

## INCORRECT LEGAL STANDARD APPLIED? ZUMA AND THE ZONDO COMMISSION

Should an unrepresented accused enter into plea and sentence agreements?

The rescission of divorce orders for purposes of claiming spousal maintenance

**A turning of the tide:** Exploring the impact of pollution in the shipping industry



**Navigating the legal regulatory issues with self-driving cars in South Africa**

**Lifestyle audits:**  
Bringing legal and ethical considerations under scrutiny

**Keep your brand –** appoint a registered and credible auditor

**Remove, withdraw or postpone?**  
The principle of double jeopardy in competition law

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### 10 Incorrect legal standard applied? Zuma and the Zondo Commission

On 28 January 2021, the Constitutional Court handed down its judgment in the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, to compel former President Jacob Zuma to appear and give testimony before it. Legal practitioner, **Andile Mcineka**, warns that a constitutional crisis manifested itself in the manner in which the court dealt with direct access.

### 12 Should an unrepresented accused enter into plea and sentence agreements?

Section 105A of the Criminal Procedure Act 51 of 1977 permits an accused person who has legal representation to enter into a plea and sentence agreement. However, s 105A(1) prohibits an unrepresented accused from entering into a plea and sentence agreement with the prosecuting authority. Legal practitioner, **Nomonde Msimanga**, explores the constitutional impediments contained in s 105A with reference to self-representation of an accused person.

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When the *MV Wakashio* hit a coral reef off the coast of Mauritius on 25 July 2020 resulting in almost 1 000 tonnes of oil being discharged into the ocean, it highlighted the impact of maritime pollution on marine life and the ecosystem. Legal practitioner, **Sharon Phumzile Msiza**, discusses the three main pollutants in the maritime/shipping industry, namely, air pollution, ballast water and oil spills.

### 16 The rescission of divorce orders for purposes of claiming spousal maintenance

The common law reciprocal duty of support between spouses ends on the termination of the marriage, either by divorce or by death. However, this duty of support can be extended post-divorce by a court in terms of s 7 of the Divorce Act 70 of 1979. Parties can waive their right to claim spousal maintenance on divorce, but cannot do so when the marriage is concluded. Regional magistrate, **James Dumisani Lekhuleni**, writes that the problem, however, arises when a divorce order is granted in default of a party who seeks to claim spousal maintenance.

### 18 Navigating the legal regulatory issues with self-driving cars in South Africa

According to former Minister of Transport, Blade Nzimande, even though there are no self-driving cars (SDC) currently on the roads of South Africa (SA), there are plans for their introduction. Candidate legal practitioner, **Charissa Chengalroyen**, explains that the proposed introduction of SDCs viewed against the backdrop of SA's high rate of car accidents, will probably require legal regulation in various forms.

### 22 Lifestyle audits: Bringing legal and ethical considerations under scrutiny

The reported request by the Gauteng Provincial Premier for the State Security Agency to conduct lifestyle audits on Members of the Executive Council warrants some probing as to its alignment with institutional legal mandates within the context of public administration governance. Directing the request to the particular institution, infers that it has a legal obligation that assigns it either a direct or shared accountability role in the matter. Diplomat, **Dr Lincoln Cave**, writes that this request brings both legal and ethical considerations under scrutiny.

### 24 Remove, withdraw or postpone? The principle of double jeopardy in competition law

Legal practitioner, **Tshepo Mashile**, discusses the case of the *Competition Commission of South Africa v Beefcor (Pty) Ltd and Another* [2020] 2 CPLR 507 (CAC), where the Competition Appeal Court considered the question whether the withdrawal of a complaint by the Competition Tribunal initiated in terms of s 49B(1) of the Competition Act 89 of 1998 serves to put an end to the proceedings before the Competition Tribunal, on the basis that the complaint cannot be reinstated.

