divorce as requested.
- The court had no jurisdiction to make orders against parties that were not before it.

The minors' legal representatives, appointed in terms of the Children's Act 38 of 2005 and read with the Constitution, agreed with K that the regional court was enjoined with jurisdiction to grant the relief sought in terms of the application. The regional court found in favour of K on the issue of the regional court's jurisdiction.

The appeal to the Western Cape Division of the High Court in Cape Town was dismissed. The judgment did not discuss or deal with the regional court's jurisdiction in respect of persons not joined in the proceedings and by necessary implication, found that the regional court was in fact enjoined with jurisdiction in respect of the non-parties relevant to the application before the regional court. In this regard the court clearly erred and the judgment in this regard does not deserve any further discussion.

In respect of the question whether the regional court is in principle enjoined with jurisdiction to order parties and mi-

nor children post-divorce to be assessed by an expert in an application as described above, the court found at para 7:

'The application to vary the divorce order in respect of the care and contact of the minor child is authorised in terms of the Divorce Act [70 of 1979]. The regional court is a court for purposes of the variation application. It follows that the application for variation is properly before the regional court. The application to order a forensic investigation is an application ancillary to the variation application and therefore authorised in terms of section 8 of the Divorce Act' and at para 9:

'The regional court, unlike the children's court, is a court for purposes of section 8 of the Divorce Act. As indicated above, the regional court may entertain the variation application and the application under discussion is ancillary thereto. It follows that the regional court has jurisdiction to entertain the application. Any court dealing with an application involving a minor has the obligation to ensure that the best interest of the minor is served. The merits of the application will determine whether any relief should be granted'.

Discussion

The regional court, being a creature of statute and being an entirely separate court than the High Court, is exercising wholly distinct jurisdiction and it is only afforded the powers provided for the Divorce Act 70 of 1979 and the Magistrates' Courts Act 32 of 1944 and read with the Rules regulating the Conduct of the Proceedings of the Magistrates' Courts (see *MC v MJ* (GJ) (unreported case number A3076/2016, 28-3-2017) (Modiba J (Carelse J concurring)) and *SW v SW and Another* 2015 (6) SA 300 (ECP) at para 22).

It has no inherent jurisdiction as does the High Court (and in particular as the upper guardian over every minor child (*Narodien v Andrews* 2002 (3) SA 500 (C) at 515G-I).

A magistrate's court for a regional division has by virtue of the provisions of s 2(1) of the Divorce Act jurisdiction in a 'divorce action'. 'Divorce action' has been defined in the Divorce Act to mean '... an action by which a decree of divorce or other relief in connection therewith is applied for, and includes –

(a) an application *pendente lite* for an interdict or for the interim custody of, or access to, a minor child of the marriage concerned or for the payment of maintenance; or

(b) an application for a contribution towards the costs of such action or to institute such action, or make such application, in *forma pauperis*, or for the substituted service of process in, or the edictal citation of a party to, such action or such application' (my italics).

The word 'action' in the definition of 'divorce action' has, save where specific reference is made to an application, it is submitted, the narrower meaning of proceedings initiated by summons.

Section 29(1B)(a) and (b) of the Magistrates' Courts Act 32 of 1944 read as follows:

'(1B)(a) A court for a regional division, in respect of causes of action, shall, subject to section 28(1A),

have jurisdiction to hear and determine suits relating to the nullity of a marriage or a civil union *and relating to divorce between persons and to decide upon any question arising therefrom*, [ie, the questions arising from a suit relating to the divorce action] and to hear any matter and grant any order provided for in terms of the Recognition of Customary Marriages Act, 1998 (Act No 120 of 1998).

(b) A court for a regional division hearing a matter referred to in paragraph (a) shall have the same jurisdiction as any High Court in relation to such a matter' (my italics).

The meaning of the word 'suits' in s 29(1B)(a) of the Magistrates' Courts Act corresponds with the words 'divorce action' in s 2(1) of the Divorce Act.

Section 2 of the Divorce Act read with the definition of 'divorce action' provides that a court with jurisdiction to grant a decree of divorce in terms of s 2 also 'has jurisdiction to make orders in respect of matters ancillary and preliminary to that divorce action' (*SW v SW and Another* 2015 (6) SA 300 (ECP) at para 18; *Green v Green* 1987 (3) SA 131 (SE) at 134D)).

An order for the referral to assessment post the granting of a final decree of divorce is not a matter ancillary and preliminary to the 'divorce action' that had been resolved by means of a final decree of divorce.

On a proper interpretation of s 29(1B)(a) of the Magistrates' Courts Act the Regional Court's jurisdiction to 'decide upon any question arising therefrom' was meant, with specific reference to the use of the comma before the word 'and' in the phrase 'and to hear any matter and grant any order provided for in terms of the Recognition of Customary Marriages Act, 1998 (Act No 120 of 1998)', to refer to 'questions' that may arise during the divorce proceedings, and not to issues that may arise post-divorce in substantive proceedings, for example as *in casu*, where a variation of the divorce order pertaining to the primary care and residence of a minor child is being sought.

The relief pertaining to the assessment of the relevant persons as sought in terms of the application does not relate to a divorce suit or a question arising therefrom, but is in respect of a process provided for in s 8(1) of the Divorce Act, and hence does not fall within the

ambit of s 29(1B)(a) or (b) of the Magistrates' Courts Act.

The powers of the regional court to deal with issues related to a divorce matter post the order of divorce is regulated by s 8(1) of the Divorce Act, which provides as follows:

'A maintenance order or *an order in regard to the custody or guardianship of, or access to, a child, made in terms of this Act*, may at any time be rescinded or varied or, in the case of a maintenance order or an order with regard to access to a child, be suspended by a court if the court finds that there is sufficient reason therefor' (my italics).

The regional court's jurisdiction in respect of actions for divorce (and any question arising therefrom) on the one hand and its jurisdiction in respect of the variation of divorce orders previously granted on the other, are derived from different statutory provisions: In respect of divorce action or divorce suits and questions arising therefrom, it is s 29(1B)(b) of the Magistrates' Courts Act read with s 2(1) of the Divorce Act. In respect of the variation of existing maintenance and custody orders pursuant to an existing regional court divorce order, it is s 8(1) of the Divorce Act.

Neither the Divorce Act and the Magistrates' Courts Act nor the Magistrates' Courts Rules enjoin the regional court with the jurisdiction to order that the minor child who is the subject of litigation in terms of s 8(1) of the Divorce Act, the parties to the litigation or non-parties to the litigation, as envisaged in the relief sought *in casu*, shall subject themselves to an assessment with the view to amending an existing custody order (see also: *Davy v Douglas and Another* 1999 (1) SA 1043 (N)).

The Children's Act also does not give the regional court the jurisdiction to order the assessment of a child, the parents, grandparents or siblings.

Conclusion

The regional court lacks jurisdiction to order an unwilling parent and the parties' minor children post-divorce to subject themselves to be assessed for purposes of obtaining a variation of an existing order pertaining to the primary care and residence of such minor children, and I submit that the Western Cape High Court's decision in *S v K* on appeal to the contrary cannot be supported.

Danie van der Merwe Bluris (UFS LLB (Unisa) LLM (NWU)) is an advocate at the South Cape Society of Advocates in George and was counsel in the above matter. □



Taking your slice of the shareholder pie: A discussion on authorised and issued shares



By
Nomathamsanqa
Nkomo

Authorised shares in a company are the maximum amount of shares that the company is authorised by its memorandum of incorporation (the MOI) to issue to shareholders. The company's board may increase or decrease the number of authorised shares to the extent provided by the MOI. Authorised shares have no rights associated with them until they have been issued. On the other hand, issued shares are units of ownership already issued to shareholders. A record of issued shares must be kept at the company's registered office. The difference between the two is that authorised shares are still in the possession of the company and issued shares are in the possession of the shareholders.

Issuing unauthorised shares or exceeding number of authorised shares

If a company issues shares that are not authorised or exceeds the number of authorised shares of any particular class, in terms of s 38(2) of the Companies Act 71 of 2008 (the Act), the board of directors may retroactively authorise such an issue within 60 business days of 'issue'. If the resolution to retroactively authorise is not adopted, the share issue is void to the extent that it exceeds the authorised share capital. In such scenarios the company must return any money received plus interest in respect of the void share issue. If any certificate was issued and if any entry was made in the securities register in respect of the nullified issue, it is void. A director who was present in the board meeting and failed to vote against the issue of an unauthorised share is liable for any damages or costs sustained by the company.

The concept of par value

Following the abolition of the concept of par value, all shares issued after 1 May 2011 subject to sch 5 of the Act do not have a nominal or par value, meaning that there is no standard value attached to the shares. This then raises the question on what happens to shares which were authorised or issued with par or nominal value before 1 May 2011. If a pre-existing company has any authorised class of par value or nominal value shares, which it has not issued before the effective date (1 May 2011) or which it has issued before the effective date but has reacquired them before the effective date, the board has to convert those shares to shares having no nominal or par value. This is done by way of adopting a board resolution and filing a notice of the resolution.

However, in instances where the pre-existing company has any outstanding issued par value or nominal value shares, the company may not increase the authorised shares but may issue further authorised shares of that class even after the effective date until such time as it publishes a proposal of conversion. For example, if the company had authorised 1 000 ordinary shares with a par value of R 1 each, of which 200 shares had been issued, the company may continue to issue the remaining ordinary shares (in this case 800 shares). It may do so until it exhausts the number of authorised shares (1 000 authorised shares) even after the effective date.

Can shareholders claim for diminution of share value?

A company is a separate legal entity, which is distinct from its owners. This means that where a wrong is done to a company, the company may sue for damage caused to it and it may also be sued for the wrong it does. When a company suffers loss due to a wrongful act perpetrated against it, this also affects shareholders as the value of their shares is diminished. A question then arises on whether a shareholder can claim from the act of a wrongdoer towards a company? A good starting point to answer this question is to revisit the rule against claims by shareholders for 'reflective loss'. Reflective loss is a principle of company law, which states that a shareholder does not have a direct cause of action against the wrongdoer but the company alone has a right of action. This principle was observed by the House of Lords in *Johnson v Gore Wood & Co (a firm)* [2001] 1 All ER 481 where Lord Bingham observed:

'Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder

suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss. ...

Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding. ...

Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other'.

From the above submission one can deduce that the reflective loss principle avoids 'double jeopardy' and 'double compensation'. If both the company and the shareholder were given the right to recover, the wrongdoer would suffer double jeopardy and the shareholder will receive double compensation. Thus, a shareholder cannot sue in instances where the company has a cause of action against the wrongdoer. However, this does not totally rule out a shareholder from suing a wrongdoer for the diminishing of the value of shares as there are instances in which such a claim can be brought. These are –

- when a company suffers loss but has no cause of action against the wrongdoer but the shareholder has a cause of action; and
- when a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss resulting from the breach of duty owed to it which is separate and distinct from the loss of a company, each may sue to recover the loss caused to it but cannot recover loss caused to the other.

In the case of *Hlumisa Investment Holdings RF Ltd and Another v Kirkinis and Others* 2020 (5) SA 419 (SCA) the Supreme Court of Appeal (SCA) had to decide whether s 218(2) of the Act establishes a claim by a shareholder in relation to the diminution in the value of shares, due to misconduct by directors. The provision states that '[a]ny person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention'.

The appeal also dealt with the viability of a shareholder's claim based on a diminution in share value due to alleged misconduct by auditors in auditing the company's financial statements. The appellants (shareholders) alleged that the directors were in breach of s 76(3) of the Act as they failed to exercise their powers in good faith and in the best interests of the company, which resulted in significant losses to the company causing share prices to drop. The SCA referred to New Zealand legislation that is 'Companies Act, 1993 (New Zealand)'. The legislature of New Zealand articulated that shareholders can only bring an action in cases where there is a duty owed to them. Its legislation set out duties of directors that are owed to shareholders and not the company, and conversely, those owed to the company and not to the shareholders.

These provisions clearly show that the legislature determined where liability should lie for conduct by directors in contravention of certain sections of the New Zealand Companies Act and who could recover the resultant loss. The appellants relied on s 76(3), which is a duty owed by the directors to the company and not to shareholders. Holding shares in a company merely gives shareholders the right to participate in the company on the terms of the MOI, which rights remain unaffected by a wrong done to the company and a claim by a shareholder to the wrongdoer of a company is misconceived.

In conclusion, shareholders cannot rely on s 218(2) nor s 76(3) of the Act for claims that are purely reflective of a loss suffered by the company. It is not merely the company's existence as a separate legal person that deprives the shareholder of an action against the wrongdoer. What deprives the shareholder of a right of action is the fact that the company has a right to recover damages for the loss it has suffered. In situations where the wrongdoers themselves control the company, an individual shareholder may bring what is known as a derivative action (which is regulated by s 165 of the Act) against the wrongdoer for relief to be granted to the company and the action is being made on behalf of the company.

Nomathamsanqa Nkomo LLB (Unisa) is a junior company secretary at Luvivi Governance Services in Johannesburg.



Protection from unlawful dispossession using the spoliation remedy



By
Mohammed
Moolla

The year 2020 will remain indelibly inscribed on the collective memory of the human race. It was a year of unpredictable developments, unexpected surprises and once-in-a-lifetime experiences. While some of COVID-19's curve balls might have come at us along unprecedented trajectories, some things do not change. Some tenants may conveniently have wanted to evade paying their rent and some lessors – frustrated by the delay with regard to evictions – have wanted to cut off the tenant's

electricity or water. But, before they do something drastic, they should think carefully about their actions.

Spoliation is the wrongful deprivation of another's right of possession. 'The aim of spoliation is to prevent self-help' (*Ivanov v North West Gambling Board and Others* 2012 (6) SA 67 (SCA)). It seeks to prevent people from taking the law into their own hands. The cause for possession is irrelevant.

Our law requires that you approach a court for assistance; self-help is not an option. So if you remove the tenant's access to the leased premises without a court order, you face having to immediately restore possession to the tenant via a 'spoliation order'.

The important thing is that at this stage, the court has no interest in how strong or weak your actual case against the tenant is. That you can fight about in a full court action down the line. All that counts now is how you dispossessed the tenant, not whether you are the owner nor whether you have any legal right to possession.

So to succeed in obtaining a spoliation order, all the tenant has to prove is that –

- they were in 'peaceful and undisturbed possession' (*Kgosana and Another v Otto* 1991 (2) SA 113 (W)), and
- they were 'unlawfully deprived of that possession' (*Lau v Real Time Invest-*

ments 165 CC (GP) (unreported case no 50134/2019, 23-7-2019) (Millar AJ)).

The critical question here is whether or not the tenant consented – freely and genuinely – to the dispossession. If so, the dispossession was lawful. If not, it was unlawful. Thus spoliation 'may take place in numerous unlawful ways. It may be unlawful because it was by force, or by threat of force, or by stealth, deceit or theft' – or just without consent (*Stocks Housing (Cape) (Pty) Ltd v Chief Executive Director, Department of Education and Culture Services, and Others* 1996 (4) SA 231 (C)).

In *Lau* an Internet café business owner was locked in a dispute with her landlord over its method of electricity billing. The landlord's response was to first cut the electricity to the premises, then to change the locks. After trying – without success to resolve the dispute – the tenant applied for a spoliation order. The landlord did not dispute that the applicant was in possession of the premises, nor that he had dispossessed her with neither consent nor court order. What the landlord did argue was that –

- the tenant's application was not urgent;
- the application should have been brought before the magistrate's court and not the High Court; and

- it was really not about spoliation, but about the tenant trying to enforce her rights in terms of the lease.

Rejecting all these contentions, the court held that the landlord had committed two separate acts of spoliation –

- the first, when the landlord disconnected the electricity supply thus denying the tenant use of the premises – ‘a limitation of her rights as a possessor’, and
- the second, when the landlord changed the locks to the premises, thus dispossessing her entirely.

The end result – the landlord had to pay all costs, immediately restore possession of the leased premises to the tenant, and immediately re-connect the electricity.

If a landlord takes the law into their own hands and cuts off the electricity supply, the tenant has the right to apply to court for a spoliation order showing that the tenant’s possession of the leased property was unduly interfered with or disturbed.

The *mandament van spolie*, or ‘spoliation order’ is a common-law remedy. Its purpose is to promote the rule of law and to serve as a shield against cases of ‘self-help’, where parties take the law into their own hands and exercise ‘power’, which they do not have (www.ee.co.za, 3-12-2020).

In *Eskom Holdings SOC Ltd v Masinda* 2019 (5) SA 386 (SCA) the court held at paras 24 and 25:

‘In seeking restoration of her electricity supply, Ms Masinda’s claim could hardly have been more terse. She said no more than that Eskom’s officials had unlawfully disconnected the supply of electricity to her house and the prepaid meter, and asked that it be reconnected to the national grid. There was no attempt to show that such supply was an incident of her possession of the property. She relied solely upon the existence of the electrical supply to justify a spoliation order. In the light of what is set out above, this was both misplaced and insufficient to establish her right to such an order.

In addition, there is the common-law cause fact that Ms Masinda purchased her electricity on credit through the prepaid system, which I have described. In these circumstances, her right to receive what she had bought flowed, not from the possession of her property, but was a personal right flowing from the sale. Similar to the case in *Xsinet [Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 (5) SA 309 (SCA)], her claim was essentially no more than one for specific performance (and to the limited extent of a supply worth no more than the unused credit still due after her last purchase). This personal, purely contractual, right cannot be construed as an incident of possession of the property. As the *mandament* does

not protect such a contractual right, for this reason too the claim ought to have been dismissed’.

The *Xsinet* case is probably the most comparable to the *Masinda* case as it involved the supply of electronic impulses to Xsinet’s premises, thereby providing the telephone and bandwidth system used by it to conduct its business as an Internet service provider. Telkom disconnected the supply alleging that Xsinet was indebted to it in respect of another service. The court found that it did not accept that the use of the bandwidth and telephone services constituted an incident of the possession of the property, even though the services were used on Xsinet’s premises. The court rejected the contention that Telkom’s services could be restored by the *mandament van spolie* as those services constituted ‘a mere personal right and the order sought is essentially to compel specific performance of a contractual right in order to resolve a contractual dispute’.

No blanket rule can be applied in these matters. Depending on the circumstances, the supply of electricity or water may be recognised as being an incorporeal right of possession, which is capable of protection under the *mandament van spolie*. In the case of *Impala Water Users Association v Lourens NO and Others* 2008 (2) SA 495 (SCA), the respondents obtained a spoliation order for the restoration of water to reservoirs on their farms. The Supreme Court of Appeal (SCA) dismissed the appeal and held that such rights were an incident of possession of each farm and that the *mandament van spolie* was, therefore, available. It is clear that the right to the supply flowed from the exercise of possession of immovable property. South African courts regard the supply of water and electricity as constituting an incident of possession.

In both cases of *Naidoo v Moodley* 1982 (4) SA 82 (T) and *Froman v Herbmere Timber and Hardware (Pty) Ltd* 1984 (3) SA 609 (W) at 610G – 611D the electricity was cut off with a view to forcing the applicants to vacate immovable property. So too with the old famous case of *Nienaber v Stuckey* 1946 AD 1049, wherein the complaint interfered with access to the property and it was the possession of that immovable property that was being protected.

The *Masinda* case is not the same as the lessors who intentionally deprive lessees of possession by taking the law into their own hands by cutting off the electricity because the tenant has not paid.

If the courts were to even allow such a situation we would be opening the floodgates for many lessors to resort to this illegal self-help option of cutting off electricity and water instead of proceeding in terms of s 4(1) and 4(2) of the

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 and will go against constitutional law where no one is allowed to be evicted without a valid court order.

In order to justify a spoliation order, the right must be of such a nature that it vests in the person in possession of the property as an incident of possession. Examples of such rights are those bestowed by servitude, registration or statute. The SCA held in the *Masinda* case that an application for spoliation does not require proof of an applicant’s existing right to property, but rather the possession of the property to grant the relief sought. The SCA also noted that the remedy for spoliation is preliminary to any investigation into the merits of the dispute, in that it provides for interim relief, pending a final determination of the parties’ respective rights. *Mandament van spolie* provides a remedy to protect what is referred to as ‘quasi-possession’ of certain incorporeal rights (see the *Masinda* case).

