LAW SOCIETY OF SOUTH AFRICA

DE REBUS

THE SA ATTORNEYS' JOURNAL

MARCH 2021

HAS MUSLIM PERSONAL LAW BEEN GIVEN RECOGNITION IN THE LIGHT OF THE RECENT APPEAL COURT JUDGMENT

Are magistrates' courts r 58-orders appealable or reviewable?

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LAW SOCIETY OF SOUTH AFRICA

What is the relevance of the LSSA?

I have written two editorials on the existence of the Law Society of South Africa (LSSA) and the duties the organisation performs through its different departments, namely *De Rebus*, Legal Education and Development (LEAD), Professional Affairs and support services (communications, marketing, human resources and finance). The pertinent questions to consider are:

- Does the legal profession need the LSSA?
- Is there any relevance to the existence of the LSSA?

To answer these two questions, one only has to look at the gap that would be left in the profession should the LSSA cease to exist. For starters, the LSSA speaks nationally on behalf of the attorneys' profession, through press releases and media interviews. If the LSSA does not exist, the profession would lose the link it has with the national media. The organisation also provides leadership and support to the profession through policy development and stakeholder relations. The stakeholder relationships the LSSA holds with many organisations has resulted in fruitful discussions that have been beneficial for the legal profession. If these relationships are lost, decades of institutional knowledge would be lost too.

On a national level – that is to the benefit of the profession and the public – the LSSA assists by interrogating and making input on policy and draft legislation in the interest of the public. The LSSA also plays an advocacy role for the profession when it engages and lobbies stakeholders and other organisations to ensure that attorneys are not met with obstacles while being officers of the court, this is also to the benefit of the public.

In the interest of ensuring rule of law, the LSSA protects and promotes democracy by protecting and promoting the independence of the judiciary and the legal profession. The organisation does this by supporting the efficient administration of the justice system.

In terms of legal education, the LSSA publishes *De Rebus*, the attorneys' journal, which has an array of legal education information and is a great research tool, which is used as an authority in court. *De Rebus* is not a mere journal that is used for research, many attorneys who cannot afford libraries, rely on *De Rebus* as their source of information in order to work at their optimum best. The organisation does more to ensure the professional development of the legal profession organisation through LEAD. This is done to empower attorneys to provide excellent legal services to the community in an ethical, professional, considerate and competent manner. The LSSA –

- is the premier provider of relevant and affordable continuing professional development for attorneys and candidate attorneys;
- provides practical vocational training to over 1 400 candidate attorneys a year;
- has ten Centres of the School for Legal Practice, namely, Bloemfontein, Polokwane, Cape Town, Port Elizabeth, Durban, Potchefstroom, East London, Pretoria and Johannesburg, as well as a distance training centre in cooperation with Unisa;
- is accredited as the premier provider of other practical legal training courses (PLT) for candidate attorneys in terms of the Legal Practice Act 28 of 2014 (LPA);
- is accredited as the premier provider of subsidised Practice Management Training (PMT) for mandatory practice management in terms of the Legal Practice Act;
- maintains standards by setting examination papers for the Attorneys Admission, Conveyancing and Notarial Professional Competency-Based Examinations for Attorneys;
- maintains a national database on statistics and trends in the attorneys' profession; and
- assists in the placement of candidate attorneys through its LEAD division and free CV placements in *De Rebus*.

Mapula Sedutla – Editor

My subjective view as the editor of *De Rebus* is that, there is a need for the LSSA, no other organisation performs all the duties listed above. The LSSA is truly committed to building a better legal profession for all. The relevance of the LSSA would be felt for years to come if it ceases to exist. Like any other organisation, the LSSA could be doing more and can improve on the functions it performs; this can only be done with the guidance of the profession. What more should the LSSA be doing for the profession? Send your views to mapula@derebus.org.za.

See also:

- 'How does the Law Society of South Africa fulfil its functions?' 2020 (Dec) *DR* 3; and
- 'What does the Law Society of South Africa do?' 2020 (Nov) *DR* 3.

Would you like to write for *De Rebus*?

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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: 23 March, 19 April and 17 May 2021.

Is a perfect storm on the way?

By Thomas Harban

I am not aware of any previous period in history, when numerous events taking place simultaneously, have had such a profound impact on legal practice in South Africa (SA). At any other time, predictions of a possible perfect storm approaching would be dismissed as being 'alarmist'. The current conditions are, in my view, ideal for a protracted stormy period ahead.

The challenges facing legal practitioners include the ongoing COVID-19 pandemic. Several legal practitioners and other role players in the profession have sadly lost their lives due to the pandemic. The losses to the affected families and practices are immense. Many practices are still trying to recover from the financial loss that resulted from the restrictions imposed in the earlier stages of the lockdown, including the inability of practices to operate to their optimum capacity, the closure of courts and *quasi*-judicial, administrative and regulatory offices (such as the offices of the Master of the High Court, the Deeds Registry, the Companies and Intellectual Property Commission (CIPC) and the Road Accident Fund (the RAF)). The closure of these offices and the restricted services offered at some of their respective branches for protracted periods limited the extent to which legal practitioners were able to render legal services and thus generate income. Some areas of practice were affected to a greater extent than others. The COVID-19 pandemic and its consequences exacerbated other risk factors that already existed for legal practitioners in SA.

The unexpected change in the business operating conditions when the lockdown measures were first imposed at the end of March 2020 caught many legal practitioners unprepared. Nobody had predicted that many businesses would be expected to make such significant changes to their operating models in such a short time and operate remotely. Neither could it be predicted that the changes and components of the 'new normal' would last this long. Legal practice has historically been mainly conducted from offices with a large amount of face-to-face interaction internally within the firms and also with clients and other third parties. The change has been a culture shock to many practitioners and their clients. Many small practices, in particular, did not have the required financial resources to invest in the requisite technological infrastructure to enable them to make a seamless transition to operating remotely. The type of work generally conducted by smaller practices also does not necessarily lend itself to remote working. Most legal practices in SA are made up of three practitioners or less. Those who have grappled with the new operating environment would thus make up a significant component of the legal sector.

The downturn in economic performance has left consumers with less financial resources available to spend on legal services. Budgets for legal services may be cut in order to use the funds for other more crucial needs. A decision to engage a legal practitioner may now only be considered when absolutely necessary and only after other possible solutions to resolve the issue at hand would, have been considered or exhausted. Consumers of legal services will now be more circumspect in deciding on whether or not to procure legal services and, also in the decision on which legal practitioner to instruct. It may well become a buyers' market as the consumers adopt tougher negotiating stances in respect of the cost structure and the ambit of the instruction. Some firms may become more amenable to accepting terms proposed by the clients, which in other circumstances, they would not. The consumers will, however, still insist on a high quality of output and efficiency from the legal practice in meeting their mandates.

Legal practices, on the hand, are facing their own cost and financial pressures. Some firms have had to cease operating, downscale operations or retrench staff. The remaining staff are then expected to meet the client's expectations while taking on the additional responsibilities previously carried out by those who have left the firm. The firm may decide to outsource some functions, but this also has its own risks.

Budgets for training and development within the firm may also have been cut as this is not seen as a priority, core to the practice or the generation of income.

These factors create a fertile ground for errors or omissions to materialise, resulting in claims being brought against the firm. An analysis of professional indemnity (PI) claims brought against legal practitioners shows that, internationally, there is a correlation between prolonged or serious economic recessions and an increase in PI claims. Financial hardship for firms may, unfortunately, also increase the temptation on the part of dishonest legal practitioners or their staff to misappropriate trust and other funds.

The pursuit of RAF related claims makes up a significant component of legal practice in SA. This is evident from the large number of RAF related matters on the various court rolls, the trust income trends of the Legal Practitioners' Fidelity Fund (the Fidelity Fund), which reflect the interest earned from RAF matters, and the claims statistics of that organisation (the Fidelity Fund) and the Legal Practitioners Indemnity Insurance Fund NPC. This important area of work has experienced a particularly turbulent period in the last year. On the one hand, the RAF decided to terminate the services of more than 100 firms that served on its panel. The matter was the subject of several tranches of litigation in 2020 (see *Mabunda Incorporated and Others v Road Accident Fund; Diale Mogashoa Inc v Road Accident Fund* (GP) (unreported case no 15876/2020, 30-4-2020) (Davis J), *FourieFismer Inc and Others v Road Accident Fund; Mabunda Inc and Others v Road Accident Fund; Diale Mogashoa Inc v Road Accident Fund* (GP) (unreported case nos 17518/2020; 15876/2020; 18239/2020, 8-7-2020) (Hughes J) and *Road Accident Fund and Others v Mabunda Incorporated and Others and related matters (Law Society of South Africa and Others as intervening parties)* [2021] 1 All SA 255 (GP)). Ultimately, the position of the RAF prevailed. The affected firms lost a major client (the sole client for some), which placed their sustainability at risk. On the other hand, the legal practitioners acting for plaintiffs have also been affected. The change in the RAF model resulted in officials of that entity having to deal with litigious matters. Some of the matters had been on the trial roll already and could not be finalised, thus prejudicing the plaintiffs and their legal representatives. Many of the legal practitioners specialising in this type of work act on a contingency basis. The firms concerned would thus have invested their own resources in the matters and paid for the reports and services of the required experts, including the medico-legal experts, actuaries and counsel. The delay in the finalisation of the matters thus places additional financial strain on the firms concerned. The extended delays by the RAF in making payment even after a settlement has been reached or judgment handed down by a court only exacerbates the situation.

Delivering judgment in *Taylor v Road Accident Fund and a related matter* [2020] JOL 48990 (GJ) on 16 November 2020, Fisher J noted at paras 9 and 10 that:

'Since May 2020, RAF cases which are currently in their various stages of litigation before the courts have been relieved of external legal representation in the form of the firms of attorneys who ply their trade (some exclusively) in acting for the RAF in personal injury cases. The new policy has been approved by both the Board of the RAF and the Minister of Transport (the Minister). Apparently, it is part of a drive to settle trial matters rather than run them. The premise is that this will save legal costs.

Whilst this may seem to be a cost cutting and thus money saving measure, it has, in my view and experience, rendered the RAF system, which is already on the verge of total collapse, even more exposed and vulnerable to malfeasance and incompetence'.

After finding (at para 129) that the settlement agreements entered into between the plaintiffs and the RAF in the two matters before the court were void *ab initio* as the RAF officials had not acted lawfully in concluding them, the judge stated at para 130 that:

'An audit of other matters settled since May 2020 is likely to yield similar concerns to those that arise in these matters. The fact that these settlements are subject to being reviewed and set aside is ultimately prejudicial to the plaintiffs'.

The challenges in an area of work, as widely pursued as RAF claims, affects a significant component of the profession and are risks that could potentially affect the sustainability of many practices and other stakeholders.

The moves by other entities such as banks, estate agents and audit firms to offer services (eg, estate administration, contract drafting, legal advisory services), which were traditionally reserved for legal practices will add to the already uncertain climate in which legal practice is conducted.

Conclusion

In raising the matters above, it is not my intention to be an alarmist or to sound like the proverbial prophet of doom and gloom. The multiple challenges facing legal practitioners must be recognised. Legal practices will need to reconsider whether their existing operating strategies are suitable to the changing environment. The examples cited above are by no means an exhaustive list. Adequate preparation to face the storm will require a concerted effort from all, including legal practitioners, the Legal Practice Council, the voluntary associations and all other interested stakeholders. We all need to batten down the hatches in preparation for the possible storm.

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

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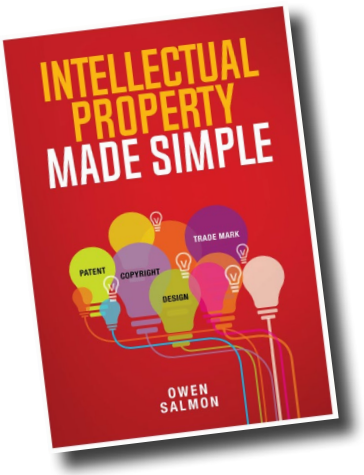

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Function of the court on settlements

By Leslie Kobrin

Many years ago, a client consulted me and instructed me to institute an action in the High Court (then known as the Supreme Court) claiming payment of a debt owed by a recalcitrant debtor. After taking instructions, I cautioned the client about the wisdom of proceeding as the costs incurred could well outweigh the financial viability of proceeding. The client appreciated my word of caution. However, in no uncertain terms I was assured that the financial viability was of no consequence as this was a 'matter of principle'. As the merits of the claim itself exhibited a strong possibility of a successful outcome, I proceeded in terms of the instructions I was given.

Some two years later the matter – which turned out to be defended – came to trial and after many hours spent in preparation for the trial, the day of the hearing arrived. Just after roll call and while walking from the roll call court to the court where the hearing was to take place, my opponent made a settlement proposal. As the proposal was, in my view, one which I could not advise my client to accept, I indicated to my opponent that I would put the proposal to my client, but expressed my doubt that it would be accepted. My client saw me speaking to my opponent and questioned me about what was discussed. I relayed the proposal to my client and before I could proffer my advice, the client immediately and without any hesitation and in clear and unequivocal terms, instructed me to accept the offer. I was informed that the client no longer wished to proceed with the matter as what was a 'matter of principle' two years earlier was no longer such a matter and insisted that the matter be settled on the terms proposed.

My counsel shared my view that we became obliged to act in terms of the unequivocal instructions we received, and the matter was so settled.

I recalled this matter when reading and considering some recent judgments concerning the function of the court on being advised of a settlement achieved by the parties.

The first judgment to which I wish to refer is in the case of *Mzwakhe v Road Accident Fund* (GJ) (unreported case no 24460/2015, 26-10-2017) (Weiner J), where Weiner J at para 6 of the judgment held:

'In being requested to make this an order of court the court is not merely a rubberstamp. The court has a duty to investigate the matter and ascertain whether or not the agreement is one which should be made an order of court. This is even more essential when the respondent is a public institution whose finances and the administration thereof are in the public interest.'

The judge was handed a draft order by the parties who were present and represented and after perusing the draft was dissatisfied with it. The judge then proceeded to indicate her refusal to make it an order of court and instead handed down an order in which, *inter alia*, the defendant was interdicted from paying to the plaintiff any amount in settlement of the entire claim without being presented with a stamped and signed order of court.

I refer now to the case of *Maswanganyi v Road Accident Fund* 2019 (5) SA 407 (SCA). In the minority judgment, the court at paras 57 and 58, in which Zondi JA and Mocumie JA concurred held:

'The court must be satisfied that the order that it is required to make is competent and proper in the sense that it will have the power to compel the person against whom the order is made, to make satisfaction. Secondly, it must satisfy itself that the agreement is not objectionable and that it must hold some practical and legitimate advantage. Where necessary, the court must play an oversight role when it is of the opinion that the terms of the agreement are inadequate. In such instances it may even insist that the parties effect the necessary changes to the terms of the settlement agreement as a condition for the making of the order.

This analysis makes it clear that the court has a discretion to make a settlement an order of court. In exercising its discretion, it must consider all relevant factors in light of the guidelines set out by the Constitutional Court in *Eke*. As indicated, in the present case the trial court refused to make the settlement

agreement an order of court on the ground that it was not satisfied that it was in accordance with the documents and pleadings filed of record.'

The most recent judgment was in the matter of *MT v Road Accident Fund; HM v Road Accident Fund* (GJ) (unreported case no 37986/2018, 16-11-2020) (Fisher J). In this judgment, Fisher J dealt with two matters involving the same defendant. In respect of the first matter before her, after engaging with plaintiff's counsel she was informed that a settlement had been achieved, which the parties did not wish to have made an order of court and she was requested to remove the matter from the roll. Because the judge was dissatisfied that a settlement in an amount far lower than what was indicated to her was on the table, she postponed the matter *sine die* and referred the conduct of the plaintiff's attorneys and counsel and an expert witness to their professional bodies to investigate their conduct in the matter with a view that they be subjected to disciplinary action.

In the judgment of *MT* there was an application for leave to appeal the judgment, which had been lodged by the parties. The application has yet to be decided. It is, therefore, inappropriate for me to comment on the text of the judgment itself.

To my mind, whenever a court is advised that the parties have achieved a settlement the inquiry is what the function of the court should be and how should that function be exercised.

I submit that if the court is informed that the matter has been settled and the parties do not wish that its terms be made an order of court, that is the end of the matter and the function of the court is to note that the matter has been settled and for it to be removed from the roll. If the parties wish that a settlement be made an order of court, the Presiding Judge must exercise judicial oversight and if they are dissatisfied, they may refuse to make it an order of court but must then remove the matter from the roll.

In the judgments referred to above, mention was made of the fact that the Road Accident Fund (RAF) faces many challenges and that it must be protected by the courts.

I respectfully submit that the strategy adopted by the RAF in terminating the mandate of its panel attorneys because it wishes to save costs and would rather enter into settlements, is a strategy adopted by the RAF Board and as such, the RAF must live with the consequences of such decisions irrespective of whether such consequences are positive or negative. Members of the judiciary must resist the seemingly overwhelming temptation to overreach their duties and responsibilities. Just as a legal practitioner cannot insist on representing a client when the client does not wish to be represented irrespective of the client's reason, so members of the judiciary must appreciate that the client's wish at the end of the day is what must be met.

Because of the above, legal practitioners are ethically, morally and legally bound to accept the instructions of the client so long as the decision of the client is not one which can be said to be against the law.

Leslie Kobrin *Dip Iur (Wits) Dip Bus Man (Damelin)* is a legal practitioner at Bove Attorneys Inc in Johannesburg.

What are substantial and compelling circumstances in terms of s 51(3)(*a*) of the Criminal Law Amendment Act?

By Sipho Tumelo Mdhluli

The term 'substantial and compelling circumstances' has not been properly defined by South African courts. However, in terms of s 51(3)(*a*) of the Criminal Law Amendment Act 105 of 1997 (the Act), a court is granted a discretion to impose a lesser sentence than that one prescribed by the Act where 'substantial and compelling circumstances' exist. The phrase 'substantial and compelling circumstances' has created much debate, as there has been a wide range of interpretations.

When sentencing an accused person, the court has to evaluate all the evidence, including the mitigating and aggravating factors, to decide whether substantial and compelling circumstances exist. A court must be conscious of the fact that the legislature has ordained a particular sentence for such an offence and there must be truly convincing reasons to depart therefrom, which reasons must be stipulated on the record.

It is for this reason that courts have not attempted to define the meaning of the phrase 'substantial and compelling circumstances', keeping in mind that with the principle, the imposition of sentence is pre-eminently the domain of a sentencing court. 'A court must consider all the circumstances of the case, including the many factors traditionally taken into account by courts when sentencing offenders. For circumstances to qualify as substantial and compelling, they need not be 'exceptional' in the sense that they are seldom encountered or rare, nor are they limited to those which diminish the moral guilt of the offender' (see *S v Pillay* 2018 (2) SACR 192 (KZD) at para 10).

In *S v Pillay* the accused was convicted of the murder of Annelene Pillay (the deceased), committed under circumstances contemplated in s 51, part I of sch 2 of the Act, in that the state alleged the offence was planned or premeditated (count 1), and, possession of a firearm in contravention of s 3 of the Firearms Control Act 60 of 2000 read with s 51, part II of sch 2 of the Act (count 2).

The issue, which concerned the court, was whether to impose the prescribed minimum sentences of life imprisonment in respect of count 1 and 15 years' imprisonment in respect of count 2, or whether to deviate from such sentences?

Henriques J stated that where a court is convinced – that after consideration of all the factors – an injustice would be done if the minimum sentence is imposed, then it can characterise such factors as constituting substantial and compelling circumstances and deviate from imposing the prescribed minimum sentence.

In *S v Vilakazi* 2009 (1) SACR 552 (SCA), the court explained that particular factors, whether aggravating or mitigat-

ing, should not be taken individually and in isolation as substantial or compelling circumstances. Ultimately, in deciding whether substantial and compelling circumstances exist, one must look at traditional mitigating and aggravating factors and consider the cumulative effect thereof. When sentencing, a court takes into account the personal circumstances of an accused. However, only some of these carry sufficient weight to tip the scales in favour of the accused to impact on the sentence to be imposed. Often the fact that the accused is young and is a first offender has the effect of reducing a sentence, as there is potential for the offender not to repeat the crime and to be rehabilitated.

The minimum sentences have been ordained to be the sentences that must ordinarily be imposed unless the court finds substantial and compelling circumstances, which justify a departure therefrom. In addition, the Supreme Court of Appeal has indicated that the minimum sentences must not be departed from for 'flimsy reasons' and are the starting point when imposing sentence.

In the event of substantial and compelling circumstances not existing, a sentencing court is then entitled to depart from imposing the prescribed minimum sentences, if it is of the view that having regard to the nature of the offence, the personal circumstances of the accused, and the interests of society, it would be disproportionate and unjust to do so. This is often referred to as the proportionality test.

Conclusion

'Mandatory minimum sentences should be approached with a degree of caution, because though there is a discretion to deviate from the prescribed sentences under s 51(3)(*a*) of the 1997 Act, courts may easily do so for "flimsy" reasons and where there is a need to deviate from the prescribed sentences, such need may not be recognised by the court. Further, South Africa should opt for the implementation of a more restorative approach, which will result in the restoration of the victim by repairing the damages suffered as a result of the crime. Finally, a strong deterrent against crime is necessary, consistency will be achieved where courts adhere to the sentencing principles, most importantly the principle of proportionality and where courts decide cases on their own merits' (Thulisile Brenda Njoko *What constitutes 'substantial and compelling circumstances' in the mandatory and minimum sentencing context?* (LLM thesis, University of KwaZulu-Natal, 2016).

I for one agree with the views of some presiding officers that, substantial and compelling circumstances can be found in traditional mitigating factors. If the imposition of prescribed sentences is disproportionate to crime, criminal and legitimate needs of society; that on its own constitutes substantial and compelling circumstance justifying a lesser sentence than life imprisonment.

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

By Kefentse Letlala

Does the exclusion of certain employees under ch 2 of the BCEA mean that those employees are not entitled to be compensated for overtime worked?

Most employment contracts specify that employees are required to work overtime. Section 10 of the Basic Conditions of Employment Act 75 of 1997 (the Act) sets out the minimum conditions and benefits afforded to certain employees who are required to work overtime. However, what is the legal position for employees specifically excluded by the Act?

Section 6 of the Act states that the provisions of s 10 do not apply to:

- '(*a*) senior managerial employees;
- (*b*) employees engaged as sales staff who travel to the premises of customers and who regulate their own hours of work;
- (*c*) employees who work less than 24 hours a month for an employer'.
- Employees who earn a salary of R 211 596,30 per annum.

Employers need to ensure that they are not incorrectly excluding employees from the provisions of the Act. In the case of *Mondi Packaging (Pty) Ltd v Director-General, Labour and Others* [2010] 11 BLLR 1131 (LAC), the court held that the term 'gross pay' in the ministerial determination means gross wage or gross pay in respect of ordinary hours of work, but excludes overtime pay. This means that in order to establish whether an employee is excluded from the protection of the Act, employers must consider only their normal wages/salary earned for normal working hours.