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# Court digitisation – the future is here

**A**t the beginning of 2020, the Gauteng Division and Gauteng Local Division of the High Court, Pretoria and Johannesburg implemented a digital/electronic case management and litigation system, named CaseLines. The aim of the case management system is to enable litigants to file and upload pleadings and other documents electronically and to present their case and argument during court proceedings. The implementation of the system was apt and timely as the world was hit by a pandemic that insisted on limited human contact (see Mapula Sedutla 'CaseLines: Electronic case management system implemented' 2020 (Jan/Feb) *DR* 3).

I spoke to Executive Committee member of the Johannesburg Attorneys Association, attorney Yusuf Wadee, about how legal practitioners have been finding their feet using the electronic case management system.

**Mapula Sedutla (MS): Did CaseLines help during the hard lockdown period?**

**Yusuf Wadee (YW):** In terms of preparing for trials, our firm was able to prepare for High Court trials, Judicial Case Management together with our opponents and experts, by following the practice directive. All the documents were uploaded to CaseLines prior to the hard lockdown, and parties were in a position to continue having virtual pretrial conferences. The preparation for trial by both parties was facilitated by CaseLines, and the ease by which it could be accessed online.

We managed to prepare summons during the hard lockdown, we were able to issue it on 5 May 2020 via CaseLines, and it was sent to the Sheriff for urgent service. Our opponents were invited to CaseLines, and a notice of intention to defend was served electronically, and filed via CaseLines.

Working remotely during the hard lockdown, CaseLines afforded legal practitioners direct access to court files and the information therein, without the need for having their physical files present. This allowed legal practitioners to have virtual consultations with clients, witnesses, experts and counsel.

**MS: Was this a great move by the Gauteng Division to implement a digital case management system, considering the direction the world is going digitally?**

**YW:** The advent of CaseLines had changed the face of litigation in 2020. Prior to CaseLines, legal practitioners had to ensure that files were in the correct office before hearings. Legal practitioners are always faced with the possibility of court files not being before the judge, or in the incorrect court. Legal practitioners would

spend hours searching for court files to have matters set down, and in some instances where court files could not be obtained, had to search for files on five separate days and once the search failed, were only then entitled to apply for duplicate files to be opened.

These challenges became a thing of the past, as all parties including the judiciary have electronic access to the court file. A digital case management platform in South Africa is much needed, and the implementation of CaseLines has saved legal practitioners time spent at court searching for files, obtaining court orders and filing documents. There are no longer any files that are misplaced, as all parties are immediately notified of any additions, alterations and if any court orders are uploaded.

With the pandemic, CaseLines has proved to be an extremely useful system. It is an efficient system of filing documents and is an easy online tool to utilise.

**MS: What challenges have attorneys encountered while using the system?**

**YW:** Training was offered on CaseLines, and the legal practitioners who had attended such training did not experience much difficulty. Attorneys' associations have received various feedback from their members, who had had teething problems (due to lack of training or misunderstanding the CaseLines system), which included –

- invitations to CaseLines by the Registrar (this was resolved);
- creation of new cases;
- network problems at court;
- invitation to the correct Registrars;
- invitation to the judges' secretaries;
- legal practitioners not receiving notes by Registrars; and
- delays in obtaining court dates.

These issues were then resolved by allowing plaintiffs and applicants the power to create their own case on the CaseLines platform.

**MS: In your view, what improvements can be made on the system?**

**YW:** The implementation of CaseLines is all thanks to the vision of Judge President Dunstan Mlambo. Judge President Mlambo has been at the forefront with the profession (attorneys' associations and advocate groups) in resolving any problems that legal practitioners faced. He ensured that all legal practitioners' problems were resolved either via CaseLines or practice directives. This added to the efficiency of the courts and case flow management. This became invaluable during the pandemic and the courts in Gauteng, were efficient under these difficult circumstances. In my view, this protected the safety of legal practition-



Mapula Sedutla – Editor

ers, the judiciary, Registrars and court staff. The system is working well and at this stage does not need any further improvements.

CaseLines is only one module of the soon to be implemented envisaged digital system, an end-to-end e-filing, digital case management and evidence management system has since been developed to replace the paper-based system. For an overview of the system, refer to [www.LSSA.org.za](http://www.LSSA.org.za).