To determine which of these incorporeal rights may be afforded protection by spoliation, it is essential to assess the nature of the incorporeal right. The rights must flow from the exercise of possession of immovable property to be afforded spoliation protection.

The mere existence of a terminated electricity or water supply in itself is insufficient to consider an incident of possession. The same applies for privatised water and electricity supply. Specific performance of contractual obligations cannot be restored using the spoliation remedy. The mere existence of a supply of services is insufficient to establish a right constituting an incident of possession of the property to which it is delivered. More than a personal right is required to constitute an incident of possession.

As explained above, the person dispossessed of the electricity or water needs more than to argue about being unlawfully disconnected. The right must be of such a nature that it vests in the person in possession of the property as an incident of their possession.

The facts of each case in the incidents of dispossession must be cautiously examined before a spoliation remedy is sought.

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



By Sipho
Tumelo
Mdhuli

Judicial immunity is a common-law concept, derived from judicial decisions. It is a form of protection afforded to judicial officers by public policy in the performance of their duties. One of its objectives is to encourage judges to act in a fair and just manner, without regard to the possible extrinsic harms their acts may cause outside the scope of their judicial work. However, this protection is not at all absolute.

The principle of immunity is universal and has been the reason for the effectiveness of Traditional Courts until the conviction and sentencing of the King of the AbaThembu nation, His Majesty Dalindyebo, in the case of *Congress of Traditional Leaders of South Africa v Speaker of the National Assembly and Others* [2017] 2 All SA 463 (WCC).

Without deciding whether immunity would have covered the actions of His Majesty, it is important to recognise that, there are forms of punishment accepted under customary law, but are not consistent with the Constitution. To leave customary law untouched by legislative intervention would place it in constant conflict with constitutional norms and principles.

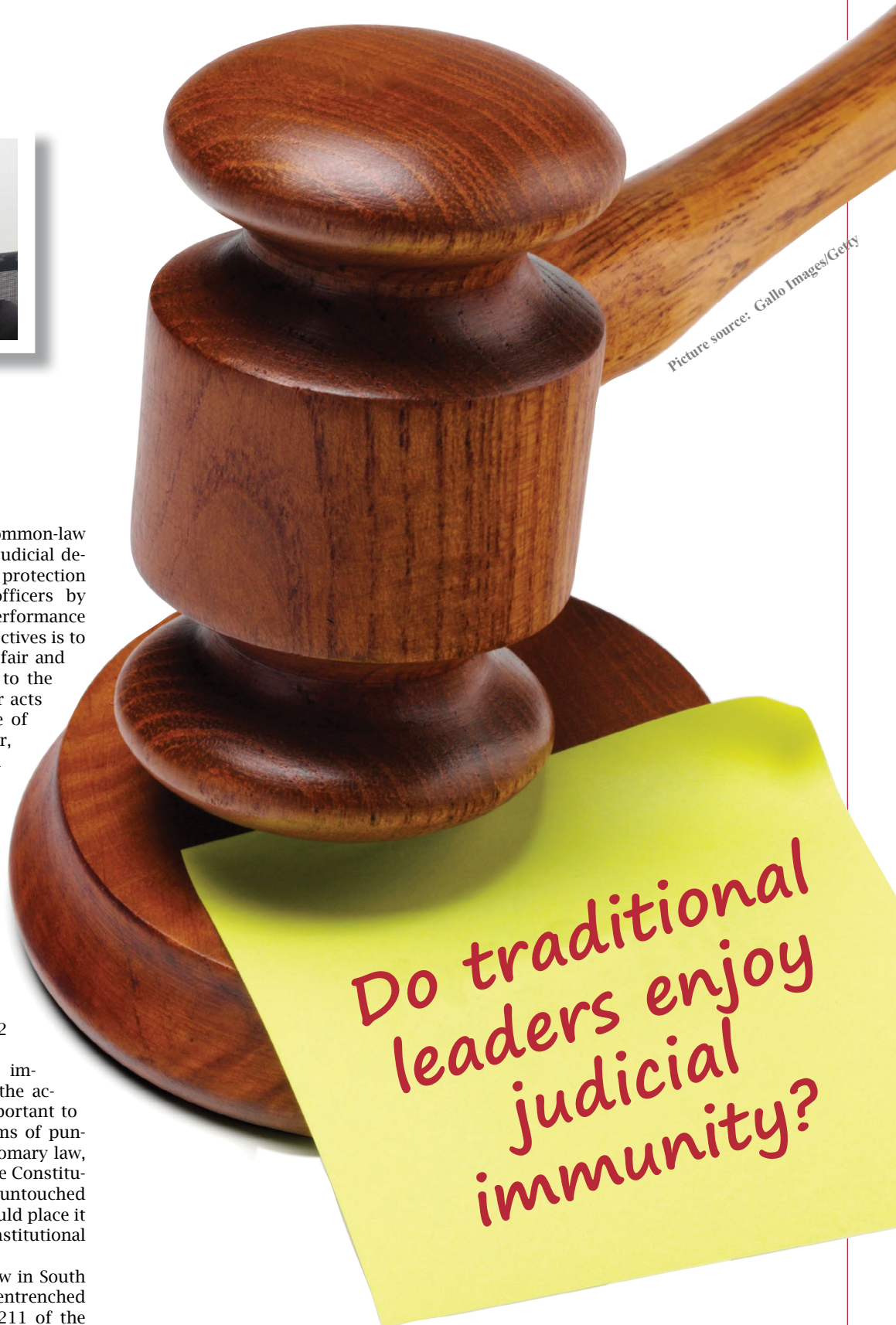
The status of customary law in South Africa (SA) is constitutionally entrenched in the Constitution. Section 211 of the Constitution provides that the institution, status and role of traditional leadership are recognised, subject to the Constitution. It further states that a traditional authority that observes a system of customary law may function subject to applicable legislation and customs, including amendments to or repeal of that legislation and those customs, and that

courts must apply customary law where it is applicable, subject to the Constitution and relevant legislation.

In short, the court has asserted that customary law enjoys a status that demands equal respect, albeit that it is subject to the Constitution. Customary law

must be treated as an integral part of the South African legal system representing an independent source of norms within the legal system (see *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) at para 42).

The Constitution imposes a manda-



Picture source: Gallo Images/Getty

tory duty on Parliament in terms of ss 211 and 212 read together with ss 34, 38 and 165 of the Constitution, to pass specific legislation dealing with the administration of justice in traditional communities and judicial immunity to traditional leaders. The mandatory duty is reinforced by the general duty of Parliament in s 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights of people under traditional leadership and governed in accordance with African customary law.

Therefore, Parliament had to pass appropriate legislation, as required in s 165(4) of the Constitution, to ensure that Traditional Courts are independent, impartial, have dignity and are accessible and effective. To give the declaratory order in terms of which it is made clear that Parliament's mandatory duty to the traditional leaders and communities of SA, include passing legislation specifically giving effect to the constitutional rights of the traditional leaders and their court.

These constitutional issues arose in the *Congress of Traditional Leaders of South Africa* case in the applicant's application, contending that the conviction and sentence of His Majesty, has heightened the constitutional necessity for Parliament to ensure that there is appropriate legislation regulating the proper functioning of Traditional Courts as required in the Constitution. In particular, the applicants were concerned that the significance of the case of His Majesty Dalindyebo is that traditional leaders are vulnerable to civil and criminal liability for acts committed by them in their capacity as judicial officers in Traditional Courts.

They, therefore, contended that the court should grant an order affirming that traditional leaders enjoy judicial immunity from civil and criminal prosecution for acts committed by them in Traditional Courts. The prosecution and conviction of the King for carrying out his traditional leadership role simply means that traditional leaders do not enjoy the same judicial immunity that magistrates and judges enjoy. This is unfair discrimination and a violation of s 9(1) of the Constitution.

Consequently, the applicant sought an order directing Parliament to pass appropriate legislation in terms of s 212 of the Constitution, giving effect to Traditional Courts, more particularly, judicial immunity.

Mantame J, noted that, '[a]lthough the applicant sought orders directed essentially at applying the principle of judicial immunity to the case of His Majesty Dalindyebo Whether or not

King Dalindyebo should not have been tried, convicted and sentenced as a consequence of judicial immunity is not for this court to decide. It is competent for us to decide the issue of principle relating to whether in terms of our traditional court system, judicial immunity for traditional leaders applies'.

Whether or not judicial immunity applies depends on whether Traditional Courts are established and operate in accordance with the Constitution.

The authority of the traditional leaders to operate independently and impartially in traditional courts is a matter that requires urgent resolution and should not continue to be in the realm of the responsible minister, namely, the Minister of Cooperative Governance and Traditional Affairs. It does not reflect the correct constitutional position that traditional leaders and traditional courts are not operating in a manner consistent with s 165 of the Constitution.

The court stated that in its current form, traditional courts are not independent and traditional leaders cannot be said to operate in courts that are free from interference. While all other courts in SA operate within a statutory framework, it is untenable for Parliament to regard its duty to extend similar legislative recognition to traditional leaders as merely permissive. Traditional Courts must enjoy the constitutional attributes of independence.

These unique attributes may be undermined by the failure of Parliament to give specific recognition to the institution of Traditional Courts. The legislation should have been passed a long time ago after the promulgation of the Constitution. Furthermore, to approach the issues of traditional communities in the manner advocated by Parliament would essentially mean that it was not constitutionally mandatory for Parliament to pass the Traditional Leadership and Governance Framework Act 41 of 2003.

The High Court concluded the Constitution imposes a mandatory duty on Parliament in terms of ss 211 and 212 read together with ss 34, 38 and 165 of the Constitution, to pass specific legislation dealing with the administration of justice in traditional communities and judicial immunity to traditional leaders.

Parliament, must pass the appropriate legislation, as required in s 165(4) of the Constitution, to ensure that Traditional Courts are independent, impartial, have dignity, are accessible, and effective. Parliament has failed to pass legislation providing for the administration of justice in traditional communities in that no legislation envisaged in s 165(4) of the Constitution exists.

It has thus failed to give legislative recognition to the status of traditional courts, the effect of which, the position

of traditional leaders and communities remains constitutionally vulnerable.

The judge reasoned that traditional leaders have the power to adjudicate disputes in their courts in accordance with African customary law. It would, therefore, be appropriate to give the declaratory order in terms of which it is made clear that Parliament's mandatory duty to the traditional leaders and communities of SA include passing legislation specifically giving effect to the constitutional rights of the traditional leaders and their court.

However, the Constitutional Court emphasised that there was no obligation imposed on the parliament to pass the legislation as it already introduced the Traditional Leadership and Governance Framework Act.

The questions that still remain undressed are:

- Since the Constitution recognises the roles, status and the functions of traditional courts in terms of ss 211 and 212, why is judicial immunity not afforded to all presiding officers, including traditional leaders as they fall within the categories of 'other court' and subject of the Constitution?
- Should we then presume that this policy applies *mero motu* or retrospectively when one assumes the judicial throne since it is not legislated?
- When does this principle cease to be absolute?

Yes, one may argue on the present case that, His Majesty was not adjudicating as a presiding officer at the time he was convicted and, therefore, he would not have been eligible for immunity.

Surely the lawmakers still have the onerous task to address and review all silent legislations that are in isolation with the rule of law by providing guides to advance the values of the Constitution.

Conclusion

In order for traditional leaders to perform their functions without fear, favour or prejudice as all other judicial officers, the issue of immunity should be reviewed and be properly addressed to also allow Traditional Courts to enjoy the constitutional attributes of independence. Our law makers, including Parliament as the representative of the people have the duty to promote and oversee adherence to the values of the Constitution.

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



Survival of alternative dispute resolution clauses in the event of fraud



By
Tshepo
Mokoana

Verbal and written contracts are an essential part of everyday life. Contracts embody the security that parties rely on, to enforce the performance of obligations arising out of the contracts. Parties enter into contracts for a myriad of reasons, which are informed by impressions, undertakings or even formal representations made by the parties. A classic case of misrepresentation occurs when a party enters into a contract on the basis of an impression that later turns out to be false. This renders the contract voidable at the instance of the misled party.

As with many contractual impasses, more and more parties are opting for alternative dispute resolution methods, such as arbitration and adjudication to settle contractual disputes. Clauses that make provision for these alternative dispute resolution mechanisms have become prevalent in agreements as they offer parties an alternative, expeditious dispute resolution process, which is independent and in terms of which the progression of the matter is largely in the control of the parties to the agreement. These clauses typically contain survival provisions which endure after the cancellation of the agreement. In the recent case of *Namasthethu Electrical (Pty) Ltd v City of Cape Town and Another* (SCA) (unreported case no 201/19, 29-6-2020) (Mbha JA (Navsa, Molemela, Plasket and Nicholls JJA concurring)) the Supreme Court of Appeal (SCA), had to decide whether a survival provision would survive the cancellation of a contract which was cancelled due to fraudulent misrepresentation.

Factual background

Two contractual provisions were at the

heart of the dispute in this case. First, a termination clause that entitled the City of Cape Town municipality (the City) to terminate the contract in the event that Namasthethu Electrical (Pty) Ltd (Namasthethu) committed a corrupt or fraudulent act during the procurement process or in the execution of the contract. This provision is common among contracts of significant value, especially in the public sector where corruption is considered rife. Second, a dispute resolution clause in terms of which the parties were to refer disputes concerning the agreement or its termination to adjudication in terms of the Joint Building Contracts Committee's (JBCC) Adjudication Rules, failing which they may resort to litigation.

In August 2014, Namasthethu was successful in its bid for a tender issued by the City for the installation of luminaries

in the City's Civic Centre. Consequently, in November 2014, the City and Namasthethu entered into a contract valued at R 29 263 401,75 excluding VAT, with an estimated completion time of 18 months.

An unsuccessful bidder and competitor sought to have the tender set aside on the basis that Namasthethu and its directors, were convicted of fraud and corruption in 2013, they were fined R 200 000 and given a suspended sentence of five years' imprisonment. The application for the tender required Namasthethu to declare that neither it, nor any of its directors, had been convicted for fraud by a court of law within the past five years.

Following an exchange of correspondence between the City and Namasthethu in which Namasthethu denied the allegations, the City launched a formal investigation into Namasthethu through its



Picture source: Gallo Images/Getty

Forensics, Ethics and Integrity Department. The Forensics, Ethics and Integrity Department confirmed that Namasthethu and its two directors, S Chetty and R Chetty were convicted by the Commercial Crimes Court in Pietermaritzburg in November 2013 and also established that Namasthethu provided a fictitious local address in its tender documents. Subsequently, the City terminated the contract with immediate effect based on the fraudulent conduct by Namasthethu during the tender process.

Namasthethu challenged the cancellation indicating that the cancellation should have been dealt with in terms of the dispute resolution clause in the contract. By this it meant the matter was to be referred to the JBCC for adjudication first, then arbitration failing which litigation. It did not address the allegations forming the basis of the cancellation and contended that those were issues to be decided at adjudication. To this end, the names of potential adjudicators from the Cape Bar were suggested by Namasthethu.

The City maintained that the agreement was terminated validly and that Namasthethu's referral to adjudication was inappropriate given that the contract was terminated for fraud. Namasthethu claimed that the City had repudiated the contract and based on this repudiation, it then cancelled the contract and was entitled to damages. The adjudicator appointed decided the matter without hearing evidence and found that the City was liable to pay Namasthethu damages. This formed the basis of the City's application to the High Court.

The High Court

The main issue before Boqwana J was whether the dispute resolution clause in the contract survived the cancellation of the contract by the City, on the basis of fraud. Put succinctly, whether the cancellation due to fraud vitiated the survival of any provision in the agreement.

The City's stance was that the contract was void or voidable due to the fraudulent misrepresentation and non-disclosure by Namasthethu. Pursuant to being satisfied of the existence of fraud by Namasthethu, the City exercised its election to cancel the contract validly. Therefore, the need for adjudication did not arise as it had already terminated the contract.

Namasthethu argued that on a proper construction of the contract, all manners of disputes (including fraud) relating to the termination of the contract was intended to be subject to the dispute resolution clause. It also argued that there was no basis in the contract or in law permitting the judicial review of the adjudicator's determination. That is, the matter should have proceeded to arbitration and then litigation. Namasthethu

maintained that the allegations of fraud were a material dispute of fact.

The High Court held that having considered the conduct of Namasthethu during and after the tender process, there was indeed fraudulent misrepresentation perpetrated by Namasthethu, which allowed the City to terminate the agreement. Namasthethu appealed to the SCA.

The SCA

The SCA held that the High Court was correct in its findings and proceeded to answer the question of whether 'fraud is conduct which vitiates every transaction known to the law'. In answering in the affirmative, the SCA referred back to its earlier decision in *Esorfranki Pipelines (Pty) Ltd and Another v Mopani District Municipality and Others* [2014] 2 All SA 493 (SCA) quoting Lord Denning in *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 (CA) where he held that:

'No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever.'

By aligning itself with this reasoning, the court's attitude to the question was clear. In this manner the court appeared to have applied, in not so many words, the Latin maxim '*ex turpi causa non oritur actio*'. This simply means, 'from a dishonourable cause, an action does not arise'. That is, an applicant or plaintiff cannot pursue a legal remedy if it arises in connection with their own wrongdoing. In this instance, Namasthethu's fraudulent conduct during the tender process cut the legs out from under a legal course.

The SCA considered the context in which the contract was concluded and held that on a commercial sensibility interpretation, the arbitration clause demonstrated that all an aggrieved party needed to do was give notice to the other in order to resolve a dispute relating to the agreement or its termination. However, such an obligation to give notice would not arise in circumstances where a party terminates the agreement due to fraud. Additionally, the termination clause was of no assistance to Namasthethu in that it related to termination for failure to satisfy contractual obligations, whereas fraud is a distinct and separate ground for termination which a notice of default could not be expected to cure.

Once an agreement is terminated by a party due to the fraud of the other, the arbitration or adjudication clause becomes legally barren. The SCA stated that given that the dispute resolution

clause was embedded in a fraud-tainted agreement that has since been terminated, the arbitration clause could not survive the termination and to enforce it would be 'offensive to justice'. The corollary is that no clause contained in an agreement marred by fraud will survive the termination of that agreement. This is so because to enforce any such provision would legitimise the agreement and as such, offend justice.

Accordingly, the SCA held that the referral of the dispute to arbitration was invalid, unlawful, and that the adjudicator was devoid of authority to adjudicate on the dispute. Interestingly, the SCA emphasised that courts have recognised the corrosive effect of widespread fraud and corruption on society. The SCA upheld the High Court's finding that Namasthethu's conduct justified a punitive cost order.

Conclusion

The necessity of drafting a dispute resolution clause in a way that ensures its survival of the contract cannot be overstated. These clauses contemplate various circumstances leading to the termination of the contract and necessitates the survival of the dispute resolution clause. Parties must be mindful of their conduct leading up to and during the contract to ensure that the legality and validity of the contract is not an issue, as this will affect the survival of clauses such as dispute resolution clauses, which are meant to assist and protect the parties beyond termination. While the SCA has held that a dispute resolution clause does not survive termination of a contract due to fraud, it does not mean the court would not enforce such a provision in circumstances where parties have expressly agreed to it.

It would be interesting to see how the courts will deal with the survival of other clauses contained in agreements rescinded as a result of fraud. One such a clause would be a confidentiality clause where the respondent is privy to the confidential information of the applicant, who has since cancelled the agreement due to fraud. Would that respondent not be bound by those confidentiality provisions and if they were to breach those provisions, would the applicant be without a remedy where the agreement has been cancelled due to fraud? It remains to be seen how the courts would approach such matters.

Tshepo Mokoana LLB (UJ) is a candidate legal practitioner at Fasken in Johannesburg. This article was supervised by legal practitioners Muhammad Moti and Thethe Mokele.