Employees mentioned in s 6 are specifically excluded from the protection and the benefits afforded under s 10 of the Act, namely that –

- employees are required to work overtime regulated by agreement; and
- the employees cannot work overtime amounting to more than ten hours a week and to claim the additional payment increase in rate of pay for overtime worked.

Accordingly, such employees have to regulate their overtime conditions and rate of pay in their contact of employment. The employee and the employer must agree on the maximum number of overtime hours that can be worked per day or week and how the employee will be compensated for overtime worked.

Employees should be aware that employers must regulate overtime conditions and compensation as it is required by the Act.

Section 7 of the Act, which relates to the regulation of working time, is still applicable to such employees and it necessitates that the employer must regulate an employee's working hours, including hours of overtime worked. The employer must take into consideration the provisions of the Occupational Health and Safety Act 85 of 1993, the health and safety of the employee, the Code of Good Practice on the Regulation of Working Time in terms of s 87(1)(*a*), as well as the family responsibilities of the employee in determining the employee's working and overtime hours.

Furthermore, s 29(*g*) of the Act requires an employer to give the employees (exception being employees who work less than 24 hours a month) written particulars of the rate of pay for overtime worked when the employee commences

employment. It is thus a requirement of the Act that the conditions and compensation for overtime worked be contained in the above employee's contract of employment.

Employers should be aware that they cannot require employees excluded by the Act to work overtime without any form of compensation unless the employees specifically agree to it in writing. If there is no such agreement, such employees may legally refuse to work overtime and to force them to work overtime would amount to forced labour in terms of s 48 of the Act.

Compensation for overtime for employees excluded by the Act can be in two forms, namely –

- payment of the employee's hourly rate; or
- time off in lieu of overtime worked.

The maximum an employee can request is their normal hourly rate and time off will be on a scale of 1:1.

Employers must be vigilant of the wording used in the contract of employment. Incorporating a clause that overtime will be paid in accordance with the Act does not necessarily mean that employees excluded by the Act are not entitled to compensation in terms of the Act. In the case of *Higgs v Natal Wholesale Jewellers (Pty) Ltd* (LC) (unreported case no D1361/01, 1-5-2003) (Woodroffe AJ), the contract of employment stated that overtime would be compensated for at the rates dictated by current legislation. The employer argued that the clause meant that the employee was not entitled to be compensated for overtime as her annual salary exceeded the threshold as set by the Act.

The Labour Court interpreted the clause to mean that the employer had agreed to pay the employee overtime at the prevailing rates in current legislation irrespective of the fact that her annual salary was above the legislated threshold and held that the employer's defence had no merit.

Employees must also be vigilant when reading their contract of employment, especially in cases where the contract states that overtime will be paid in accordance with the company overtime policy. Employees must request a copy of the policy and read it before signing on the dotted line.

Employees are also encouraged to seek clarification in instances where the contract is vague regarding the form of compensation that will be given for overtime worked.

Employees must also be mindful of the danger of working overtime at their own discretion. If the contract of employment states that overtime must be worked when required or approved by the employer, employees should refrain from working overtime without such authority.

In the *Higgs* case, the applicant claimed payment of overtime worked. The contract of employment stated that the employee was required to work overtime at the management's discretion.

The court drew a distinction between overtime worked at the election of an employee and overtime worked at the election of an employer and required that the applicant prove she had clear authority from her employer to work overtime.

The court held that based on the evidence before the court, the applicant failed to prove that the overtime worked was with the requisite authority from the employer. The employer had initially paid overtime claimed by the applicant but later on disputed and refused to pay overtime claimed by the applicant on the basis that same was not authorised.

The bulk of the applicant's claim was based on the disputed overtime and the applicant could not provide clear evidence of all the overtime she claimed she had worked which made it difficult to prove that she had the required authority for same.

Last, but not least, unlike employees protected under the Act, employees excluded by the Act do not have the benefit of having their terms and conditions for overtime worked re-negotiated and renewed annually. Consequently, these employees must ensure that they cover all their bases when they conclude their contract of employment.

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Has Muslim personal law been given recognition in the light of the recent appeal court judgment?

By Mohammed Moolla

In the 26 years since the advent of our non-racial constitutional democracy, many Muslims have remained or have become parties to Muslim marriages, which are not recognised as valid marriages in South Africa (SA) for many purposes. South Africa has come a long way since the judgments of *Ismail v Ismail* 1983 (1) SA 1006 (A), *Kader v Kader* 1972 (3) SA 203 (RA), *Bronn v Fits Bronn's Executors and Others* (1860) 3 Searle 313 and *Seedat's Executors v The Master (Natal)* 1917 AD 302, which withheld legal recognition from Muslim marriages.

Although there have been several judgments from the Constitutional Court (CC) and High Courts, which have criticised the state's failure to take steps to afford legal recognition to Muslim marriages, the hardship and prejudice suffered by Muslim women and children continue to prevail.

The pre-constitutional view of South African courts for their refusal to recognise Muslim marriages was mainly because they viewed Muslim marriages as potentially polygmous, and thus *contra bonos mores*.

The plight and difficulties of Muslim women and children, as well as injustices suffered by them as a result of absence of legal recognition are evident in several cases, such as *Ryland v Edros* 1997 (2) SA 660 (C); *Daniel v Campbell NO and Others* 2004 (5) SA 331 (CC); *Amod v Multilateral Motor Accidents Fund* 1999 (4) SA 1319 (SCA); *Khan v Khan* 2005 (2) SA 272 (T); and *Hassam v Jacobs NO and Others* 2009 (5) SA 572 (CC).

The hearing and outcome at the Western Cape Division of the High Court

On 31 August 2018, the High Court, in the matter of the *Women's Legal Centre Trust v President of the Republic of South Africa and Others (United Ulama Council of South Africa and Others as* amici curiae*) and two related matters* [2018] 4 All SA 551 (WCC) declared that the state was obliged by the Constitu-

Picture source: Gallo Images/Getty

tion to establish legislation to recognise Muslim marriages as valid marriages and regulate the consequences of such recognition. It declared that the President and Cabinet have failed to fulfil their constitutional obligations and directed them to rectify that failure within 24 months. It held that if the contemplated legislation was referred to the CC by the President or members of the National Assembly, then the deadline would be suspended pending the final determination of the CC. The court also held that if not enacted within 24 months from the date of the order then –

- a Muslim marriage may be dissolved in terms of the Divorce Act;
- a husband who is a spouse in more than one marriage, the court shall –
  - take all relevant factors and must make any equitable order it deems just; and
  - any person who has sufficient interest may be joined.
- any person may approach the court for variation; and
- the Department of Home Affairs and the Department of Justice publish orders widely in newspapers and radio.

The Supreme Court of Appeal (SCA) hearing

The President appealed and Women's Legal Centre Trust cross-appealed the matter. At the SCA hearing Saldulker J questioned the counsel for the state as to what the pragmatic solution was for women and children whose constitutional rights were being infringed on a daily basis. She highlighted that Muslim women cannot wait another 20 years. They conceded that the Marriage Act 25 of 1961 and Divorce Act 70 of 1979 infringed the constitutional rights to equality, dignity and access to justice for women in Muslim marriages in that they failed to recognise Muslim marriages as valid marriages for all purposes. They conceded that the rights of children in Muslim marriages were similarly infringed on and with regard to the dissolution of the marriage; they are not afforded the automatic court oversight of s 6 of the Divorce Act in relation to care and maintenance. The non-recognition of Muslim marriages also infringed the rights of access to courts in terms of s 34 of the Constitution.

Parties to the proceedings were given an opportunity to formulate a draft order by agreement, or alternatively to find substantial common ground. They were unable to agree to one draft order.

The SCA in *President of the RSA and Another v Womens Legal Centre Trust and Others; Minister of Justice and Constitutional Development v Faro and Others; and Minister of Justice and Constitutional Development v Esau and Others* (SCA) (unreported case no 612/19, 18-12-2020) (Saldulker and Van der Merwe JJA (Maya P, Plasket JA and Weiner AJA concurring)) delivered its judgment on the 18 December 2020. It had to decide on three main issues, namely –

- is the state under obligation to enact legislation under the Constitution;
- whether the provisions are inconsistent with the Constitution; and
- whether the interim measure should have retrospective operation.

Is the state under obligation to enact legislation under the Constitution?

The South African Human Rights Commission (SAHRC) contended that the state is bound by international instruments to which it is a party to, and the state can enact legislation based on four instruments that had been ratified by Parliament, namely –

- the United Nations Convention on the Elimination of all Forms of Discrimination against Women;
- the International Covenant on Civil and Political Rights;
- the Protocol of the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; and
- the Southern African Development Community Protocol on Gender and Development.

The SCA was of the view that the purpose of the above documents was to advance equality between men and women or spouses and they required the state to enact legislation and take measures to that end. The SCA could not find any provision that required legislation to establish equality between women that are married under different marital regimes. As a result, they found that the instru-

ments did not oblige the state to enact legislation relevant to this matter.

Whether the provisions are inconsistent with s 15 of the Constitution

The SCA referred to ss 43 and 44 of the Constitution, which stipulates that the legislative authority in the national sphere of government is exclusively vested in Parliament. In terms of s 42(1) of the Constitution, Parliament consists of the National Assembly and the National Council of Provinces. The legislative authority confers on the National Assembly and the National Council of Provinces to pass legislation. It is the responsibility of Parliament to make laws. It follows that the obligation to enact legislation is found outside s 7(2) of the Constitution. The SCA advised there was no authority where the court directed the enactment of legislation and, in its view, for a court to order the state to enact legislation on the basis of s 7(2) alone – in order to realise fundamental rights – would be contrary to the separation of powers. Parliament makes legislative choices and the court may only act in terms of s 172 if they are not rational or constitutionally compliant. On this basis, the SCA set aside para 1 of the WCC's judgment and replaced it with the declaratory orders that the Women's Legal Centre Trust had sought in the alternative.

Although the High Court included reference to s 15 of the Constitution in para 1 of the order, it did not make any finding that any provisions of the Marriage Act or Divorce Acts are inconsistent with s 15. The SCA stated that this was not the argument of the Women's Legal Centre Trust and the crux of the argument was quite correctly that the permissive powers of s 15(3) do not prevent legislation and thus the declarations of unconstitutionality should not contain reference to s 15.

Whether the interim measure should have retrospective effect

The Women's Legal Centre Trust requested the court to order interim relief and backdate the relief to April 1994. The SCA stated this was a far-reaching proposal that goes way beyond what it sought in the High Court and in the cross-appeal. It is also a complex subject and may have profound unforeseen circumstances. It is also the prerogative of Parliament to determine if it should apply retrospectively.

The SCA order

The SCA replaced the WCC order, set aside para 5 of the High Court order, and made an order as follows:

- The Marriage Act and Divorce Act are declared inconsistent with the Constitution as they fail to recognise Muslim marriages.
- Section 6 of the Divorce Act is inconsistent with the Constitution as it fails to provide for mechanisms to safeguard the welfare of children of Muslim marriages.
- Section 7(3) of the Divorce Act is inconsistent with the Constitution as it fails to provide for redistribution of assets.
- Section 9(1) of the Divorce Act is inconsistent with the Constitution as it fails to make provision for forfeiture of matrimonial benefits of a Muslim marriage.
- Declarations of constitutional invalidity are referred to the CC for confirmation.
- The common law definition of marriage is declared inconsistent with the Constitution and invalid to the extent it excludes Muslim marriages.
- The declarations of invalidity in paras 1.1 to 1.4 are suspended for a period of 24 months to enable the President and Cabinet, together with Parliament to remedy the foregoing defects by either amending legislation or passing new legislation within 24 months in order to ensure the recognition of Muslim marriages as valid marriages for all purposes in SA and to regulate the consequences arising from such recognition.
- Pending legislation, a Muslim marriage may be dissolved in accordance with the Divorce Act as follows:
- The Divorce Act shall be applicable save that all Muslim marriages shall be treated as out of community of property, except where there are agreements to the contrary.
- Section 7(3) of the Divorce Act shall apply.

In the case of a husband who is a spouse in more than one Muslim marriage, court:

- Shall consider any contract or agreement and must make an equitable order.
- May order person with sufficient interest joined in proceedings.
- Declared that s 12(2) of the Children's Act 38 of 2005 applies to Muslim marriages.
- The provisions of s 3 of the Recognition of Customary Marriages Act 120 of 1998 apply to Muslim marriages.
- Any interested party may approach the court.

The SCA views that the order given will cure the hardship by vulnerable women and children in Muslim marriages, which will operate until proper legislation is put in place.

The SCA views that the order given will cure the hardship by vulnerable women and children in Muslim marriages, which will operate until proper legislation is put in place. The effect of the order is that a court may redistribute assets of a couple of a Muslim marriage on the dissolution of the marriage in a manner, which the court may deem just. The wife may also be granted maintenance beyond the *iddah* period ('the period a woman must observe after the death of her spouse or after a divorce, during which she may not marry another man. Its purpose is to ensure that the male parent of any offspring produced after the cessation of a *nikah* (marriage) would be known' (www.ijhcs.com, accessed 1-2-2021)), unless there is an agreement on dissolution. The state may push ahead with a Single Marriage Bill where they want to give recognition to all marriages, including civil, religious and customary marriages and same-sex unions. To ensure that the Single Marriage Bill is properly responsive to the nuances of different types of marriages and caters for specific needs of relevant communities, in depth consultations with relevant stakeholders within those communities and broader civil society will be required including the Women's rights groups. The SAHRC may have to engage with the stakeholders within the Muslim communities to address the outstanding issues and tension in relation to the Muslim Marriages Bill.

This matter has given Muslim marriages recognition, but has not implemented Muslim Personal Law nor made Sharia Law part of South African law.

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

Fact corner

- The Muslim population in South Africa is approximately 550 000 (ie, 1,36 % of the entire population) (Haferburg 2000: 33, referring to the 1996 Census Database).

Picture source: Gallo Images/Getty

STADIO INTRODUCES BA LAW

STADIO Higher Education, one of South Africa's largest consolidated private tertiary education institutions, has announced that it has received approval from the Department of Higher Education (DHET) to present the Bachelor of the Arts in Law degree in the first semester of 2021.

STADIO Higher Education came into existence in October 2020, following the consolidation of Southern Business School, Embury, LISOF, and Prestige Academy, and has five faculties across ten campuses in South Africa and Namibia.

Acting head of the STADIO School of Law, Christo Swart, says 'the BA Law rounds off our undergraduate offering in the Faculty of Law quite nicely now with students being able to choose between the Bachelor of Arts in Law (BA Law) and the Bachelor of Commerce in Law (BCom Law).'

According to Mr Swart, all their law degrees are exclusively offered in distance learning mode, which has become increasingly popular as students' studies are not interrupted by any outside factors, as was the case with COVID-19 in 2020.

'The BA Law means a great deal for STADIO and it reaffirms the regulator's belief in our credibility as a leading higher education institution. Our track record of excellence since introducing law at Southern Business School six years ago is illustrated by the fact that the STADIO Faculty of Law is the fastest growing faculty within STADIO Higher Education.

With more than a month left until our registration closes, we already have more LLB students enrolled than what we had in total for last year's first semester intake.

I truly believe that a degree in law equips students for a variety of life's challenges, as well as challenges they will face in their careers, even if they choose to pursue something outside of the law as a career option. It is a valuable foundation for life,' he says.

The introduction of the BA Law now provides access to a legal career for a different type of student at STADIO; someone who previously might not have considered this field of study.

'We are seeing a dramatic increase in school leavers who are deciding to take the distance learning route within the Faculty of Law, and this provides another option for them to further their studies with STADIO.'

With scores of last year's matric learners facing rejection in 2021 – as South Africa's state-funded public universities are unable to meet the demand for space – more and more parents and matric learners are considering tertiary qualifications outside of the public system with institutions which are registered with DHET, such as STADIO.

STADIO Higher Education offers more than 50 accredited qualifications to more than 20 000 students via contact learning or distance learning. It also provides qualifications up to doctorate level in several faculties.

Both the Bachelor of Commerce in Law and the BA Law provide an undergraduate route to enrol for a post graduate Bachelor of Laws (LLB) degree, which can be obtained within two years after completion of the BA Law or Bachelor of Commerce in Law at STADIO.

The BA Law, which is a three-year degree, is ideally suited to students who have an interest in languages or social sciences. The BA Law complements the LLB, as it provides a foundation for disciplines related to law, such as Political Science, Philosophy and Criminology.

BA Law graduates can also choose to specialise in a field in the social sciences or languages instead of law, and could then register for an honours' degree in humanities.

The Bachelor of Commerce in Law, which is also a three-year degree, focuses on the core subjects of economics and management. Graduates can also specialise in a field within economics and management instead of the law, and could then register for an honours degree with the STADIO Faculty of Commerce Administration and Management.

'Which law degree you choose depends on your aptitude and personal interests. I'm delighted that students now have the choice at STADIO,' Mr Swart concluded.

- For more information visit www.stadio.ac.za.

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Judicial misconduct: A sword that undermines judicial integrity

By Sihlulelwe Reward Nxumalo

Picture source: Gallo Images/Getty

South Africa (SA) is a state governed by the supremacy of the Constitution, in particular, s 2 of the Constitution dictates that: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'. With this being said, the very same Constitution professes that 'courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice' (s 165(2)). In addition, '[n]o person or organ of state may interfere with the functioning of the courts' (s 165(3)). This article seeks to investigate whether or not the supremacy of the Constitution is respected and adhered to by judicial officers when performing their constitutionally bestowed duties, in particular, focus will be given to the case of *Minister of Police v Vowana and Another* 2019 (4) SA 297 (ECM).

Background

The first respondent was a magistrate, presiding in the Herschel Magistrate's Court. However, when the matter came before the Eastern Cape Local Division of the High Court in Mthatha, the court was informed before the date of hearing that, the first respondent had passed on. The second respondent is an attorney in private practice.

It is necessary to provide the background which led to the trial in the court *a quo*. An elderly woman was raped and murdered in her shack at Silindeni Administrative Area, Sterkspruit and as a result, the community took the law into its own hands, by burning down the home of a person suspected of having committed the crime. The police managed to arrest six people who were allegedly involved in the arson and mob justice. A joint trial for the accused followed, wherein the second respondent was their attorney of record.

During the trial in November 2012, evidence was given by the four plaintiffs and one witness for the Minister of Police. The magistrate reserved his judgment. On 26 November 2012 the magistrate prepared a draft judgment, which was four pages in length. The unsigned draft judgment was sent to the second respondent per facsimile on 27 November 2012. Soon after receiving the judgment, the magistrate and the second respondent discussed telephonically that the second respondent would 'redraft' the judgment. It must be said that the Minister of Police's attorney of record was not informed of the involvement of the second respondent in the 'redrafting' of the judgment.

The second respondent's attorney managed to 'redraft' the judgment, which was ten pages in length, with significant amendments and additions effected to the draft, and this 'redraft' was considered the 'final, official judgment' according to a statement that was made by the magistrate to the police. On 4 December 2012, the magistrate appended his signature to the judgment and sent it per facsimile to the respondent, while the minister's attorney collected a copy of the judgment in the court file from the clerk of the court.

At para 8 the court held: 'It appears that during April 2013 the second respondent enforced payment of the dam-

ages and costs awarded to the plaintiff as these had not been defrayed until then. It is at this stage that it came to the attention of the Minister's employees that there had been a gross irregularity or misconduct in the writing of the judgment. A criminal case on a charge of corruption was opened against the magistrate by the police in Sterkspruit'.

Struck the matter off the roll

A point *in limine* was raised on behalf of the respondents, who suggested that 'there had been an unreasonable delay in the launch of the application by the minister'. Their argument relied on time and not merits. The judgment was handed down during November 2012 and the review application was launched only on 1 April 2014. In addition to this, the respondents took the view that the court 'was prevailed upon to dismiss the application on this point without a consideration of the merits'.

A rebuttal by the minister's counsel was led, where they argued correctly that there was no explanation for the 11-month delay. In their concession, they correctly persuaded the court that 'the misconduct had been so egregious and unlawful that the court ought to condone the delay so as to deal with the misconduct'.

The High Court had to decide whether or not to condone the late application. In doing so, the court relied on the case of *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as* Amicus Curiae*)* 2008 (2) SA 472 (CC), 2008 (4) BCLR 442 (CC) at para 22, where the Constitutional Court (CC) held: 'An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay' (para 11). Furthermore, the court held that 'the delay cannot be "evaluated in a vacuum". It is necessary that all the relevant factors be considered and a determination be made whether or not there are sound reasons for overlooking the delay'. The High Court had no difficulty in condoning the late application, on the basis that '[t]he misconduct is a stain on the judiciary which requires that the court determine the merits. It is of singular importance for the integrity of the judiciary that the merits of the review be considered'.

Merits of the case

In *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC), Ackermann J referred to the views of the Canadian Supreme Court in case of *The Queen in Right of Canada v Beauregard* (1986) 30 DLR (4th) 481 (SCC), *R v Valente* (1985) 24 DLR (4th) 161 (SCC) and *R v Genereux* (1992) 88 DLR (4th) 110 (SCC), on the question of what constitutes an independent and impartial court, describing them as being 'instructive'. In answering this question, the court held that: 'In this context, he mentioned the following summary of the essence of judicial independence given by Dickson CJC in *Beauregard*'s case:

"Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual Judges to hear and decide the cases that come before them: No outsider – be it government, pressure group, individual, or even another Judge – should interfere in fact, or attempt to interfere, with the way in which a Judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence". This requires judicial officers to act independently and impartially in dealing with cases that come before them, and at institutional level it requires structures to protect courts and judicial officers against external interference.'

It is common cause that '[j]ustice must not merely be done but must also be seen to be done'. In determining whether this notion was complied with, the High Court relied on the case of *R v Genereux.* The test applied in this case is 'whether the court or tribunal from the objective standpoint of a reasonable and informed person, will be perceived as enjoying the essential conditions of independence'. The reason for such determination is well explained in Canadian jurisprudence, in the case of *R v Valente v The Queen* where Le Dain J held that: 'Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception'.

The CC had no trouble in setting aside a judgment prepared by a judicial officer who had allowed external influences to interfere with his independence. The case of *Stuttafords Stores (Pty) Ltd and Others v Salt of the Earth Creations (Pty) Ltd* 2011 (1) SA 267 (CC), concerned itself with a judge who had reproduced the heads of argument of counsel for the respondents, the reproduction had an addition of 32 lines. It followed that the very same heads, were recited in the judgment, in adjudication of this matter, the court held that: 'While some reliance on and invocation of counsel's heads of argument may not be improper, it would have been better if the judgment had been in the judge's own words: The true test of a correct decision is when one is able to formulate convincing reasons (and reasons which convince oneself) justifying it'.