During 2019, the Office of the Chief Justice (OCJ) approached the Law Society of South Africa (LSSA) to discuss a joint venture between the two organisations that would assist in educating practitioners on the court e-filing (Court Online) project. During a meeting between the LSSA and the OCJ, on 5 March 2021, the OCJ explained that the launch of the Court Online platform is drawing near and that legal practitioners are an integral part of the platform. For more information on the Court Online project see: [www.judiciary.org.za](http://www.judiciary.org.za).

The Uniform Rules of Court do not make provision for Court Online. However, the Department of Justice and Constitutional Development had been developing rules, which the Rules Board for Courts of Law has invited legal practitioners to comment on. The links to the proposed rules are as follows –

- e-Rules and certain amended rules for the High Court ([www.justice.gov.za](http://www.justice.gov.za)); and
  - e-Rules and certain amended rules for the magistrates' courts ([www.justice.gov.za](http://www.justice.gov.za)).
- Comments must be submitted on or before Friday, 14 May 2021 and may be delivered to the Secretariat of the Rules Board in any of the following ways –
- by hand delivery to the offices of the Secretariat, 2nd Floor, East Tower, Centre Walk, 266 Pretorius Street, Pretoria;
  - by e-mail to Ms C Kemp at [ChKemp@justice.gov.za](mailto:ChKemp@justice.gov.za); or
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# LETTERS TO THE EDITOR

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

## Suggestion: Classifieds

The *De Rebus* Classifieds section does not offer the support needed in encouraging the setting up of legal practices by the new entrants into the practice world. Considering the restrictions or obstacles encountered around financing a practice (ie, raising funds or sourcing different skills) *De Rebus* should have a column or platform in the journal where people who wish to set up practices can meet or network.

This would be a great contribution from your part towards the development of the legal profession.

**Thami Wellington Nene**

*BProc LLB LLM (UP)* is a legal practitioner at Senyema Gwangwa Inc in Pretoria.

- Thank you for the suggestion, which is a great idea. *De Rebus* will start a 'Practice Set-up' column that will allow legal practitioners to network. To be included in the new column send your information to [shireen@derebus.org.za](mailto:shireen@derebus.org.za)

**Editor.**

## Legal practitioner's freedom of expression during the times of social media

I completed my LLB half a decade ago and was very excited to begin the journey of becoming a legal practitioner. The

reality of unemployment and lack of job opportunities swiftly extinguished my excitement and I started experiencing frustrations. My frustration was not so much about the lack of opportunities, but it emanated from the lack of access to opportunities that already exist. Naturally I wanted to voice these unfortunate circumstances and preach to the world about my newly acquired wisdoms that came with my struggles. As a graduate in his 20s with a smart phone, I had all the tools necessary to voice my battles on social media. Little did I know that there are certain things one cannot say as a legal professional.

When I voiced my concerns about the unfairness of the requirement for candidate legal practitioners to own a motor vehicle and hold a driver's licence in order to secure articles of clerkship, I was given counsel by senior lawyers that it was unwise of me to publish such content on social media because prospective employers would never consider my job applications. After receiving this advice, I desisted from posting this on social media as it served as a deterrent and limited my freedom of expression. We all pursue a career because we want to succeed in it and appreciate the necessity to make sacrifices in order to achieve our goals, but is it fair to be silenced because of fear of being unpopular with potential employers?

Our right to freedom of expression is enshrined in s 16 of the Constitution and the limitations to such freedom are

clearly outlined. However, often, the limitations to our freedom of expression are not derived from the letter and spirit of the Constitution but from fear of some form of retribution from individuals in positions of control, who oppose the market place of ideas because they are unwilling to listen to new ideas, especially those that seek to persuade them. It is in my view unreasonable to exclude a capable candidate for a job position just because they dare to disagree. How many other issues remain unchallenged elephants in the room?