THE LAW REPORTS



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

November 2020 (6) South African Law
Reports (pp 1 – 324)

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

Abbreviations

CC: Constitutional Court

GJ: Gauteng Local Division, Johannesburg

GP: Gauteng Division, Pretoria

SCA: Supreme Court of Appeal

WCC: Western Cape Division, Cape Town

Children

The right of an unmarried father to register a child's birth in absence of the mother: Section 9(1) of the Births and Death Registration Act 51 of 1992 (the Act) provides for the notification of the birth of any child 'born alive'; and s 9(2) that this notification is '[s]ubject to the provisions of section 10'. Section 10 deals with the notification of the birth of a child born out of wedlock, and makes the exercise by an unmarried father of his right under s 9(1) contingent on either the mother's presence (s 10(1)(b)) or her consent (s 10(2)).

In *Centre for Child Law v Director-General: Department of Home Affairs and Others* 2020 (6) SA 199 (ECG) a Full Bench concluded that s 10 implicitly barred an unmarried father of a child born out of wedlock from giving notice of the child's birth under his surname if the mother was absent. The ECG, per Rugunanan J (Revelas J and Mapoma AJ concurring) ruled that this was discriminatory not only against the father of a child born out of wedlock but also against the child born out of wedlock. In an unmarried father's case, the discrimination was on the basis of marital status, directly violating his right to equality (in s 9(3) of the Constitution). Where the child was born out of wedlock, the discrimination

was on arbitrary grounds because it had the effect that, absent the mother's co-operation, the child – who had a legitimate claim to a nationality from birth – could be denied a birth certificate.

The court accordingly declared s 10 of the Act inconsistent with the Constitution and invalid to the extent that it did not allow an unmarried father to register the birth of his child in the absence of the child's mother. The court ordered a reading-in or substitution as the appropriate remedy to expunge the bar presented by s 10 and to provide a mechanism for a child born out of wedlock to be notified in the surname of their father where the mother was absent.

Elections

Independent candidates' right to contest provincial and national elections: In *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (6) SA 257 (CC), the CC considered whether the failure of Electoral Act 73 of 1989 to make provision for independent candidates to contest provincial and national elections – namely, making access to political office possible only through membership of political parties – rendered the Act constitutionally invalid insofar as it unjustifiably limited the constitutional rights to freedom of association (s 18); and to 'stand for public office and, if elected, to hold office' (s 19(3)(b)).

In the main judgment the CC, per Madlanga J (Cameron J, Jafta J, Khampepe J, Mothapo AJ, Mhlantla J, Theron J and Victor AJ concurring), pointed out that, at best, s 19(3)(b) was neutral, as it did not say that when an adult citizen

wanted to exercise the right they had to do so through a political party. He found the relevance of the right to freedom of association in determining the content of s 19(3)(b) in the principle of harmonious interpretation; the provision had to be interpreted to avoid conflict with the right of freedom of association. The CC summarised the issue before court as being whether such conflict would arise if s 19(3)(b) were interpreted to mean that adult citizens who intended to stand for and hold political office would be prevented from doing so without forming or joining a political party.

The CC ruled that conflict did arise because, if it was a fundamental right for individuals to freely associate with anyone, it would equally be their fundamental right to associate with no one. For the state to force individuals to associate when they did not want to, would limit the right to freedom of association. An individual's choice not to associate at all – a negative right not to be compelled to associate – was, therefore, also protected by s 18. Conflict would, therefore, arise if s 19(3)(b) were read to restrict standing for and holding political office by requiring the forming or joining of a political party – namely, a denial of the right to freedom of association. Such a reading would also be in conflict with the constitutional rights of freedom of conscience (s 15(1)) and to dignity (s 10). Section 19(3)(b) accordingly had to be interpreted in a way that was consonant with s 18 and did not lead to a denial of the right to freedom of association.

The CC concluded that the Electoral Act was unconstitutional to the extent that it made it impossible for candidates

to stand for political office without being members of political parties. The CC gave Parliament 24 months to remedy the defect.

See also:

- Muchengeti Hudson Hwacha 'The Constitutional Court declares Electoral Act unconstitutional' 2020 (Oct) DR 33; and
- Jonathan Wright 'Electoral reform – constitutionality of the Electoral Act' 2020 (Dec) DR 37.

Intellectual property

Several general principles of intellectual property law applied, judgment of the GJ substantially reversed on appeal to the SCA: In *Quad Africa Energy (Pty) Ltd v The Sugarless Co (Pty) Ltd and Another* 2020 (6) SA 90 (SCA) the SCA dealt with a dispute between an Australian Company (the respondent), a maker of sugar-free confectionary, and its local distributor (the appellant). The respondent's product came in packaging with a large letter 'S' printed in a circle above the word SUGARLESS in capital letters on a black background. It had a South African trademark registration for the S sugarless logo in class 30 covering confectionery.

When the relationship between the parties ended, the appellant started selling its own competing product in similar packaging, with an inverted 'S', removed the circle around it and replaced SUGARLESS with SUGARLEAN, also in capital letters. The respondent then sued the appellant in the GJ, claiming infringement of its trademark registration for its label, passing-off and infringement of copyright in the packaging. It also claimed counterfeiting. The GJ found in favour of the respondent on all aspects, granting it both interdictory and declaratory relief.

Turning to the SCA, the appellant appealed against the finding of copyright infringement in the packaging, passing off and counterfeiting, based on its new and future packaging.

The SCA, per Ponnann JA (Wallis JA, Makgoka, JA, Schippers JA and Mbotha JA concurring) ruled, as to whether there had to be a disclaimer against the word 'sugarless', that the term 'sugarless' was inherently incapable of distinguishing one person's confectionery goods from another's and that no amount of use of a purely descriptive term could make it distinctive. Since descriptive terms like 'sugarless' or 'sugarless confectionary' could not function as trademarks, and no amount of use could make it distinctive for trademark purposes, the SCA entered a disclaimer of exclusive rights to the word 'sugarless'.

The SCA then dealt with the alleged copyright infringement. The SCA pointed out that the issue hinged on whether the

appellant's artwork on the new packaging was an adaptation of the respondent's work, namely, a transformation of the work so that the original was still recognisable. The respondent's contention that the use of a 'senior' work to create a 'junior' work constituted making an adaptation of the senior work was incorrect: The mere fact that prior work had been used did not mean that the subsequent work was to be considered an adaptation, and thus an infringement. The actual creative composition had to be similar, not just the idea. Since there was not a substantial degree of correspondence between the packaging, it could not be said that the appellant availed itself of a great deal of the skills and industry that had gone into the respondent's packaging. The SCA accordingly ruled on copyright that, since there was no objective similarity, the GJ's decision on the matter was wrong.

Moving on to passing-off, the SCA pointed out that the appellant's packaging was not calculated to deceive. The main similarity was the use of the colour black and fruit or other devices. But, there was nothing wrong with that, given the many confectionery products in the market that utilised black and the obviously non-distinctive nature of the devices. The SCA concluded that there were sufficient dissimilarities between the packaging – which would be apparent and obvious to any customer – to hold that there was no reasonable likelihood of confusion between the two.

In dealing with trademark infringement, the SCA ruled that the 'SUGARLESS' and 'SUGARLEAN' marks were visually, phonetically and aurally different. In any event, when descriptive terms are used as trademarks, courts will accept comparatively small differences as sufficient to avert confusion. In any event, a measure of confusion was acceptable.

The SCA then held, as to counterfeiting, that the GJ did not consider all the requirements for counterfeiting. These were more extensive than those for copyright or trademark infringement. To counterfeit meant to make an imitation of something in order to deceive. Since neither the claim of breach of copyright nor that of trademark infringement was made out, there had also been no counterfeiting.

The appellant thus succeeded on all substantive aspects of its appeal against the order in the GJ.

Motor vehicle accidents

Whether a 'reach stacker' is a 'motor vehicle' in terms of the Road Accident Fund Act 56 of 1996: In *Road Accident Fund v Mbele* 2020 (6) SA 118 (SCA), Mrs Mbele's husband, a stevedore, was knocked over at his workplace, Cape Town Harbour, by a 'reach stacker', and

later succumbed to his injuries. Stackers are engine-driven machines designed to lift, manoeuvre and stack ship containers, and this one was 12 metres long, four metres wide, and weighed over 70 tonnes.

Mrs Mbele sued for loss of support under the Road Accident Fund Act 56 of 1996, but the Fund disputed liability on the ground that the stacker was not a 'motor vehicle' as defined in s 1 of the Act, thus excluding the claim from its ambit. Section 1 defines a 'motor vehicle' as a 'vehicle designed for propulsion ... on a road'.

It appeared that while the stacker had a normal Cape Town registration number, its weight and size prevented it from operating on public roads without appropriate escort, but in its day-to-day operations it did duty on both public and non-statutory roads within Cape Town Harbour.

When the matter came to the WCC, a single judge concluded that the stacker was not a motor vehicle as defined in s 1, but on appeal the Full Bench reversed the finding, ruling that the stacker was indeed a motor vehicle for the purposes of the RAF Act.

In a further appeal, the SCA per Zondi JA (Maya P, Plasket JA, Nicholls JA and Eksteen AJ concurring) restated the test to determine whether a vehicle was a 'motor vehicle' for the purposes of the Act, namely that if a reasonable person would conclude that driving the vehicle on a public road would be extraordinarily difficult and hazardous unless special precautions or adaptations were effected, then it was not a 'motor vehicle'.

The SCA pointed out that design features such as lights, indicators, field of vision, hooter, maximum speed and engine output are considerations in deciding whether there is compliance with the definition. Since the stacker was designed and suitable for travelling on a road inside the port, it could not be said that driving it on a road used by pedestrians and other vehicles would be extraordinarily difficult or dangerous. The SCA concluded that the stacker was a 'motor vehicle' as defined in the Act and dismissed the appeal.

- See also 'Law Reports – Road Accident Fund claims' 2019 (September) DR 17 for the WCC judgment.

Pensions

The permissibility of attachment by trustees of insolvent estate of insolvent's pre-sequestration pension fund pay-out: The facts in *M and Another v Murray NO and Others* 2020 (6) SA 55 (SCA) were that the first appellant had received a pension pay out some two years before his sequestration, which he then gave to the appellants. This disposition was set aside by the GP on ap-

plication by the trustees of his insolvent estate, on the basis that these were 'collusive dealings before sequestration' as contemplated in s 31 of the Insolvency Act 26 of 1934.

On appeal to the SCA, the principal issue whether a pension pay-out made before sequestration fell within the ambit of s 37B of the Pensions Fund Act 24 of 1956, which protects 'the estate of anyone entitled to a pension benefit payable' against attachment by a trustee of an insolvent estate (by deeming such benefit not to be part of the insolvent's estate, subject to certain exceptions).

The SCA, per Mokgoka JA (Ponnan JA, Dambuza JA, Van der Merwe JA and Mbatha JA concurring), held that s 37B established an exception to the provisions of s 20(1)(a) of the Insolvency Act – one which only entailed that, while in the hands of a pension fund, the insolvent's pension interest could not be attached by their trustee on the basis that it formed part of the insolvent's assets. It protected only the pension benefit of a person whose estate was already sequestrated when they received a pension pay-out. Once the benefit was paid, the beneficiary ceased to be a 'member' of the pension fund, and the money ceased to be a 'benefit' as defined. And when payment of a benefit was made before sequestration, there was no insolvent

estate or trustees to speak of. The SCA, therefore, concluded that s 37B did not extend protection beyond payment of the pension benefit. A benefit paid out to an insolvent before their estate was sequestrated, therefore, did not enjoy the protection provided in s 37B.

Practice

Execution against a property owned by a trust but inhabited, as primary residence, by a natural person: Rule 46 or 46A? In *Investec Bank Ltd v Fraser NO and Others* 2020 (6) SA 211 (GJ), the first respondent, Ms Fraser, opposed an application by the applicant bank for an order declaring the immovable property, which was her primary residence to be specially executable. This as a precursor to satisfying a monetary judgment granted against a trust, which owned the property, and was being held liable as a surety and co-principal debtor in an amount of R 13,24 million.

Ms Fraser based her opposition on the fact that she resided on the property with her two adult children, and that since the bank had failed to comply with r 46A of the Uniform Rules of Court, the application was fatally defective.

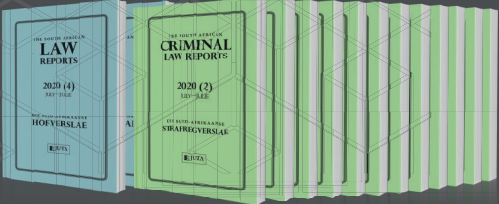
The GJ, per Lapan AJ, analysed the rules and relevant case law and concluded that all the constitutional considera-

tions required to be taken into account for the protection of judgment debtors, applied to individuals and natural persons only. The provisions of r 46A were not applicable to the trust as owner of the property. The GJ accordingly ruled that the bank had been correct to proceed in terms of r 46 to obtain execution against its immovable property.

Spoilation

Deactivation of biometric access to residential estate: In *Bill v Waterfall Estate Homeowners Association NPC and Another* 2020 (6) SA 145 (GJ) the applicant had taken cession of the rights in a 99-year lease of a property on a residential estate. In so doing, and having become a party to the agreement, the applicant automatically became a member of first respondent, the estate's homeowners' association, and subject to its memorandum of incorporation and the estate's rules.

The estate's rules required the applicant to start building on the property within a certain time, and when he failed to, he became liable to pay certain monetary penalties, which he disputed. Ultimately, and apparently in an attempt to induce the applicant to pay, the first respondent deactivated the applicant's biometric access to the estate, but not,



Equip your practice with an investment in

JUTA'S TRUSTED AND AUTHORITATIVE LAW REPORTS PRINT SERIES.

Also available online as part of *Jutastat Evolve* Essence or Advance plans. [ORDER NOW](#)

Soft cover - Monthly Periodical; Online 342 pages 00382396/SALRU R8,415.00

The South African Law Reports

[ORDER NOW](#)

Juta's South African Law Reports is the primary source of legal precedent in South Africa. The series incorporates decisions of the Constitutional Court and South African, Namibian and Zimbabwean higher courts, carefully selected and expertly cross-referenced and annotated by Juta's Law Reports Editors.

Soft cover - Monthly Periodical; Online 1 500 pages 10163107 (SACLR) R6,120.00

The South African Criminal Law Reports

[ORDER NOW](#)

The South African Criminal Law Reports is a monthly report of criminal law and procedure cases emanating from the superior courts in Southern Africa.

ORDER NOW:

Contact Juta Customer Services | Email: orders@juta.co.za • Tel. 021 659 2300 • Fax 021 659 2360 quoting code **DR2021**.



www.juta.co.za



however, to his property. The first respondent also barred the applicant's builders from the estate.

In response the applicant approached the GJ under the *mandament van spolie* for the restoration of his and his builders' biometric access to the estate. The GJ, per Southwood AJ, found that the applicant's biometric access to the estate, as well as that of his contractors, were entitlements incidental to the applicant's possession of the property. Since the applicant's peaceful and undisturbed quasi-possession of these rights of access were unlawfully disturbed, it was entitled to the *mandament*.

Other cases

Apart from the cases and material dealt with or referred to above, the material

under review also contained cases dealing with –

- access to information held by a public body;
- an interdict to prevent the police from enforcing various provisions of the Firearms Control Act 60 of 2000;
- automatic review of enquiry in terms of s 77 of Criminal Procedure Act 51 of 1977;
- declarator of rights of public with respect to enforcement of COVID-19 lockdown;
- income tax deductions future expenditure on contracts;
- measure of damages for unlawful arrest and detention;
- requirements for proof of certificate in terms of s 212(8) of Criminal Procedure Act 51 of 1977;

- sentence for housebreaking with intent to commit offence unknown;
- the citizenship of a child of a South African citizen where the child is foreign-born;
- the composition of the Legal Practice Council's provincial councils; and
- the powers of court conducting on debt review.

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



By
Merilyn
Rowena
Kader

Abbreviations:

CC: Constitutional Court

ECG: Eastern Cape Division, Grahamstown

GJ: Gauteng Local Division, Johannesburg

KZP: KwaZulu-Natal Division, Pietermaritzburg

SCA: Supreme Court of Appeal

WCC: Western Cape Division, Cape Town

Civil procedure

Requirements for interim interdict: The Public Protector (PP) sought an interim interdict preventing, in particular, the Speaker of the National Assembly (the Speaker) from taking any further steps in a process in the National Assembly that could result in the PP's impeachment in terms of the provisions of s 194 of the Constitution. The PP in *Public Protector v Speaker of the National Assembly and Others* 2020 (12) BCLR 1491 (WCC); [2020] 4 All SA 776 (WCC) also sought to have the newly adopted rules in terms of which the process was to be conducted, set aside.

The Speaker and the Democratic Alliance (DA) opposed the relief sought on the ground that the provisions of s 194 of the Constitution are the ultimate mechanism for the accountability of office bearers of Chapter 9 Institutions, and provide for the National Assembly to remove any such office bearers on the basis provided therein.

It was held by Saldanha J (Steyn and Samela JJ concurring) that the PP is one of several state institutions established under ch 9 of the Constitution, and is subject to oversight by the National Assembly. The National Assembly is required by s 57(1) of the Constitution to create mechanisms for overseeing Organs of State and to make rules, which define and give meaning to the grounds of removal for office bearers of Chapter 9 Institutions.

Contrary to the PP's argument, the court endorsed the test as described in the case of *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (11) BCLR 1148 (CC) (the OUTA test), where it was stated that in the absence of *mala fides*, an application for an interdict restraining the exercise of statutory powers is not readily granted. The applicant must, therefore, establish the clearest of cases for such an interdict to be granted. In an effort to meet the OUTA test, the PP levelled several allegations of *mala fides* against the Speaker and the DA. The court stated that the DA was fully entitled as a member of the National Assembly to engage the office of the Speaker with a request to initiate an impeachment process against the PP. Any member in the National Assembly may do

so if they have cause in terms of s 194 of the Constitution and the new rules to move for the removal of any office bearer of a Chapter 9 Institution. The court rejected the allegations of *mala fides*.

The PP relied on alleged invalidity of the new rules on various grounds to establish her *prima facie* right to an interim interdict. She relied on fairness in most of her challenge to the rules, and raised the common law principles of natural justice of *audi alteram partem* and *nemo sua iudex in causa sua* protections, as well as what she referred to as the procedural irrationality in both the content and procedures envisaged under the new rules. Examining each of the contentions raised by the PP, the court found none of the grounds relied on to be sustainable, with the result that no *prima facie* right to the relief sought was established. The court was also not satisfied that the remaining requirements for an interim interdict had been met.

Dismissing the application for an interim interdict, the court ordered the PP to pay the costs of the Speaker and the DA.

Company law

Misappropriation of economic opportunity: In *Modise and Another v Tladi Holdings (Pty) Ltd* [2020] 4 All SA 670 (SCA) the first appellant (Modise) was identified by a fellow businessman (Sandler) as a key player in an intended electrical conglomerate, which would seek to do business with state-owned entities and municipalities in the energy sector. Sandler held a majority interest in an electrical company (Muvoni), which

December [2020] 4 All South African Law Reports (pp 613 – 917); December 2020 (12) Butterworths Constitutional Law Reports (pp 1419 – 1546)

would need to comply with Black Economic Empowerment (BEE) requirements to become eligible to exploit whatever opportunities might become available.

Modise joined Muvoni's board on 1 December 2004 and was appointed as Director and Chairman of the respondent (Tladi) on 14 December 2004.

One of the opportunities, which Sandler identified as worth pursuing concerned a company (ARB), which was a major supplier of electrical equipment to Muvoni. Modise denied that Sandler had mentioned the ARB opportunity. In any event, in 2005, when ARB needed a new BEE partner, Modise and his company (Batsomi Power) were offered the same deal that Sandler had identified as the ARB opportunity for Tladi. Modise accepted the offer.

That led to the present litigation, in which the High Court found that the appellants had misappropriated a corporate opportunity to buy shares in ARB, which opportunity properly belonged to Tladi. The court also dismissed the appellants' special plea of prescription in respect of the claim against Batsomi Power.