In the case of *Calligeris NO and Another v Parker NO Another* (WCC) (unreported case no 7937/2017, 22-3-2018) (Meer J) the court held: 'An award by an arbitrator was a word-for-word regurgitation of the claimant's heads of argument. It did not contain any independent consideration or assessment of the defendant's argument and defence which were presented to the arbitrator both orally and in writing'. In resolving these injustices, the court held that '[t]he manner in which the arbitrator abrogated his duty to write his own award, and his failure to address the trustees' arguments and defences, prevented a fair trial of the issues. In replicating the heads of argument as his award, the arbitrator did not exercise his own judgment in deciding the issues'.

Going back to the *Vowana* case, the High Court highlighted that a comparison of the draft and the judgment indicates that the judgment was predominantly in the second respondent's words. This suggests that the plaintiff had lost the matter even before they had approached the court. Even though their right to access to courts was not affected, they had lost their matter before counsel could make his submissions. The whole ideal, behind an adversarial system is to ensure that the eyes of the presiding officer are not blinded by the dust produced by the litigants, during the course of legal proceedings.

Conclusion

There is no need to draft comprehensive legislation, which imposes harsh sanctions on presiding officers, who neglect their functions. What we really need are judicial officers who will have to take unilateral decisions to safeguard the Constitution, to administer justice impartially, but most importantly to assume the bench not because there is a vacant post, but rather because they believe in the rule of law. It can be said that some lawyers fail their clients, be it in good or bad faith. However, the same should never be thought or considered for presiding officers. The inherent consequence of poor administration of justice is that citizens will take the law into their own hands, with a valid reason to do so.

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Immunity from jurisdiction and execution enjoyed by international organisations

By Riaan de Jager

In three previous articles I briefly touched on the establishment and immunities of international organisations. In this article, I will examine an international organisation's immunity from jurisdiction and execution in more detail in light of the relatively recent judgment in the Gauteng Division of the High Court in Pretoria in the matter of *African Development Bank v TN* 2019 (2) SA 437 (GP).

Overview

The vast majority of international organisations are created by multilateral treaties (ie, a constituent or establishing agreement) concluded between states. International organisations are, therefore, products and subjects of public international law and they are bound by the fundamental principles of that body of law (see International Court of Justice (ICJ) decision in the *Reparation for Injuries Suffered in Service of the UN, Advisory Opinion,* [1949] ICJ Rep 174 at 179 and the ICJ's *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion,* [1980] ICJ Rep 73). The establishing agreement, *inter alia*, clouds the international organisation with its own legal personality, sets out the functions and goals of the organisation, as well as the structures and powers through which these are to be achieved.

Immunities

The establishing agreement usually confers immunities on an international organisation based on 'functional necessity' to preserve and ensure the independence of the organisation and to enable it to fulfil its functions to prevent any unwarranted interference from the host state. It includes jurisdictional immunity (eg, 'from every form of legal process') that is a procedural bar to the jurisdiction of domestic courts rather than exemptions

Picture source: Gallo Images/Getty

from substantive law. This suggests that, substantively, local law remains the applicable law but that the local court is the wrong forum to apply it (Chanaka Wickremasinghe *The jurisdictional immunities of international organisations and their officials* (PhD thesis, London School of Economics and Political Science, 2003) at 64). International organisations also enjoy immunity from execution. Their premises and archives are also usually inviolable as any measure of constraint against its funds, property and assets could prejudice the international organisation in the exercise of its functions and jeopardise its independence (see Guido den Dekker 'Immunity of the United Nations before the Dutch courts' (www.haguejusticeportal.net, accessed 31-8-2020)).

An international organisation's immunity has, unlike state or diplomatic immunity, and with few exceptions (ie, treaty-based explicit exceptions), remained absolute (see *Mothers of Srebrenica et al v State of the Netherlands and United Nations* (case no 295247, 10-7-2008); Den Dekker (*op cit*) at 4; Eric de Brabandere *Measures of Constraint and the Immunity of International Organisations* (Leiden University – Grotius Centre for International Legal Studies, 2018) at 7).

The *African Development Bank* case

The facts of the *African Development Bank* case are briefly that Ms TN obtained an emoluments attachment order (EAO) against her husband, one EN, an employee of the African Development Bank (the bank), from the Clerk of the Maintenance Court. The bank then brought an application in terms of s 28 of the Maintenance Act 99 of 1998 to have it rescinded and set aside, arguing *inter alia*, that it enjoyed immunity. After the rescission application had been rejected, the bank appealed to the High Court.

In its judgment, the court, per Kollapen and De Vos JJ, referred to art 52.1, 52.2 and 53.1 of the Agreement Establishing the African Development Bank, as well as art 4.1 and 4.2 of the agreement establishing a regional office of the bank in South Africa (SA). For the sake of brevity, the relevant articles will not be quoted herein.

The court held *in sum* as follows –

- the maintenance dispute between the bank and TN did not fall within the general business or the scope of the bank's operations and will not impact on its operations, efficacy or its ability to discharge its mandate;
- the EAO did not fall within the scope of the protection of art 52 of the establishment agreement;
- giving effect to the order will not compromise the assets of the bank – what the bank is required to attach and pay over is not its own assets but the emoluments that become due to TN that will cease to be the assets and property of the bank;
- art 6.5 of the agreement establishing a regional office enjoins the bank and its officials to respect South African law;
- with reference to *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), the phrase 'immunity from every form of legal process' must be interpreted in context and not simply be afforded its literal meaning;
- since a dispute involving the rights of minor children to maintenance is at play, the claim for immunity is simply not sustainable – the South African courts have consistently expressed themselves on the importance of maintenance obligations being diligently discharged; and
- neither the course of justice, nor the interests of the bank, are best served by invoking immunity as invoking same will ultimately result in preventing the effective enforcement of a court order for the payment of maintenance.

The establishing agreement usually confers immunities on an international organisation based on 'functional necessity' to preserve and ensure the independence of the organisation and to enable it to fulfil its functions to prevent any unwarranted interference from the host state.

Analysis

It is noted that the court made no mention in its judgment of s 232 of the Constitution, which provides that '[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'. In terms thereof, the court was required to consider international law and prefer an interpretation that accords with international law (see *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2019 (3) SA 30 (CC) at para 5).

The court also did not have regard to the Vienna Convention on the Law of Treaties of 1969 (Convention). In the *Law Society* case it was held at para 36 that, although SA is not party to the Convention, it is bound by some of its major provisions and that decisions of the ICJ confirm that such major provisions (ie, articles on interpretation doctrines and the good faith doctrine) amount to a codification of customary international law (see para 38 of the *Law Society* case; *World Bank Group v Wallace* 2016 SCC 15 (Canadian Supreme Court) at para 47).

In my view, an EAO constitutes a measure of constraint taken against the bank and serving such an order would violate its immunity from execution. The court was, however, correct in holding that the sums, which were the subject of the EAO were owed by the bank to TN. Therefore, the attachment targets TN's claims and are not strictly speaking funds of the bank itself. However, in the case of garnishee proceedings, the bank correctly relied on its immunity from jurisdiction to challenge the EAO. I submit that, even if TN's interests would *prima facie* outbalance those of the bank – because the bank itself was not a party to TN and EN's dispute – the court should have upheld the bank's claim to immunity (ie, from 'every form of legal process') in terms of the EA and agreement establishing a regional office.

This happened in *Atkinson v Inter-American Development Bank* 156 F.3d 1335 (DC Cir. 1998), decided by the US Court of Appeal for the DC Circuit. In this case, the former wife of a staff member of the international organisation had attempted to attach (through a garnishee order) the salary of her ex-husband who had failed to pay alimony and child support. After the international organisation invoked its immunity, the DC Court of Appeal ruled that international organisation's immunity is absolute. A similar approach was taken by the Court of Justice of the European Union in *Tertir-Terminais de Portugal SA v Commission of the European Communities* (case no C-1/04 SA, 14-12-2004) regarding an application for authorisation to serve an interim garnishee order on the Commission of the European Communities.

Conclusion

I submit that a proper interpretation of customary international law should have led the court to conclude in the bank's case that the Maintenance Court lacked jurisdiction to entertain TN's application for an EAO. Moreover, the bank's seemingly absolute immunity from execution also prevented the Maintenance Court from attaching the bank's funds to give effect to TN's application.

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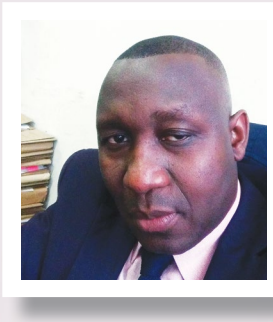
There is an intruder on my *stoep*: Do defensive acts amount to vigilantism?



Picture source: Gallo Images/Getty

By Itai Ayah Kagwere

Violent crime statistics in South Africa (SA) are alarming, and the level of violence associated with these crimes are worrying. Property owners have resorted to fighting fire with fire against their assailants. Of late, the media has been abuzz with news of property owners retaliating violently to burglaries, robberies and hijackings.

Property owners have had to resort to using firearms to ward off their attackers and defend their lives and properties. In some instances, assailants have lost their lives when property owners struck back. This now begs the question, whether these defensive acts amount to vigilantism? This article is aimed at establishing what the legal position is if one finds oneself under attack and fights back.

Private defence

The right to act in private defence is subsidiary in nature. It takes effect only when the state is not there to protect a particular person. The implication of this is that if help from the state in the form of the police is available to protect a person, such person should not violate another's physical integrity in private defence.

In legal literature, two *rationes* or theories for the existence of private defence have been identified. Knowledge of these theories is of great benefit when endeavouring to answer problem questions relating to borderline cases in regard to this ground of justification. The first theory is the protection theory (also known as the individual protection theory). Here the emphasis is on the individual and their right to defend oneself against an unlawful attack. Every person has a natural right to protect oneself. Nobody need simply suffer the infringement on their life, limb, property or honour by another. In both man and beast, there is the instinct to defend against danger. The individualistic notion of self-defence predominates here.

The second theory relating to the existence of private defence is the upholding-of-justice theory. The idea underlying this theory is that people acting in private defence perform acts whereby they assist in upholding the legal order. Private defence is meant to prevent justice from yielding to injustice, because private defence comes into play only in situations in which there is an unlawful attack. People acting in private defence protect not only themselves, but also the entire legal order. They act in place of the authorities (the state or the police), because it is practically impossible for the police to always protect all people in all places.

As a point of departure: 'A person acts in private defence, and her act is therefore lawful if she uses force to repel an unlawful attack which has commenced or is imminently threatening upon her or somebody else's life, bodily integrity, property or other interest which deserves to be protected, provided that the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is reasonably proportionate to the attack' (CR Snyman *Criminal Law* 6ed (Durban: LexisNexis 2014) at 102 in *Mbatha v S* (GP) (unreported case no A621/2016, 22-11-2017) (Phiyega AJ)).

Let me begin by summarising the requirements of private defence as a ground of justification, namely, the attack must be –

- unlawful;
- against interests which ought to be protected; and
- threatening but not yet completed.

Requirements of the defensive action –

- must be directed against the attacker;
- must be necessary;
- must stand in reasonable relationship to the attack; and
- must be taken while the defender is aware that they are acting in private defence.

It is common knowledge that house robberies, motor vehicle hijackings

and muggings are often associated with much violence and are unlawful. At some point, we find ourselves being unlawfully attacked by ruthless elements. These attacks happen unexpectedly without any warning. Victims find themselves with their backs against the wall and the situation on its own is very scary, traumatising and nerve-racking. It takes a split second for your defensive instincts to kick in. So, let us look at what is meant by the phrase 'interests which ought to be protected'. As human beings, we have basic human rights. The South African Constitution recognises a number of these rights.

It is in such circumstances that the victim can invoke private defence as a ground of justification. The requirement for private defence presently under discussion is merely that the attack against the victim must be unlawful. The victim can successfully rely on a private defensive act, which was directed at the conduct of a mentally ill person. Since the law does not address itself to animals, animals are not subject to the law and, therefore, cannot act unlawfully. For this reason, one does not act in private defence if one defends oneself, or others against an attack by an animal. In such a situation the person may, however, rely on the ground of justification known as necessity.

Although the attack must be unlawful, it need not necessarily be directed against the defender. One can act in private defence also in defence of a third party. If for instance, you come across a person assaulting another and you come to the defence of the attacked, even going as far as assaulting or injuring the attacker, you can successfully rely on private defence. '[T]he attack must be directed at an interest which legally deserves to be protected' (see *Nene v S* (KZP) (unreported case no AR65/2017, 4-5-2018) (Henriques J (Chetty concurring)) at para 10). Private defence is usually invoked in protection of the attacked party's life of physical integrity, but in principle, there is no reason why it should be limited to the protection of these interests. Thus, the law has recognised that one can also act in private defence even in protection of dignity. If your dignity is continually being attacked, for instance, through insults, you can defend yourself and successfully rely on private defence.

Case law

In *Ex parte Die Minister van Justisie: In re S v Van Wyk* 1967 (1) SA 488 (A), the court was seized with a case where the accused pleaded private defence. The court was tasked with answering the question whether one can kill in defence of property. This case came before the court in 1966. However, the legal issues are as much relevant today. As a shop owner, Van Wyk had to put up with never-ending burglaries at his shop. All his efforts to secure his shop and property from thieves proved inadequate. He devised a plan to set up a shotgun to go off whenever anyone attempted to break into his shop. One night a burglar broke into his shop, triggering the shotgun to fire and the burglar was fatally wounded. Van Wyk was found to have acted in private defence. The court found that he had the right to protect his property even if it meant killing someone. The court, however, further noted: 'The owner of property is not allowed to protect his property in every conceivable mode. He must proportion his means to his end' (at p 515).

Over the years, various legal academics and legal authors have voiced different points of view on which right (that of the aggressor to their life or that of the defender to their person and property) should prevail. Others argue that today with the constitutional democracy and the Bill of Rights enshrined therein, advancement in technology, security systems and even private security companies, one can still kill in protection of property. However, it has to be remembered that property owners are doing all at their disposal to upgrade security, are paying an arm and a leg for tracking devices, installation of security gadgets around their property, hefty premiums to private security companies. However, all these efforts are challenged by intruders who are very aggressive in their attacks. I submit that killing in defence of property would at least be justifiable if the defender, at the same time was defending their life or bodily integrity.

In *S v Mogohlwane* 1982 (2) SA 587 (T) the court arrived at the same conclusion. The accused successfully relied on private defence. Let me reiterate, however, there is a thin line between defending oneself and committing a crime while one is of the impression they are acting in private defence. The defensive act must be necessary in order to protect the interests threatened, in the sense that it must not be possible for the person threatened to ward off the attack in another less harmful way. There must be a reasonable relationship between the attack and the defensive act. The act of defence may not be more harmful than necessary to ward off the attack. It stands to reason that there ought to be certain balance between the attack and the defence. If the defender can ward off the attack by merely using their fists or by kicking the assailant, they ought not to use excessive force such as stabbing or shooting the assailant. There are, however, other factors to be considered, such as the sex of the parties, the ages of the parties, the means they have at their disposal, the nature of the threat and the persistence of the attack.

In practice whether this requirement for private defence has been complied with is more a question of fact than law. These attacks occur out of the blue so there is very little time or no time at all for one to consider the next move. In a split second one finds oneself in grave danger and one has to act decisively there and then. The test is an objective one and South African courts have emphasised that one should not judge the events like an armchair critic, but rather place oneself in the shoes of the attacked person at the critical moment and bear in mind that at such point in time the attacked person only has a few seconds in which to make a decision. The court should then ask whether a reasonable person would have acted in the same way in those circumstances. A person who suffers a sudden attack cannot always be expected to weigh up all the advantages and disadvantages of their defensive act and to act calmly.

In *S v Ntuli* 1975 (1) SA 429 (A) the court noted the following: 'In applying these formulations to the flesh-and-blood facts, the court adopts a robust approach, not seeking to measure with nice intellectual callipers the precise bounds of legitimate self-defence or the foreseeability or foresight of resultant death'.

In the *Nene* case, the appellant was convicted of murder, attempted murder, reckless endangerment to person, or property by the court *a quo*. On appeal, he unsuccessfully attempted to raise private defence/self-defence. The facts of the matter, witness accounts and all circumstances of the case indicated that the appellant acted out of rage and revenge not self-defence or protecting any interests. As a trained security guard, he should have foreseen that discharging a firearm on unarmed people would result in the death and/or injury. The deceased did not produce any firearm or dangerous weapon that posed a threat or danger to the safety and well-being of the appellant in order to justify his conduct in shooting the deceased.

Conclusion

It has been pointed out that, by looking at the two reasons for the existence of private defence, namely the notions of individual protection and that of the upholding of justice, the reasons for the existence of the various requirements for a valid reliance on this ground for justification becomes clearer, and it also becomes easier to answer certain questions that come to the fore in borderline-cases relating to this ground for justification.

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Picture source: Gallo Images/Getty

Are magistrates' courts r 58-orders appealable or reviewable?

By Danie van der Merwe

The recent judgments confirming the constitutionality of s 16(3) of the Superior Courts Act 10 of 2013 and r 43 of the Uniform Rules of Court (and the non-appealability of r 43) in *S v S and Another* 2019 (6) SA 1 (CC) and *CT v MT and Others* 2020 (3) SA 409 (WCC) respectively, have raised the question whether, and to what extent, orders granted under r 58 of the Magistrates' Courts Rules, which is similarly worded to r 43, may be reconsidered by the High Court. This question has recently received judicial consideration in *EB v CB* (FB) (unreported case no A22/2020, 22-10-2020) (Daffue J (Nekosie AJ concurring)) in an appeal from the regional court.

The purpose of this article is to show that the judgment in *EB v CB* was wrongly decided and r 58 orders are, in fact, subject to reconsideration to the extend indicated below. To motivate my contention, it is prudent to first briefly discuss the non-appealability of r 43 pursuant to the provisions of s 16(3) of the Superior Courts Act.

The constitutionality of s 16(3) of the Superior Courts Act

Section 16(3) of the Superior Courts Act expressly provides that the matters referred to in r 43 are not appealable. In *S v S* the legality and constitutionality of s 16(3) were challenged on the grounds that it infringes on the following constitutional rights –

- the best interest of the child-right;
- the right of equality before the law; and
- the right of access to the courts.

The Constitutional Court (CC) dismissed the contentions raised on behalf of the applicant and found in respect of the alleged grounds of unconstitutionality as follows:

- Allowing appeals in r 43 proceedings would entail significant delays, the cost of which would weigh disproportionally on financially vulnerable spouses, especially

the wives, who generally launched r 43 applications. An appeal process was, moreover, susceptible to abuse by recalcitrant spouses, to the detriment of the interests of their children. The detrimental impact on the children of delayed maintenance payments far outweighed the danger of an erroneous interim order (*S v S* at paras 31 – 35).

- Infringement of the right to equality before the law would arise only if the differentiation between litigants in r 43 proceedings and other litigants were irrational, which it was not. The prohibition in s 16(3) bore a rational connection to the legitimate government purpose of preventing delays and curtailing costs (*S v S* at paras 37 and 41 – 44).
- It was not axiomatic that non-appealability *per se* amounted to an unconstitutional denial of a litigant's right of access to court. The question was whether it passed constitutional muster, which in this case it did (*S v S* at para 48), and the litigants' right, under r 43(6), to vary their orders ameliorated any injustice where changed material circumstances might emerge (*S v S* at paras 49 and 56 – 57).

It is significant to note that the CC did not deal in its judgment with the non-appealability of an r 43-judgment on the basis that such an order is not final or not of final effect, and for this reason is not appealable. It must be accepted that the CC must have regarded an r 43-judgment in principle appealable, were it not for the express provisions of s 16(3) of the Superior Courts Act. (To the extent that Rogers J's remark in *CT v MT and Others* at para 33 is meant to say that r 43-orders are also non-appealable being interim in nature, his view cannot be supported (see *see Tshwane City v Afriforum and Another* 2016 (6) SA 279 (CC)).

The CC, however, and notwithstanding its finding that s 16(3) of the Superior Courts Act passes constitutional muster and acknowledged that r 43-orders may be –

- unjust because they may be enforceable for longer than initially anticipated (*S v S* at para 55);
- patently unjust and erroneous and not able to be amended due to the absence of changed circumstances (as required in r 43(6) for the amendment of an order) (*S v S* at para 58).

In this regard, the CC recognised that most r 43-applicants are mothers in financial distress (*S v S* at para 3) and made certain *obiter* 'suggestions' on how the above r 43-problems could be addressed:

- In respect of the unintended duration of an r 43-order courts should ensure that divorces are given preferential dates and complex divorce matters should be actively case managed to prevent delays in the finalisation of such divorces (*S v S* at para 55).
- In cases where an order is patently unjust and erroneous with no changed circumstances, the court should exercise its inherent power to regulate its own process in the interest of justice (*S v S* at para 58).

The judgments of *S v S* and *CT v MT* are not beyond criticism, but I deem it unnecessary for purposes of this article to deal with those criticisms herein.

I contend that the judgment in *S v S* has no effect on the question of the appealability of r 58-orders in the regional courts, for the following reasons:

- The Magistrates' Courts Act 32 of 1944 has no provision corresponding with s 16(3) of the Superior Courts Act.
- The regional court, absent changed circumstances and being a creature of statute, is not possessed with the inherent power in the event that an order is patently unjust or erroneous to regulate its own process in the interest of justice, as the High Court does.

Appealability/reviewability of r 58 orders in the regional court

Rule 58 of the Magistrates' Courts Rules is a special rule governing certain specific applications in contrast with the provisions of r 55, which govern magistrates' courts applications in general.

Rule 58 provides that orders may be granted in matrimonial matters in respect of the following –

- interim maintenance;
- a contribution towards the costs of a pending matrimonial action;
- interim care of any child; or
- interim contact with any child.

In DE van Loggerenberg *Jones & Buckle: The Civil Practice of the Magistrates' Courts in South Africa* (Cape Town: Juta 2019) vol 1 (at 588-588A) it is submitted, relying on the fact that the Magistrates' Courts Act and rules do not contain a similar provision as s 16(3) of the Superior Courts Act, that r 58-orders are interlocutory and are thus not appealable.

Appeals in the magistrates' court are regulated by s 83 of the Magistrates' Courts Act, which reads as follows:

'Subject to the provisions of section 82, a party to any civil suit *or proceeding in a court* may appeal to the provincial or local division of the Supreme Court having jurisdiction to hear the appeal, against –

(*a*) ...

(*b*) *any rule or order made in such suit or proceeding and having the effect of a final judgment, including any order under Chapter IX and any order as to costs*' (my italics).