In order to address issues that continue to haunt the legal profession, opinions and debates must be encouraged. The courage to voice one's opinions, especially those that are constructive, ought to be rewarded rather than reprimanded. Social media platforms present a good opportunity for legal practitioners to discuss, debate and come up with good innovative ideas that benefit the betterment of the legal profession.

**Siyakha Plaatiyi**

*LLB (UFH)* is a candidate legal practitioner at NT Mdlalose Inc in Johannesburg.

- See Mapula Sedutla 'Driver's licence and own vehicle no longer an employment requirement' 2021 (Jan/Feb) *DR* 3.

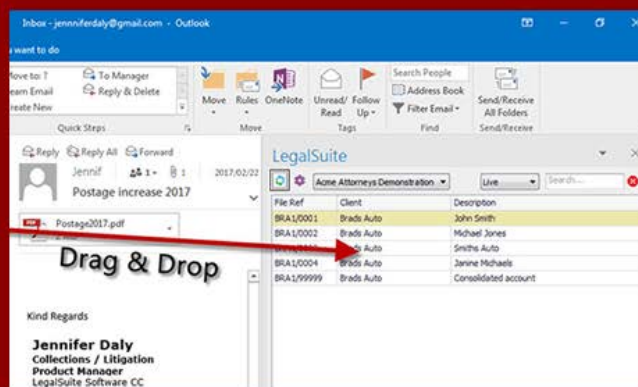


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By  
Simthandile  
Kholelwa  
Myemane

# Keep your brand – appoint a registered and credible auditor

**R**ule 54.20 of the Rules as per ss 95(1), 95(3) and 109(2) of the Legal Practice Act 28 of 2014 (the Rules) requires each legal practice to appoint an auditor to discharge the duties assigned to the auditor in terms of the Rules. The Rules further require that the auditor produces a report to be submitted to the Council at specified intervals.

## Who is the accountant?

AccountingTools defines an ‘accountant’ as a ‘person who records business transactions on behalf of an organisation, reports on company performance to management, and issues financial statements’ (www.accountingtools.com, accessed 12-2-2021). This person is generally employed by the legal practice or the service is outsourced to an entity that provides the service. Effectively, this person is accountable to the legal practitioner.

Both the accountant and the auditor fall within the accountancy profession, but their roles may differ. There is often confusion out there among some of the newer legal practitioners who cannot differentiate between an accountant who prepares the books and an auditor who examines the books, and the appointment of the auditor. This article will clarify this confusion, but mostly seeks to communicate the importance of appointing a registered and credible auditor.

## An auditor

AccountingTools defines an ‘auditor’ as an ‘individual who examines the accuracy of recorded business transactions. Auditors are needed in order to verify that processes are functioning as planned, and that the financial statements produced by an organisation fairly reflect its operational and financial results’ (www.accountingtools.com, accessed 12-2-2021). The auditor, while appointed by the legal practice, is not accountable to the legal practitioner but to the authority that relies on the report produced by the auditor, the Legal Practice Council (LPC) in the case of a legal practice.

From the foregoing definitions, it becomes apparent that the accountant records the business transactions, and the auditor examines the recorded business transactions, meaning they have different roles. With this understanding, the two functions should not be performed by the same person or by persons from the same entity, unless the entity can prove that a Chinese Wall (‘a virtual barrier intended to block the exchange of information between departments if it might result in business activities that are ethically or legally questionable’ (www.investopedia.com, accessed 12-2-2021)) has been built. It is often not easy to prove Chinese Walls convincingly.

## Regulatory regime for auditors

Auditors in South Africa (SA) are registered with and regulated by the Independent Regulatory Board for Auditors (IRBA), which is a statutory body for accountants and auditors in SA. The IRBA, among others, develops and maintains audit-

ing and ethics standards that are internationally comparable. When appointing an auditor for purposes of fulfilling the requirements of r 54.20 it is important to seek the services of a credible auditor registered with IRBA. There are two types of auditors registered with IRBA, namely assurance providers and non-assurance providers. Auditors that provide assurance services reflect an assurance status of ‘Assurance’ and can be confirmed on IRBA’s website [www.irba.co.za](http://www.irba.co.za) or directly with the IRBA. The LPC accepts reports issued by an auditor with an ‘Assurance’ status.