The court, per Cachalia JA (Nicholls, Wallis JJA; Ledwaba and Matojane AJJA concurring) held that directors have an overarching and paramount fiduciary duty to exercise their powers in good faith and in the best interests of the company. Directors may not place themselves in positions of conflicts of interest or duty (the 'no-conflict rule'); may not make secret profits (the 'no-profit rule'); or acquire economic opportunities for themselves (the 'corporate opportunity rule') that properly belong to the company. The latter was the most relevant to the present case. Modise not only failed to disclose the approach made to him by ARB, but also concealed the fact that he was pursuing the opportunity in his own interest. The court rejected all the submissions made by Modise.

With regard to Batsomi Power (the second appellant) it was contended that the claim had prescribed and also that the case against it – being a separate legal entity – to account to Tladi, was not made. The court *a quo* dismissed both contentions. On appeal, the court found that the claim against Batsomi Power was not part of the original cause of action, but was based on an entirely different cause of action and the prescriptive period had run. Accordingly, Batsomi Power's appeal against the court *a quo*'s finding on prescription was upheld. Modise's appeal was, however, dismissed.

Constitutional and administrative law

Powers of the Public Protector (PP): In *Government Employees Medical Scheme*

and Others v Public Protector of the Republic of South Africa and Others [2020] 4 All SA 629 (SCA), the first appellant, the Government Employees Medical Scheme (GEMS) was a medical scheme, involved in a dispute with Mr Ngwato. He lodged a complaint with the Registrar of Medical Schemes.

Instead of exercising his right of a further appeal to the Appeal Board of the Council, Mr Ngwato lodged a complaint with the PP, making various allegations against GEMS and the Government Pensions Administration Agency (GPAA). Well over a year later, GEMS received an e-mail from the office of the PP, stating that although it had found the complaint to be unsubstantiated and closed the file. Mr Ngwato had applied for review of that decision. GEMS was requested to attend a meeting at the office of the PP, to discuss certain issues raised in the complaint.

In response, GEMS explained that despite its membership consisting of government employees, it was a private medical scheme and not an Organ of State, nor a public entity, nor falling within any sphere of government. It challenged the jurisdiction of the PP over the matter.

On 24 April 2018, two subpoenas were purportedly issued under s 7(4)(a) of the Public Protector Act 23 of 1994 and were served on GEMS' legal advisor and the second appellant, the Principal Officer of GEMS. They were required to appear in person before the PP on 18 May 2018, as also, to produce a list of specified documents.

GEMS approached the High Court for declaratory relief in its jurisdictional challenge against the PP. The court found for the PP, stating that even though GEMS was not a government or an Organ of State, it performed a public function in terms of national legislation and its functions were public in nature. The present appeal thus ensued.

It was held by Ponnan JA (Mbha, Zondi JJA; Goosen and Mabindla-Boqwana AJJA concurring) that s 6(5)(b) of the Public Protector Act allows the PP to investigate any alleged abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct by a person performing a function connected with their employment by a public institution or entity. The PP was unable to bring herself within the ambit of the section. Furthermore, the nature of the complaint and the nature of the power exercised by GEMS, meant that the jurisdictional preconditions for an investigation in terms of ss 6(4) and (5) had not been met. The PP accordingly did not have the statutory power to investigate the complaint.

The appeal thus succeeded.

Corporate and commercial
Investments procured from clients by lawyer working as consultant for law

firm: In *Stols v Garlicke and Bousfield (PKF (Durban) Incorporated and Others as third parties)* [2020] 4 All SA 850 (KZP) a consultant (Cowan) for the defendant law firm Garlicke and Bousfield (G&B) committed suicide in November 2010 after admitting to having committed fraud and misrepresented facts to G&B's directors by inducing them to authorise certain fraudulent transactions. The firm was faced with numerous enquiries from people claiming to be G&B clients, enquiring as to the whereabouts of their funds, which they claimed Cowan had invested with G&B. The investors alleged that Cowan had been running a bridging finance business on behalf of G&B for its clients who required short-term finance. The plaintiff (Stols) was one such person. He claimed to have made two investments totalling an amount of R 7,5 million, and demanded payment from G&B.

When his demand was not met, Stols sued G&B for payment. In its plea, G&B admitted that Cowan was an executive consultant and practising attorney at G&B, and that he had caused an amount of R 2 million to be paid into its trust account, but denied that Cowan was authorised to conclude any such contract on its behalf. Garlicke and Bousfield further alleged that Cowan had entered into such contract for his own dishonest and illegal purposes. However, Stols claimed that G&B was estopped from denying Cowan's authority to enter into the contract based on their representations which led him to believe that Cowan was part of the firm, and the firm's awareness that Cowan was conducting a bridging finance business as part of his practice housed in G&B's offices. Stols also relied on the assurances allegedly given to him by a director (Ramsay) of the firm regarding the propriety of the scheme run by Cowan. Ramsay denied those allegations.

A serious dispute of fact existed between the versions of Stols and Ramsay, and that dispute had to be resolved in order to deal effectively with the issues for determination. The court, per Ngweni J, found that Stols' version was to be preferred, cementing the fact that Ramsay had not discouraged Stols against the investments.

The first of the main issue to be decided was whether the contract on which Stols sued was illegal. Garlicke and Bousfield purported to place reliance on various cases in support of its contention that the underlying contract was illegal. However, the court distinguished those cases, which all dealt with unlawful pyramid schemes. The scheme operated by Cowan was one involving the provision of bridging finance, which was not unlawful. There was, therefore, no reason why Stols' claim could not be validly based upon the contract in question.

The next question was whether Cowan was authorised to sign the letter of undertaking, and if he was not, whether G&B was estopped from relying on the absence of authority. Garlicke and Bousfield contended that Cowan did not have the authority to represent it when concluding any agreement binding on the firm, and in particular, to issue letters of undertaking. The evidence showed that Cowan operated his bridging finance scheme as an executive consultant of G&B, with an office in G&B's premises. Importantly, G&B also allowed him to use its trust account for payments in connection with the scheme and to earn commission for the benefit of G&B in relation to the bridging finance transactions. That was sufficient to create the appearance of authority.

The court was satisfied that Stols had established that he acted to his detriment as a result of the representations made to him, and that he had proved his claim to hold G&B to its contract of deposit, concluded through Cowan. Judgment was granted in his favour.

Employee benefits and retirement

Pension fund – decision to amend rule governing calculation of actuarial interest of members: In December 2014, the first respondent, the Government Employees Pension Fund (GEPF) took a decision to amend the fund rule governing the calculation of actuarial interest of members. The decision was made, relying only on an actuarial valuation report, thus, without prior consultation with the first appellant, the Public Servants Association of South Africa (PSA) or any of the employee organisations prescribed by the rules. The appellants contended that the GEPF, in acting as it did, offended against the principle of legality.

It was held in *Public Servants Association of South Africa and Others v Government Employees Pension Fund and Others* [2020] 4 All SA 710 (SCA) that the challenge to the decision in this case was based on a failure to comply with the rules of the GEPF, which were mandated by the Pension Funds Act 24 of 1956. It was, in essence, a legality challenge. The delay in launching the review application had to be addressed first, as it would determine whether the other questions were required to be addressed. Delay, and whether it should in the circumstances of a particular case be condoned, must be considered in a legality review. In respect of a legality review, the application must be initiated without undue delay and courts have the discretion to refuse a review application in the face of an undue delay or to overlook the delay. In considering whether the delay should be overlooked, a court will have regard to the delay and the attendant circumstances.

On a conspectus of all the circumstances, including potential prejudice and having regard to the prospects of success on the merits, the court held that the delay should be overlooked or excused.

On the merits, the court per Navsa JA (Saldulker, Schippers, Dlodlo JJA and Goosen AJA concurring) confirmed that the required consultation had to precede the decision and had to take the form prescribed by the rules. The court also disagreed that the failure by the GEPF to consult beforehand could be cured by its belated attempts to invoke the bargaining council as a forum through which, it was contended on behalf of the GEPF, the same result could be achieved. The rule was clear about the sequence of events: Consultation had to occur first, followed by a decision. The rules prescribed a specific consultative process before arriving at a decision. It had to be followed. It was not followed and consequently the GEPF's decision was flawed and liable to be set aside.

The appeal was upheld with costs.

Legal practice

Gross misconduct: In *South African Legal Practice Council v Bobotyana* [2020] 4 All SA 827 (ECG). The respondent (Bobotyana) was an attorney consulted by a client to facilitate the purchase of immovable property. More than R 2 million was paid to the respondent by the client, to purchase the property. The applicant, the Legal Practice Council, sought to strike the name of Bobotyana off the roll of attorneys, as well as prayers for ancillary relief.

The application, having been launched after 1 November 2018, had to be adjudicated in terms of the Legal Practice Act 28 of 2014, although the conduct of Bobotyana had to be adjudged in accordance with the law as it stood at the time that it took place, namely before the repeal of the Attorneys Act 53 of 1979 and when the rules of the previous Law Society were still applicable. The Legal Practice Act, like the Attorneys Act, requires that a person be fit and proper in order to practise as either an attorney or an advocate.

The Law Society which was the watchdog of the profession, at the time, attempted to investigate the complaint against Bobotyana, but he refused to cooperate. Nevertheless, the court, per Kroon AJ (Beshe J concurring) found that the admitted facts revealed how Bobotyana systematically plundered his trust account in an exercise in theft and fraud. The numerous incidences of misappropriation of trust funds justified the conclusion that Bobotyana was not a fit and proper person to continue practising as an attorney.

The respondent's name was struck from the roll of attorneys.

Personal injury/delict

Claim for damages sustained as a result of a dog attack: In December 2013, while on a visit to a day camp under the control of the appellant (the City), the first respondent (Fatiema) was attacked by a pitbull owned by the second respondent (Quinton). The dog had been brought to the camp by the third respondent (Dylan).

Fatiema sustained serious physical injuries as a result of the attack, and developed post-traumatic stress disorder. She instituted action against the City in the High Court, claiming damages sustained as a result of the attack by the dog. The action was based on the alleged negligent breach of a legal duty to ensure the safety of visitors to the camp. The City defended the action and served third party notices, in terms of r 13 of the Uniform Rules of Court, on Quinton and Dylan, claiming an indemnity from them in relation to any damages that might be awarded against it.

While admitting that it owed the public utilising the facility a duty of care, the City denied liability to Fatiema, stating that it had complied with its duty by taking reasonable precautionary steps to keep the facility safe and it pointed to the fact that the dog was brought onto the premises unlawfully by a third party.

The High Court in *City of Cape Town v Carelse and Others* [2020] 4 All SA 613 (SCA) found that the City was liable for Fatiema's proven damages, and that Quinton was liable to compensate the City for 50% of those damages. The present judgment was on the City's application for leave to appeal. The primary question was whether there would be reasonable prospects of success.

The High Court had regard to the fundamental principle that allegedly negligent conduct in the form of an omission is not *prima facie* wrongful. Wrongfulness depended on the existence of a legal duty.

In seeking leave to appeal, the City stated that the court had erred in determining both wrongfulness and negligence against it and that there was a reasonable prospect of success in that regard. It also argued that the case raised pertinent questions in relation to liability of a municipality for the unlawful conduct of third parties.

The court, per Navsa JA (Dlodlo, Mocumie JJA; Eksteen and Poyo-Dlwati AJJA concurring) held that the evidence established that the City was aware of the potential dangers that dogs presented at the facility. It had signs prominently displayed at the main entrance, warning the public. While the main entrance was manned by officials, the camp's officials were aware that dogs entered the facility, either on their own or led by owners at a weak point in the camp's fence – away from the main entrance. The officials did

nothing to man that weak point. In those circumstances, the High Court correctly found against the City, and there were no prospects of success on appeal. The application for leave to appeal was dismissed.

- See Heinrich Schulze 'Law Reports' 2019 (July) *DR* 16 for the WCC judgment.

Property

Sale of property – right of pre-emption:

In *Aarifah Security Services CC v Jakoita Properties (Pty) Ltd and Others* [2020] 4 All SA 730 (GJ) the first respondent (Jakoita) as owner of a commercial building, marketed it for sale in 2017. The applicant (Aarifah) was a potential purchaser but ended up executing a lease as tenant of a portion of the building in September 2017. The lease contained a right of pre-emption in favour of Aarifah. In December 2017, Jakoita executed a deed of sale as seller with the second respondent (Nu-Line) as purchaser. It had informed Aarifah of an offer to purchase received from Nu-Line, and given it the opportunity to exercise the right of first refusal. According to the respondents, Aarifah had not exercised its right under clause 18 within 48 hours as required.

The dispute between the parties concerned the validity of an asserted exercise by Aarifah of a pre-emptive right, or right

of first refusal, in respect of the purchase of the immovable property. The matter was in particular, concerned with the formal manner in which such a right is to be exercised, and when it can be said to have been exercised.

Snyckers AJ held that the first important aspect of a right of pre-emption, as opposed to an option proper, is that, unlike an option, it is an enforceable right with respect to a sale despite the absence of any determination of the price or terms on which it is to be exercised. South African law currently holds that a distinction should be made between the covenant embodying the pre-emptive right, and acts that turn it into an agreement of sale between the grantor and the grantee. The covenant embodying the pre-emptive right, even in respect of the sale of land, need not comply with the formalities. It is binding if it is proved as a contract deliberately concluded, conferring a personal right. The only way in which the pre-emptive right can become an agreement of sale between grantor and grantee is if both execute it in writing, in compliance with the formalities. The holder may enforce its pre-emptive right by submitting an offer that complies with the formalities if it were accepted, and compelling the grantor to countersign it, or having the registrar or some other official authorised to countersign if the grantor fails to do so, in the event that the gran-

tor fails to countersign the holder's offer.

Applying the law to the facts, the court concluded that Aarifah did not exercise its right of pre-emption in terms of the relevant clause of the lease agreement.

Other cases

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

- accountability, the rule of law and the supremacy of the Constitution;
- action against party not privy to contract;
- distinction between option and right of pre-emption;
- principles of co-operative government and intergovernmental relations laid down in the Constitution;
- procurement of services by a bargaining council;
- review of any decision taken or any act performed by the state in its capacity as employer; and
- special dispensation for politically motivated crimes where offenders did not participate in Truth and Reconciliation Commission.

Merilyn Rowena Kader LLB (Unisa) is a Legal Editor at LexisNexis in Durban. □

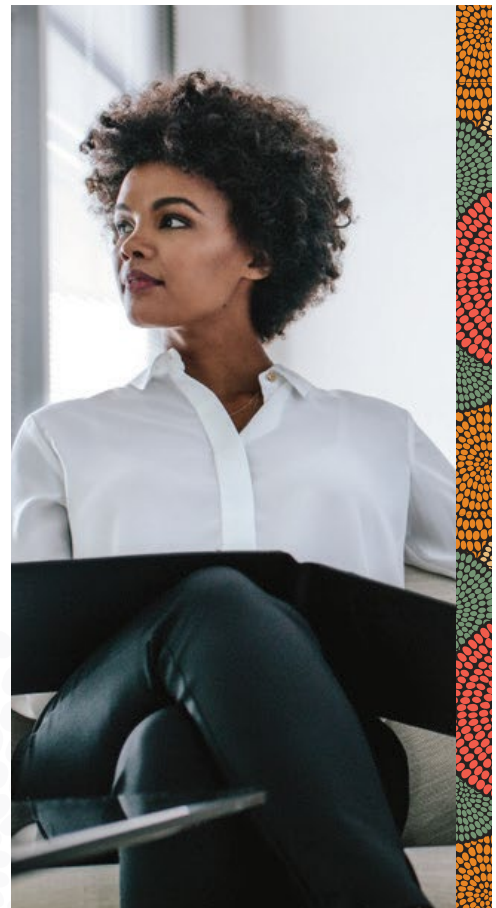
Quantum: Non-Patrimonial Loss

Help your clients claim what's fair

An online legal tool on the market powered by Lexis Library's online platform, specially-designed law report that uses an easily accessible matrix to collate and rank relevant information for quick, accurate and justifiable comparisons.

Find out more at

www.lexisnexis.co.za/non-patrimonial-loss





By Madoda
Mandla
Aseza Koti

Can information be requested in terms of the Mineral and Petroleum Resources Development Act?

Baleni and Others v Regional Manager: Eastern Cape Department of Mineral Resources and Others (Centre for Applied Legal Studies as amicus curiae) [2020] 4 All SA 374 (GP)

On 11 September 2020, the Gauteng Division of the High Court in Pretoria delivered an interesting judgment in *Baleni* regarding the rights of interested and affected parties in accessing a mining right application. Accordingly, this article seeks to set out the legal implications of this judgment on access to a mining right application or information.

Factual background

The applicants brought an application in their personal capacity, including a representative of the community, regarding the mining right application (the MR application) submitted by Transworld Energy and Mineral Resources (TEM) in uMgungundlovu. TEM applied for a mining right on 3 March 2015 and the applicants wrote a letter to the regional manager on 17 March 2015 seeking to ascertain whether the MR application was filed with the regional manager and requested a copy of same. The regional manager replied to the applicants' letter and confirmed that TEM had made an application for a mining right, which was already accepted in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) and the National Environmental Management Act 107 of 1998 (NEMA). Furthermore, the regional manager assured the applicants they would be consulted and advised them to request a copy of the MR application from TEM. However, TEM's legal representatives advised the applicants that their request did not form part of what they were responsible for and advised the applicants to request the MR application from the offices of the Department of Mineral Resources in Port Elizabeth and that such information could be requested in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA).

The applicants wrote a letter to the

regional manager objecting to the proposed mining activity on the basis that it would disrupt their way of life and they were never notified of the MR application as set out in s 10 of the MPRDA. However, the regional manager responded to the applicants and advised them to request a copy of the MR application from the TEM's representatives, who subsequently refused to provide such information. This refusal to provide the MR application ultimately led to the instituting of legal proceedings where the community applied for the following orders:

- Declaring them as interested and affected parties in terms of the MPRDA and, therefore, entitled in terms of ss 10(1) and 22(4) of MPRDA to be furnished with a copy of the MR application.
- Compelling the government officials to provide the applicants with a copy of the MR application by no later than five days from the date of the order.
- Prohibiting the government officials from awarding the mining right to TEM until the MR application has been furnished to the applicants and the processes for consultation, comment and objection contemplated in ss 10 and 22(4) have been completed.

Following copious amounts of correspondence between the parties, TEM forwarded the copy of the MR application to the applicant's attorneys on 5 February 2016 and contended that the relief sought by the applicants had been rendered moot and also disputed whether the applicants were entitled to prayer 3 of the application. However, in July 2016 the applicants discovered or became aware that TEM's majority shareholding and announced that it had entered into a Memorandum of Understanding to divest its 56% share in TEM and transfer it to BEE partner, Keysha. For this reason, the applicants were of the view that such developments necessitated an amendment of TEM's MR application and accordingly

requested a copy of the amendment and such request was refused by TEM.

Having regard to the above, the court was requested to determine the following issues –

- whether the applicants were entitled to a copy of the MR application in terms of ss 10 and 22 of the MPRDA; and
- whether the facts giving rise to the application rendered the relief sought academic?

At this point, it is worth noting that TEM contended that they 'voluntarily provided the documents, the applicants were not entitled to them' in terms of ss 10 and 22 of the MPRDA because the right of access to information is governed by PAIA and the applicants should utilise the process contemplated therein.

On the other hand, the applicants contended that on the proper interpretation of ss 10 and 22(4) of the MPRDA the applicants were entitled to the MR application automatically on request from regional manager. Furthermore, it was contended that an interpretation that is consistent with the objects of the MPRDA and the Constitution must be preferred over any other interpretation. Finally, the applicant argued that the purpose of consultation envisaged in s 10 of the MPRDA is to provide sufficient details to the landowners or occupiers to enable them to make an informed decision on the proposed mining activity.

Following an extensive analysis of the legal provisions of the relevant statutes (namely NEMA, the MPRDA and the Constitution), the court granted the relief sought by the applicants and held that the applicants should be provided with the MR application without having to utilise the procedure set out in PAIA. This decision was strengthened by the sluggish process contemplated in PAIA and that such process will defeat the purpose of making a meaningful consulta-

tion and submission to the MR application. Also, PAIA does not give automatic access to salient documentation, such as shareholding of the proposed mining project and, therefore, will prejudice the interested and affected parties in making substantial comments to the MR application.