Notwithstanding the fact that the Magistrates' Courts Act and rules do not contain any provision similar to s 16(3) of the Superior Courts Act, the court in *EB v CB* applied s 16(3) of the Superior Courts Act to an appeal from the regional court, ignoring the fact that s 16 only deals with appeals against decisions of the high court as court of first instance.

Section 83(*b*) expressly provides that any order as to costs is appealable, and as such, a cost order in r 58-proceedings is without question appealable. In the adjudication of the costs on appeal, the merits of the matter by necessity need to be considered by the court of appeal.

An order in terms of r 58 would also be appealable in terms of s 83(*b*) if such order has the effect of a final judgment. An order, albeit interim in duration, may have the effect of a final order, and such an order would in terms of s 83(*b*) of the Magistrates' Courts Act, be appealable.

Albeit that a pending matrimonial dispute between spouses is a jurisdictional requirement for relief in terms of r 58-applications, such an application remains an independent proceeding and is totally separate from the divorce action and the relief sought and granted therein. An r 58-application has no bearing on the outcome of the divorce action.

As such an r 58-order cannot be said to be 'interlocutory' (see also *Pretoria Garrison Institutes v Danish Variety Products (Pty), Limited* 1948 (1) SA 839 (A) at 870 and *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 549).

An order to make a contribution towards the costs of the other party also has the effect of a final order on the party at the receiving end of such an order, albeit that the party favoured with an order for a contribution towards costs may approach the court for a further contribution if the earlier contribution is proved to be inadequate. There could be no question that an order to make a contribution towards costs is not 'interlocutory'.

The refusal of any of the relief anticipated in r 58 would constitute an order final in effect and such refusal is appealable in terms of s 83(*b*) of the Magistrates' Courts Act (see *Van Niekerk and Another v Van Niekerk and Another* 2008 (1) SA 76 (SCA) at 78G-I and *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 358B-359G).

Rule 58 should thus be regarded as an order having final effect at least in respect of the refusal of any relief sought under r 58, orders for the payment of a contribution towards costs and costs orders.

What could be done about an r 58-order that is from its inception blatantly

unjust and erroneous? The regional court, unlike the High Court, is not enjoined with the inherent power to regulate its own process and is only enjoined in terms of r 58(6) to vary its own order in the event of a subsequent material change taking place in the circumstances of either party or a child, or the contribution towards costs proving inadequate.

If a blatantly unjust or erroneous r 58-order is not subject to an appeal the order shall, absent a subsequent material change taking place in the circumstances of either party or a child, or the contribution towards costs proves to be inadequate, remain in force until the completion of the divorce action and that may take years. In such an event, an aggrieved party would thus be left in the proverbial judicial desert if they have no right of appeal.

The CC in *Tshwane City* ((*op cit*) at paras 40 – 41 and 179) has stated that the common-law requirements for the appealability of interim orders – whether the interim order appealed against had a final effect or was dispositive of a substantial portion of the case – had been subsumed under the constitutional interests of justice standard.

If the appeal of an r 58-order would best serve the interests of justice, then the right of appeal should be allowed no matter what the pre-Constitution common-law impediments might suggest.

For this reason, also any r 58-order that is from its inception blatantly unjust or erroneous, even if considered 'interim', should be subject to reconsideration by the High Court in terms of the Constitution, be it by means of an appeal or review of the impugned decision.

Where the rights of minor children are at stake, it is also open to an aggrieved parent in the event of an order being blatantly unjust or erroneous, to approach the High Court as upper guardian of a minor for the reconsideration of the order. The best interest of minor children shall be paramount (*SW v SW and Another* 2015 (6) SA 300 (ECP)).

Jones and Buckle's bald contention that orders under r 58 are not appealable because they deem such orders 'interlocutory', is for the above reasons in my view incorrect and cannot be supported.

Conclusion

I thus contend that *EB v CB* was wrongly decided and should not be followed and that r 58-orders are appealable in respect of the refusal of any relief sought under r 58, orders for the payment of a contribution towards costs and costs orders. An aggrieved party has an automatic right to appeal such orders in terms of s 83(1) of the Magistrates' Courts Act.

Orders under r 58 that are from inception blatantly unjust or erroneous, are reviewable in terms of the Constitution by the High Court with jurisdiction, and an order involving the rights of a minor child, by the High Court in terms of its inherent powers as the upper guardian of all minor children within its area of jurisdiction.

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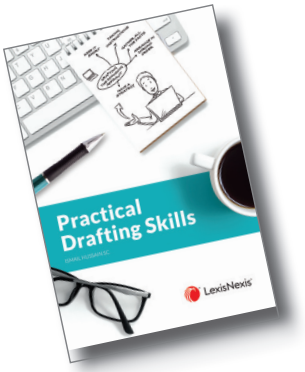
Practical Drafting Skills



By Ismail Hussain SC
Durban: LexisNexis
2019 1st edition
R 555,45 (including VAT)
239 pages (available as e-book, hardcopy and online)

This is not your traditional legal textbook. It is a practical instruction manual passionately and ably put together by the author, former Judge of the High, Competition Appeal and Military Appeal Courts, a former member of the Electoral Commission and a well-known Legal Education and Development trainer, Ismail Hussain SC. The author brings his valuable theoretical and practical experience on board.

The manual encourages legal practitioners to draft their own legal documents by applying certain techniques. The techniques and methods of good drafting are presented and applied to case studies. It teaches the reader how to acquire the skills to become proficient in drafting letters, particulars of claim, special pleas, pleas, counterclaims, replications, notices of motion, founding affidavits, heads of argument and opinion writing.

The author places a lot of emphasis on the use of good vocabulary, plain language, punctuation, logical and critical thinking, sequence and chronology, not to mention concentration, improved memory skills and understanding all the facts of your client's case. It is stressed in the book that little or no reliance should be placed on precedents.

The reader is advised to research legal principles, the latest judgments of the highest court and to get acquainted with the Practice Manual and Rules of the applicable court. This is sage advice.

The manual provides a step-by-step methodology to become a good drafter and takes the reader down to the basic details of formatting and layouts of documents, which includes font size, spacing, headings, paragraphs, sub-paragraphs and punctuation.

The basic techniques are applied to the given case studies. These techniques are invaluable and the reader is encouraged to practise them over and over again in order to achieve a high skill set.

The manual does not only contain teaching methods to draft legal documents in action and motion proceedings but also provides writing techniques for drafting Heads of Argument for trials, motion proceedings and appeals. The step-by-step basic techniques are invaluable.

Similarly, the manual contains ten steps that a lawyer could follow when called on to write a legal opinion. It contains drafting techniques that should be incorporated in producing a user-friendly document.

The manual is published in a soft cover in A4 size and may sit uncomfortably among the other textbooks in your library, but it is a must have. Purchase this manual, read and use it. It will only enhance your drafting skills set to which you can be proud of and which will impress your colleagues and clients.

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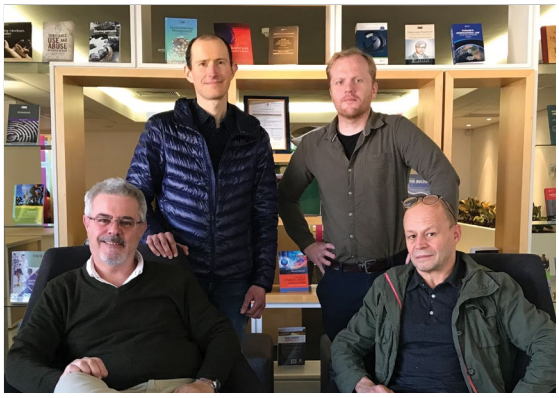
THE LAW REPORTS



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

January 2021 (1) South African Law Reports (pp 1 – 323); January 2021 (1) South African Criminal Law reports (pp 1 – 120)

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

AD: Appellate Division
ECP: Eastern Cape Division, Port Elizabeth
FB: Free State Division, Bloemfontein
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
KZP: KwaZulu-Natal Division, Pietermaritzburg
LAC: Labour Appeal Court
LC: Labour Court
SCA: Supreme Court of Appeal

Administrative law

Request state organ for review of decision of another state organ: In *Compcare Wellness Medical Scheme v Registrar of Medical Schemes and Others* 2021 (1) SA 15 (SCA) the South African Council for Medical Schemes, avowedly acting in the public interest, sought to review the Appeal Board of the Council for Medical Schemes' endorsement of the name change sought by the appellant medical scheme. An interesting question arose: Could an organ of state like the Council or the Registrar for Medical Schemes apply – in the public interest – for the review of an administrative decision of another state organ? And if so, would it be reviewable under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) or the principle of legality?

The SCA per Plasket JA (Cachalia and Schippers JJA, Ledwaba and Matojane AJJA concurring) ruled that, because they were stepping into the shoes of a member of the public, the Council and the Registrar had the required standing to seek review, and that the review would fall under PAJA.

In coming to this conclusion, the SCA went on to discuss the judgment in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC), in which the CC ruled, controversially, that organs of state were not bearers of the fundamental right to just administrative action and that they, therefore, had to use the principle of legality when seeking the review of their own decisions. But the SCA pointed out that in that case the CC was concerned with an organ of state acting in its own interest and reviewing its own decision. It was not concerned with a scenario where an organ of state that is in a position akin to that of a private person (natural or juristic) may be seeking to review the decision of another organ of state or with a situation where – in seeking a review of its own decision – an organ of state is purporting to act in the public interest in terms of s 38 of the Constitution. Here, however, the decision of the Appeal Board was an administrative action as defined in PAJA, as it was a decision of an administrative nature, taken in the exercise of a public power by an organ of state in terms of empowering legislation that had the potential to adversely affect rights, had a direct, external legal effect and was not excluded by any of subss (*aa*) to (*ii*) of s 1 of PAJA.

When the Registrar and the Council brought their application in the public interest, they did so in order to safeguard the fundamental right of each member of the public to just administrative action. That being so, they stepped into the shoes of the members of the public on whose behalf they litigated and, in this sense were, despite being organs of state, bearers of fundamental rights to just administrative action. PAJA consequently applied to the review of the Appeal Board's decision. While a legality review would in this case have the same result, this would not always be the case. For instance, the common law that applied to legality reviews differed from PAJA in respect of the exhaustion of internal remedies, and there were some differences between the common-law delay rule and PAJA's delay rule.

The SCA went on to hold that the court *a quo*, the GP, had correctly set aside the Registrar's decision to allow the name change because he had no power to approve once he had formed the view that it was likely to mislead the public. On this topic, the SCA went on to reiterate that all administrative law rested on the principle of legality such that the legislature and the executive in every sphere were constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law.

- For more on the *Gijima Holdings* case see: Thenjiwe Vilakazi 'Organs of state seeking a review of own decision: A question of legality or PAJA?' 2018 (April) *DR* 32.

Animals

The pauperien action: A defence of non-custodian third party negligence? 'Many people in South Africa choose to own animals for companionship and pro-

tection. That is their choice, but responsibilities follow in its wake. … People are entitled to walk our streets without having to fear being attacked by dogs and, where such attacks occur, they should in most circumstances be able to look to the owner of the dog for recompense.'

So ends the judgment in *Van Meyeren v Cloete* 2021 (1) SA 59 (SCA), in which the SCA had to deal with the question of whether it should extend pauperien principles by allowing the owner to escape liability on the ground of the negligence of a 'non-custodian' third party. The court *a quo*, the ECP, had refused to do so, leading to the present appeal by the owner.

The facts serve to illustrate the dilemma faced by the SCA. The respondent, Mr Cloete, an itinerant gardener and refuse collector, was on his way to the shops one afternoon, pulling his trolley down a street in suburban Port Elizabeth when – for no reason and without any warning – he was attacked by three dogs owned by the appellant, Mr Van Meyeren. The dogs, pit bull cross-breeds, savaged Mr Cloete to such an extent that neighbours who came to the scene thought he was dead. He survived, but his left arm was amputated because of his injuries.

Pleading his claim under the *actio de pauperie* and, alternatively negligence, Cloete instituted action to recover damages from Van Meyeren. Van Meyeren and his family had been away from home on the day in question. The garden could be accessed from the street through a gate through which the dogs had escaped. While it was usually padlocked, the SCA accepted in favour of Van Meyeren (but with reservations) that on the fateful day, the padlocks were damaged by an unknown intruder so that the dogs were able to escape.

The SCA per Wallis JA (Cachalia and Mocumie JJA and Ledwaba and Weiner AJJA concurring) cited the pauperien law on dog attacks as it was summarised by the AD in *O'Callaghan NO v Chaplin* 1927 AD 310. If the owner of a dog that attacks another person who was lawfully at the place where he was injured, and who neither provoked the attack nor by his negligence contributed to his own injury, is liable, as owner to make good the resulting damage. Liability was based on ownership alone, providing a remedy where it was impossible to impute negligence to the owner.

The SCA pointed out that the *actio* had an element of anthropomorphism in that, for the owner to incur liability, the animal had to have acted from vice, or *contra naturam sui generis*. That is, there had to be something equivalent to *culpa* in its conduct. If it was merely frightened, in pain or provoked, then it had not acted *contra naturam* and the owner was not liable. Nor would the owner be liable if the injured party had been in a place where he should not have been, for example where an intruder was bitten by a watchdog, or where the animal was restrained and the injured party ventured within reach.

However, in *Lever v Purdy* 1993 (3) SA 17 (A) the AD recognised a third exception. Such as where the owner had appointed someone to look after the animal in his absence and the negligence of that person (the custodian) was the cause of the harm. Van Meyeren argued that the defence recognised in *Lever v Purdy* had to be extended to exempt the owner from liability where the harm would not have occurred but for the negligent conduct of a third party, irrespective of whether the third party had had custody or control of the animal.

After carefully analysing *Lever v Purdy*, the SCA ruled that there was nothing in that judgment to provide any support for the exception for which Van Meyeren contended. Roman-Dutch law provided no clear authority in favour of extending an owner's exemption from liability for harm caused by their animal to instances where a third party's negligence is involved without the third party having the custody or control of the animal.

The SCA then proceeded to the question of whether the common law should be developed by extending the exception in *Lever v Purdy* under s 39 of the Constitution. Counsel for Van Meyeren alluded to the high level of crime in South Africa and the right of people to protect their homes against criminals. The SCA parried this line of argument by asking why, if it was only in extreme circumstances permissible to shoot and kill an intruder in self-defence, it should be permissible to keep a dog that – irrespective of the level of threat – might kill or maim them? Moreover, Van Meyeren's dogs did not harm an intruder but an innocent passer-by. The ambit of the right to keep dogs for protection at home was irrelevant where the dog had caused harm outside the home.

The SCA emphasised that Van Meyeren was seeking to escape liability on the basis that what had occurred here was not his fault. However, the absence of fault has never been a basis for avoiding pauperien liability. It proceeded on the basis of strict liability arising from ownership of the animal that caused the harm. Absence of fault was a ground for resisting aquilian liability, not a claim under the *actio.* Where the actions of the victim or third parties had been held to exonerate the owner from pauperien liability, it was because those actions directly caused the incident in which the victim was harmed in circumstances where the owner could not prevent that harm from occurring. Responsibility for the dogs had not passed from Van Meyeren to the intruder in the way it had passed in *Lever*, it still resided squarely with him as the owner.

Stripped of everything extraneous, Van Meyeren's argument was nothing more than that he was not liable because the harm was not his fault. The SCA rejected the argument that control by the person whose negligence allowed the animal to escape was not a requisite for the extended exception to operate. It ruled that it would be inappropriate to undermine the principle of strict liability for harm caused by domestic animals by extending the exception in *Lever v Purdy*. The SCA accordingly dismissed the appeal with costs.

- See Mdumseni Gambushe 'Pauperien liability: Strict liability reigns supreme again' 2020 (Dec) *DR* 29.

Credit agreements

Debt enforcement and enforcement notice requirements: *FirstRand Bank Ltd t/a First National Bank v Moonsammy t/a Synka Liquors* 2021 (1) SA 225 (GJ) was another in a series dealing with the notice requirements in s 129 of the National Credit Act 34 of 2005 (the NCA). In an application for summary judgment on a credit agreement subject to the provisions of the NCA, the respondent's defence was that the contract required a prior demand before the debt became payable but no such notice had been given, and if such notice was necessary, it had to be given, and it had to be alleged as having been given, before a default notice could be given under s 129. Counsel for the applicant, relying on High Court authority of that division, contended that there would have been proper compliance with the NCA if the s 129 default notice was attached to the summons. The contract did contain notice terms that the plaintiff had to comply with before the loan became repayable but those terms were not pleaded.

The court, per De Villiers AJ, held that the plaintiff did not plead a completed cause of action. The cause of action was not verified and the particulars of claim were therefore, excipiable. In the circumstances, summary judgment would be refused. However, the applicant, having alleged that it had complied with ss 129 and 130, could amend its particulars of claim. Therefore, the court had to consider whether there was indeed compliance with those sections.

The court further held that non-compliance with s 129 could not be cured by attaching proof of purported compliance with s 129 to a summons, an application for default judgment or one for summary judgment. Compliance with ss 129 and 130 was not elective but compulsory. The NCA made no provision for the curing of the non-compliance with s 129,

other than a stay of proceedings until a court order in terms of s 130(4) was given effect to. Therefore, the application for summary judgment had to be dismissed and the defendant granted leave to defend. The action proceedings would be stayed until ten business days after the plaintiff, in due compliance with ss 129 and 130 of the NCA, had served a notice as contemplated in s 129(1)(*a*) on the defendant.

In reaching the above finding, the court refused to follow a line of Gauteng cases, originating with *SA Taxi Development Finance (Pty) Ltd v Phalafala* 2013 JDR 688 (GSJ), which held that non-compliance with s 129 could be cured by attaching a s 129 default notice to the summons.

Criminal law

Review of decision not to prosecute: *Panday v National Director of Public Prosecutions* 2021 (1) SACR 18 (KZP) arose out of the 2010 FIFA World Cup soccer tournament hosted in South Africa. The applicant, Mr Panday, had applied for an order setting aside the decision of the National Director of Public Prosecutions (the NDPP) to prosecute him on charges of fraud and corruption relating to the provision of accommodation for members of the South African Police Service (the SAPS) during the World Cup. This decision came after the Director of Public Prosecutions in KwaZulu-Natal (the DPP) had declined to prosecute him. The applicant attacked the rationality of the decision, contending that the NDPP had failed to consult the DPP before taking the decision, as was required by s 22(2)(*c*) of the National Prosecuting Authority Act 32 of 1998 (the Act). He also contended that the decision was irrational in that after requesting the intercepted communications from the SAPS, the NDPP had not waited for the provision of the material but had gone ahead and taken the decision to prosecute anyway.

In examining s 22(2)(*c*) of the Act the KZP, per Gorven J, held that the phrase 'after consulting' in the provision had to be construed in context and in the present context, it meant giving serious regard to the views of the DPP. In assessing whether provision was satisfied, the KZP found that in circumstances where the DPP had had the opportunity to motivate her decision to decline to prosecute by addressing a memorandum to the NDPP (giving as her reasons those in the report of a subordinate), it could not be said that she had not had the opportunity to explain her reasons to the NDPP. It could also not be said that he was unaware of her reasons or had made his decision in ignorance of them.

As to the failure by the NDPP to wait for the arrival of the intercepted material, prior to making the decision, the NDPP had before him a record running to some 3 790 pages including thousands of pages of invoices, many statements of witnesses, and a forensic report. That being the case, it could not be said that the NDPP ought to have insisted on receiving the intercepted material prior to making the impugned decision.

The KZP accordingly rejected the attack on the legality of the impugned decision, and based on the accepted prosecution policy, found that the NDPP could conclude that the decision to prosecute the applicant was 'well-founded upon evidence reasonably believed to be reliable and admissible'.

Other criminal law cases

Apart from the cases and material dealt with above, the material under review also contained criminal law cases dealing with –

- arms and ammunition;
- assault;
- constitutional law;
- prescribed minimum sentences;
- rape; and
- search and seizure.

Education

May a special needs school refuse to readmit a troubled and misbehaving learner until she was 'cured'? Young R, just 12 years old, diagnosed with foetal alcohol syndrome, cognitive impairments behavioural disorders and epilepsy, was admitted as a learner at a special needs school but later refused entry. She had started using snuff, alcohol and the respondents were willing to allow her to attend school and reside in the school hostel once her 'issues' were attended to. She was effectively barred from school until such time as the respondents were satisfied that she had been 'cured'. These were the sad facts the FB, per Mathebula J, had to deal with in *Cassim NO v MEC, Department of Social Development, Free State and Others* 2021 (1) SA 184 (FB). The applicant, R's *curator ad litem*, had applied on a semi-urgent basis for an order compelling the school to admit her. The participating respondents, the school and its governing body, in the first place denied urgency on the ground that the country was in COVID-19 lockdown, requiring the closure of schools, and argued that there was therefore no compelling reason for the court to urgently consider the matter.

The FB ruled that the arguments raised in opposition to urgency lacked merit since courts would always come to the aid of the vulnerable where their welfare and life were under threat and were ignored by those tasked with the responsibility to protect them. It would, in the light of this, be an absurdity to put the matter in abeyance until the COVID-19 lockdown was lifted.

The FB then observed that the conditions imposed by the respondents for R's admission were unlawful since they effectively barred her from school until the respondents were satisfied that she had been cured. This attitude tended to perpetuate exclusivity and was unlawful because every child who had been admitted to school had to be allowed to attend school. The FB accordingly upheld the curator's application.

Labour law

Firing a worker who was suffering from depression: Section 187(1)(*f*) of the Labour Relations Act 66 of 1995 (the LRA) provides that a dismissal will be automatically unfair if the reason for the dismissal is that the 'employer unfairly discriminated against an employee, directly or indirectly', *inter alia* on grounds of 'disability'.

In *Legal Aid South Africa v Jansen* 2021 (1) SA 245 (LAC), the LAC considered the nature of the enquiry where the claimed disability was depression. This in an appeal against the LC's finding in favour of the respondent, one Mr Jansen, that his dismissal for misconduct – which misconduct that court accepted was caused by his depression, as claimed by Mr Jansen – amounted to discrimination against him on the grounds of 'disability'; and that his dismissal was therefore automatically unfair as contemplated in s 187(1)(*f*) of the LRA.

On appeal, the LAC held that in an automatically unfair dismissal claim based on depression, the inquiry was whether the reason for the dismissal was depression, and differential treatment on that basis. An applicant seeking to establish that a dismissal was automatically unfair on any of the grounds listed in s 187(1) of the LRA must show causation, and produce sufficient evidence raising a credible possibility that the dismissal amounted to differential treatment on the alleged ground. The LAC, setting aside the LC's decision, concluded that Mr Jansen had failed to adduce cogent evidence, medical or otherwise, showing that his acts of misconduct were caused by his depression and that he was dismissed for being depressed.

- See also Moksha Naidoo 'Employee alleges being dismissed on account of his depression' 2020 (Oct) *DR* 39.