## Code of Professional Conduct for Registered Auditors

The IRBA, as already indicated in the foregoing paragraphs, develops, and maintains auditing and ethics standards for registered auditors. The IRBA developed a Code of Professional Conduct for Registered Auditors (the Code), which a registered auditor is expected to always observe.

One of the major expectations of a registered auditor is that they remain independent in the performance of their duties. The Code identifies independence at two levels:

- ‘Independence of mind’ – ‘the state of mind that permits the expression of a conclusion without being affected by influences that compromise professional judgment, thereby allowing an individual to act with integrity, and exercise objectivity and professional scepticism’.
- ‘Independence in appearance’ – ‘the avoidance of facts and circumstances that are so significant that a reasonable and informed third party would be likely to conclude’, weighing all the specific facts and circumstances, that a firm’s, or a member of the audit or assurance team’s integrity, objectivity or professional scepticism has been compromised.

In terms of the Code, there are fundamental principles, which all registered auditors will have to comply with:

Fundamental principle	Meaning
<b>Integrity</b>	To be straightforward and honest in all professional and business relationships.
<b>Objectivity</b>	To not allow bias, conflict of interest or undue influence of others to override professional or business judgments.
<b>Professional competence and due care</b>	To maintain professional knowledge and skill at the level required to ensure that a client receives competent professional services based on current developments in practice, legislation and techniques and Acts diligently and in accordance with applicable technical and professional standards.



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Fundamental principle	Meaning
<b>Confidentiality</b>	To respect the confidentiality of information acquired as a result of professional and business relationships and, therefore, does not disclose any such information to third parties without proper and specific authority, unless there is a legal or professional right or duty to disclose, nor use the information for the personal advantage of the registered auditor or third parties.
<b>Professional behaviour</b>	To comply with relevant laws and regulations and avoid any action that discredits the profession.

All of the five fundamental principles and the independence of the auditor are crucial in determining the credibility of the auditor. If one considers the meaning given to 'objectivity' as a fundamental principle, one should be cognisant that lack of objectivity can be 'actual' or 'perceived' and both should be avoided.

### The impact of the Code on legal practices

The LPC places reliance on the reports of the auditors. As part of the criteria that the LPC uses to issue Fidelity Fund Certificates (FFC) to legal practitioners, is the presence of an approved audit report. More often than not, audit reports that are unqualified by the auditors, clean audit reports, are approved by the LPC. The impact that the Code has on the legal practitioner is that should the registered auditor be found not to have been independent or not to have complied with any of the fundamental principles, the auditor may be investigated. If on investigation the auditor is found guilty of misconduct, the report issued by that auditor to the Council may be nullified. The Council may, on nullification of the report, appoint its own inspector to conduct an inspection at the legal practice. It should also be noted that the LPC may refuse to accept an audit report issued by an auditor that the LPC does not approve of. Non-approval of an auditor by the LPC may be subject to various reasons, including the history of the reports issued by that auditor.

The Legal Practitioners' Fidelity Fund (the Fund) on the other hand, has developed a Legal Practitioner's Risk Management Framework by which the Fund monitors information coming through in respect of the legal practitioners and legal practices. This information is gathered to identify potential exposure of the Fund to increased theft claims. Information coming through in respect of audit reports of the legal practices submitted to the LPC forms part of the Fund's analysis. Therefore, should the Fund receive information related to nullified audit reports of a legal practice, the Board of the Fund may, through its vested powers and functions in terms of s 63(1)(e) of the Legal Practice Act, authorise an inspection of the legal practice affected. Readers are encouraged to read this article together with Simthandile Kholelwa Myemane 'The increased importance of maintaining proper and accurate trust accounting records' 2020 (July) DR 6.