Implications

To contextualise this aspect, it is important to set out the salient provisions contained in the relevant statutes. Section 10 of the MPRDA read with s 22 of MPRDA imposes an obligation on the mining right applicant to consult with the interested and affected parties in applying for a mining right. Section 32 of the Constitution guarantees everyone

the right of access to information and s 33 of the Constitution guarantees everyone to an administrative action that is lawful, reasonable, and procedurally fair. In giving effect to s 32 of the Constitution, the PAIA was promulgated and, therefore, any person requiring access to information will utilise the process set out therein.

However, this judgment has emphasised the importance of transparency and meaningful consultation with the stakeholders in the mining right application process in that the process set out in PAIA need not be followed if it cannot achieve specific results or enable parties to submit meaningful comments to the mining right application. However, it is unclear whether such request for infor-

mation in terms of the MPRDA can be pursued after the granting of the mining right or renewal of such mining right as well. Finally, it is important to mention that this judgment considered the legal position prior to the amendment of the MPRDA regulations and the amendments have since introduced a robust, transparent and stringent requirements on meaningful consultation for mining right applications.

Madoda Mandla Aseza Koti LLB (UWC) Cert Mining and Prospecting Law and Climate Change Law (Wits) is a legal practitioner at Gwina Attorneys Inc in Johannesburg. □



By
Kgomo
Ramotsho

Which Act should legal practitioners rely on when applying for admission to practice on or after the commencement of the LPA?

Donaldson v Legal Practice Council (GJ) (unreported case no 15295/2020, 5-11-2020) (Lamont J (Meyer J and Harrison AJ concurring))

In the *Donaldson* matter, the Gauteng Local Division of the High Court in Johannesburg was approached by the applicant (Donaldson) seeking to obtain that the defendant (the Legal Practice Council (LPC)) enrol him as an attorney, after the LPC declined to approve his application seeking a conversion of his status from advocate to attorney on the basis that he had not completed a Practice Management Training course for legal practitioners prior to making his application.

The applicant was admitted on 12 October 2012 in the Western Cape Division of the High Court in Cape Town and practiced as such from 2012 to early 2013. He then proceeded to take up a position on the non-practising roll as the national litigation manager of the Invictus Group. He held this position for approximately three years. On 2 April 2015, the applicant applied to have his name removed from the roll of attorneys and applied to be admitted as an advocate of the High Court. He was duly admitted as such on 6 August 2015 and he became a member of the National Bar Association.

On 11 May 2020, the applicant applied to the LPC seeking the conversion of his status from an advocate to attorney.

The court, per Lamont J, said the respondent was of the view that there was nothing in the Legal Practice Act 28 of 2014 (LPA) that entitled a practitioner to be exempted from completing the course, which in its view was compulsory to complete. The applicant's application in all other respects demonstrated his compliance with the LPA. The court added that the issues raised and which are to be demonstrated by that court were defined by the Judge President when he established the Full Court to hear the matter, included:

- Whether legal practitioners who apply for conversion from advocate to attorney and were admitted as attorneys and advocates prior to the promulgation of the LPA are exempt from completing the peremptory legal practice management course.
- What the legislature intended by the use of the wording in r 30.4.4.2 read with s 85(1)(b) of the LPA concerning the requirement to complete a prac-

tice management course insofar as an application for conversion from advocate to attorney is concerned.

The High Court said the LPC is entitled, by reason of the provisions of the LPA, to make rules. Section 95 of the LPA provides:

'95. Rules

(1) The Council may, and where required in the circumstances, must by publication in the *Gazette*, make rules relating to –

...

(z) the circumstances in which a legal practitioner can apply for the conversion of his or her enrolment and the requirements that must be complied with as contemplated in section 32(3);

...

(zL) the legal practice management course to be completed by first time attorneys and advocates referred to in section 34(2)(b) and the fee payable in respect thereof as contemplated in section 85(1)(b).'

The court said that s 95(1)(z) and (zL) of the LPA expressly recognise that the practice management course is a course

that has to be completed by first-time attorneys and advocates referred to in s 34(2)(b). To produce proof of competence as required at the time of application. The court added that legal practitioners who are not first-time attorneys and advocates contemplated in s 34(2)(a)(ii) of the LPA, who seek enrolment or conversion are excused from providing proof.

The High Court pointed out that the applicant who was admitted as an attorney on 12 December 2012 and who had converted to being an advocate on 6 August 2015 remained entitled to be admitted as an attorney notwithstanding that the LPA, which came into operation on 1 November 2018, replaced the Attorneys Act 53 of 1979. The High Court added that s 115 of the LPA provides that any person who immediately before the date referred to in s 120(4) was entitled to be

admitted and enrolled as such in terms of the LPA. The court said that the applicant, notwithstanding the fact that he was admitted and practised as an attorney at the time the Attorneys Act was of application, is to be treated as if he had been admitted and practiced at the time the LPA was of application. The court held that accordingly the applicant did not seek in his conversion to be admitted as an attorney for the first time.

The High Court referred to the matter of *Ex Parte Goosen and Others* 2019 (3) SA 489 (GJ) where it was held that any person who applies for admission to practice on or after the commencement of the LPA is entitled to rely on the provisions of the Attorneys Act or the Admission of Advocates Act 74 of 1964 as the case may be. The court held that in the present matter the applicant was a person who previously had practised as

an attorney and so was not a first-time legal practitioner. The court pointed out that the applicant did not need to attend a legal practice management course and was entitled to be admitted as all other requirements were duly met.

The court made the following order:

'1. The respondent is directed to approve the applicant's application for conversion from advocate to attorney (legal practitioner) dated 11 May 2020 in accordance with the applicant form provided by the respondent to it.

2. Each party is to pay its own costs'.

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



By Meshack
Fhatuwani
Netshithuthuni

An absolute or flexible restriction: Can prohibited practices be prosecuted three years after the practice ceased?

Competition Commission of South Africa v Pickfords Removals SA (Pty) Limited 2020 (10) BCLR 1204 (CC)

On 24 June 2020 the Constitutional Court (CC) handed down a landmark judgment in the matter between the Competition Commission of South Africa (the Commission) and Pickfords Removals SA (Pty) Ltd (Pickfords). The matter concerned a complaint referral by the Commission against various furniture removal companies including, Pickfords accused of engaging in 37 instances of collusive tendering for furniture removal services in contravention of the Competition Act 89 of 1998 (the Act). The judgment has a significant impact on the interpretation of the prescription provisions of the Act. Therefore, it is expected to have substantial implications in the investigation and prosecution of prohibited practice matters in light of the fact that the Commission will, from now on, be in a position to seek con-

donation from the Competition Tribunal (Tribunal), where the conduct in question would have ordinarily prescribed under s 67(1) of the Act.

Facts

In this case, various furniture removal companies were accused of tendering collusively by providing 'cover pricing' to customers in respect of tenders for furniture removal services, in contravention of s 4(1)(b)(i), (ii) and (iii) of the Act. The Commission had initiated two complaints – the first one on 3 November 2010 (2010 initiation) but did not specifically cite Pickfords as a respondent to the investigation. The second one on 1 June 2011 (2011 initiation), which included Pickfords and other furniture removal firms. Pickfords was not identified in the 2010 initiation, but was only identified in the 2011 initiation. The 2011

initiation was in turn amended in June 2013, alleging the total of 37 instances of collusive tendering by Pickfords. Pickfords contended that 14 of these alleged incidents occurred more than three years prior to the 2011 initiation, and that six were insufficiently pleaded. In September 2015, the Commission referred a prohibited practice complaint to the Tribunal, alluding to both the 2010 initiation and 2011 initiation.

Pickfords argued, *inter alia*, that 14 of the 37 counts of the alleged collusive conduct were time-barred in terms of s 67(1) of the Act. In addition, Pickfords contended that they had prescribed since these incidents stopped three years before the investigation started. Further, the complaint was only initiated in 2011 (not 2010, as contended by the Commission), since it was not identified as a party in the 2010 initiation. Pickfords ar-

gued that it was the 2011 initiation, rather than the 2010 initiation, that was the 'trigger event' for the commencement of the running of prescription period.

As a counter argument, the Commission contended that the three-year period only started to run once the Commission acquired knowledge of the prohibited practice in line with the Prescription Act 68 of 1969 (Prescription Act). The Commission further argued that it would be incorrect to apply the 2011 initiation date for s 67's time-barring purposes, as it was a mere amendment (ie, a continuation) of the 2010 initiation. The Commission argued that the 2011 initiation was merely an amendment of the 2010 initiation and that the latter was thus the 'trigger event'.

The Tribunal ruled in Pickford's favour that the Commission could not investigate and prosecute the 14 cartel instances, as these stopped three years before the Commission started its investigation. Dissatisfied with the Tribunal decision, the Commission appealed the Tribunal decision to the Competition Appeal Court (CAC), which was dismissed on the basis of the same reasoning that s 67(1) prevents the commission from investigating and prosecuting cartels that stopped three years before the investigation started.

Trigger event

The CC had to consider whether s 67(1) of the Act constitutes a substantive time-bar, which places an absolute prohibition on the initiation of a complaint in respect of a prohibited practice more than three years after the cessation of that practice or is merely a procedural time-bar provision, in which instance the event of non-compliance may be condoned in terms of s 58(1)(c)(ii) of the Act. Accordingly, the CC had to consider whether the 2010 complaint, alternatively the 2011 complaint, constituted the 'trigger event' for purposes of s 67(1). A determination of the correct 'trigger event' for the commencement of the running of the three-year period is crucial. On the facts, several counts of the alleged collusive conduct would only be timely if the 2010 initiation, as opposed to the 2011 initiation, was used as the trigger event.

In this regard, the Tribunal as the court of first instance, had found that the 2011 initiation was not an amendment of the 2010 initiation, but was a self-standing initiation. The CAC overruled the Tribunal, finding the converse. The CC noted that the 2010 initiation pertinently stated that the collusion was 'ongoing', foreshadowing the possible addition of further firms and, in the CC's view, the 2011 initiation made it clear that it was intended to be an extension

of the 2010 initiation. The Tribunal and CAC agreed with Pickfords and held that s 67(1) of the Act prevents the Commission from investigating and prosecuting cartels that stopped three years before the investigation started. However, the Tribunal and CAC had differing opinions on whether the 2011 initiation constituted an amendment of the 2010 initiation, or if it constituted a separate self-standing initiation. The CAC nonetheless held that Pickfords only became a named party when the 2011 initiation occurred, 'before that, the alleged prohibited practice did not involve it' such that, on the CAC's analysis, the trigger event would have still been in 2011. It is in this regard that the CC departed from the CAC.

In disagreeing with the CAC that the trigger event was the 2011 initiation, the court held that: 'That approach misconceives the purpose and objects of the Competition Act, particularly the provisions relating to the initiation of a complaint. As stated, the emphasis in those provisions is on the prohibited practice concerned, not the names of firms or parties implicated in it.' The trigger event from which the three-year period for purposes of s 67(1) of the Act was to be calculated was with reference to the 2010 initiation.

Does s 67(1) constitute an absolute time-bar?

Section 67(1) of the Act, as it was then read that: 'A complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased'. This so-called 'prescription' provision was previously widely interpreted as a substantive time bar that extinguished the Commission's statutory power to initiate a complaint more than three years after the practice has ceased to have an effect.

The Tribunal held that it could not condone non-compliance with s 67(1). The CAC agreed with this finding, having viewed the prescription provision as serving a legitimate purpose of barring investigations into cartel behaviour that ceased an appreciable time ago, and no longer endangered the public. In overruling the CAC, and finding in favour of the procedural time-bar interpretation of s 67(1), the CC noted that a rigid interpretation could potentially subvert the Commission's work as a public body by hindering its access to the Tribunal and could also possibly limit access to a civil court for potential claimants seeking damages arising from a prohibited practice. The CC emphasised that due to the secretive nature of cartels it would be inequitable to penalise the Commission, which would invariably have no knowledge of said conduct (price fixing), for its failure to act within the three-year

period. That would be tantamount to rewarding cartels for their covert unlawful conduct and would not be in the interests of justice.

The CC held that interpreting s 67(1) of the Act as imposing an absolute substantive time-bar in the form of a prescription provision would clearly subvert access to the Tribunal, the CAC and other courts. The CC stated that it will hypothetically encourage cartels to remain silent for a period of three years, in order to gain immunity for known prohibited activities. Thus, the CC concluded by finding that s 67(1) of the Act is a procedural time-bar, capable of condonation.

In a unanimous judgment, the CC held that the 2010 initiation is the correct trigger date and that the 2011 initiation was merely an amendment of the 2010 initiation. The purpose of the initiation of a complaint is to commence an investigation. This purpose would be defeated if the Commission was expected to know the identities of all the parties involved before an initiation was properly made. The CC found that the Commission need only have in mind some of the firms potentially involved in a prohibited practice to initiate a valid complaint, and the names of all the firms need not be included when the complaint is first initiated.

On the condonation argument, the CC concluded that s 58(1)(c) of the Act grants the Tribunal the power to condone, on good cause shown, any non-compliance of, *inter alia*, a time limit set out in the Act. Overruling the CAC, the CC found that this 'expressly provides a general power of condonation, save for the exclusions mentioned', and that condonation of non-compliance with the procedural time-bar of s 67(1) of the Act are within the Tribunal's powers, when good cause is shown. The CC, however, cautioned that condonation for non-compliance with s 67(1) does not provide a blank cheque for slothful litigation, as 'good cause' must still be shown, which depends on the facts of each case, with the overriding consideration being the interests of justice. To this end, relevant factors that may be considered include –

- the extent and cause of the delay;
- the effect of the delay on the administration of justice and other litigants;
- the reasonableness of the explanation for the delay;
- the issues to be raised in the matter; and
- the prospects of success.

According to Majiedt J, secretive cartel conduct will flourish if the Commission is precluded from accessing the Tribunal in justified cases, more than three years after cessation. The CC concluded that an interpretation of s 67 as a proce-

dural time-bar is preferred and absent a knowledge requirement or the possibility of condonation, which would ameliorate the effect of s 67(1) of the Act, the purpose of the Act would be undermined. Accordingly, the CC held that the Tribunal enjoyed the power, in terms of s 58(1)(c)(iii) of the Act, to condone non-compliance with s 67(1) on 'good cause' shown. As a result, the appeal was upheld with costs.

Conclusion

As a consequence of this judgment, s 67(1) of the Act can be interpreted as a

procedural time-bar capable of condonation if good cause is shown, rather than a substantive time-bar, which places an absolute prohibition on the initiation of a complaint in respect of a prohibited practice, more than three years after the cessation of that practice. The CC upheld the Commission's appeal that s 67(1) of the Act does not prevent the Commission from investigating and prosecuting cartel conduct, which stopped three years before the investigation started. Section 58(1)(c)(iii) of the Act expressly grants the Tribunal the power to condone non-compliance with s 67(1) of the Act, so long

as good cause is demonstrated. The CAC judgment was set aside.

Meshack Fhatuwani Netshithuthuni LLB (Unisa) LLM (Commercial law) (UJ) Cert in Climate Change and Energy law Cert in Prospecting and Mining law Cert in Water law (Wits) Cert in Environmental law (UP) Cert in Pension Funds law (Unisa) is a legal practitioner at the Competition Commission of South Africa in Pretoria. □

By
Solomon
Gordon

Taxation review – taxing master ignoring court order

Nedbank Limited v Gordon NO and Others (GP) (unreported case no 8938/17, 16-8-2019) (Mabuse J)

The *Nedbank* case is an important judgment dealing with principles relating to the question of whether legal practitioners, appointed as executors, are entitled to a fee outside their capacity as an executor.

Nature of the matter

This matter is a review of the taxation by the Taxing Master of the Gauteng Division of the High Court of a bill of costs pursuant to an order granted by Haupt AJ in an application to compel the respondents, the executors in an estate, to file the liquidation and distribution account and to be removed if they did not. The matter was fully argued, which included the costs order and both parties had the benefit of counsel.

The application was dismissed with costs on an attorney and client scale and the legal representatives of the applicant were not allowed to charge any fees for the preparation of the application.

The Taxing Master, notwithstanding the order made by the judge, disallowed the attorney and client costs due to the respondents, but not the disbursements incurred by them on the basis that the 'executors [remuneration] covers all the work as an attorney and executor of the Estate'.

The respondents applied for a review of the Taxing Master's order to disallow the attorney and client fees.

Background

The respondents opposed the application as the validity of the will was being challenged, and litigation to set aside the will and other relief was also pending

in the Gauteng Local Division of the High Court in Johannesburg. They were unable to draw a liquidation and distribution account, until the validity of the will had been determined.

The Taxing Master's case

The Taxing Master argued that the first respondent was the co-executor, as well as the attorney of record and that an executor can only be paid their 'commission'.

The Taxing Master cited – as authority for her ruling – Marcus Jacobs and NEJ Ehlers *Law of Attorneys' Costs and Taxation Thereof* (Cape Town: Juta 1979) at p 91 where they discuss how 'an attorney who performs duties as an attorney and who is also at the same time an executor of an estate, is not entitled to recover costs for work done in his professional capacity'. She went on to state that: 'The principle is strictly applied and even where an estate is successful in legal action and costs are awarded against the other party, they cannot be recovered except for disbursements'.

As further support for her ruling she cited *Estate Fawcus v Van Boeschoten and Lorentz* 1934 TPD 94 and *Nieuwoudt v Estate van der Merwe* 1928 CPD 486. In *Estate Fawcus* it was held that: 'An executor who is an attorney and acts in his professional capacity on behalf of the estate in a lawsuit is not entitled to remuneration as an attorney, notwithstanding that his co-executor approves of his so acting'.

The Taxing Master referred to circumstances where the work undertaken by an executor in their administration of the estate far exceeds what has been al-

lowed as an executor's remuneration in terms of the Administration of Estates Act 66 of 1965 and not for work undertaken by them that is not part of their functions in attending to the administration of the estate. It appears from the Taxing Master's remarks that she had not grasped the difference between the executor's functions in administering the estate and work undertaken by them outside the estate and which was not part of their functions as executor.

The Taxing Master believed that she exercised her 'discretion reasonably and justly ... in finding that the executor's [remuneration] covers all of his work as an attorney and executor of the estate.'

The cases cited by the Taxing Master, were where the costs were argued at the hearing of the matter.

The discretion, which the Taxing Master can exercise, is in relation to an item in a bill or the quantum thereof and not whether to accept an order of court or not.

Estate Fawcus must be clarified. The question of liability for costs was argued at the trial and related to fees claimed by an attorney for the work they had carried out in connection with the estate. A distinction must be made between costs incurred in an action against the executors for an order compelling them to draw a liquidation and distribution account and costs which were incurred by them in administering the estate. The costs claimed by the respondents were in respect of an application against the executors personally where there was a prayer for costs against them *de bonis propriis*.

The respondents' case

The task of the Taxing Master is to quantify the costs in accordance with the order that already exists and they are not entitled to ignore the order made by the judge or vary it in any way.

The respondents argued that it was not the function of the Taxing Master to interpret statutes or to conduct an inquiry as to what fees may be charged by executors by law.

Furthermore, s 51(a) of the Administration of Estates Act read with para 12 of the will, specifically allowed for payment of professional fees incurred by the executors outside of the executor's remuneration, and reads in the will: 'An executor ... or any firm of which he is a member or partner, may be employed to act in any matter relating to my estate ... and shall be entitled to charge and be paid for any services rendered by him or his firm in a professional capacity. Including for acts or services which any Executor ... could have done personally'.

The fees incurred were not in respect of the executor's functions in administering the estate but rather to defend a claim against them personally.

'A Taxing Master's duty is to carry out an order for costs not to vary it. Whether the order is right or wrong the Taxing Master must give effect to it. The argument that the trial court was wrong in law in making the order it did is not an argument which can be advanced on taxation, for this would in effect amount to a Taxing Master sitting in appeal on the judgment of the Court which made the order. This is not the function of the Taxing Master' (Jacobs and Ehlers (*op cit*) at p 32 in the *Nedbank Limited* case at para 9).