Legal practice

Abuse of interlocutory court process: In *Munyai v Road Accident Fund and Related Matters* 2021 (1) SA 258 (GJ), in eight matters that came before the interlocutory court in terms of the Judge President's Directive 2 of 2019, the court felt itself obliged to comment on –

- the lackadaisical way in which affidavits were being drafted; and
- the nature of relief sought, in particu-

lar the abuse by practitioners of items 20 (succinctness) and 25.5 (failure to timeously secure an expert witness) of the Directive.

The court, per Thompson AJ, held that the interlocutory court was intended to be an easily approachable court, its purpose being to assist parties to obtain procedural relief against recalcitrant litigants who are delaying matters from becoming trial-ready.

While the court would assist litigants by ensuring that their cases were trial ready and by calling to order recalcitrant litigants that were preventing it, legal procedure and protocol nevertheless had to be followed.

Practitioners were taking the stance that item 20 allowed them to negate their professional obligations and submit affidavits containing largely unsubstantiated allegations, leaving the judge the unenviable task of making assumptions. This was noticeable in matters where an applicant sought an order to compel the other party to discover. In the applications before the present court, no allegations were made that either a r 35(1) notice had been delivered or that the other party had received notice of the trial date – the court was expected to assume that such a notice had been served.

Practitioners were also misconstruing item 25.5 of the Directive as giving a licence to applicants to ask the interlocutory court to direct a respondent to appoint experts and to do so within specified time periods. The Directive was never intended to confer any power on the courts to order a litigant to appoint experts but was merely intended to enable an applicant to approach the court for an order to place a respondent on terms to decide how it wished to conduct and/or present its case. Similarly, practitioners had taken to interpreting item 25.5 to mean that the court could compel a defendant to cause a plaintiff to submit to a medical examination. That interpretation was only partially correct. If the defendant had given notice, in terms of r 36(9)(a), of its intention to call a particular expert, the court could be approached to compel the defendant to cause the plaintiff to submit to a medical examination in terms of r 36(1).

Minerals and petroleum

Community members' right of access to application for mining rights: In *Baleni and Others v Regional Manager, Eastern Cape Department of Mineral Resources and Others* 2021 (1) SA 110 (GP) the applicants, community members living and working on the land in respect of which the fifth respondent (TEM) had applied for mining rights under s 22(1) of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA), sought a declaratory order that they had a right under ss 10(1) and 22(4) of the MPRDA to be furnished with a copy of a s 22 application for a mining right on request to the relevant Regional Manager of the Department of Mineral Resources (the Department), subject to the Department redacting financially sensitive aspects of the application.

The Department had earlier referred their request for information regarding the application to TEM, but they refused it, only doing so after the application was launched. The state respondents did not oppose the application but TEM did. This on the bases that the relief sought had become moot; and that ss 10 and 22 did not confer the right of access contended and that instead the applicants must instead utilise the procedures of the Promotion of Access to Information Act 2 of 2000 (PAIA).

The GP, exercising its discretion to adjudicate otherwise moot issues when it would have a practical effect on the parties or on others, held that this was such a case because the applicants were clearly persons interested in an existing, future or contingent right or obligation.

As to the relief sought, the GP held that they were entitled to it: Interested parties had a right to raise environmental objections as the basis for objecting to an application for a mining licence and were entitled to be heard before a decision was made. A meaningful consultation process was intended, to advance the objects of the MPRDA. The applicants, unlike the general public, would be affected by the environmental impact of the mining operations. The information was requested for the specific purpose of facilitating meaningful consultation, that is, the applicant's inputs intended to inform the outcome of the application. The way in which the applicants obtained a copy of the mining right should not be restricted to the request processes in terms of PAIA. The Department had to deal directly with the issues that would determine the application. The relevant sections (ss 10 and 22(4)), properly interpreted, meant that they were entitled to a copy on request from the Regional Manager.

- See Madoda Mandla Aseza Koti 'Can information be requested in terms of the Mineral and Petroleum Resources Development Act?' 2021 (Jan/Feb) *DR* 35.
- David Matlala 'Law reports' 2019 (June) *DR* 17 for the GP judgment.

Prescription

Interruption of prescription by acknowledgement of liability: In *Investec Bank Ltd v Erf 436 Elandspoort (Pty) Ltd and Others* 2021 (1) SA 28 (SCA) the appellant, Investec, had advanced a loan to the first respondent company Erf 436, secured by the passing of a notarial mortgage bond over a 50-year long notarial lease, in respect of a commercial property, concluded by Erf 436 as lessee and the South African Rail Commuter Corporation (SARCC) as lessor. The further respondents stood as sureties for Erf 436's debt under the loan. It was a term of the loan agreement that Investec had an option to replace Erf 436 as lessee in the event of Erf 436 defaulting on its obligations to SARCC. Erf 436 did default, and so, as it was entitled to, Investec demanded, on 10 September 2002, payment within seven days of the full outstanding amount. The commencement of prescription of the debt was thus 17 September 2002, being the due date of payment.

When payment was not forthcoming, Investec elected to exercise its option and conclude a lease with SARCC. Despite this, an agreement was reached between Investec and Erf 436 that the latter would continue to manage the property, collect monthly rental from subtenants, and pay those amounts over to Investec to be credited to its loan account. The parties so conducted themselves until around mid-2003, when another agreement was reached between Investec and Erf 436 providing that the former would take over management of the property, itself collect rental from subtenants and credit the Erf 436 account with the amounts collected each month. It was further understood that endeavours would be made to find a purchaser for Investec's rights in the property and the purchase price would be credited to Erf 436's loan. Investec so managed the lease until July 2009, when it sold its rights as lessee to the entity Johnny Prop, and credited Erf 436's loan account with the purchase price, as agreed.

Investec subsequently, in a summons issued in the High Court served on 21 January 2011, claimed the outstanding amount it alleged was owing in terms of the loan agreement – R 3 979 184,50 – from Erf 436, as well as the sureties. Erf 436 and the sureties raised a special plea of prescription. Investec, in response, pleaded that, on the basis of the number of payments made to reduce its loan, as well as various statements made in letters on behalf of it, Erf 436 had made a series of acknowledgments of liability, the effect of each acknowledgment being to interrupt prescription against Erf 436, and hence against the sureties too. The High Court, however, upheld the special plea of prescription. Investec appealed to the SCA to press its case.

The court first stressed that, in order to determine whether the various payments and statements amounted to acknowledgments of debt for the purposes of interrupting prescription in terms of

s 14 of the Prescription Act 68 of 1969, they had to be viewed holistically and in their broader context. Here in particular, the two agreements referred to above relating to the management of the property.

The SCA, per Plasket JA (Petse DP, Saldulker JA, Dambuza JA and Poyo-Dlwati AJA concurring), held that the following acts, given the context in which they took place, constituted acknowledgments of debt by Erf 436, each of which had the effect of interrupting prescription:

- During the period in which Erf 436 was responsible for collection of the subtenants' rental, the multiple payments made by Erf 436 to Investec, the last of which occurred on 30 September 2003.
- Two letters, dated 7 May 2003 and 13 June 2003, respectively written by one of the directors of Erf 436 in which he expressly acknowledged liability on behalf of Erf 436.
- During the period in which Investec managed the property, the multiple payments made by Investec to reduce Erf 436's loan account, the last of which occurred on 17 July 2008.
- A payment to Investec on 29 March 2006 made by another entity, for the purpose of, as agreed with Investec, reducing Erf 436's loan. (The court held that such payment could be inferred to have been made on behalf of Erf 436, given the involvement and acquiescence of a director common to both entities.)
- Queries on 21 May 2007 by a director of Erf 436 as to the mechanics of the monthly payments into the Erf 436 account, and relating to how the VAT components of the rentals would be dealt with.
- The payment of the purchase price of Investec's rights in the property into the Erf 436 account in around July 2009.

The court concluded that, at the time of service of summons, the claim in question had not prescribed, given the series of interruptions of prescription. The court upheld Investec's appeal.

Other civil law cases

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

- delict;
- government procurement;
- interlocutory proceedings;
- land transfer;
- punishment of drug offences by children;
- telecommunications; and
- the right to school meals

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By Tshepo Mashile

Arbitration clause in a contract does not survive termination of contract as a result of fraud

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))

Does a clause requiring the parties to submit any dispute between them to arbitration or other adjudication process, bind the aggrieved party in an instance where the contract has been induced by fraud? This issue came before the SCA in this matter. The appeal turns on the question whether a dispute resolution clause in a contract survives the termination of that contract on the ground of fraudulent misrepresentations made during a tender process. There is another ancillary issue, which arose but has been overlooked for the purpose of this article. The court *a quo* is the Western Cape Division of the High Court, Cape Town (Boqwana J) found that the contract had been induced by fraudulent misrepresentations by the appellant (Namasthethu) and held that a dispute resolution clause in a contract did not survive the termination of the contract for fraud. Thus it set aside a determination made by the second respondent, Mr James Garner (Garner), following an adjudication process in terms of the dispute resolution clause in the contract. Namasthethu, appealed against these findings.

On 7 March 2014 the first respondent, the City of Cape Town (the City), advertised a tender for the supply, retrofit and installation of energy efficient luminaires at the Cape Town Civic Centre. On 25 August 2014, the City awarded the tender to Namasthethu. The tender had an estimated value of R 29 263 401,75 (excluding VAT), and its execution was contemplated to take 18 months. During November 2014 a written agreement following on the tender was concluded between the City and Namasthethu.

On 17 September 2014 an unsuccessful bidder, Citrine Construction (Pty) Ltd (Citrine), a company that competed in the tender process, appealed the award of the tender to Namasthethu and called on the City to set it aside. Citrine complained that Namasthethu and its directors had been convicted of fraud and corruption on 13 August 2013. The basis of the complaint – so the City was informed – was that Namasthethu and its directors were sentenced to a fine of R 200 000 coupled with a wholly suspended sentence of five years' imprisonment, and that in its tender submission, Namasthethu had completed the official tender document declaring that neither it, nor any of its directors, had in the past five years been convicted of fraud by a court of law. If the allegations by Citrine were true, it would mean that Namasthethu was guilty of a fraudulent misrepresentation. In terms of the contract, the City was entitled to terminate the contract where Namasthethu had committed a corrupt or fraudulent act during the procurement process, or in the execution of the agreement.

On 25 November 2014, the City sent a letter to Namasthethu, stating that it had come to its attention that Namasthethu and/or its directors had been found guilty on charges relating to fraud and corruption during August 2013. Namasthethu responded by letter dated 27 November 2014, written by the CEO, one Shamla Chetty (Mrs Chetty), stating that neither it nor its sole director, Mrs Chetty, had been convicted of fraud and corruption during August 2013.

On 3 December 2014 the City replied to Namasthethu, stating that it had now received information, which indicated that Namasthethu and/or its directors had on 13 August 2013 been found guilty, in terms of a plea and sentence agreement, on various charges of fraud and corruption and that Namasthethu and/or its directors were sentenced to a fine of R 200 000 plus five years' imprisonment, the latter of which was suspended on certain conditions. Namasthethu was notified that the matter would be referred to the City's Forensics, Ethics and Integrity Department (FEID) for further investigation and it was requested to furnish a response within seven days.

On 12 December 2014 Namasthethu replied to the City's letter, stating that at the time of the tender Mrs Chetty was the sole director of Namasthethu and also referred to a letter attached to the reply, apparently written by one Colonel K Naidoo of the South African Police Service (SAPS) Anti-Corruption Task Team, which recorded that no criminal conviction was obtained against Namasthethu or Mrs Chetty in the criminal proceedings and that Mrs Chetty was not an accused at the finalisation of the criminal matter.

The forensic investigation by the FEID was completed around the beginning of 2016. In its report to the City Manager, dated 26 February 2016, FEID confirmed that there had been a number of false misrepresentations and other fraudulent conduct on the part of Namasthethu, which included, *inter alia,* that:

- Namasthethu and its directors (Mrs Chetty and Ravan Chetty (Mr Chetty), who were husband and wife) were criminally charged with fraud and corruption and Namasthethu and Mr Chetty were convicted in the Commercial Crimes Court in Pietermaritzburg on 7 November 2013, less than a year prior to the date of the tender application.
- Mrs Chetty made a *prima facie* misrepresentation to the City when she stated in the negative on the tender declaration to the question whether any of the directors or the company/entity has been convicted by a court of law for fraud or corruption during the past five years. This amounted to fraud.
- Mrs Chetty in her tender submission provided the City with a local business address for Namasthethu was discov-

ered to be false. Furthermore, it was established that the service provider operated from three containers located at the Civic Centre parking area.

As a result of these findings, the FEID recommended the termination of the contract.

On 15 March 2016, the City wrote to Namasthethu informing it that the contract was being cancelled with immediate effect. Namasthethu disputed the cancellation and focused on insisting that the dispute surrounding the City's cancellation of the contract be adjudicated in accordance with the dispute resolution procedure specified in the contract.

The City, however, persisted in contending that the contract was validly cancelled on 15 March 2016, and that Namasthethu's insistence on referring the matter to adjudication, in the face of its fraudulent conduct, was inappropriate. Thereafter, Namasthethu approached the Association of Arbitrators (Southern Africa) (the Association), which then appointed Garner, a construction consultant and surveyor, as adjudicator.

The dispute, which Namasthethu purported to refer to adjudication, and in respect of which the Association was asked to appoint an adjudicator, concerned the validity of the City's cancellation of the contract and a claim for damages. Garner prepared a determination on the basis of the Statement of Claim, and the documents sent to him by Namasthethu, but without hearing evidence. In that determination, he upheld various claims by Namasthethu and found the City liable to Namasthethu for damages in a total amount of R 2 499 440,44 (including VAT).

In the SCA, Namasthethu contended that, on a proper construction of the contract, the parties contemplated that the disputes regarding the cancellation of the contract, including those involving allegations of fraud during the tender process, were subject to the dispute resolution process agreed to by the parties and submitted that the dispute resolution clause is widely worded so as to encompass disputes of whatever nature.

The City, on the other hand, submitted that the contract was void, alternatively voidable, as a result of specified fraudulent misrepresentations and non-disclosures by Namasthethu and that on being satisfied that there had in fact been fraud on the part of Namasthethu, on the strength of a comprehensive forensic investigation, the City elected to terminate or rescind the contract and validly did so.

It is trite law that fraud is conduct, which vitiates every transaction known to the law. In affirming this principle, the SCA, in *Esorfranki Pipelines (Pty) Ltd and Another v Mopani District Municipality and Others* [2014] 2 All SA 493 (SCA) at para 25, referred with approval to Lord Denning's dicta in *Lazarus Estates Ltd v Beasley* [1956] 1 QB (CA) at 712, when he said: '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'.

As regards an arbitration or similar adjudication clause contained in an agreement, which was found to have been induced by fraud, the SCA has emphatically ruled that once the agreement had been rescinded by an aggrieved party, the said arbitration clause cannot stand. The reason, the SCA stated per Cameron JA in *North West Provincial Government and Another v Tswaing Consulting CC and Others* 2007 (4) SA 452 (SCA) para 13, was because 'the arbitration clause was embedded in a fraud-tainted agreement the province elected to rescind' and 'cannot survive the rescission', for 'to enforce the arbitration agreement, the tainted product of [the guilty contractor's] fraud, would be offensive to justice'.

In *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA) the SCA had occasion to again consider the question of fraud in relation to an arbitration clause and reiterated that the effect of fraud that induces a contract is, in general, that the contract is regarded as voidable. This means that the aggrieved party may elect whether to abide by the contract and possibly claim damages, or to resile from it and regard the contract as void from inception. The court held that the arbitration clause could not survive in the face of allegations of fraud by one party, even though it expressly included the phrase 'any question as to the enforceability of this contract'. Thus, disputes regarding the validity or enforceability of contracts induced by fraudulent misrepresentation and non-disclosures were not generally intended to be arbitrable.

A simple reading of the arbitration clause reveals that it merely provides that one party may give notice to the other to resolve a disagreement in the event of there being a disagreement 'arising out of or concerning this agreement or its termination'. Clearly, this clause contemplates a dispute arising out of the agreement when it was accepted to be valid from the outset. There is no suggestion that it covers fraud, nor that it involves an exception to the general rule. The giving of 'notice' as stipulated would clearly not apply to a situation of a contract which the aggrieved party has already validly terminated or cancelled as a result of fraud.

As the SCA emphasised in *North East Finance (Pty) Ltd*, in order for the validity of a contract terminated for fraud to be determined by reference to adjudication, the contract must specifically say so, or otherwise clearly indicate as much. In this case, the contract unquestionably does not. It follows that the referral of the dispute to Garner for adjudication was invalid and unlawful and that the court *a quo* was correct in setting aside his determination following on an unlawful adjudication process. Clearly, Garner was not clothed with any authority to adjudicate the dispute. There can be no question of waiver on the part of the City.

The position might only change if the parties specifically made provision in the contract for such a dispute being referred to arbitration. It may require very clear language to effect the result. So the question that must be answered is whether there is clear and unequivocal language in the contract or even the arbitration clause itself, providing for this kind of dispute to be addressed by arbitration or adjudication.

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By
Kgomotso
Ramotsho

Advocate performing functions of an attorney found guilty of misconduct

General Council of the Bar of South Africa v Rösemann 2002 (1) SA 235 (C)

In the case of *Rösemann*, an application was brought to the Cape Provincial Division, in terms of s 7(1)(*d*) of the Admission of Advocates Act 74 of 1964 for an order that the name of advocate, Eckhard Rösemann, be struck off the roll of advocates on the ground of professional misconduct, or for alternative relief, and for costs on the scale as between attorney and client.

According to the court application the applicant complained that the respondent –

'(*a*) … on two occasions … signed on behalf of the plaintiffs concerned, his clients, and caused to be issued out of a magistrate's court two summonses, in one of which he gave his own address as the address at which process in the action could be served on the plaintiff;

(*b*) … on two other occasions he signed two notices of motion in a magistrate's court on behalf of the applicant concerned, his client, over words "applicant/prokureur vir applikant"'.

The court pointed out that the applicant contended that actions by the respondent were professionally improper, as the work was usually performed by an attorney. The court said that the respondent's conduct in that regard was not denied by him. The court added that the respondent averred that the attorney in Pretoria gave him specific instructions to perform each item of work being complained about by the applicant. The court said the respondent adopted the attitude that, as long as he was performing the work as her agent, properly instructed by her, he was not acting unprofessionally.

The court added that the respondent pointed out that, in the case of the two summonses, his name and signature were followed by the 'per opdraggewende prokureur Louanda Fourie Ingelyf'. As for the two notices of motion, the respondent conceded that they contain no reference to an instructing attorney, however, he put it down to a computer error. According to the respondent he acted throughout as the agent of his instructing attorney.

The respondent contended that it is not improper for an advocate, provided he is instructed by an attorney, to sign pleadings in the magistrates' court, including summonses and notices of motion, as he had done. The respondent submitted that there is no prohibition against such a practice to be found in the Magistrates' Courts Act 32 of 1944 or in the Magistrates' Court Rules and he relied on certain provisions in the enactments sanction therefor. The court added that the respondent denied that he had undertaken work normally performed by an attorney.

Before the court handed down the judgment, Thring J explained – in summary – the functions of an attorney when instructed by a client. The court said that there is certain work, which is properly within exclusive ambit of the functions of the attorney who has been instructed by their client to act for them. The court added that such work is usually done best, and most cost-effectively, by the attorney or their clerk and not by counsel. The court pointed out that the advocate's profession is a referral profession. That the advocate is the specialist in forensic skills and in giving expert advice on legal matters (*In re Rome* 1991 (3) SA 291 (A) at 306B).

The court explained that the attorney on the other hand, takes care of matters such as the investigation of the facts, the issuing and service of process, the discovery and inspection of documents, the procuring of evidence and attendance of witnesses, the execution of judgments, and the like (*De Freitas and Another v Society of Advocates of Natal and Another* 2001 (3) SA 750 (SCA) at 757C – D). The court further said that, it is not proper for an attorney to shuffle off such functions onto the shoulders on an advocate by simply briefing the latter to attend to them on their own, nor can it be proper for counsel to accept such a brief. The court noted that there is no objection to counsel being briefed to advise an attorney on how to deal with a specific problem, which may have arisen in a particular matter, for example, in connection with discovery, or the service of process, or execution of an order, or to assist an attorney in drafting a particular document or settle its terms.

The court pointed out that in the first two affidavits the respondent said that in any event if it was improper for him to perform the functions he did, he held the *bona fide* belief at the time that it was not improper, having made inquiries in various quarters and not having been given any clear indication to the contrary. He, therefore, denied that he had at any time acted in deliberate breach of the order against him. The court referred to two other cases. The first was *General Council of the Bar of South Africa v Van der Spuy* 1999 (1) SA 577 (T) in which judgment was handed down on 23 March 1998. An application for leave to appeal in the matter was dismissed with costs by the Supreme Court of Appeal (SCA) on 19 September 2001. The second matter was the *Society of Advocates Natal v De Freitas and Another (Natal Law Society Intervening)* 1997 (4) SA 1134 (N), in which the judgment of the Full Bench of the Natal Provincial Division was delivered on 25 September 1997.

An application for leave to appeal then went to the SCA, which handed down judgment on 9 March 2001 *sub nom De Freitas and Another v Society of Advocates of Natal and Another* 2001 (3) SA 750 (SCA). The application for leave to appeal was dismissed with costs. Thring J said that the respondent's attention was drawn by the Cape Bar Council to the decisions in the *Van der Spuy* case and the *De Freitas* (in the Natal Provincial Division) case as long ago as September 1998. The respondent's written response dated 18 September 1998.

The court added that it was important to point out that during January and February 2000, when the conduct of the respondent that was being complained about was committed, the respondent was fully aware of the *Van de Spuy*

and *De Freitas* cases. The court said one would not expect otherwise from a practising advocate, especially as the decisions impinged directly on him and his style of practising.

The court said that the mere fact that the respondent had instructions from an attorney to act as he did was insufficient to render his conduct necessarily proper, instead it depended on the work he was 'briefed' to do. The court found that signing and issuing summonses and notices of motion in the magistrate's court and furnishing an address for the service of process is work normally performed by and is part of normal functions of an attorney. The court also had regard to the attorney's averment that he had at all times acted *bona fide* and had been unaware of the impropriety of his conduct.

The court as it had explained said the respondent's explanation should be rejected, as he could not have been labouring under any misapprehension as to what the notices of motion said, nor indeed, does he say that he laboured under any such misapprehension. It follows that he could not have *bona fide* believed that he was acting properly. That he must have known that his conduct in furnishing his address as address service of process was improper and that it had been clearly held to be so as long ago as 1965 in the *Beyers v Pretoria Balieraad* 1966 (2) SA 593 (A).