### Who should appoint a registered auditor?

The legal practitioner/s of a legal practice should appoint a registered auditor after performing due diligence on the sought auditor. The legal practice, on appointment of a registered auditor, should inform the LPC of the appointed auditor. We have noted instances where legal practitioners get advice from their bookkeepers or accountants who write up the books of the legal practice on the auditor to appoint. Should the le-

gal practice appoint an auditor recommended by a bookkeeper or accountant, the legal practice inevitably allows a situation where objectivity of the auditor may be impaired or perceived to be impaired.

There is also a risk that the legal practice opens itself to the possibility of theft being concealed. If the bookkeeper or accountant and auditor have some relations with one another, the auditor may conceal the wrong doings of the bookkeeper or accountant. When this happens, the legal practitioner/s may be unaware of any wrong doings of the bookkeeper or accountant and the wrong doings may take long to be uncovered, landing the legal practice in trouble with the regulator, the Fund, and possibly other legal authorities.

While legal practitioners should appoint the auditors without the influence of bookkeepers or accountants in the employ of the legal practice, legal practitioners themselves should not have any prior existing relations with the auditor appointed. This too subjects the auditor to perceived lack of objectivity and independence.

#### • Scenario

A new legal practice appoints SKM Accountants and Auditors Inc as their auditor of record. The director at the auditing firm is the customary wife to the accountant of the legal practice, not using the husband's surname, and this information was never disclosed to the legal practice. In pursuit of bringing business to the wife's company, the accountant recommended to the legal practitioners of the legal practice the appointment of the audit firm. The legal practitioners, having failed to do a proper due diligence on the auditing firm, went with the recommendation of the accountant and appointed the auditing firm.

For five years in a row the legal practice received unqualified audit reports, resulting in the legal practitioners receiving their FFCs. The professional relationship of the accountant and the legal practitioners soured over time to a point that the accountant was dismissed and replaced with another accountant. The new accountant on assuming the duties at the legal practice, noticed some creative accounting in the trust accounting records that persisted over the past three years. The accountant brought her discovery to the attention of the legal practitioners. By this time, some clients of the legal practice

had started calling the legal practitioners with complaints and others lodged formal complaints with the LPC against the legal practice. The LPC launched an investigation into the trust accounts of the legal practice, and the investigation revealed that the previous accountant and the auditor were related, which relationship is perceived to have compromised the independence and objectivity of the auditor. In the absence of the clients' funds in the trust bank account of the legal practice, the LPC advised the complainants to lodge claims with the Fund. The Fund admitted and paid the claims and recovered the funds from the legal practitioners of the legal practice. From the foregoing scenario, it is clear that the legal practitioners did not misappropriate the trust funds themselves but were misled into believing that everything was above board. Their failure to do a proper due diligence on the auditor, while relying on the report of the auditor, cost them their reputation with the public, the LPC and the Fund.

#### Conclusion

In conclusion, legal practitioners should realise that the appointment of a credible auditor is critical to the survival or collapse of the legal practice. A proper understanding of the role and expectations on the auditor and a proper due diligence on the auditor are crucial for a legal practice. Not every auditor out there has the best interest of the legal practice, third parties relying on the report of the auditor and the public at heart. These interests should always be in balance.

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By  
Rachel  
Jiyana

## Mozambique, Cabo Delgado insurgency – what does this mean for foreign investors and international lenders who have vested interests?

**M**ozambique with its huge mineral deposits has been the center of attention, especially for foreign investors who have an interest in investing in the African continent for the exploration and exploitation of natural gas. The largest private multinational investors, as well as commercial banks have funded the biggest natural gas projects situated in Mozambique. However, in the past three years and four months,

Mozambique and particularly, the Cabo Delgado Province, has experienced ongoing insurgency, which is said to be a conflict between the Islamist militants who have been attempting to form an Islamic state in the Province and the Mozambican security forces. It is unfortunate that the civilians have been caught in the cross fire and have been the main targets of attacks by Islamist militants. This conflict has claimed well over 2 000 lives and more than 500 000 people

have been forced to flee from their homes. While there are discussions between the Government of Mozambique and the European Union on strengthening the country's security, the natural gas projects have been affected by what is viewed as terrorism or war and civil disturbance.