By disallowing the fees, the Taxing Master overrode the order and acted contrary to the order.

The cases cited by the Taxing Master were based on s 81(2) of the Insolvency Act 32 of 1916, which was followed by a similar provision in s 63(1) of the Insolvency Act 24 of 1936.

The respondents contended that neither of the Insolvency Acts are applicable to the remuneration of executors in deceased estates which are regulated by the Administration of Estates Act nor did they contain similar provisions to s 51(1) of the Administration of Estates Act.

Judgment

Mabuse J in the review judgment, found the respondents did not advance any argument that the fees did not constitute a salary. It was clearly not a salary and I submit that the judge was misdirected in this regard. However, the judge found that the fees were classified as remuneration and raised the question whether the respondents' were entitled to receive

any remuneration outside 'the precinct of the word "remuneration" as envisaged in s 51(1) of [the Administration of Estates] Act 66 of 1965'.

The judge also found the application was opposed by the respondents in their capacities as executors 'and not in their personal professional capacities'.

Section 51(1) of the Administration of Estates Act is of paramount importance and points out that 'whatever service the executor renders in the *administration of the deceased estate*, he will receive his remuneration from the assets of the estate' (my italics).

The respondents were charging for fees in respect of the administration of the estate and were defending an application brought by a creditor (the applicant) to compel them to prepare and lodge a liquidation and distribution account, which application included a prayer for the respondents to pay costs. The work the respondents carried out in defending the application was clearly not carried out in the administration of the estate as envisaged by s 51(1).

The fees ordered against the respondents belonged to the estate and not to the respondents and that neither the 'executor nor their attorneys were entitled to claim the fees that were awarded by the court. They were an asset in the estate of the deceased. They should therefore be reflected in the liquidation and distribution account of the deceased. They were not assets of the executors or the attorneys.'

Perhaps the judge did not fully appreciate how bills are drawn for submission for taxation. Only a legal practitioner can present a bill of costs for taxation. The costs were awarded to and belong to the litigants and not to the estate.

The crucial point is whether the legal practitioner is entitled to fees outside their capacity as the executor.

'The ruling of the taxing master was that only disbursements were allowed and that all legal fees for work done by the first respondent in his capacity as the attorney should be disallowed. Accordingly, I agree with the applicant's attorneys' argument that an executor's commission covers the whole of his work for the estate and that if the executor is an attorney, he or his firm is not entitled to recover any fees for work done as an attorney'.

Conclusion

This judgment sets a very dangerous precedent for litigants. It is clear that the judge misdirected himself in dealing with whether there was any liability by the applicant for costs – he found that there was no such liability – because it is the Taxing Master's function to determine whether the services have been performed, whether the charges are rea-

sonable and not to determine liability for costs or to question the court's order, but to follow it. The question of liability is one for the court to determine not for the Taxing Master.

The judge found support in and quoted Boshoff J in *Mouton and Another v Martine* 1968 (4) SA 738 (T) in regard to taxation of costs:

'The purpose of the taxation was really twofold; firstly, to fix the costs at a certain amount so that execution could be levied on the judgment and, secondly, to ensure that the party who is condemned to pay the costs does not pay excessive, and the successful party does not receive insufficient, costs in respect of the litigation which resulted in the order for costs.'

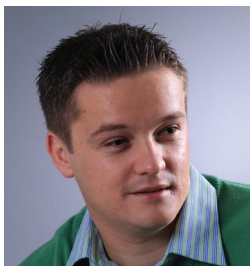
The question of costs was argued at the hearing of the matter and if the applicant was not satisfied with the order by the court as to the costs, it should have appealed the judgment. What the judge has now allowed, in effect, is an appeal on the order for costs.

The judge also found that 'accordingly, the function of the Taxing Master is to decide: "... whether the services have been performed, whether the charges are reasonable or adding (sic) to tariff, and whether disbursements properly allowable as between party and party have been made, his function is to determine the amount of the liability, assuming that liability exists, and the fact that he requires to be satisfied that liability exists before he will tax does not show that there is any liability. The question of liability is one for the court, not for the Taxing Master"'.

I respectfully suggest that the judge should have taken careful note of, and indeed followed, the authority quoted which was, of course, the real reason for the review application. The judge should, therefore, have found that it was the Taxing Master's function to assess the quantum of the fees, not to determine liability therefor.

If this judgment is followed it may result in a situation where opposing litigants would be free to abuse the court system and litigate recklessly, as in this matter, safe in the knowledge that there would be no costs consequences for their actions. This would not be in the interests of the courts or in the interest of justice.

Solomon Gordon *BCom LLB LLM H Dip Tax (Wits)* is a legal practitioner and consultant at Fairbridges Wertheim Becker in Johannesburg. Mr Gordon was personally involved in the *Nedbank* matter. □



By
Philip
Stoop

New legislation

Legislation published from
1 November – 31 December 2020

Bills

Traditional Courts Bill B1C of 2017.
Traditional Courts Bill B1D of 2017.
Cybercrimes Bill B6B of 2017.
Cybercrimes Bill B6D of 2017.
Local Government: Municipal Systems Amendment Bill B2B of 2019.
Recognition of Customary Marriages Amendment Bill B12A of 2019.
Recognition of Customary Marriages Amendment Bill B12B of 2019.
Upgrading of Land Tenure Rights Amendment Bill B6B of 2020.
Electoral Laws Amendment Bill B22A of 2020.
Electoral Laws Amendment Bill B22B of 2020.
Rates and Monetary Amounts and Amendment of Revenue Laws Bill B26A of 2020.
Rates and Monetary Amounts and Amendment of Revenue Laws Bill B26B of 2020.
Taxation Laws Amendment Bill B27A of 2020.
Taxation Laws Amendment Bill B27B of 2020.
Pension Funds Amendment Bill B30 of 2020.
Sectional Titles Amendment Bill B31 of 2020.
Correctional Services Amendment Bill B32 of 2020.
Agricultural Produce Agents Amendment Bill B33 of 2020.

Commencement of Acts

Traditional and Khoi-San Leadership Act 3 of 2019. *Commencement:* 1 April 2021. Proc38 GG43981/11-12-2020 (also available in Afrikaans).
Border Management Authority Act 2 of 2020, ss 7 – 12. *Commencement:* 1 January 2021. Proc41 GG44038/24-12-2020 (also available in Sepedi).

Promulgation of Acts

Disaster Management Tax Relief Act 13 of 2020. *Commencement:* 5 November 2020. GN1188 GG43883/5-11-2020 (also available in Afrikaans and isiXhosa).
Disaster Management Tax Relief Administration Act 14 of 2020. *Commencement:* 1 April 2020. GN1189 GG43884/5-11-2020 (also available in Afrikaans).

Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Act 15 of 2020. *Commencement:* 23 December 2020. GN1416 GG44034/23-12-2020 (also available in Afrikaans).

Social Assistance Amendment Act 16 of 2020. *Commencement:* To be proclaimed. GN1414 GG44035/23-12-2020 (also available in Afrikaans).

Selected list of delegated legislation

Airports Company Act 44 of 1993

Airport charges. GenN738 GG44031/24-12-2020.

Allied Health Professions Act 63 of 1982

Allied Health Professions Council of South Africa: 2021 annual fees. BN142 GG43962/4-12-2020.

Agricultural Produce Agents Act 12 of 1992

Biosecurity rules for livestock agents. BN135 GG43900/13-11-2020.

Auditing Profession Act 26 of 2005

Amendment of the Code of Professional Conduct for Registered Auditors. BN141 GG43962/4-12-2020.

Banks Act 94 of 1990

Amendment of Regulations. GenN724 GG44003/18-12-2020 and GN1427 GG44048/31-12-2020.

Broad-Based Black Economic Empowerment Act 53 of 2003

Applications for market access permits for agricultural products in terms of the World Trade Organisation (WTO) Agreement for 2021 (Marrakesh Agreement) to be issued to importers into the Republic for certain quantities and reduced levels of duty. GN R1227 GG43909/17-11-2020.

Child Justice Act 75 of 2008

Accredited diversion service providers and diversion programmes. GN1356 GG44003/18-12-2020.

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Regulations on Compensation Fund's Tariffs of Assessment. GN1282 GG43959/3-12-2020.

Disaster Management Act 57 of 2002

• Correctional services

Measures to address, prevent and combat the spread of COVID-19 in all cor-

rectional centres and remand detention facilities in South Africa. GN1197 GG43894/10-11-2020.

• Communication

Amendment of the Information and Communications Technology (ICT) COVID-19 National Disaster Regulations in terms of the Electronic Communications Act 36 of 2005. GenN678 GG43945/27-11-2020.

• Education

Directions regarding the marking of examination scripts of the 2020 National Senior Certificate and Senior Certificate examinations and measures to address, prevent and combat the spread of COVID-19. GenN748 GG44054/31-12-2020.

• General regulations

Amendment of regulations issued in terms of s 27(2) (alert level 1 lockdown: Partial opening of borders, sale and dispensing of liquor, offences and passenger ships). GN1199 GG43897/11-11-2020.

Extension of the National State of Disaster (COVID-19) to 15 December 2020. GN1225 GG43905/14-11-2020.

Amendment of regulations issued in terms of s 27(2). GN1290 GG43964/3-12-2020.

Geographical area or cluster of geographical areas determined as hotspots for COVID-19. GN1291 GG43965/3-12-2020, GN1345 GG43996/14-12-2020 and GN R1424 GG44045/29-12-2020.

Explanatory note: Alert level 1 during COVID-19 lockdown. GN1292 GG43966/3-12-2020.

Amendment of regulations issued in terms of s 27(2) (alert level 1 lockdown). GN1346 GG43997/15-12-2020, GN1370 GG44009/17-12-2020 and GN1421 GG44042/24-12-2020.

Amendment of regulations issued in terms of s 27(2) (alert level 3 lockdown). GN R1435 GG44051/29-12-2020.

Amendment of regulations issued in terms of s 27(2) (adjusted alert level 3). GN R1423 GG44044/29-12-2020.

• Health

Amendment of directions regarding measures to prevent and combat the spread of COVID-19. GN1278 GG43954/3-12-2020 and GN1360 GG44004/15-12-2020.

• **Home Affairs**

Amendment of directions regarding measures to prevent and combat the spread COVID-19 in Home Affairs. GN1277 GG43953/3-12-2020.

• **Social development**

Amendment of directions on measures to address, prevent and combat the spread of COVID-19. BN131 GG43866/2-11-2020.

• **Transport**

Amendment of directions on measures to prevent and combat the spread of COVID-19 in the air services for alert level 1. GN1279 GG43956/3-12-2020.

Amendment of directions on measures to prevent and combat the spread of COVID-19 in cross-border road transport for alert level 1. GN1280 GG43957/3-12-2020.

Amendment of directions regarding measures to prevent and combat the spread of COVID-19: Determination of extension for the validity period of learner's licences, driving licence cards, licence discs, professional driving permits and registration of motor vehicles. GN1281 GG43958/3-12-2020.

Amendment of directions relating to measures to prevent and combat the spread of COVID-19 in public transport services. GN1344 GG43995/14-12-2020 and GN1420 GG44040/24-12-2020.

Films and Publications Act 65 of 1996

Amendment of the Films and Publications Tariff's Regulations. GN1174 GG43872/6-11-2020.

Gas Regulator Levies Act 75 of 2002

Levy and interest payable on petroleum pipelines. GN1342 GG43994/14-12-2020.

Levy and interest payable on piped-gas. GN1343 GG43994/14-12-2020.

Higher Education Act 101 of 1997

Policy framework for internationalisation of higher education in South Africa, 2019. GN1176 GG43872/6-11-2020.

Interim Protection of Information Land Rights Act 31 of 1996

Extension of the application of the Act until till 31 December 2021 (also available in Afrikaans). GN1323 GG43981/11-12-2020.

International Co-operation in Criminal Matters Act 75 of 1996

Mutual Legal Assistance in Criminal Matters Treaty and Extradition Treaty between South Africa and Bangladesh. GN1324 GG43981/11-12-2020.

International Trade Administration Act 71 of 2002

Amendment of the Automotive Production and Development Programme Regulations. GN R1348 GG44001/15-12-2020.

Legal Practice Act 28 of 2014

Amendment of the rules of the South African Legal Practice Council (r 54.12 and 54.15.3). GenN626 GG43872/6-11-2020.

Marine Living Resources Act 18 of 1998
Amendment of Regulations. GN1373 GG44017/18-12-2020.

Marketing of Agricultural Products Act 47 of 1996

Establishment of a statutory measure and determination of differentiated levy on planted hectares for funding of an integrated area wide fruit fly control programme in specified production areas. GN R1276 GG43952/2-12-2020.

Medicines and Related Substances Act 101 of 1965

Exclusion of sch 2, sch 3 and sch 4 substances from the operation of certain provisions of the Act. GN1233 GG43913/20-11-2020.

Updated schedules. GN R1375 GG44019/18-12-2020.

Regulations regarding fees payable. GN R1379 GG44026/22-12-2020.

Merchandise Marks Act 17 of 1941

Prohibition of the use of Companies and Intellectual Property Commission Logo *biz PORTAL*. GN1226 GG43906/16-11-2020.

National Energy Act 34 of 1998

Regulations for the mandatory display and submission of energy performance certificates for buildings. GenN700 GG43972/8-12-2020 (also available in isi-Zulu and Sesotho).

National Environmental Management: Waste Act 59 of 2008

Regulations regarding Extended Producer Responsibility. GN1184 GG43879/5-11-2020.

Extended producer responsibility scheme for the electrical and electronic equipment sector. GN1185 GG43880/5-11-2020.

Extended producer responsibility scheme for the lighting sector. GN1186 GG43881/5-11-2020.

Extended producer responsibility scheme for paper, packaging and some single use products. GN1187 GG43882/5-11-2020.

National Health Act 61 of 2003

Enforcement policy in terms of the Procedural Regulations Pertaining to the Functioning of the Office of Health Standards Compliance and Handling of Complaints by the Ombud. GN1286 GG43962/4-12-2020.

Occupational Health and Safety Act 85 of 1993

Asbestos Abatement Regulations, 2020. GN R1196 GG43893/10-11-2020.

Incorporation of Health and Safety Standard: Code of Practice for commercial zip line and aerial adventure parks. GN R1399 GG44029/24-12-2020.

Pharmacy Act 53 of 1974

Fees payable to the council. BN132 GG43870/4-11-2020.

Guidelines for the registration of persons who hold a Bachelor of Pharmacy degree as Pharmacist's Assistant Post-Basic. BN138 GG43934/27-11-2020.

Plant Breeders' Rights Act 15 of 1976

Amendment of the regulations relating to plant breeders' rights. GN1249 GG43934/27-11-2020.

Prescribed Rate of Interest Act 55 of 1975

Prescribed rate of interest from 1 September 2020. GN R1182 GG43873/6-11-2020 (also available in Afrikaans).

Private Security Industry Regulation Act 56 of 2001

Amendment of Regulations. GN1325 GG43981/11-12-2020.

Project and Construction Management Professions Act 48 of 2000

Fees and charges for 2021/22 financial year. BN140 GG43948/1-12-2020 and BN165 GG44031/24-12-2020.

Promotion of National Unity and Reconciliation Act 34 of 1995

Amendment of the regulations relating to assistance to victims in respect of basic education. GN R1193 GG43890/6-11-2020 and GN R1364 GG44005/18-12-2020 (also available in Afrikaans).

Amendment of the regulations relating to assistance to victims in respect of higher education and training. GN R1194 GG43891/6-11-2020 (also available in Afrikaans).

Increased amounts in terms of the regulations relating to assistance to victims in respect of higher education and training. GN R1302 GG43979/11-12-2020 (also available in Afrikaans).

Public Service Act 103 of 1994

Amendment of the official form (Z83 Application for Employment Form) in terms of the Public Service Regulations, 2016. GenN627 GG43872/6-11-2020.

Amendment of the official form (Z1(a) Application for Leave of Absence Form) in terms of the Public Service Regulations, 2016. GN1355 GG44003/18-11-2020.

Refugee Act 130 of 1998

Amendment of the Refugee Appeals Authority Rules. GN1234 GG43913/20-11-2020.

Societies for the Prevention of Cruelty to Animals Act 169 of 1993

National Council of Societies for the Prevention of Cruelty to Animals: Amendment of rules. BN137 GG43913/20-11-2020.

South African Schools Act 84 of 1996

Amendment of the Curriculum and Policy Statement of the National Curriculum Statement to provide for minimum outcomes and standards and a national process and procedure for the assessment of learner achievement. GN1261 GG43934/27-11-2020.

National norms and standards for school funding: Schools that may not charge school fees (no-fee schools) in 2021. GN1376 GG44020/18-12-2020.

Tax Administration Act 28 of 2011

Extension of the deadline to file country-by-country returns: 31 December 2020

or 31 January 2021 deadline to 28 February 2021; and the 28 February 2021 deadline to 31 March 2021. GN1236 GG43913/20-11-2020 (also available in Afrikaans).

Veterinary and Para-Veterinary Professions Act 19 of 1982

Amendment of the regulations relating to veterinary and para-veterinary professions (fees). GenN662 GG43913/20-11-2020.


Draft Bills

Draft National Small Enterprise Amendment Bill, 2020, for comment. GenN709 GG43981/11-12-2020.

Draft delegated legislation

- Draft Sports Broadcasting Services Amendment Regulations, 2020 in terms of the Independent Communications Authority of South Africa Act 13 of 2000 for comment. GenN635 GG43877/5-11-2020.
- Classes of stock remedies relating to the proposed Draft Stock Remedy Regulations in terms of the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947 for comment. GN R1180 GG43873/6-11-2020.
- Rules relating to good pharmacy practice in terms of the Pharmacy Act 53 of 1974 for comment. BN139 GG43934/27-11-2020.
- Draft methodological guidelines for quantification of greenhouse gas emissions – carbon sequestration in the forestry industry to support the implementation of the Greenhouse Gas Emission Regulations, 2016 in terms of the National Environmental Management: Air Quality Act 39 of 2004 for comment. GN1283 GG43962/4-12-2020.
- Draft Municipal Elections Broadcasts and Political Advertisements Amendment Regulations, 2020 in terms of the Independent Communications Authority of South Africa Act 13 of 2000. GenN716 GG43984/10-12-2020.
- Proposed electricity licence fees and levies on the Piped-Gas and Petroleum Pipeline Industries for 2021/22 financial year in terms of the Electricity Act 41 of 1987. GN1334 GG43983/10-12-2020.
- Draft regulations regarding nuclear non-proliferation in terms of the Nuclear Energy Act 46 of 1999 for comment. GN R1304 GG43979/11-12-2020.
- Amendment of regulations (declaring *Amaranthus palmeri* as a weed) in terms of the Conservation of Agricultural Resources Act 43 of 1983 for comment. GN R1396 GG44029/24-12-2020.
- Proposed Farm Planning Regulations in terms of the Conservation of Agricultural Resources Act 43 of 1983 for comment. GN R1395 GG44029/24-12-2020.
- Proposed amendment of the Civil Aviation Regulations, 2011 in terms of the Civil Aviation Act 13 of 2009 for comment. GN R1411 GG44029/24-12-2020.
- Determination of permit fees in terms of s 23(2) of the National Railway Safety Regulator Act 16 of 2002 for comment. GN1394 GG44031/24-12-2020.
- Draft Official Identity Management Policy (of the Department of Home Affairs) in terms of the Constitution. GN1425 GG44048/31-12-2020.
- Draft One-Stop Border Post Policy (of the Department of Home Affairs) in terms of the Constitution. GN1426 GG44048/31-12-2020.

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



DE REBUS
THE SA ATTORNEYS' JOURNAL

Guidelines for articles in *De Rebus*

De Rebus welcomes contributions in any of the 11 official languages, especially from legal practitioners. The following guidelines should be complied with:

1 Contributions should be original. The article should not be published or submitted for publication elsewhere. This includes publications in hard copy or electronic format, such as LinkedIn, company websites, newsletters, blogs, social media, etcetera.

2 *De Rebus* accepts articles directly from authors and not from public relations officers or marketers. However, should a public relations officer or marketer send a contribution, they will have to confirm exclusivity of the article (see point 1 above).