The court pointed out that it found it extremely difficult to accept the respondent's *bona fides* when there were several reported decisions available to him, given in various divisions of the court, to guide him, especially in the *Van der Spuy* case and the *De Freitas* case in the Natal Provincial Division. The court added that the respondent adopted the attitude that signing and issuing pleadings in the magistrate's court is not dealt with in those cases. 'He is mistaken, as appears from what I have said above (see *Van der Spuy* case 611A and the *De Freitas* case in the Natal Provincial Division at 1173G),' Thring J said. The court pointed out that had the respondent read those judgments properly he would have known that his conduct was improper.

The court made the following order:

'1. The application was granted in part. It was held that the respondent was guilty of professional misconduct in the respects set out in the judgment.

2. The respondent was suspended from practising as an advocate for a period of two months, the period said commenced on 15 October 2001.

3. No order was made as to costs'.

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A victorious CC ruling on social security benefits and relief for domestic workers

By Tanya Calitz

Mahlangu and Another v Minister of Labour and Others (Commission for Gender Equality and another as amici curiae*)* 2021 (1) BCLR 1 (CC)

'Domestic workers are the unsung heroines in this country and globally', however '[they] have not basked in the fulfilment of [a] constitutional promise. Instead, their fate has been blighted as a result of being excluded from statutory protections' (paras 1 and 5).

In a recent application for confirmation of declaration of constitutional invalidity, the Constitutional Court (CC) in Mahlangu had to delve into and address the constitutionality of s 1(xix)(*v*) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA). More specifically, whether s 1(xix)(*v*) violates fundamental human rights envisaged in the Constitution of equality (s 9), human dignity (s 10), and access to social security (s 27(1)(*c*)).

COIDA was enacted with the purpose of providing compensation to employees for occupational injuries or diseases sustained or contracted in the course of their employment, or for death resulting from such injuries or diseases. The compensation that can be claimed consists of a percentage of an employee's salary, which is paid monthly to the Compensation Fund. Notably and according to s 1(xix)(*v*) 'domestic workers' are not included in the definition of employees and they or their dependants are, therefore, not able to benefit from the Compensation Fund.

In this matter, Ms Mahlangu was a domestic worker who passed away during the course of her employment. Domestic workers are one of the most vulnerable and disadvantaged groups of society who are strong, predominantly black women, often breadwinners and placed at the bottom of the social hierarchy. They tirelessly work away under difficult working conditions and are many a time not treated fairly or humanly with decency and dignity in accordance with the Constitution. After Ms Mahlangu's daughter, being wholly dependant on Ms Mahlangu, was informed that she could not receive compensation under COIDA, she launched an application in the CC to have s 1(xix)(*v*) declared unconstitutional.

The CC held that the effect of excluding domestic workers from the definition of employees led to indirect and unfair discrimination based on race and gender and impairs the inherent dignity of domestic workers. If further relied on a host of provisions in international conventions such as the Convention Concerning Decent Work for Domestic Workers, 2011 (arts 3, 13, and 14), the Universal Declaration of Human Rights (arts 22 and 25), the International Covenant on Economic, Social and Cultural Rights (arts 2, 3, and 9), and the Convention on the Elimination of All Forms of Discrimination against Women (arts 2 and 11) to emphasise South Africa's obligations in respect of advancing and realising the human right to access social security and its commitment to eradi-

cate discrimination against women particularly.

The CC, per Victor AJ (Mogoeng CJ, Khampepe, Madlanga, Majiedt, Theron and Tshiqi JJ concurring), further held that economic, social and cultural rights, which the right of access to social security forms part of, are indispensable for human dignity and equality and that the definition of 'social security' in the Constitution expressly provides that everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. In its current and restrictive form, s 1(xix)(*v*) does not promote democratic values, social justice, and fundamental human rights. It further has the effect that children or other dependants of a breadwinner, when that breadwinner has passed away, are left utterly helpless and without any financial support to make ends meet. This goes directly against a compelling human rights ethos enshrined in the Constitution.

The CC confirmed the declaration of constitutional invalidity of s 1(xix)(*v*) with immediate and retrospective effect from 27 April 1994. This victorious ruling will ensure that domestic workers now have access to the Compensation Fund, are no longer excluded from the benefits under COIDA, and are recognised as employees in terms of the provisions in COIDA.

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By Sipho Tumelo Mdhluli

Career put on hold due to violation of the right to education in terms of s 29(1) of the Constitution

Moko v Acting Principal of Malusi Secondary School (CC) (unreported case no CCT297/20, 28-12-2020) (Khampepe J (Mogoeng CJ, Jafta J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring))

It is every parent's desire to see their child flourish to their greatest potential academically and achieving their dreams. In fact, in African tradition to raise a child is to make an investment for oneself in that when the child becomes an adult and is able to participate in the labour market, that child will never simply forget about where they came from. Late former President Nelson Mandela once said: 'Education is the most powerful weapon which you can use to change the world'. This basic right to education is enshrined in s 29 of the Constitution.

However, it is concerning that since the dawn of the Constitution, South Africa (SA) still has students who are denied access to basic education, putting their careers on hold as evidenced in the recent case of *Moko*.

The Constitutional Court (CC) recently handed down a judgment in an urgent application for direct access to the CC. The central question before the CC was whether there had been a violation of the right to education in s 29(1) of the Constitution.

The applicant, Mr Moko, was a grade 12 leaner who, on the morning of 25 November 2020, arrived at his school in Limpopo to write the Business Studies Paper 2 as part of the matric examination. He was stopped at the school gate by the first respondent, the Acting Principal of Malusi Secondary School, because he had failed to attend certain extra lessons. Mr Moko was informed that he needed to fetch his parents or guardians, in order to discuss the missed extra lessons, and not to return to the school without them. Mr Moko left to find his guardians, but being unable to do so, returned to the school, alone, sometime later. By the time he returned, the examination was underway. The Acting Principal refused to allow Mr Moko entry into the examination room and Mr Moko subsequently missed the examination.

Various meetings with the Acting Principal and members of the Limpopo Department of Education ensued and Mr Moko was informed that he would only be able to write the supplementary examination in May 2021. Aggrieved by this decision, as he wished to pursue tertiary education at the start of 2021 and writing the examination in May would delay this, Mr Moko brought an urgent application to the High Court for an order that he be given an opportunity to write the missed examination. The High Court struck the matter off the roll for lack of urgency.

Mr Moko applied for leave to approach the CC directly, and on an urgent basis, for an order that the conduct of the Acting Principal was inconsistent with the right to basic and further education in terms of s 29(1)(*a*) and (*b*) of the Constitution and that he be afforded the opportunity to write the examination before the marking of the other matric examination scripts and the release of the other matric results.

Mr Moko submitted that this matter was urgent because, if he did not sit the examination imminently, it would affect his ability to pursue further studies at an institution of higher learning in February 2021. On the matter of direct access to the CC, Mr Moko contended that it would be in the interests of justice for the CC to determine the matter, as the matter was struck off the urgent roll in the High Court and a determination of the matter on the ordinary roll in the High Court would leave him without effective relief.

On the merits, Mr Moko submitted that his right to basic education in terms of s 29(1)(*a*) of the Constitution was infringed by the conduct of the Acting Principal. He contended that the conduct

also amounted to a violation of his right to further education in s 29(1)(*b*) of the Constitution because, if he was only allowed to write the examination in May 2021, he would be unable to begin tertiary education in February 2021.

The Acting Principal did not oppose the application brought by Mr Moko to the CC. The second to fourth respondents, the Member of the Executive Council (MEC) and Head of the Department of Education, Limpopo and the Minister of Basic Education (collectively, the Department), and the fifth respondent, Umalusi, also did not oppose the application. The Department filed written submissions to assist the CC in its determination of the matter, in which they offered Mr Moko the opportunity to write the missed examination in January 2021. The matter was determined on the papers without an oral hearing.

The CC, in a unanimous judgment penned by Khampepe J (Mogoeng CJ, Jafta J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring) granted leave to the applicant to approach the CC directly on an urgent basis. It held that a lack of urgent relief could have a significant adverse effect on Mr Moko's future and that the urgency of the matter was undeniable. It further held that the circumstances in the matter were of an exceptional nature and Mr Moko had raised compelling reasons for direct access. It was, therefore, in the interests of justice to grant leave to approach the CC directly and on an urgent basis.

The CC highlighted the transformative role of education in SA and the importance of education for individuals and society as a whole. It found that the matric examinations fall within the purview of 'basic education', the right to which is protected by s 29(1)(*a*) of the Constitution. It held that the Acting Principal had both a positive obligation to give effect to that right and a negative obligation to not interfere with Mr Moko's right to basic education. The Acting Principal's conduct that resulted in Mr Moko missing the examination clearly amounted to a violation of the right to basic education. The CC also noted that an undue delay in the completion of his school education, as a result of the conduct of the Acting Principal, would similarly have an adverse effect on Mr Moko's right to further education, protected by s 29(1)(*b*) of the Constitution.

As a result, the CC declared the conduct of the Acting Principal to be a violation of the right to education in s 29(1) of the Constitution. It ordered the Department and Umalusi to follow through with their offer to allow Mr Moko the opportunity to write the examination at the start of January 2021 and to release the result of that examination simultaneously with the general release of the 2020 National Senior Certificate examination results.

Conclusion

I agree with the held CC's decision that the Acting Principal violated the right to education bestowed to Mr Moko. Most importantly, s 29 must be understood in the light of the aim of education. Education must be aimed at the full development of the human personality and instil a sense of dignity. It should be aimed at enabling all persons to effectively participate in a free society. In the first instance, education should confer the ability to appreciate and exercise human rights; it should also develop learners' ability to make political and civil choices. Secondly, education should confer the necessary skills to enable recipients to enjoy and appreciate human existence, and participate in the economy.

To this end, the content of the curricula forms an important part of the right to education and should provide the necessary skills to participate fully in society. The right to education imposes an obligation on the state to put in place and maintain an education system, with educational programmes available in all its forms and at all levels. The state has to take steps to ensure that there are functioning educational institutions with education programmes and educators throughout its territory. The government also needs to educate all school structuring bodies of the importance of the right to education.

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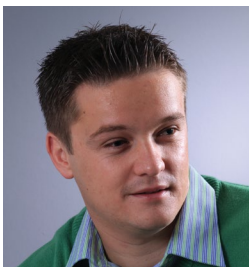

New legislation

Legislation published from 5 – 29 January 2021

By Philip Stoop

Commencement of Acts

Political Party Funding Act 6 of 2018. *Commencement:* 1 April 2021. GN64 *GG*44125/29-1-2021.

Promulgation of Acts

Second Adjustments Appropriation Act 21 of 2020. *Commencement:* 20 January 2021. GN21 *GG*44079/20-1-2021 (also available in Setswana).

Rates and Monetary Amounts and Amendment of Revenue Laws Act 22 of 2020. *Commencement:* 20 January 2021. GN24 *GG*44082/20-1-2021 (also available in Afrikaans).

Taxation Laws Amendment Act 23 of 2020. *Commencement:* 20 January 2021. GN25 *GG*44083/20-1-2021 (also available in Afrikaans).

Tax Administration Laws Amendment Act 24 of 2020. *Commencement:* 20 January 2021. GN22 *GG*44080/20-1-2021 (also available in Afrikaans).

Selected list of delegated legislation

Competition Act 89 of 1998

Guidelines for Competition in the South African Automotive Aftermarket. GN46 *GG*44103/29-1-2021.

Disaster Management Act 57 of 2002

- ***Correctional services***

Directions regarding measures to address, prevent and combat the spread of COVID-19 in all correctional centres and remand detention facilities. GN54 *GG*44111/28-1-2021.

- ***Education***

Amendment of directions regarding measures to address, prevent and combat spread of COVID-19: Re-opening of schools for the 2021 academic year under the adjusted alert level 3. GenN18 *GG*44096/22-1-2021.

- ***General regulations***

Amendment of regulations issued in terms of s 27(2): Alert level 3 during the COVID-19 lockdown. GN R11 *GG*44066/11-1-2021. Extension of the national state of disaster (COVID-19) to 15 February 2021. GN R15 *GG*44071/13-1-2021.

- ***Home Affairs***

Amendment of directions regarding measures to prevent and combat the spread of COVID-19 in Home Affairs. GN16 *GG*44072/14-1-2021.

- ***Social development sports, arts and culture***

Amendment of directions issued in terms of reg 4(10) regarding measures to address, prevent and combat the spread of COVID-19 in sport, arts and culture during the adjusted alert level 3. GN1 *GG*44055/5-1-2021.

- ***Transport***

Directions regarding measures to prevent and combat the spread of COVID-19 in the air services during the adjusted alert level 3. GN63 *GG*44124/29-1-2021.
Directions regarding measures to address, prevent and combat the spread of COVID-19 in railway operations during the adjusted alert level 3. GN62 *GG*44124/29-1-2021.
Directions regarding measures to address, prevent and combat the spread of COVID-19 in cross-border road transport services during the adjusted alert level 3. GN61 *GG*44122/29-1-2021.
Directions regarding measures to address, prevent and combat the spread of COVID-19 in public transport services during the adjusted alert level 3. GN59 *GG*44120/29-1-2021.

Genetically Modified Organisms Act 15 of 1997
Amendment of regulations. GN41 *GG*44102/27-1-2021 and GN55 *GG*44115/28-1-2021.

International Trade Administration Commission of South Africa
Certificate issued in terms of sch 1, para 8 of the Value Added Tax Act 89 of 1991 for the importation of vaccines classifiable under tariff heading 3002.20 for the treatment of COVID-19. GenN34 *GG*44113/28-1-2021.

Legal Practice Act 28 of 2014
Amendment of r 22.1.11 and r 22.2.9 (candidate attorneys and pupils). GenN6 *GG*44068/15-1-2021.

Medical Schemes Act 131 of 1998
Amendment of regulations. GN45 *GG*44103/29-1-2021.

National Environmental Management: Air Quality Act 39 of 2004
Amendment of the regulations regarding the phasing-out and management of ozone depleting substances. 2014. GN10 *GG*44065/11-1-2021.

National Environmental Management: Waste Act 59 of 2008
Amendment of regulations regarding extended producer responsibility, the extended producer responsibility scheme for the electrical and electronic equipment sector, the extended producer responsibility scheme for the lighting sector and the extended producer responsibility scheme for paper, packaging and some single use products. GN20 *GG*44078/15-1-2021.
National Waste Management Strategy 2020. GN56 *GG*44116/28-1-2021.

National Nuclear Regulator Act 47 of 1999
Fees payable to the Regulator. GN19 *GG*44076/15-1-2021.

Planning Profession Act 36 of 2002
A Manual for the Calculation of Guideline Professional Fees by Registered Persons. GenN14 *GG*44089/21-1-2021.

Postal Services Act 124 of 1998
Fees and charges for postal services. GN57 *GG*44117/28-1-2021.

Public Finance Management Act 1 of 1999
Statement of national revenue, expenditure and borrowings as at 31 December 2020. GenN27 *GG*44105/29-1-2021.

Road Accident Fund Act 56 of 1996
Adjustment of the statutory limit in respect of claims for loss in income and loss of support to R 299 154 with effect from 31 January 2021. BN1 *GG*44103/29-1-2021 (also available in Afrikaans).

Standards Act 8 of 2008
Standards matters: New standards, revision standards and cancelled standards. GenN4 *GG*44064/8-1-2021.

Superior Courts Act 10 of 2013
Notice for the Western Cape Division of the High Court of South Africa: Declaration of Circuit Courts. GenN11 *GG*44086/22-1-2021

Tax Administration Act 28 of 2011
Extension of the due date for income tax returns relating to provisional taxpayers submitted on South African Revenue Service eFiling platform to 15 February 2021. GN58 *GG*44119/29-1-2021 (also available in Afrikaans).

Draft Bills

Draft National Youth Development Agency Amendment Bill. GN51 *GG*44103/29-1-2021.

Draft delegated legislation

- Fees payable by social workers, child and youth care workers, social auxiliary workers, auxiliary child and youth care workers, student social workers and student child and youth care workers in terms of the Social Service Professions Act 110 of 1978 for comment. GN R17 *GG*44073/15-1-2021.
- Draft national norms and standards for the safe operations of tourism sector in the context of COVID-19 and beyond in terms of the Tourism Act 3 of 2014. GenN12 *GG*44088/21-1-2021.
- Amendment of the regulations relating to the application, eligibility for and payment of social assistance and the requirements or conditions in respect of eligibility for social assistance in terms of the Social Assistance Act 13 of 2004 for comment. GN R39 *GG*44099/25-1-2021.
- Amendment of the regulations on the lodging and adjudication of appeals for social assistance, as well as the appointment of the independent tribunal in terms of the Social Assistance Act 13 of 2004 for comment. GN R40 *GG*44099/25-1-2021.
- Draft assessment policy in terms of the Private Security Industry Regulations Act 56 of 2001 for comment. GenN23 *GG*44103/29-1-2021.

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Employment law update

By Monique Jefferson

Automatically unfair dismissal after filing a grievance

In *Sweet (James) v Namcon Logistics (Pty) Ltd* [2021] 1 BLLR 104 (LC) an employee was summarily dismissed for negligence. This dismissal occurred shortly after the employee lodged a grievance regarding the employer's failure to submit an occupational injury claim to the Compensation Fund in respect of an injury that the employee sustained on duty. The employee also alleged that he was being victimised. On the other hand, the employer argued that there was a valid basis to dismiss the employee for misconduct as he had, in his capacity as warehouse manager, repeatedly loaded incorrect materials from the warehouse onto trucks.

The Labour Court (LC) had to determine whether the employee was in fact dismissed for misconduct or whether the reason for his dismissal was that he had lodged grievances. According to the employee, he had asked the employer to assist him with his injury on duty claim in January 2017 but was informed that he should rather claim from his medical aid. His medical aid did not cover the injury and he was liable to pay the medical expenses personally. He again followed up with the employer in May 2017 regarding the claim and alleged that the employer contravened the Compensation for Occupational Injuries and Diseases Act 130 of 1993 in that the claim was not submitted within seven days of the injury. When he followed up about this he was informed that the claim was in fact lodged in January 2017 when he initially reported the injury but this transpired to be incorrect.

Later that month the employee received a notification to attend a disciplinary inquiry and was issued with a written warning for failing to report a broken wheel as per policy. The employee then lodged another grievance in about July 2017 relating to the employer's failure to lodge his injury on duty claim and on the basis of being issued with unfair disciplinary warnings in response to having lodged a grievance. About a week later, he was issued with a final written warning in relation to the performance of his duties in that he had loaded clothing on a truck without the employer's permission. The employee's trade union representative then followed up on the status of the injury on duty claim and was provided with a claim number. Shortly thereafter, the employee was issued with a notice to attend another disciplinary inquiry and was charged with negligence in the performance of his duties. This related to his failure to ensure that the correct number of boxes was loaded onto a truck. He was summarily dismissed and lodged a grievance regarding victimisation and intolerable working conditions. The employee's legal practitioner also sent a letter to the employer stating that the Compensation Commissioner had advised that the claim had not been lodged in January 2017 and had only been lodged in May 2017 after the employee lodged the grievance. The letter from the legal practitioner called on the employer to provide reasons for the late submission to the Compensation Commissioner.

The LC considered whether this amounted to an automatically unfair dismissal under s 187(1)(*d*) of the Labour Relations Act 66 of 1995 and made reference to a recent judgment of *DBT Technologies (Pty) Ltd v Garnevska* [2020] 9 BLLR 881 (LAC) handed down by the Labour Appeal Court (LAC). In this case it was held that to determine whether a dismissal was an automatically unfair dismissal under s 187(1)(*d*) of the LRA one had to determine whether the reason for the dismissal was 'that the employee took action, or indicated an intention to take action, against the employer' by exercising any right conferred by the LRA or participating in any proceedings in terms of the LRA. This requires the court to determine factual causation and ascertain whether the dismissal would have arisen had the employee not taken action against the employer. The dismissal would not be automatically unfair in circumstances where the dismissal would have taken place in any event whether or not the employee took action against the employer. If the dismissal would have not taken place but for the employee taking action against the employer, then one would still need to determine legal causation. This would require determining whether the employee taking action against the employee was the dominant, proximate or most likely cause of the dismissal. In the *DBT Technologies* case it was found that the employee was not dismissed for having taken action against the employer and the dismissal was accordingly not automatically unfair.

The LC found that this case was distinguishable from *DBT Technologies* in that in the *DBT Technologies* case the employee had demonstrated no intention to take action against the employer whereas in this case the employee had clearly indicated that he intended to take action against the employer for the failure to lodge the claim in accordance with the Compensation for Occupational Injuries and Diseases Act. The employee lodged grievances with the employer and submitted a complaint to the Department of Employment and Labour, as well as involved his legal practitioners in the case. The LC found that this brought the matter within the ambit of s 187(1)(*d*) and the dismissal was accordingly automatically unfair. Compensation equal to 24 months' remuneration was ordered and the employer was ordered to pay the employee's legal costs.

Temporary employment service employees in a service provider arrangement

In the case of *Victor and Others v Chep South Africa (Pty) Ltd and Others* [2021] 1 BLLR 53 (LAC), the Labour Appeal Court (LAC) considered whether a service provider, C-Force, providing pallets to a logistics company, Chep, was a temporary employment service as opposed

to a service provider. The appellants in this case were initially engaged to repair wooden pallets for Chep in terms of a labour brokering agreement. This was subsequently changed to a service level agreement. In terms of this service level agreement, Chep was engaged as an independent contractor to re-condition pallets and manage the staff at the plant where the pallets were being repaired.

The appellants approached the Commission for Conciliation, Mediation and Arbitration (CCMA) seeking to be deemed employees of Chep in terms of s 198A(3)(*b*) of the Labour Relations Act 66 of 1995 (LRA) on the basis that they alleged that they were labour broker employees who earned below the prescribed annual earnings threshold and had worked for Chep for longer than three months. They also sought to be treated on the whole not less favourably than Chep employees performing the same or similar work on the basis of s 198A(5) of the LRA.

Chep argued that the deeming provisions in s 198A of the LRA did not apply as C-Force was a service provider and in order for C-Force to constitute a temporary employment service it would need to provide labour at the behest of Chep as opposed to provide a service with a specific output or result. The CCMA found that the appellants were labour broker employees and directed that the matter be set down for arbitration to determine whether the appellants were entitled to the same conditions as Chep's employees. This award was set aside by the Labour Court (LC) on review as the LC found that C-Force provided a service in the form of repairing pallets as opposed to the provision of employees.