One may ask, where do the political unrests and disturbances of the natural gas projects leave investors and lenders who have vested interests?

Before investors and lenders make a financial decision on funding such projects, extensive due diligence must be conducted. Project risk analysis is the most crucial exercise done by lenders and investors when considering whether to provide financing, especially for projects of this nature (oil and gas related). The financing process involves significant levels of scrutiny by the lenders and investors into the project risks and impact on cash flows (as well as projected returns). Typically, and depending on the jurisdiction where the project is situated, a due diligence in country risk will also be considered and this includes the credit rating of the country, its stability and certainty of the local laws and policies and the political risk exposure, which relates to the political and economic environment within which the project is situated and operated (ie, expropriation, war and civil disturbance, terrorism and sabotage). It is crucial for lenders and investors to understand the legislative framework of the country that is hosting the project, importantly, whether the local laws recognise and protect foreign investors from political risks.

Of course, in mitigating these risks and in order to make the project more attractive for investors and lenders to fund, the project sponsors (being the developers and equity injectors of the project) would have to demonstrate the measures put in place in order to miti-

gate, among other risks, political risks. In this instance (the Cabo Delgado insurgency), sponsors have tried to strengthen security but this is not the only measure that gives lenders comfort.

Some of the other comforts that are offered to lenders and investors as a means of mitigating political risk exposure is political risk insurance (PRI) and commercial risk covers, which are normally provided by export credit agencies (ECAs). Most jurisdictions have a government sponsored ECAs to support or back the export of capital goods and services. The commercial banks ordinarily structure cost-effective financing packaging against ECA covers. The insurgency can be viewed as a politically related issue (civil disturbance or terrorism), which consequently may suspend the operation of the project. The suspension of the project due to a political event is one of the triggers under the ECA or PRI policy of insurance (the Policy), which is classified as a 'cause of loss event' and allows the lenders or the insured to claim under the Policy. The premium towards this PRI cover is often financed by the sponsors/borrowers for the benefit of the lenders. Although the lenders may have this PRI cover as an added cushion to their security package, often sponsors/borrowers will negotiate triggers under the loan agreements and policy document to allow the salvaging of the project before lenders can call a claim under the policy and/or accelerate

the debt in terms of the loan agreements, basically 'bringing the house down'. For example, if the political risk event has occurred but the lender's debt is still being serviced by the borrower; and the loan provisions have not been breached by the borrower; or the project is still operating (even if it is not at full capacity), it will be difficult for lenders to justify a claim. However, it is not as easy as it may sound. Over and above the steps that need to be followed in terms of the underlying agreements and depending on the type of risk that is covered, certain risks do not trigger immediate payment under the Policy. There are waiting periods that allow the ECAs to fully assess the claim and cause of loss, and also obtain internal board approvals before paying out a claim. Such waiting periods differ and may range between 90 to 120 days or more depending on the payment processes governing each ECA, the size of the claim and other factors (see [www.ecic.co.za](http://www.ecic.co.za), accessed 13-3-2021). As such, lenders will not be able to claim as and when they please. It is important for the lender to fully appreciate the processes of the ECA and the perils covered by that Policy from the onset.

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By  
Louise  
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## Section 40 of the Children's Act: Parenthood by syringe or intention?

**A** couple in a permanent life partnership have launched an application challenging the constitutionality of s 40 of the Children's Act 38 of 2005, as a result of their gamete donor seeking parental rights.

Section 40, which governs children conceived through artificial fertilisation, does not automatically confer parental rights on a permanent life partner to the mother.

The couple seeks to change a section of the Act to the following in order to include permanent life partners –

'any child born of that spouse or per-

manent life partner as a result of such artificial fertilisation must for all purposes be regarded to be the child of those spouses or permanent life partners'.