3 Contributions should be of use or of interest to legal practitioners, especially attorneys. The *De Rebus* Editorial Committee will give preference to articles written by legal practitioners. The Editorial Committee's decision whether to accept or reject a submission to *De Rebus* is final. The Editorial Committee reserves the right to reject contributions without providing reasons.

4 Authors are required to disclose their involvement or interest in any matter discussed in their contributions. Authors should

also attach a copy of the matter they were involved in for verification checks.

5 Authors are required to give word counts. Articles should not exceed 2 000 words. Case notes, opinions and similar items should not exceed 1 000 words. Letters should be as short as possible.

6 Footnotes should be avoided. Case references must be incorporated into the text.

7 When referring to publications, the publisher, city and date of publication should be provided. When citing reported or unreported cases and legislation, full reference details must be included. Authors should include website URLs for all sources, quotes or paraphrases used in their articles.

8 Authors are requested to have copies of sources referred to in their articles accessible during the editing process in order to address any queries promptly. All sources (in hard copy or electronic format) in the article must be attributed. *De Rebus* will not publish plagiarised articles.

9 Articles should be in a format compatible with Microsoft Word and should be submitted to *De Rebus* by e-mail at: derebus@derebus.org.za.

10 The publisher reserves (the Editorial Committee, the Editor and the *De Rebus* production team) the right to edit contributions as to style and language and for clarity and space.

11 In order to provide a measure of access to all our readers, authors of articles in languages other than English are requested to provide a short abstract, concisely setting out the issue discussed and the conclusion reached in English.

12 Once an article has been published in *De Rebus*, the article may not be republished elsewhere in full or in part, in print or electronically, without written permission from the *De Rebus* Editor. *De Rebus* shall not be held liable, in any manner whatsoever, as a result of articles being republished by third parties.



By
Nadine
Mather

Employment law update

Constructive dismissal as a result of bullying

In *Centre for Autism Research and Education CC v Commission for Conciliation, Mediation and Arbitration and Others* [2020] 11 BLLR 1123 (LC), the employees were employed as special needs teachers by the Centre for Autism Research and Education (the School). Both employees resigned from the School on one month's written notice. Thereafter, the employees referred a constructive dismissal claim to the Commission for Conciliation, Mediation and Arbitration (CCMA), contending that they had been forced to resign as a result of being bullied by the School's owner, Ms Riback.

The employees alleged that Ms Riback's conduct consisted of the following:

- She portrayed significant mood swings and subjected the employees to abusive language, lewd behaviour and discriminatory remarks. She would commonly refer to the employees as a 'screaming queen' and 'goblin', respectively.
- She made unauthorised deductions from the employees' salaries and imposed unreasonable and unlawful demands on the employees.
- When travelling for work purposes, she insisted on sharing a bedroom and a bed with one of the employees concerned and insisted on keeping an interleading door between the bedrooms open, commenting on the employees' bodies while they were required to dress in front of her.
- She threw tantrums and screamed at the employees in public areas, including at conferences and in restaurants, stating that they were 'disgusting', 'pathetic' and 'dumb'.

In broad terms, the requirements to be met to establish a constructive dismissal are that –

- the employee must have terminated the contract of employment;
- the reason for the termination must be that the continued employment had, objectively, become intolerable; and
- that it was the employer who made continued employment intolerable.

At the CCMA, both employees testi-

fied. The School closed its case without leading evidence. Having regard to evidence led by the employees, the Commissioner found that Ms Riback's behaviour towards the employees and other teachers was 'shockingly unacceptable' and her conduct continuously impaired the dignity of the two employees concerned. The Commissioner had no doubt that Ms Riback's behaviour towards the employees caused their employment to have become intolerable.

While the Commissioner observed that an employee is required to exhaust all possible internal remedies prior to resigning and claiming a constructive dismissal, he noted that Ms Riback was the employees' 'final point of call' and she had been dismissive of prior attempts by the employees to raise issues with her. In the circumstances, the Commissioner found that the resignations of the employees constituted a constructive dismissal and awarded them compensation equal to four and six months' remuneration, respectively.

The School sought to review and set aside the Commissioner's award on the basis that, *inter alia*, the –

- Commissioner had ignored the fact that the employees had not lodged a grievance prior to their resignation; and
- the fact that the employees resigned on notice was irreconcilable with the conclusion that their continued employment had become intolerable.

The Labour Court noted that the employees had made serious allegations against Ms Riback, none of which were properly contested in cross-examination, and Ms Riback elected not to attend the arbitration. The employees' evidence, therefore, had to be accepted. The court found that the evidence portrayed a workplace operated by a narcissistic personality whose offensive and unwelcome conduct created a toxic working environment for the School's employees. Ms Riback's conduct amounted to persistent workplace bullying, which constituted harassment and had rendered the employees' employment intolerable.

Insofar as the School contended that the employees' failure to lodge a grievance was fatal to their claim, this was not necessarily the case. The court held that

while it is so that employees who claim that employment is intolerable should file a grievance before resigning, this is not an inflexible rule; each case must be decided on its own facts. In the present case, this was not an option available to the employees, particularly as the person against whom their grievance was directed was Ms Riback, the owner of the School. To have lodged a grievance in these circumstances would accordingly have been futile.

As regard to the School's submission that the employees' resignation on notice was incompatible with any notion of intolerability, the reason the employees chose to work their notice period was out of a sense of duty towards the learners in their care. In any event, both employees had been escorted off the School's premises immediately after handing in their resignations and were not permitted to work their notice periods.

In conclusion, the court found that the School had rendered the employees' continued employment intolerable and the Commissioner's decision that the employees had been constructively dismissed was correct.

Turning to costs, the court demonstrated its disapproval at Ms Riback's conduct by awarding a punitive costs order. The costs the employees had to incur by defending the review had consumed much of the compensation granted by the Commissioner. The court noted that had the employees brought a cross-review against the compensation awarded, serious consideration would have been given to increasing it.

The review was dismissed with costs on the attorney-client scale.

Theft in the workplace

In *Aquarius Platinum (SA) (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2020] 11 BLLR 1071 (LAC), the employee was employed as a shaft engineer by Aquarius Platinum (the Company). The employee wished to mount a TV aerial at his mine residence at a great height to avoid any vandalism. In order to do so, the employee sought to use discarded scaffolding poles at the mine shaft.

The employee approached the mine

manager and informed him that he wanted to borrow the scaffolding poles. The mine manager authorised him to do so, subject to the employee complying with the Company's waybill procedure required to remove any Company property. The employee then instructed a subordinate to cut pieces of the scaffolding poles, worth about R 1 000, which were then removed by the employee. The employee did not, however, prepare the necessary waybill nor did he return the scaffolding poles to the mine.

Consequently, the employee was dismissed for, among other things –

- dishonesty in that he misappropriated Company property and abused and misused his position of management by using mine labour to perform private tasks; and
- failing to comply with the Company's waybill procedure. The employee referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).

The CCMA Commissioner found the employee guilty of failing to comply with the waybill procedure. In addressing the other charges, the Commissioner concluded that there was no 'dishonesty' by the employee and that there had been inconsistent application of discipline by the Company. On these findings, the dismissal was held by the Commissioner to be unfair. The Company sought to review the Commissioner's award.

On review, the Labour Court (LC) disagreed that the employee had been treated inconsistently. However, similarly to the CCMA Commissioner, the LC was not persuaded that the employee had been 'dishonest' when removing the Company property as he was not secretive in doing so and executed his conduct in an open manner. The court held that the employee could, therefore, not have been found guilty of theft, rather his conduct amounted, at best, to a misappropriation of Company assets, an offence, which did not warrant dismissal. Aggrieved by this finding, the Company took the matter on appeal.

The Labour Appeal Court held that the LC's finding that theft or dishonesty requires secrecy or concealment was misplaced. Neither is an element of the crime of theft. All that is required is that a person deliberately deprives another of their property permanently. The court went further to state that the idea that secretiveness is a necessary attribute of theft or dishonesty overlooks the fact that theft sometimes takes place quite brazenly. One common example is where senior employees abuse their authority by taking possession of Company property for private use. The facts of the present case illustrated this exact scenario.

The court noted that while employers frequently charge employees suspected of theft with 'unauthorised possession', this is merely to cater for situa-

tions where an intention to steal cannot be proved. Having said this, the court found that the honest misappropriation of property is a contradiction in terms. To describe the deliberate retaining of property to which the employee is not entitled to retain is not, conceptually, distinguishable from theft. It is conceivable that a person may intend to return an item at the time of borrowing it but later changes that intention. The change of intention would, however, have to be inferred from the evidence. In the present case, the employee had not provided any explanation and an inference could be drawn that the employee intended not to return the Company property.

Even if an intention to return the Company property had been proved, the court found that the employee was guilty of another serious form of misconduct – the brazen abuse of his status and seniority by using a subordinate's labour for private use. Having regard to the employee's seniority, he was obliged to set a good example, which he did not. In the circumstances, the court found that dismissal was an appropriate sanction for such abuse.

The appeal was upheld.

Nadine Mather BA LLB (cum laude) (Rhodes) is a legal practitioner at **Bowmans in Johannesburg.**



By
Moksha
Naidoo

Unlawfulness v unfairness

Chubisi v SABC and Others (LC) (unreported case no J1169/20, 2-11-2020) (Tlhotlhamale J).

The applicant employee commenced her employ with the South African Broadcasting Corporation (SABC) in April 2011 as a radio presenter. On 1 April 2016, the applicant was appointed as a producer/presenter for one of SABC's television (TV) shows.

Her appointment to the TV show was termed a 'deviation from regulated recruitment process'. In terms of this

process, the SABC, when recruiting for a strategic and critical role was afforded the discretion to deviate from its normal recruitment process if identifying a candidate with talent and scarce skills.

In 2017 and pursuant to an anonymous complaint, the Public Prosecutor initiated an investigation into the allegation that the applicant's appointment as of 1 April 2016, was irregular and that there were more suitably qualified candidates who applied for the same post.

In March 2020, the Public Protector (PP) delivered a report finding that the SABC, when appointing the applicant, had unduly failed to follow its own recruitment process, in particular the fact that the post was never advertised. The PP listed four alternate remedial actions for the SABC to implement – instructive to the judgment was the fact that none of the remedies proposed by the PP included terminating the applicant's employment.

On 30 June 2020, the SABC afforded the applicant to make written representations on the PP's findings. In the same communication, the applicant was informed that the SABC intended not to recognise her employment contract on grounds that it was *void ab initio*.

On 19 October 2020 the SABC handed

the applicant a document titled 'Re: Notification of the non-recognition of your purported contract of employment with the SABC', wherein she was notified that the SABC did not recognise her employment contract on grounds relating to her unlawful and irregular appointment, following which she was not considered an employee with immediate effect.

This prompted the applicant to launch an urgent application at the Labour Court (LC) seeking a declaratory order that her termination was unlawful, unconstitutional, invalid and of no force and effect and that she be allowed to return to work.

At court the SABC challenged the jurisdiction of the LC. In keeping with the Constitutional Court's decision in *Steenkamp and Others v Edcon Ltd (National Union of Metalworkers of SA intervening)* (2016) 37 ILJ 564 (CC), the SABC argued that the LC did not have jurisdiction to determine the lawfulness of an employee's termination. This view, so the SABC argued further, was recently followed by the LC in *Lieutenant General Phahlane and Another v South African Police Service and Others* (LC) (unreported case no J736/20, 11-8-2020) (Van Niekerk J). In *Phahlane* the court held that the effect of *Steenkamp* was that the Labour

Relations Act 66 of 1995 (LRA) did not provide a remedy for a claim that an employee's dismissal was unlawful and thus the court lacked jurisdiction to make a determination on the lawfulness of a dismissal.

The applicant, relying on s 158 of the LRA, as well as s 77(3) of the Basic Conditions of Employment Act 75 of 1997 (BCEA), argued that the court has jurisdiction to make an order declaring the applicant's termination unlawful and that any reliance on the judgment in *Steenkamp*, was misplaced.

Having considered the respective arguments, the court held:

'I agree with the views expressed by this court in *Tshivhandekano v Minister of Mineral Resources and Others* [[2018] 6 BLLR 628 (LC)] and *Solidarity and Others v South African Broadcasting Corporation* [[2017] 1 BLLR 60 (LC)] that the decisions in *Steenkamp* (and *Phalane*) ought to be understood within the context of what the Constitutional Court (and this court in *Phalane*) was called upon to determine in the light of the pleadings before it.

In *Steenkamp*, the issues before the Constitutional Court and the LAC concerned the declarations of invalidity of dismissals based on non-compliance with the provisions of section 189A of the LRA. As La Grange J in *Tshivhandekano* correctly observed, *Steenkamp* was not concerned with the court's exercise of its powers to determine contractual disputes under section 77(3) of

the BCEA, nor was it concerned with the exercise of the court's powers to "review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law" as provided for in section 158(1)(h). The Constitutional Court had found that a dismissal in breach of those provisions did not make the dismissal invalid because the invalidation of a dismissal is not a remedy contemplated by the LRA'.

The court noted that the matter before it was distinguishable from the plethora of urgent applications wherein employees claim their dismissal, disciplinary inquiry or suspension was unlawful whereas the true nature of their claim, viewed holistically, sought to challenge the fairness of their employer's decision. *In casu*, the applicant was not informed that she had been dismissed or her employment terminated; all that she was advised was that her employment contract was not recognised anymore. In such circumstances it would be difficult for the applicant to discharge her onus of establishing a dismissal had she referred an unfair dismissal claim to the appropriate forum.

Additionally, the applicant's pleadings did not refer to unfair dismissal or unfair labour practice nor did her pleadings infer any challenge on the fairness of the SABC's conduct.

The court found that under s 158 of the LRA, together with a reading of the applicant's pleadings, it had jurisdiction to consider the applicant's claim.

Turning to the merits of the application, the court accepted that the Public Protector's remedial actions were binding on the SABC. However, it further noted that nowhere in the report did the PP propose or recommend that the SABC not recognise the applicant's employment contract. Nor was the SABC in a position to explain to the court why it had not opted for anyone of the proposals made by the PP when addressing the applicant's irregular appointment.

Furthermore, the court aligned itself with the principle that if an existing employee is appointed to a certain position, whereafter it is found that the appointment was unlawful or irregular; then it does not follow that once the employee's appointment is set aside, the employee ceases to be an employee. Under such circumstances the employee reverts to the position they occupied prior to the appointment which had been set aside.

The court declared the applicant's termination unlawful and that she be allowed to immediately return to work. The court did, however, note that on the applicant's return, the SABC had discretion to pursue any one of the remedial actions proposed by the PP.

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).



By
Kathleen
Kriel

Recent articles and research

Abbreviation	Title	Publisher	Volume/issue
<i>ILJ</i>	Acta Juridica	Juta	(2020) 41
<i>JCCLP</i>	Journal of Corporate and Commercial Law and Practice	Juta	(2020) 6.1
<i>LitNet</i>	LitNet Akademies (Regte)	Trust vir Afrikaanse Onderwys	(2020) 17.3
<i>Obiter</i>	Obiter	Nelson Mandela University	(2020) 41.2
<i>PER</i>	Potchefstroom Electronic Law Journal	North West University, Faculty of Law	(2020) 23
<i>PSLR</i>	Pretoria Student Law Review	Pretoria University Law Press (PULP)	(2020) 14.2
<i>TSAR</i>	Tydskrif vir die Suid-Afrikaanse Reg	Juta	(2020) 4

Administrative law

Twala, T and Mogdime, M 'Transformative adjudication and the place of administrative law in South African jurisprudence: *ABSA Bank Limited v Public Protector*' (2020) 14.2 *PSLR* 362.

Alternate dispute resolution

Rantsane, DP 'The origin of arbitration law in South Africa' (2020) 23 *PER*.

Animal rights

De Villiers, JH 'Thinking-of-the-Animal-Other with Emmanuel Levinas' (2020) 23 *PER*.

Artificial intelligence

Townsend, BA 'Software as a medical device: Critical rights issues regarding artificial intelligence software-based health technologies in South Africa' (2020) 4 *TSAR* 747.

Children's rights

Khoza, TN and Zuma, C 'The *pas de deux* between education and recreation: Facilitating the realisation of Articles 11 and 12 of the African Charter on the Rights and Welfare of the Child in Schools' (2020) 14.2 *PSLR* 381.

Subroyen, T 'The *Gabriel Fernandez* case: A comparative analysis of a "mandated reporter" in light of the Children's Act' (2020) 14.2 *PSLR* 341.

Company law

Mujulizi, J 'The continued relevance of the Turquand Rule under the current company law regime in South Africa' (2020) 6.1 *JCCLP* 54.

Subramanien, D 'A discussion of the requirements of a trial of a serious question of consequence and the best interests of the company as contemplated in s 165(5)(b) of the Companies Act 71 of 2008' (2020) 6.1 *JCCLP* 1.

Constitutional law

Boniface, AE 'To smack or not to smack is no longer a question: No defence of reasonable chastisement' (2020) 4 *TSAR* 861.

Muller, G 'Statutory utility rights to realise access to services as a characteristic of adequate housing' (2020) 14.2 *PSLR* 1.

Rosenberg, W 'Does the right to know one's origins exist and can it be limited?' (2020) 4 *TSAR* 724.

Constitutional law – expropriation of land

Van Staden, M 'Property rights and the basic structure of the Constitution: The case of the Draft Constitution Eighteenth Amendment Bill' (2020) 14.2 *PSLR* 169.

Consumer law

Reddy, S 'Implementing a South African

e-dispute resolution system for consumer disputes' (2020) 41.2 *Obiter* 371.

Shange, K 'Consumer over-indebtedness landscape: The obliteration of a creditor-oriented approach through the debt intervention procedure?' (2020) 14.2 *PSLR* 116.

Sonnekus, JC 'Onverskuldigde betaling na vermeende sessie van 'n breukdeel van die vorderingsregte ingevolge 'n lewensversekering – *aberratio ictus*' (2020) 4 *TSAR* 652.

Copyright law

Karjiker, S and Jansen, G 'The right of communication to the public: An examination of the judgments of the court of justice of the European Union to provide a framework for the interpretation in the South African context' (2020) 4 *TSAR* 702.

Contract law

Laubscher, M 'Is the sanctity of contract cast in stone? An evaluation of *AB v Pridwin Preparatory School* (1134/2017) [2018] ZASCA 150; [2019] 1 All SA 1 (SCA); 2019 (1) SA 327 (SCA) (1 November 2018)' (2020) 41.2 *Obiter* 436.

Corporate governance

Mofokeng, T 'Good corporate governance affirms the board (led by the chairperson) as the focal point of governance and the courts have no mandate to undermine this principle' (2020) 6.1 *JCCLP* 66.

Wagener, GP 'Board autonomy and recourse to the courts in South Africa' (2020) 6.1 *JCCLP* 24.

COVID-19

Rautenbach, IM 'Unruly rationality. Two high court judgments on the validity of the COVID-19 lock-down regulations' (2020) 4 *TSAR* 825.

COVID-19 – labour law

Van Eck, M and Van Staden, M 'The contract of employment in the time of the Coronavirus' (2020) 4 *TSAR* 807.

Criminal law, litigation and procedure

January, L 'The constitutionality of warrantless search and seizure operations' (2020) 14.2 *PSLR* 129.

Watney, M 'Rising on the tide of crime control: The doctrine of common purpose in perspective' (2020) 4 *TSAR* 623.

Cryptocurrency

Erasmus, D and Bowden, S 'A critical analysis of South African anti-money laundering legislation with regard to cryptocurrency' (2020) 41.2 *Obiter* 309.

Electoral law

Mhlongo, L 'A critical analysis of South Africa's system of government: From a disjunctive system to a synergistic system of government' (2020) 41.2 *Obiter* 257.

Environmental law

Kgomosotho, KG 'International law rules relating to migration arising from rising sea-levels' (2020) 14.2 *PSLR* 91.

Estate planning

Jamneck, J 'Die *dominium* of eiendomsreg van 'n bestorwe boedel op die oomblik van die erflater se dood' (2020) 17(3) *LitNet*.