On appeal, the LAC had to determine whether C-Force was a temporary employment service, which provided labour to work for Chep for reward. The LAC rejected the LC's reasoning that a temporary employment relationship cannot exist if the employees are involved in providing a service as opposed to simply being provided as labour. According to the LAC, this interpretation is too restrictive and would allow parties to circumvent s 198A of the LRA, which would undermine its purpose to protect vulnerable employees. The LAC found that the CCMA correctly took into account the following factors when making the assessment as to whether or not the appellants were temporary employment service employees –

- the requisite raw materials, plant and equipment were supplied and maintained by Chep;
- pallet conditioning formed an integral part of Chep's business;
- C-Force did not enjoy any discretion as to how the work was to be performed;
- Chep prescribed the desired results and the manner in which these results were to be achieved;
- Chep prescribed the working hours and the work was to be performed in accordance with Chep's policies and instructions;
- Chep exercised control over the workers' activities and determined performance targets;
- Chep had the right to require a worker to cease providing services; and
- Chep had the right to institute disciplinary proceedings against the workers.

It was held that the CCMA had correctly assessed the degree of control that Chep exercised over the employees and the level of integration of the employees in Chep's organisation and had, therefore, correctly found that the appellants were temporary employment service employees. The appeal was accordingly upheld.

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By Moksha Naidoo

Can the right to embark on protest action become stale?

COSATU and Another v Business Unity of SA and Another (LAC) (unreported case no JA97/2019, 27-11-2020) (Davis JA (Jappie JA and Kathree-Setiloane AJA concurring)).

At the centre of this dispute lay the question of how long a trade union has, from when first acquiring the right to embark on protest action, to exercising such a right.

Section 77 of the Labour Relations Act 66 of 1995 (LRA) sets out the requirements for employees to embark on lawful protest action and reads:

'Every employee who is not engaged in an essential service or a maintenance service has the right to take part in protest action if –

(*a*) the protest action has been called by a registered trade union or federation of trade unions;

(*b*) the registered trade union or federation of trade unions has served a notice on NEDLAC stating –

(i) the reasons for the protest action; and

(ii) the nature of the protest action;

(*c*) the matter giving rise to the intended protest action has been considered by NEDLAC or any other appropriate forum in which the parties concerned are able to participate in order to resolve the matter; and

(*d*) at least 14 days before the commencement of the protest action, the registered trade union or federation of trade unions has served a notice on NEDLAC of its intention to proceed with the protest action.'

On 21 August 2017, the Congress of South African Trade Unions (COSATU) issued a notice in terms of s 77(1)(*b*) to the second respondent, the National Economic Development and Labour Council (NEDLAC), setting out certain grievances, as well as the possibility of protest action should its grievances not be resolved.

In the main demand, COSATU was to end the alleged practice of employers, particularly in the banking sector, retrenching staff for the sole purpose of increasing profits.

On 15 September 2017, a consultative process, as contemplated in s 77(1)(*c*) was held between representatives of government, COSATU and Business Unity South Africa (BUSA). While certain of COSATU's grievances were settled and its demand that business desist from retrenchment proceedings to allegedly maximise profits, was left unresolved.

On 15 January 2019, some 17 months later and acting on the strength of its notice issued to NEDLAC on 21 August 2017; COSATU issued a further notice in terms of s 77(1)(*d*), advising NEDLAC that it would be embarking on protest action on 13 February 2019.

On 5 February 2019, COSATU issued a further s 77(1)(*d*) notice to NEDLAC informing it that it would continue its protest action on 19 February 2019.

On 28 and 29 August 2019, the federation issued two additional notices informing NEDLAC that a further two days of protest action would take place on 27 September and 7 October 2019.

Material to the question of law raised in this matter, was the fact that all four notices COSATU issued, were on the back of the s 77(1)(*b*) notice it served on NEDLAC on 21 August 2017.

Having received the last two notices in August 2019, BUSA approached the Labour Court (LC) seeking to interdict COSATU on the basis that it failed to comply with s 77.

In granting the interdict the court *a quo* held:

'I therefore find that s 77 must be read to mean that a s 77(1)(*d*) Notice is issued within a reasonable period. This was not the case in this matter. Further, and in consequence of the same reading of the section, I do not find that the section contemplated the issuing of more than one such Notice in respect of a referral in terms of s 77(1)(*b*). The s 77(1)(*d*) Notice must be issued within a reasonable period dependent on the particular facts and circumstances of the process undertaken in terms of s 77(1)(*c*).'

On appeal, BUSA argued that the spirit and purpose of the LRA was to ensure labour disputes were expeditiously and timeously resolved. This purpose, according to BUSA, must be infused into a proper interpretation of s 77. In doing so, there was no room for protest action being 'open ended' to the extent that a trade union can decide to embark on protest action irrespective of how much time had passed from when the consultative process, as required by s 77(1)(*c*), has been concluded.

COSATU, in drawing an analogy that the right to strike does not become stale (see *Chamber of Mines SA v National Union of Mineworkers and Another* (1986) (7) ILJ 304 (W)), argued that the right to protest action likewise does not become stale once the right had been attained.

The Labour Appeal Court (LAC) firstly noted that s 77 invokes three constitutional rights, namely–

- freedom of expression;
- the right to assemble and picket; and
- the right to fair labour practice, in particular the right to participate in activities of a trade union.

As such, interpreting s 77 should give 'viable meaning' to the purpose of these rights. Considering the opposing arguments the LAC held:

'[Section] 77 of the LRA does not expressly provide for time limits. While the first respondent argued for an implicit "reading in" of the principle of expedition of resolution in respect of protest action, the nature of protest action as envisaged in s 77, may not be subject to the kind of expeditious resolution that would be the case with a labour dispute between employees and an employer in that as is the case in the present dispute, the gravamen of appellant's protests concerns a series of complaints about the government's economic policy. Manifestly the aim of the protest which is to press for policy changes falls within the scope of protest action as set out in s 77 of the LRA. Unlike a labour dispute between the parties to an employment relationship, the nature of this protest is not one that falls to be resolved as expeditiously as a defined labour dispute.'

The LAC went further to find that on BUSA's interpretation of s 77, once COSATU ended its first day of protest action, the only avenue open for it to pursue its protest action over the same issue in the future, was for it to start the s 77 afresh. This would mean that COSATU would have to issue a new notice in terms of s 77(1)(*b*), go through the consultative process and if there is an impasse, to give the 14-day notice period as required in s 77(1)(*d*). The LAC found that here was no justification to read into s 77 such an interpretation, more so in light of the constitutional rights entwined within the section.

Accordingly, the LAC upheld the appeal and replaced the findings of the LC with an order dismissing BUSA's application for an interdict with no order as to costs.

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Recent articles and research

By Kathleen Kriel

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Abbreviation	Title	Publisher	Volume/issue
AHRLJ	African Human Rights Law Journal	Centre for Human Rights, Department of Law, University of Pretoria	(2020) 20.2
BTCLQ	Business Tax and Company Law Quarterly	SiberInk	(2020) 11.3
JJS	Journal for Juridical Science	University of the Free State, Faculty of Law	(2020) 45.2
LDD	Law, Democracy and Development	University of the Western Cape, Faculty of Law	(2020) 24
SALJ	South African Law Journal	Juta	(2020) 137.4
SJ	Speculum Juris	University of Fort Hare	(2020) 34.1
THRHR	Tydskrif vir Hedendaagse Romeinse-Hollandse Reg	LexisNexis	(2020) 83.4

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By Willem Boshoff

Valuing living annuities

The Supreme Court of Appeal (SCA) recently ruled in *CM v EM* [2020] 3 All SA 1 (SCA) that the value of a living annuity falls in the policyholder's estate on divorce or death. In this case, the couple were married out of community of property with accrual and the contention was whether Mr EM's living annuity – purchased prior to filing for divorce – should be included in determining the accrual. The court found that although the assets underlying the policy were owned by the life insurance company, Mr EM had the right to draw an income from those assets, and that the income stream should be valued as part of his estate. The ruling closed the loophole whereby an individual could move assets from their estate into a living annuity at the expense of their spouse.

The calculation

However, the question as to how exactly the living annuity is to be valued was not answered by the court. There is common actuarial agreement on the basis of the calculation, namely –

- projecting the income into the future;
- applying income tax and mortality; and
- then discounting it to the present.

The difficulty, however, is that the policyholder can choose what level of income to draw from the pool of assets, and can change that on a yearly basis, varying between 2,5% to 17,5% (the 'drawdown rate') of the underlying asset value.

It should also be noted that a policyholder will (in theory) never completely exhaust the underlying assets as one can only ever draw a percentage of the underlying assets. This risk to the policyholder is to draw too much early on and thereby deplete the policy to such an extent that they have insufficient income in their old age. Nothing prohibits a policyholder, however, to draw down at a high percentage and reinvest part of the proceeds to provide income later in life. A further important consideration is that the policyholder can never access the underlying assets, which will only be paid to nominated beneficiaries or their estate upon their death. As such, only the income drawn from the living annuity and other assets they own can be used to meet any financial obligations to their spouse.

The assumed drawdown rate

An obvious starting point would be to value the income stream at the level of drawdown effective at the time of divorce. However, that still leaves a loophole whereby a policyholder can lower their drawdown percentage in anticipation of the divorce, and thus prejudice their spouse.

The choice of reasonable drawdown rate is riddled with individual and subjective factors. One should consider the following scenarios:

- ### The drawdown percentage at the time of divorce

On the assumption that this level of drawdown is representative of what the policyholder would have drawn regardless of the divorce (rarely less than 6%), the valuation of the income stream at this level gives a useful indication of the 'lower end' of the living annuity's value. This is because the real (inflation-adjusted) Rand value of yearly income, at a fixed drawdown percentage, will most likely be eroded over time, and hence this scenario is based on a level of income that is likely to be insufficient in the long run.

- ### Drawdown increasing annually at consumer price index (CPI) inflation

A more reasonable scenario may be to assume that the policyholder will increase the Rand amount drawn each year in line with CPI inflation. This is a good 'middle of the road' basis on which to value the living annuity.

- ### Taking the maximum drawdown

A useful theoretical calculation is to assume the maximum drawdown rate. This represents the maximum income the policyholder can get from the living annuity and anything less is by choice. If the policyholder had to re-purchase the right to the income stream for oneself, one could argue that this value would be the correct price since it represents the value the buyer can obtain.

In reality, the considerations are more complex, and most people will draw less than the maximum to mitigate longevity risk.

The value of the living annuity

The above three scenarios give a range of possible values of the living annuity. There is, however, not an objectively correct value (due to the unknown future draw down rates), and the value determined should take into account further considerations such as:

- The extent to which the values of the methods above differ. If these values are relatively close to each other, one should have a high degree of confidence that any number within the range reasonably represents the true underlying value and parties can agree on, for instance, the average value.
- If, however, the range of values is more spread out, one would have to place more emphasis on method three above – this will be more prevalent in cases with a low drawdown rate. For instance, if the different methods yield values of R 1 million, R 1,3 million and R 3 million, it does not seem fair to give equal weight to the lower numbers as they are, after all, low due to the policyholder's choice of drawdown rate. It may be appropriate to weight the value more towards that of method three, subject to the next two points.
- The policyholder and spouse's overall financial position and needs – this will affect their reliance of the living annuity to meet their basic needs, their income tax rate and their current drawdown rate.
- The policyholder's liquidity – if the living annuity is their only source of income, they might have to borrow at punitive rates to pay their spouse's share and hence a value lower on the scale will be appropriate.

Willem Boshoff is a senior actuary and SAMLA registered Medico-Legal practitioner at Munro Forensic Actuaries in Cape Town. ❑

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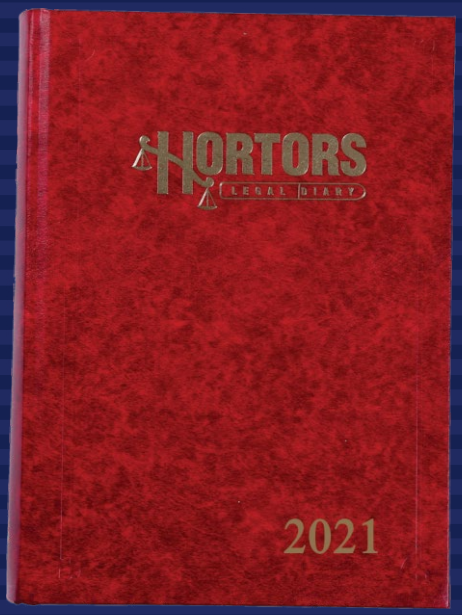

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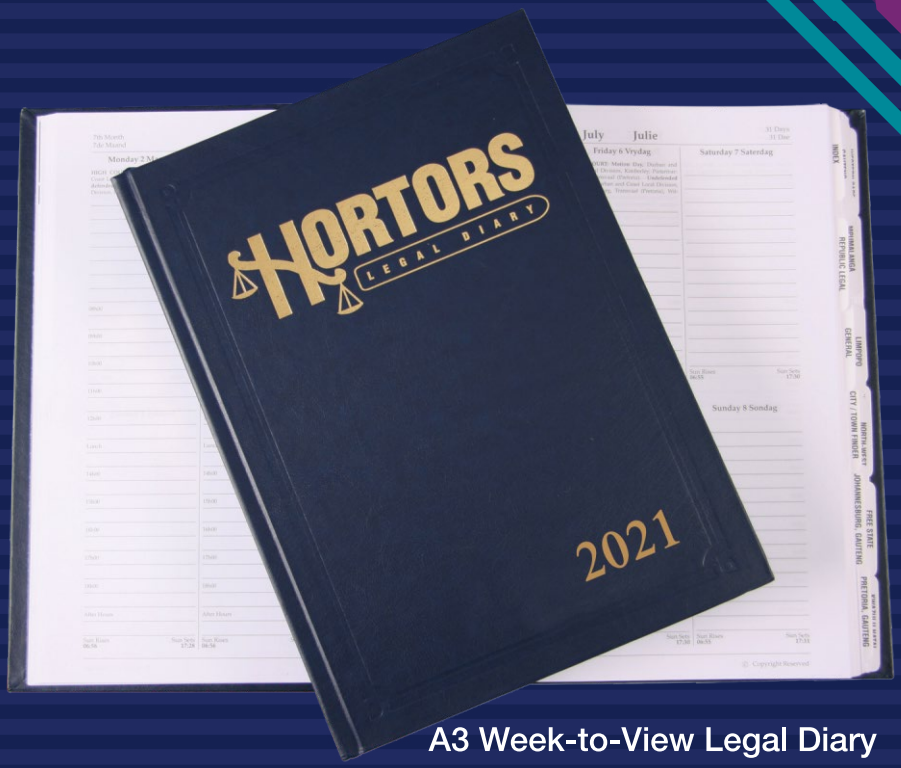

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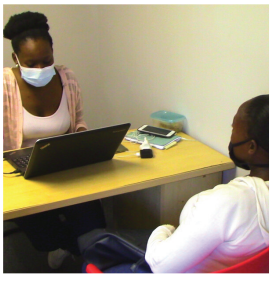

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RISKALERT

MARCH 2021 NO 1/2021

IN THIS EDITION

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LEGAL PRACTITIONERS' FIDELITY FUND
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RISK MANAGEMENT COLUMN

WHO IS INSURED BY THE LPIIF?

In this edition, we continue with the series of articles aimed at addressing some of the common questions raised in respect of the Master Policy issued by the Legal Practitioners Indemnity Insurance Fund NPC (the LPIIF).

In the November 2020 edition, we explained who the LPIIF insures and the amount of cover provided. The December 2020 edition gave details on the excess payable. The current edition will cover who an insured is in terms of the policy.

Thomas Harban,
Editor
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LPIIF, Centurion
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The statutory framework

A useful starting point is an examination of the applicable provisions of the Legal Practice Act 28 of 2014 (the Act). The LPIIF is the insurance vehicle established by the board of the Legal Practitioners' Fidelity Fund (the Fidelity Fund) to provide the insurance cover and suretyships referred to in section 77 of the Act. The relevant parts of section 77 of the Act read as follows:

*"77. **Provision of insurance cover and suretyships**- (1) The Board [of the Fidelity Fund] may-*

(a) acquire or form and administer a public company; or
(b) together with any other person or institution, establish a scheme, underwritten by a registered insurer,

In order to provide insurance cover, subject to the provisions of the Short-[t]erm Insurance Act, 1998 (Act No. 53 of 1998), to legal practitioners referred to in section 84(1) in respect of any claims which may arise from the professional conduct of those legal practitioners.

(2) The Board may enter into a contract with a company or scheme referred to in subsection (1), or any company carrying on professional indemnity insurance business, for the provision of group professional indemnity insurance to legal practitioners referred to in section 84 (1) to the extent and in the manner provided in the contract" (my emphasis).

RISK MANAGEMENT COLUMN continued...

The Short-term insurance Act has since been replaced by the Insurance Act 18 of 2017.

Section 84 (1) of the Act creates an obligation for certain categories of practitioners to practice with a Fidelity Fund certificate and reads as follows:

***"84. Obligations of legal practitioners relating to the handling of trust monies.**-(1) Every attorney or every advocate referred to in section 34(2)(b), other than a legal practitioner in the employ of the South African Human Rights Commission or the State as a state attorney or state advocate and who practices or is deemed to practice-*

(a) for his or her own account either alone or in partnership; or
(b) as a director of a practice which is a juristic entity, must be in possession off a Fidelity Fund certificate."

The obligation on an attorney to practice with a Fidelity Fund certificate received in-depth consideration in *NW Civil Contractors CC v Anton Ramaano Inc & Another* (1076/2018) (1024/2018) [2019] ZASCA 143 (14 October 2019). The Supreme Court of appeal, in that case, considered the implications of an attorney practising without a valid Fidelity Fund certificate in violation of section 41(1) of the Attorneys Act 53 of 1979 (the corresponding provision to section 84(1) in the repealed legislation) and analysed the previous decisions on that question. The LPIIF was admitted to the proceedings as *amicus curiae*. The court found that an attorney practising for his or her own account must be in possession of a valid Fidelity Fund certificate.

The LPIIF is an insurer registered in terms of the Insurance Act. The LPIIF's lines of business accord with section 77 of the Act. The insurance licence issued in terms of section 23 of the Insurance Act authorises the company to conduct business in the following classes and sub-classes of non-life insurance business:

Class of business	Sub-class
Liability	Professional indemnity
Guarantee	

The liability class of business is relevant for present purposes as the current focus is on the company's professional indemnity line of business. The guarantee line of business (executor bonds) will be addressed in a separate edition of the Bulletin. The company can only conduct business in the approved classes and sub-classes of business (see Chapter 4 of the Insurance Act).

The statutory framework applicable to the LPIIF thus only authorises the company to provide professional indemnity insurance to attorneys and trust account advocates with Fidelity Fund certificates.

The LPIIF policy

The relevant clauses of the policy read as follows:

"Who is insured?

*5. Provided that each **Principal** had a **Fidelity Fund Certificate** at the time of the circumstance, act, error or omission giving rise to the **Claim**, the **Insurer** insurers all **Legal Practices** providing **Legal Services**, including:*

*a) a sole **Practitioner**;*
*b) a partnership of **Practitioners**;*
*c) an incorporated **Legal Practice** as referred to in section 34(7) of **the Act**; and*
*d) an advocate referred to in section 34 (2) (b) of **the Act**. For purposes of this policy, an advocate referred to in section 34 (2) (b) of **the Act**, will be regarded as a sole practitioner.*

*6. The following are included in the cover, subject to the **Annual Amount of Cover** applicable to the **Legal Practice**:*

*a) a **Principal** of a **Legal Practice** providing **Legal Services**, provided that that **Principal** has a **Fidelity Fund Certificate** at the time of the circumstance, act, error or omission giving rise to the **Claim**;*
*b) a previous **Principal** of a **Legal Practice** providing **Legal Services**, provided that that Principal had a **Fidelity Fund Certificate** at the time of the circumstance, act, error or omission giving rise to the **Claim**;*
*c) an **Employee** of a **Legal Practice** providing **Legal Services** at the time of the circumstance, act, error or omission giving rise to the **Claim**;*
d) the estates of the people referred to in clauses 6(a), 6(b) and 6(c);
*e) subject to clause 16 (c), a liquidator or trustee in an insolvent estate, where the appointment is or was motivated solely because the **Insured** is a **Practitioner** and the fees derived from such appointment are paid directly to the **Legal Practice**.*

The words in bold text above are defined in the policy.

Only a legal practice conducted in one of the forms listed in clauses 5 (a) to 5(d) of the policy are indemnified by the LPIIF. It will be noted from section 34 (1) to 34 (7) of the Act, read with paragraphs 1.13 and 1.16 of the code of conduct for legal practitioners and rules 1.18 and 1.22. Incorporated practices are personal liability companies must comply with the section 34 (7) of the Act. A practice conducted in any other form of company (a Pty (Ltd), for example) will not be indemnified. A separate article will be published in a later edition of the Bulletin analysing the requirements for an incorporated practice.

Legal practices conducted in any format, other than those listed in clauses 5 (a) to (d) of the policy, will not be covered by the LPIIF. The Supreme Court of Appeal in *Propell Specialised Finance v Attorneys Insurance Indemnity Fund NPC* (1147/2017) [2018] ZASCA 142 (28 September 2018) confirmed that the LPIIF can only provide indemnity to insured practitioners (as defined in the statute and the policy).

RISK MANAGEMENT COLUMN continued...

LPIIF CLAIM STATISTICS

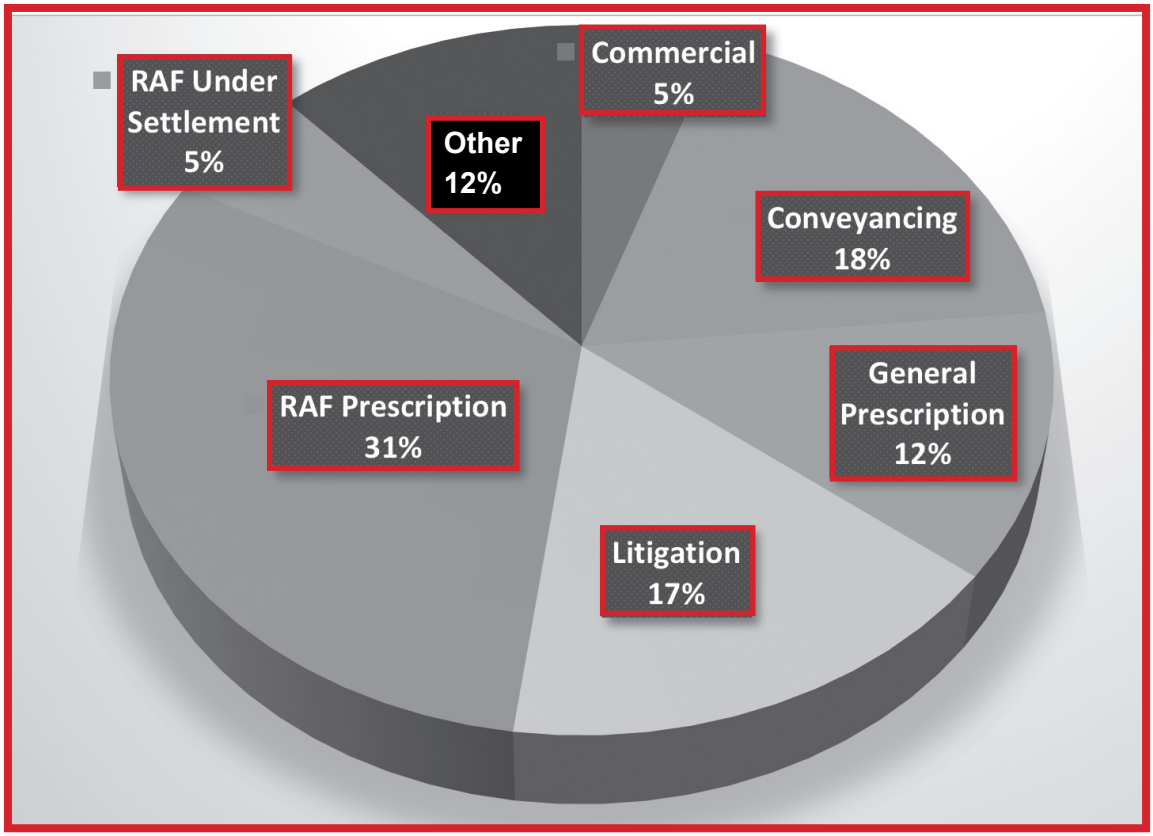

Table 1

The reserve requirement for outstanding claims notified to the Legal Practitioners Indemnity Insurance Fund NPC (the LPIIF) was actuarially assessed at R665 566 300 as at the end of December 2020. The stabilisation in the number of claims notified since 2017 is welcomed, but the overall value of claims notified is still a serious cause for concern. The growth in the number and value of professional indemnity claims threatens the long-term sustainability of the LPIIF. Practitioners must thus address the underlying circumstances within their practices that could, potentially, lead to claims.

In table 1 above, the claims notified between 1 July 2005 and 31 December 2020 have been broken down into the various claim types.

Prescribed Road Accident Fund (RAF), general prescription, conveyancing and litigation claims continue to make up the highest number and value of claims notified. These claim categories have made up the highest numbers of notifications for over a decade. The category designated as 'other' includes claims arising from legal services rendered relating to the Liquor Act 27 of 1989, medical malpractice claims (prescription or under-settlement), wills and estates, wrongful arrest claims, liquidations and matters arising from circumstances where the insured practitioners have acted as trustees, liquidators or administrators.

The LPIIF website (www.lpiif.co.za) contains a section with numerous risk management materials that practitioners can have regard to in order to enhance the risk management measures in their respective practices.

The LPIIF's Practitioner Support Executive, Henri van Rooyen, can also be contacted to arrange risk management training for the firm. This service is offered at no cost. Please send an email to risk@lpiif.co.za to arrange risk management training for you and your staff.

THE STANDARD OF CONDUCT EXPECTED OF LEGAL PRACTITIONERS

By: Thomas Harban,
General Manager
LPIIF

Introduction

The standard of conduct reasonably expected of a legal practitioner appears, at face value, to be a straightforward topic. However, digging deeper into the subject, amorphous and multifaceted are the adjectives I would use to describe it.

A word search of the Legal Practice Act 28 of 2018 (the Legal Practice Act) indicated that the phrase 'norms and standards' appeared three times, with 'professional conduct' being referred to four times in the legislation. The word 'ethics' could only be located in the definition of 'code of conduct'. The relatively few appearances of these and related phrases in the legislation belie their importance to legal practice. Topics relevant to the professional standard of conduct can be gleaned from numerous other parts of the Act, the Rules and the Code of Conduct for Legal Practitioners, Candidate Legal Practitioners and Juristic Entities (the Code of Conduct) issued in terms of the Act. Furthermore, over the last century, the courts have developed extensive jurisprudence on the subject.

Ethical and professional conduct

Ethical and professional conduct are core to legal practice, locally and in other jurisdictions. In 2011 the International Bar Association (IBA) adopted the International Principles on Conduct for the Legal Profession. The IBA document covers 10 principles, being:

(i) independence;
(ii) honesty, integrity and fairness;
(iii) conflicts of interest;
(iv) confidentiality / professional secrecy;
(v) clients' interest;
(vi) lawyers' undertaking;
(vii) clients' freedom;
(viii) property of clients and third parties;
(ix) competence; and
(x) fees.

The 10 principles identified in the IBA document are all covered in the standards of professional conduct applicable in South Africa. One interesting distinction between South Africa and many other jurisdictions is that, in some jurisdictions professional ethics are taught as a course in the academic program for law students, whereas in South Africa I am not aware of such a course being taught as a full credit at all universities. Including ethics as a compulsory subject in the academic program will go a long way in enhancing compliance with the ethical standards that the law graduates will be expected to meet when they commence commence practice, take up corporate counsel roles or even roles in the public sector (as will be noted from *General Council of the Bar of South Africa v Jiba and Others* (CCT192/18) [2019] ZACC 23; 2019 (8) BCLR 919 (CC) (27 June 2019). The fact that ethics is one of the subjects addressed in the admission exams for legal practitioners is, in my respectful view, not sufficient. The subject goes to the core of the requirements that legal practitioners must meet and thus needs broader and more in-depth consideration than it currently receives in the path to admission as a legal practitioner. It is hoped that a greater emphasis on professional ethics will also be included in the practical vocational training for candidate legal practitioners and the continuing professional development program to be developed and implemented.

The Code of Conduct provides that:

"3. Legal practitioners, candidate legal practitioners and juristic entities shall-

3.1. maintain the highest standards of honesty and integrity;

….

3.11 use their best efforts to carry out work in a competent and timely manner and not take on work which they do not reasonably believe they will be able to carry out in that manner;

…

3.13 remain reasonably abreast of developments in the law and legal practice in the fields in which they practice; [and]

…

3.17 comply with provisions of [the Code of Conduct] and any other code applicable to them and with those of the rules with which it is their duty to comply."

The Code of Conduct is "a written code setting out rules and standards relating to ethics, conduct, and practice for legal practitioners and its enforcement through the [Legal Practice Council

(LPC] and its structures". (definition in section 1 of the Legal Practice Act). It is trite that a failure to comply with the provisions of the Code of Conduct may lead to action being taken by the LPC against the legal practitioner, candidate legal practitioner or juristic entity concerned. Practitioners must thus ensure that their conduct and that of everyone in their practices meets the prescribed standards. Non-compliance with the Code of Conduct may result in disciplinary action being taken against practitioners by the LPC and professional indemnity (malpractice) claims being brought by third parties.

The Code of Conduct defines a "legal practitioner" as "an advocate or attorney admitted and enrolled to practice as such in terms of sections 24 and 30 respectively of the Act", a "candidate legal practitioner" as "a person undergoing practical vocational training, either as a candidate attorney or as a pupil", and a "juristic entity" means "a commercial juristic entity established to conduct legal practice as an attorney, as contemplated in section 34(7) of the Act and a limited liability legal practice as contemplated in section 34(9) of the Act." The Code of Conduct thus applies to the broad pool of legal practitioners equally.

The fit and proper requirement

The standard of conduct is the high ethical and professional standards that legal practitioners are expected to meet at all times. It is these high professional standards that allow society at large to entrust their affairs (and their monies) to the honourable and noble profession that the legal profession is accurately described as. The role of legal practitioners is of particular importance in a constitutional democracy. The legislative objectives listed in the preamble to the Legal Practice Act include "[ensuring] that the values underpinning the Constitution are embraced and that the rule of law is upheld." The public, the courts, fellow practitioners and the administration of justice as whole rely on the integrity of legal practitioners. Delivering the unanimous judgment of the Constitutional Court in *General Council of the Bar of South Africa v Jiba and Others*, Jafta J noted that:

"[1] The proper administration of justice may not be achieved and justice itself may not be served unless truthful facts are placed before the courts. Legal practitioners are a vital part of our system of justice. Their important role includes preventing false evidence from being presented at court hearings, and by so doing they protect judicial adjudication of disputes from contamination by fabricated facts. As a result, the law demands from every practitioner absolute personal integrity and scrupulous honesty.

[2] One of the reasons for holding legal practitioners to this high ethical and moral standard was furnished on these terms in [Ex parte Swain 1973 (2) SA 427 (N) at 434]:

"[I]t is of vital importance that when the Court seeks an assurance from an advocate that a certain set of facts exists the Court will be able to rely implicitly on any assurance that may be given. The same standard is required in relations between advocates and between advocates and attorneys. The proper administration of justice could not easily survive if the professions were not scrupulous of the truth in their dealings with each other and with the Court."

[3] To underscore this requirement, the Admission of Advocates Act [74 of 1964] … demands that before an advocate may be permitted to practise, she must satisfy the High Court that she meets all conditions, including the qualities of honesty and integrity. If satisfied, the High Court may admit the advocate into the profession and direct that her name be included on the roll of advocates in the custody of the Department of Justice and Constitutional Development.

[4] If an advocate, having been so admitted and enrolled, fails to measure up to the required standard or it is established that she is no longer fit and proper to practise, an application may be instituted in the High Court by a relevant body for the removal of her name from the roll of advocates. Once an order of that kind is granted, the advocate concerned is not allowed to practise.

[5] This matter is about the fitness of the respondents to practice as advocates. The misconduct charge was that they are no longer fit and proper persons to continue to practice as advocates. It arose from the conduct in litigation where they deposed to affidavits which were presented to courts as evidence and their failure to comply with court rules and directives" (footnotes omitted. My emphasis).

Writing in *Vassen v Law Society of the Cape of Good Hope* (468/96) [1998] ZASCA 47; 1998 (4) SA 532 (SCA); [1998] 3 All SA 358 (A) (28 May 1998), Eksteen JA noted that:

" … it must be borne in mind that the profession of an attorney, as of any other officer of the Court, is an honourable profession which demands complete honesty, reliability and integrity from its members; and it is the duty of the [law society] to ensure, as far as it is able, that its members measure up to the high standards demanded of them. A client who entrusts his affairs to an attorney must be able to rest assured that that attorney is an honourable man who can be trusted to manage his affairs meticulously and honestly. When money is entrusted to an attorney or when money comes

GENERAL PRACTICE continued...

to an attorney to be held in trust, the general public is entitled to expect that that money will not be used for any other purpose than that for which it is being held, and that it will be available to be paid to the persons on whose behalf it is held whenever it is required. Here once again the [law society] has been created to ensure that the reputation of this honourable profession is upheld by all its members so that all members of the public may continue to have every confidence and trust in the profession as a whole. The fact that an attorney may be regarded as the pillar of society who serves the community in civic or political spheres, or who works indefatigably for the upliftment of the poor and the defenceless members of society, cannot in respect of his profession, be seen as a substitute for that honesty, reliability and integrity which one is entitled to expect of an attorney. One does not entrust money to a person because of his good deeds in the community, but because he is an attorney who can be trusted and on whom one can rely" (my emphasis).

Alas, this has not always been so, as the following passage from Bosielo JA's judgment in *Steyn v Ronald Bobroff & Partners* (025/12) [2012] ZASCA 184 (29 November 2012) demonstrates:

"[2] In order to appreciate and understand the crucial role which a [present-day] attorney plays in many people's affairs, I deem it necessary to give a brief evolution of the profession of an attorney over the years. In his book, The Judicial Practice of South Africa, (4 ed) vol 1, at p 31 G B Van Zyl said the following about the profession of an attorney:

'In ancient days the profession of an attorney was considered as "infamissima vilitas," servile, of no value, and contemptible. But under the Roman Emperors Diocletian and Maximilian it became an office of respect and good repute. Many people still think at the present day as the ancients did before the period of these Emperors. Even Lord Macaulay, the learned historian, who in all his professional career held only one brief, for which he received a guinea, could not refrain from remarking: "That pest whom mortals call attorneys." But the present consensus of opinion, all the civilised world over, is that the profession of an attorney is an honourable and respectable one, and to be held in the utmost esteem. An attorney is nowadays an indispensable adjunct to everyone, not only in lawsuits but in many other private affairs, and his office is deemed both necessary and praiseworthy. It is essential, therefore, that the relationship between him and the public should be better known; as also what is expected of him and what his obligations are'."

Fortunately, the regard with which the profession is held in the eyes of the public has rightly improved significantly since the ancient times referred to above. However, a concerningly high number of legal practitioners still fail to meet the required professional standards. The Legal Practitioners' Fidelity Fund (the Fidelity Fund) annual report for 2019 noted that R1,3 billion had been paid in trust money theft claims in 13 years. This is a shockingly high figure for liability arising out of dishonesty. There is a long list of suspended and struck-off legal practitioners published by the LPC on its website (accessible at https://lpc.org.za/members-of-the-public/list-of-struck-off-lps/). It is, unfortunately, the cases of malfeasance that make the headlines, tarnishing the image of the profession as a whole though the defaulting practitioners make up a small number of the overall professional population.

The courts have dealt with several cases where it is alleged that the legal practitioners concerned have failed to meet the standard of professional conduct expected of them. Regard can be had to the following judgements which demonstrate how the courts have approached the assessment of the standard of professional conduct required of legal practitioners: *Ex parte Swain* cited above, *Society of Advocates of South Africa (Witwatersrand Division) v Cigler* 1976 (4) SA 350 (T), *Law Society Transvaal v Behrman* 1981 All SA 470 (A), *Kekana v Society of Advocates of South Africa* [1998] ZASCA 54; 1998 (4) SA 649 (SCA), *Vassen v Law Society of the Cape of Good Hope* (cited above) , *Jasat v Natal Law Society* (78/98) [2000] ZASCA 14; 2000 (3) SA 44 (SCA); [2000] 2 All SA 310 (A) (28 March 2000), *Swartzberg v Law Society, Northern Provinces* 2008 All SA 438 (SCA), *Malan and another v The Law Society, Northern Provinces* 2009 (1) All SA 133 (SCA), *General Council of the Bar of South Africa v Jiba and Others* (referred to above), *Nthai v Pretoria Society of Advocates and Others* [2019] ZALMPPHC 23 and *Johannesburg Society of Advocates and Another v Nthai and Others* (879/2019; 880/2019) [2020] ZASCA 171 (15 December 2020).

The three-stage enquiry developed by the courts when dealing with applications to strike legal practitioners off the roll includes an enquiry regarding whether the practitioner is 'fit and proper' to be a legal practitioner. A failure by a legal practitioner to meet the standards of integrity may thus result in being struck from the roll. Ethics, integrity and compliance with the ethical standards are thus at the core of what makes a legal practitioner.

Legal practitioners who are not in private practice (corporate counsel) must also comply with the Code of Conduct. Part VII of the Code applies specifically to corporate counsel.

A law firm conducting an investment practice must, in terms of rule 55.12, comply with all the requirements of the Financial Advisory and Intermediaries

Services Act 37 of 2002 (the FAIS Act) and the regulations issued terms of that Act. There is a specific code of conduct issued for entities operating in terms of the FAIS Act. If a legal practice is registered in terms of the FAIS Act and there is a conflict between the FAIS Code and that issued in terms of the Legal Practice Act, which code will apply? What is the effect of paragraph 3.17 of the Code of Conduct in the event of such a conflict?

In the culture where collegiality between legal practitioners is encouraged, one wonders how the obligation on practitioners to report conduct of their colleagues will be applied. The Rules, for example, prescribe the following:

"Reporting of dishonest or irregular conduct"

54.36 Unless prevented by law from doing so every legal practitioner is required to report to the [Legal Practice] Council any dishonest or irregular conduct on the part of a trust account practitioner in relation to the handling of or accounting for trust money on the part of that trust account practitioner."

The standard of care in assessing professional liability

It must be pointed out that not every breach of the ethical standards or the professional duties will result in a professional indemnity claim against a legal practitioner. Similarly, not every professional indemnity claim can be said to be a result of a breach of the Code of Conduct. Some professional indemnity claims arise out of *bona fide* errors made by legal practitioners. However, professional indemnity claims may well arise from a failure to meet the required professional standards of conduct. Breaches of the duty of care may be an indication that a practitioner, in breach of their professional duties, is not paying sufficient attention to their practice. (If you find this paragraph somewhat confusing and potentially contradictory, please have regard to the two opening sentences at the beginning of this article.)

In assessing whether there is negligence on the part of the defendant in a professional indemnity claim, the courts assess the conduct of the practitioner concerned against the standard of care expected of a legal practitioner in similar circumstances. One might ask: has the practitioner against whom the professional indemnity claim is brought:

(i) used their best efforts to carry out work in a competent and timely manner and not taken on work which they do not reasonably believe they will be able to carry out in that manner (as prescribed by paragraph 3.11 of the Code of Conduct)? Time-barred claims would immediately come to mind when carrying out the work timely is concerned. Practitioners will be well advised to have regard to Rampai J's judgment in *Mlenzana v Goodrick and Franklin Inc* (4423/08) [2011] ZAFSHC 111 2012 (2) SA 433 (FB) (14 July 2011) as a case study when conducting training in their practices on paragraph 3.11 of the Code of Conduct; or

(ii) remained reasonably abreast of developments in the law and legal practice in the fields in which they practice (as prescribed in paragraph 3.13 of the Code of Conduct)? The risk of claims against practitioners following from incorrect legal advice provided will be reduced by complying with this rule.

The jurisprudence on this point has been developed by the courts over a period of more than a century. In *Van der Spuy v Pillans* 1875 Buch 133 at 135, De Villiers CJ remarked that:

"I do not dispute the doctrine that an attorney is liable for negligence and want of skill. Every attorney is supposed to be proficient in his calling, and if he does not bestow sufficient care and attention in the conduct of business entrusted to him, he is liable, and where proved the Court will give damages against him."

Commenting on these words of De Villiers CJ, Bosielo JA, in *Steyn v Ronald Bobroff & Partners*, stated the following:

"[3] The attorney's profession having become more diverse and sophisticated, these wise words are, to my mind, more apt today than they were during the time of De Villiers CJ. Indubitably, this is the yardstick against which the respondent's conduct in this case has to be adjudged".

Dealing with the questions before the court, Boshielo JA went on to note that:

"[27] In the absence of clear evidence to prove what a reasonable attorney in the position of the respondent, faced with a similar case under similar circumstances, would have done, I am unable to conclude that the respondent failed to act with the necessary care, skill and diligence which would ordinarily be expected from a reasonable attorney. It is axiomatic that the conduct of a reasonable attorney concerning a case that he/she handles will primarily be determined, amongst others, by the facts and circumstances of the case, the investigations which had to be done, the nature and extent of the injuries suffered and the complexity of the matter. It would in my view be unwise to attempt to determine the conduct of a reasonable attorney in vacuo. As Van Zyl eloquently stated in his work, The Judicial Practice of South Africa (above) at p 46, '…the degree of negligence or want of prudence, or useless work, must depend upon the nature of each case'."

Steyn v Ronald Bobroff & Partners arose out of circumstances where the respondent has acted for the applicant in pursuing a claim against the Road Accident Fund. In *Margalit v Standard Bank of*

SA Ltd (883/2011) [2012] ZASCA 208 (3 December 2012), the court considered whether there was negligence on the part of a conveyancer. In that case Leach JA stated that:

[22] I turn to consider the crucial issue of the second respondent's alleged negligence. I preface my remarks by observing that of course not every act which causes harm to another is actionable in delict. The action complained of must also be wrongful, the concept of which has been authoritatively dealt with in cases such as Le Roux v Dey 2011 (3) SA 274 (CC) para 122 and the various judgments referred to therein. It is unnecessary to deal further with this issue as counsel for the respondents conceded that, should the delays in transfer, [affecting what] occurred after the rates clearance certificate had been provided, have been due to the second respondent's negligence, both respondents should be held liable for the agreed damages and the appeal should succeed. Negligence on the part of the second respondent [a firm of conveyancing attorneys], and not wrongfulness, is therefore the crucial issue that has to be decided.

[23] A conveyancer is of course 'an attorney who has specialised in the preparation of deeds and documents which by law or custom are registerable in a deeds office and who is permitted to do so after practical examination and admission….Like any other professional, a conveyancer may make mistakes. But not every mistake is to be equated with negligence, and in a claim against a conveyancer based on negligence it must be shown that the conveyancer's mistake resulted from a failure to exercise that degree of skill and care that would have been exercised by a reasonable conveyancer in the same position….

[24] Although at times a court may need expert evidence on a particular professional practice to determine whether a professional person acted negligently, that is not a fixed and inflexible rule and the views of a professional, while often helpful, are not necessarily decisive. The nature of the conduct complained of may well be such that a court, even without the benefit of professional opinion, may determine that the conduct complained of was of such a nature that it clearly falls below the mark of what can be regarded as reasonable. This in my view is such a case (I should mention that the expert evidence called by the parties in this case, while extremely helpful in explaining the mysteries of certain procedures in the deeds office, did not deal pertinently with all the issues relevant to the second respondent's negligence) ….

[26] To avoid causing such harm, conveyancers should therefore be fastidious in their work and take great care in the preparation of their documents. Not only is that no more than common sense, but it is the inevitable consequence of the obligations imposed by s 15(A) of the [Deeds Registry Act 47 of 1937] as read with [regulation] 44, both of which oblige conveyancers to accept responsibility for the correctness of the facts stated in the deeds or documents prepared by them in connection with any application they file in the deeds office."

Some of the other cases where the standard of the reasonable legal practitioner in the circumstances of the defendant were applied in assessing negligence are: *Mazibuko v Singer* [1979] 1 All SA 30 (W), *Rampal (Pty) Ltd and another v Brett, Willis and Partners* [1981] 3 All SA 213 (D), *Slomowitz v Kok* [1983] 1 All SA 79 (A) and *Mlenzana v Goodrick and Franklin Inc* (cited above).

It will be noted in time how the courts will use the provisions of the Legal Practice Act, the Rules and the Code of Conduct in further developing the test for liability in professional indemnity claims.

A final point needs to be made in order to address a common misconception. The LPIIF is an insurance company independent of the LPC. A legal practitioner notifying the LPIIF of a claim made against her/him, must not fear that the LPIIF will report that matter to the LPC as a matter of course. The only circumstances listed in the LPIIF Master Policy under which the insurer will report an insured legal practitioner to the regulator are where either:

(a) There is a material non-disclosure or misrepresentation by the insured practitioner in respect of the application for indemnity, the LPIIF reserves the right to report the conduct to the regulator and to recover any money incurred because of the insured's conduct (clause 35); or
(b) The insured fails or refuses to provide information, documents, assistance or cooperation to the LPIIF or its appointed agents.

Conclusion

It will be noted from the judgments referred to that a failure to meet the professional standards potentially attracts quadruple jeopardy for the practices concerned-

(i) a striking off the roll;
(ii) criminal prosecution
(iii) civil liability in the malpractice claim; and
(iv) the reputational damage flowing from the publication of practitioner's name on dishonourable list on the LPC website and being named in an unfavourable court judgement.

A straightforward risk mitigation measure is suggested: Learning, implementing and monitoring compliance with the required professional ethical standards of conduct at all times.