Wood-Bodley, MC 'Section 2C(1) of the Wills Act 7 of 1953 and the meaning of "spouse" – *Moosa NO v Minister of Justice* 2018 (5) SA 13 (CC)' (2020) 41.2 *Obiter* 461.

Estoppel

Eiselen, GTS and Schulze, WG 'Die terugskryf van 'n elektroniese oordrag en die rol van estoppel' (2020) 4 *TSAR* 837.

Freedom of expression

Fourie, MP and Swart, M 'Speak no law without justice: Evaluating the retrospective force of declarations of unconstitutionality with specific reference to *Qwelane v SAHRC & Others* (686/2018) [2019] ZASCA 167' (2020) 14.2 *PSLR* 194.

Kahanovitz, SC, C 'The independence of newspaper editors as an enforceable constitutional right?' (2020) 41 *ILJ* 2294.

Gender rights

Van der Linde, C 'Sexual orientation and gender identities (SOGI) law and social change' (2020) 14.2 *PSLR* 45.

Human rights

Mphidi, TM and Lubaale, EC 'The IAAF rules on testosterone levels and the right to health' (2020) 41.2 *Obiter* 410.

Human rights – assisted suicide

Welgemoed, M and Lerm, H 'Palliative care as a form of relief for the dying: A South African perspective' (2020) 41.2 *Obiter* 348.

Human rights – education

Mtsweni, TM 'The Fourth Industrial Revolution: A case for educational transformation' (2020) 14.2 *PSLR* 321.

ICT law

Njotini, M 'Exposing the ICT regulatory dilemma: The test for governments' (2020) 41.2 *Obiter* 328.

Insolvency law

Boraine, A 'Does the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act of 1998 provide adequate family home protection to insolvent debtors or is it still pie in the sky? (Part 1)' (2020) 41.2 *Obiter* 199.

Calitz, J 'Insolvency law adjustment in response to the economic impact of the Covid-19 pandemic: The South African experience' (2020) 4 *TSAR* 763.

Kadish, JS 'Possible manipulation of the

“solvency and liquidity” test under the Companies Act makes the test an ineffective alternative to the “maintenance of capital” principle’ (2020) 6.1 *JCCLP* 40.

International customary law

Mujuzi, JD ‘Reconciling customary law and cultural practices with human rights in Uganda’ (2020) 41.2 *Obiter* 239.

Tshikota, G ‘Game of Thrones: The battle of the Mphephus’ (2020) 14.2 *PSLR* 54.

International human rights law

Khoza, TN ‘When life gives you law, make lemonade: Exploring the “legalised” oppression of black women in the United States of America and South Africa and their musical response thereto’ (2020) 14.2 *PSLR* 298.

International labour law

Van der Merwe, M ‘A comparative analysis of the proposed mandatory nature of employment legislation and its interaction with the choice of law of an international contract’ (2020) 14.2 *PSLR* 147.

International tax law

Ngidi, M ‘A critique of the determination of a composite supply for VAT purposes in South Africa: Lessons from selected countries’ (2020) 14.2 *PSLR* 216.

Law of succession

Abduroaf, M ‘Application of the Islamic law of succession in South Africa’ (2020) 41.2 *Obiter* 396.

Mochela, RJ and Smith, BS “Mind the gap(s)”: Legal differentiation between same-sex and heterosexual cohabitants regarding intestate succession – options for reform and comparative insights into the regulation of “polygamous” life partnerships (part 2)’ (2020) 4 *TSAR* 683.

Labour law

Haslop, R ‘Association of Mineworkers and Construction Union and Others v

Ngululu Bulk Carriers (Pty) Ltd (In Liquidation) and Others (2020) 41 *ILJ* 1837 (CC)’ (2020) 41 *ILJ* 2328.

Maharaj, S ‘Workers of the world, united: A discussion through a gendered lens on why stronger protection of workers in the informal economy will better equip South Africa to cope with labour market changes of the Fourth Industrial Revolution’ (2020) 14.2 *PSLR* 238.

Nxumalo, I ‘The role of trade unions in South Africa: Towards the inclusion of persons with disabilities in the workplace’ (2020) 41 *ILJ* 2311.

Pillay, D ‘Labour dispute system design – dispute resolution, conflict management or problem solving?’ (2020) 41 *ILJ* 2237.

Raligilia, KH and Nxokweni, U ‘Legal pitfalls of incompatibility in the workplace: An examination of the landmark ruling on racism in *Rustenburg Platinum Mine v SAEWA obo Meyer Bester* 2018 (5) SA 78 (CC)’ (2020) 41.2 *Obiter* 429.

Ramji, B and Poriazis, K ‘The courts, the amendments and the excluded: A critical analysis of the Labour Appeal Court’s approach to triangular employment relationships’ (2020) 41 *ILJ* 2274.

Van Staden, MJ ‘An update of recent labour law developments from South African courts 2020’ (2020) 4 *TSAR* 777.

Legal communication

Mswela, M ‘Beyond literal understanding: “Womb theft” as metonym – an interpretation of the language used to describe caesarean kidnappings’ (2020) 41.2 *Obiter* 226.

Legal education

Horn, JG and van Niekerk, L ‘The patchwork text as assessment tool for post-graduate law teaching in South Africa’ (2020) 41.2 *Obiter* 292.

Legal practice

Makhaye, C “I’ve changed” says South African law: Has the judiciary opened up to black women lawyers?’ (2020) 14.2 *PSLR* 31.

Van Eck, M ‘A framework for professional duties and the liability of legal practi-

tioners in the payment of trust monies’ (2020) 4 *TSAR* 846.

Refugee law

Eberechi, OE ‘The challenges of protecting refugees in mixed migration vis-à-vis the application of articles 1F and 31 of the Refugee Convention’ (2020) 41.2 *Obiter* 275.

Socio-economic rights

Mfete, T ‘Neoliberalism and inequality in post-Apartheid South Africa’ (2020) 14.2 *PSLR* 270.

Surajpal, S ‘Dismantling the status quo: Prohibiting unfair discrimination on the grounds of poverty under capitalism’ (2020) 14.2 *PSLR* 256.

Tax administration

Moosa, F ‘Consequences for non-payment of PAYE and VAT compared’ (2020) 23 *PER*.

Tax law

Botes, M ‘Vonnisbespreking: BTW-toedeling van dienste gelewer aan nie-inwoners’ (2020) 17(3) *LitNet*.

Transformation of the judiciary

Warring, HC ‘Critical race theory and feminist legal theory: Perspectives on transformation of the judiciary’ (2020) 14.2 *PSLR* 68.

Trusts

Ferreira, S and Pretorius, CJ ‘Interpretation of a trust deed – *Harvey v Crawford* 2019 (2) SA 153 (SCA)’ (2020) 41.2 *Obiter* 447.

Women’s rights

Mendes, B ‘The experiences of women and barriers for career advancement in tertiary institutions in a South African context’ (2020) 14.2 *PSLR* 22.

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



NOTICE OF RELOCATION OF OFFICES AND CHANGE OF ADDRESS

We have relocated our firm and from 13 January 2021 you can contact us at:

Physical address:

Marivate House
1016 Clifton Avenue, Lyttelton
Manor, Centurion, Pretoria, 0157

Postal address:

PO Box 1855 Pretoria 0001
Docex 99 Pretoria

Our telephone number and

fax number remains
the same until further notice:

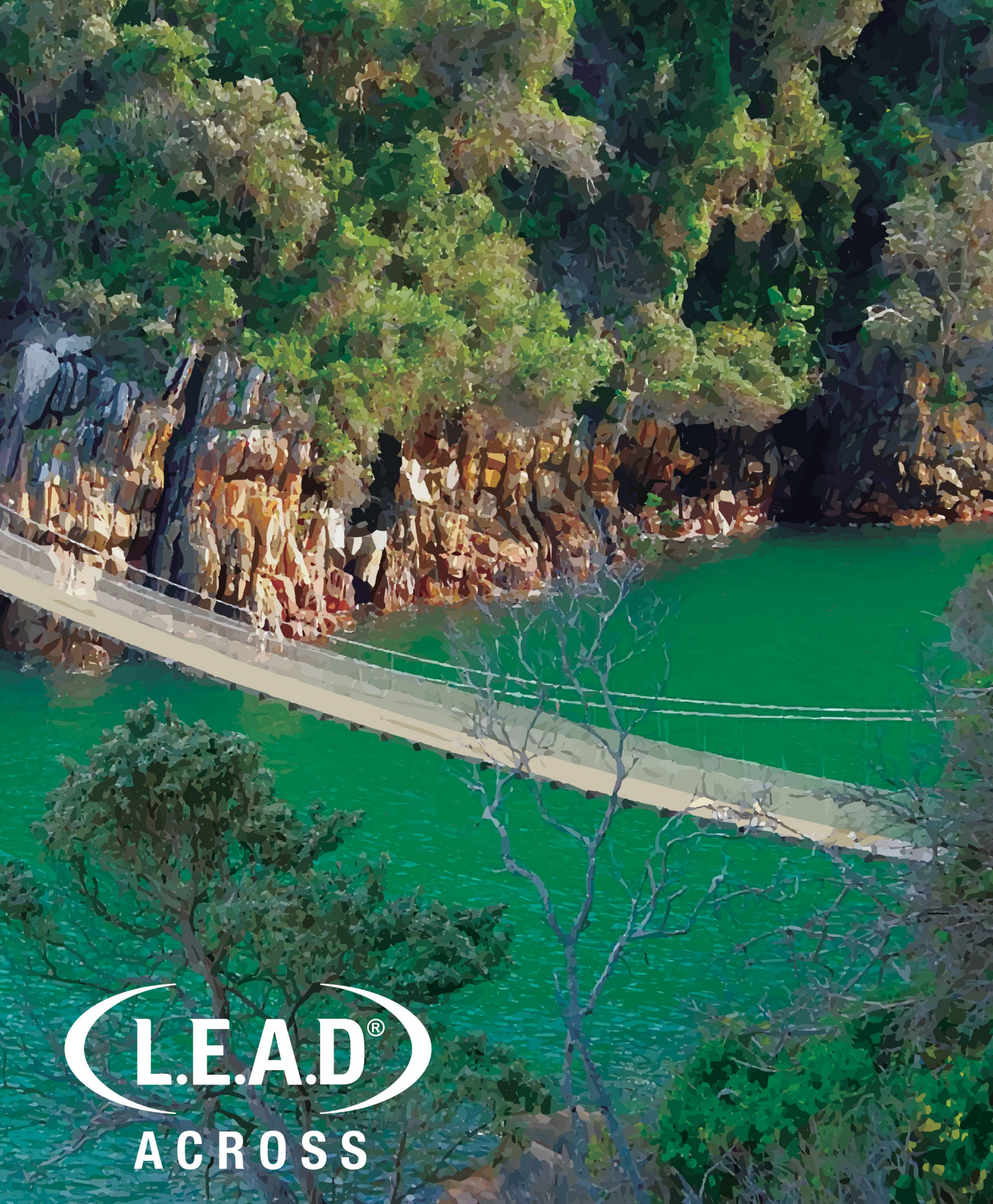
Telephone: (012) 341 1510

• (012) 341 1519 • (012) 341 1781

Fax: (012) 341 1782

E-mail address:

• marivate@absamail.co.za
• rhulani@marivate.co.za
• mmakeledi@marivate.co.za
• stephina@marivate.co.za



LEAD[®]

ACROSS



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

Administration of Deceased Estates



Partner with us to administer your Deceased Estate matters.

- ☒ Earn a referral fee that can be pre-arranged with every estate.
- ☒ We have a specialist division dedicated to the daily administration, as well as attendances at both the Master of Pretoria and Johannesburg.
- ☒ When referring the estate to us we make sure that your client remains YOUR client.

**No need to come to us,
we will gladly meet with YOUR client at YOUR offices.**

1 Forster Street, Benoni, 1501 | Tel: 011 748 4500
E-mail: estates@janljordaan.co.za | www.janljordaaninc.co.za

Jan L. Jordaan
Jan L. Jordaan Inc. Attorneys

Classified advertisements and professional notices

Index

Page

Vacancies.....	1
To let/share.....	1
Services offered.....	2
For sale/wanted to purchase.....	3
Smalls.....	3

• Visit the *De Rebus* website to view the legal careers CV portal.

Rates for classified advertisements:

A special tariff rate applies to practising attorneys and candidate attorneys.

2020 rates (including VAT):

Size	Special tariff	All other SA advertisers
1p	R 11 219	R 16 104
1/2 p	R 5 612	R 8 048
1/4 p	R 2 818	R 4 038
1/8 p	R 1 407	R 2 018

Small advertisements (including VAT):

	Attorneys	Other
1–30 words	R 567	R 827
every 10 words thereafter	R 190	R 286
Service charge for code numbers is R 190.		

DE REBUS

Closing date for online classified PDF advertisements is the second last Wednesday of the month preceding the month of publication.

Advertisements and replies to code numbers should be addressed to: The Editor, De Rebus, PO Box 36626, Menlo Park 0102.

Tel: (012) 366 8800 • Fax: (012) 362 0969.

Docex 82, Pretoria.

E-mail: classifieds@derebus.org.za

Account inquiries: David Madonsela

E-mail: david@lssa.org.za

Vacancies



Aaron Stanger & Associates

HIRING: CANDIDATE ATTORNEY/ LEGAL INTERN

- Dynamic and self-motivated **CANDIDATE ATTORNEY/LEGAL INTERN** sought for boutique law firm in Hyde Park, Sandton to start as soon as possible.
- Temporary and/or permanent.
- Send your contact details with a brief CV (three pages maximum) and a copy of your ID.
- NO supporting documents.
- Shortlisted candidates will be contacted to supply further information.

Contact: Michelle

E-mail: michelle@aaronstanger.com

LAW CHAMBERS TO SHARE

Norwood, Johannesburg

Facilities include reception, Wi-Fi, messenger, boardroom, library, docex and secure on-site parking. Virtual office also available.

**Contact Margot Howells at
(011) 483 1527 or 081 064 4643.**



Fully furnished turn-key office solutions available in
HATFIELD and LYNNWOOD, PRETORIA

Looking for office space within your budget?

**Professional receptionist | Boardrooms | Docex |
Printing, scan and fax facilities | Secure parking | Water
and electricity | Fully serviced and cleaned daily**

- **Low startup cost**
- **Want to downscale?**
- **Most cost-effective way to practice as a legal practitioner**
- **Only practicing legal practitioners (attorneys and advocates)**
- **Service address for pleadings – messenger services**
- **Affordable rates and flexible terms – various options**

Feel free to contact **Johan or Mariana at 083 228 3228/ 082 464 8497** for more information or to make an appointment to view our offices or send an e-mail to johan@lawoffices.co.za or mariana@lawoffices.co.za or visit www.lawoffices.co.za

To let/share

OFFICE TO LET: PRETORIA EAST

- 90m² office building in Ashlea Gardens close to N1 Highway;
- Situated on the premises of an existing practice;
- Good security and safe parking;
- Back-up generator; and
- Available immediately.

**Contact: Conrad Brandt
(012) 460 0027/082 499 8723.**

Automated Enrollments



Moller & Pienaar
Attorneys

Automate the enrollment process.

Enrollments are made quick and easy with our system, which integrates directly with CaseLines.

Visit



mollerpienaar.co.za



amarentiea@mollers.co.za



012-433 6573

to automate today



LAND CLAIMS COURT Correspondent

We are based in Bryanston, Johannesburg only 2.7 km from the LCC with over 10 years' experience in LCC related matters.

Zahne Barkhuizen: (011) 463 1214 • Cell: 084 661 3089

• E-mail: zahne@law.co.za

Avril Pagel: Cell: 082 606 0441 • E-mail: pagel@law.co.za

SPECIALIST IN LEGAL RECRUITMENT

We offer Specialised Legal Recruitment Services and the introduction of possible Company Mergers.

Executives: Senior Associates, Partners and Directors

Professionals: Attorneys and Conveyancers

Support Staff: Secretaries (Litigation, Conveyancing, Commercial)

Pretoria: Karen – 012 809 2809

Midrand: Natasha – 011 314 7552

East Rand: Milanie – 011 397 3922

Randburg: Mellissa – 011 326 0609

Nelspruit: Ananda – 013 590 2055

Cape Town: Candice – 021 555 1800



www.dantesa.co.za



Moodie & Robertson

Attorneys Notaries & Conveyancers

BRAAMFONTEIN — JOHANNESBURG

We offer assistance with preparation of all court papers to ensure compliance with Rules and Practice Directives of Constitutional Court.

Our offices are located within walking distance of the Constitutional Court.

We have considerable experience in Constitutional Court matters over a number of years.



Contact: Donald Arthur

☎ 011 628 8600 / 011 720 0342

✉ darthur@moodierobertson.co.za

📍 12th Floor • Libridge Building (East Wing) • 25 Ameshoff Street • Braamfontein • Johannesburg



Why you should use Rode & Associates as your property valuation firm

With so many (alleged) shenanigans in the listed property sector, you should consider using a valuation firm that has the highest credibility in the industry.

Rode is one of South Africa's large independent property valuation firms and has been the annual overall top performer in the *pmr.africa* awards since 2016. For more info on these awards, visit our website at: www.rode.co.za.

Our credibility has been built over 33 years and is partially based on rigorous research. After all, we are also property economists of note and town planners and publishers of the esteemed *Rode Reports* – used by banks as a 'bible'. All our valuers have post-graduate degrees.

Contact our head of valuations, Marlene Tighy BSc (Wits) Hons (OR) (RAU), MBL (UNISA), Pr Sci Nat, by email at mtighy@rode.co.za or tel. 086122 44 88.



Pretoria Correspondent



RAMA ANNANDALE & MUNONDE
Prokureurs/Attorneys

High Court and magistrate's court litigation.
Negotiable tariff structure.
Reliable and efficient service and assistance.
Jurisdiction in Pretoria Central, Pretoria North, Tembisa, Soshanguve, Atteridgeville, Mamelodi and Ga-Rankuwa.

Tel: (012) 548 9582 • Fax: (012) 548 1538
E-mail: carin@rainc.co.za • Docex 2, Menlyn

For sale/wanted to purchase



CAMPBELL ATTORNEYS[®]
DURBAN | PRETORIA | CAPE TOWN

WANTED LEGAL PRACTICE FOR SALE

We are looking to purchase a personal injury/
Road Accident Fund practice.
Countrywide (or taking over your personal injury matters).

Contact Dave Campbell at 082 708 8827 or
e-mail: dave@campbellattorneys.co.za

ITALIAN LAWYERS

For assistance on Italian law (litigation, commercial, company, successions, citizenship and non-contentious matters), contact

Anthony V. Elisio

South African attorney and member of the Italian Bar, who frequently visits colleagues and clients in South Africa.

Rome office

Via Aureliana 53
00187 Rome, Italy

Tel: 0039 06 8746 2843
Fax: 0039 06 4200 0261
Mobile: 0039 348 514 2937
E-mail: avelisio@tin.it

Milan office

Galleria del Corso 1
20122 Milan, Italy

Tel: 0039 02 7642 1200
Fax: 0039 02 7602 5773
Skype: Anthony V. Elisio
E-mail: a.elisio@alice.it

SMALLS

Services offered

CERTIFIED FORENSIC DOCUMENT EXAMINER and HAND-WRITING EXPERT CAPE TOWN. International standards of reporting excellence. Clear, logical proof of opinion for your disputed signature or handwriting case: www.fdex.co.za

Would you like to write for *De Rebus*?

De Rebus welcomes article contributions in all 11 official languages, especially from legal practitioners.

Legal practitioners/advocates who wish to submit feature articles, practice notes, case notes, opinion pieces and letters can e-mail their contributions to derebus@derebus.org.za.

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



LABOUR COURT Correspondent

We are based in Bryanston, Johannesburg and fall within the Labour Court's jurisdiction.

Odete Da Silva:

Telephone: +27 (0) 11 463 1214
Cell: +27 (0)82 553 7824
E-mail: odasilva@law.co.za

Avril Pagel:

Cell: +27 (0)82 606 0441
E-mail: pagel@law.co.za