One could speculate on which section of the Act the gamete donor is relying to claim parental rights. It would seem that he would need to apply under s 23 for care and contact and s 24 for guardianship. These two sections allow non-parents to apply for parental rights. He could not apply under s 21, due to the fact that artificial fertilisation was used.

If conception had been achieved without the use of a syringe he could apply under s 21 for recognition of automati-

cally acquired parenthood, regardless of a sperm donor agreement.

### Parenthood by clinic

If the couple used a clinic for artificial fertilisation, they would probably be able to prove that the conception was, as a result of, artificial fertilisation. However, if they had not used a clinic and there is no proof of artificial fertilisation, the gamete donor could commit perjury and be successful in a s 21 application.

Such legal disputes are probably more likely when a clinic has not been used. It is highly probable that a lay person would be unaware that a sperm donor can apply



for equal parental rights under ss 21, 23, and 24.

However, one does not want to force would-be parents to spend money unnecessarily, or to conceive in a clinical setting, which may also limit their chance of falling pregnant. Many may not be happy to use a syringe or clinical introduction of gametes for various reasons. They may also not be happy with having to use frozen or 'washed' gametes ([www.vitalab.com](http://www.vitalab.com), accessed 12-3-2021). Many would be unnecessarily financially burdened by using a clinic or may be forced to forego parenthood altogether. Restrictions on the mode of conception exacerbate social inequalities and may have negative effects on the child. For example, take a heterosexual couple who wish to conceive with their own gametes, using a syringe at home, for reasons such as an HIV positive partner. Legally the biological father would not automatically acquire parental rights. The same would apply should two people who are not romantically involved decide to have a child together, using a syringe. This is because ss 20, 21, and 40 are mutually exclusive.

## Preconception parental contract

The order sought will still fall short of creating a constitutional s 40. I would propose in place the following:

40. Rights of child conceived with a preconception parental contract:

(1) Subject to s 296, the intended parents who are party to a preconception parental contract automatically acquire full parental rights and responsibilities.

(2) Subject to s 296, no right, responsibility, duty or obligation arises between a child born of a woman with a preconception parental contract and any person whose gamete has, or gametes have been used or the blood relations of that person, unless that person was an intended parent.

This is similar to Quebec's legislated 'parental project' synonymous with the term 'collaborative reproduction' but encompasses instances where no third-party gametes were used. I prefer the term 'intended parent' as opposed to

the oft-used 'commissioning parent' (RF Storror 'Parenthood by pure intention: Assisted reproduction and the functional approach to parentage' (2002) 53 *Hastings Law Journal* 597).

## Parenthood by intention

Currently, within the context of artificial fertilisation, regardless of whether a married couple uses their own gametes or a third party's, they are automatically granted parental rights, based on their preconception intention to parent.

The Act's definition of 'parent' currently excludes 'any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation'.

This sentence confirms that the intention to parent is the factor that assigns legal parenthood, rather than the biological connection.

It would make sense that the same treatment be extended to any other person that articulated their intention to parent/not parent prior to attempted conception. The same should apply where no syringe is used. To do so otherwise would be unfair discrimination based on the mode of conception, birth or social origin. This notion has previously been confirmed in *J and Another v Director-General, Department of Home Affairs and Others* 2003 (5) BCLR 463 (CC).

Based on the Children's Act excluding gamete donors from the definition of 'parent', it would seem apparent that it did not intend for s 21 to be applied to sperm donors, although not explicitly stated in s 21.

Intention is a good signal of legal parenthood, as it is a marker of responsibility for the child that exists even prior to conception.

Storror (*op cit*) cites two thought-leaders on intention, namely Marjorie Maguire Shultz and Professor John Lawrence Hill. Shultz speaks of 'the legitimacy of individual efforts to project intentions ... into the future' and 'procreation and sexual-interpersonal intimacy are no longer tied together'.

Prof Hill clarifies '[w]hat is essential to parenthood is not the biological tie be-

tween parent and child but the preconception intention to have a child, accompanied by the undertaking of whatever action is necessary to bring a child into the world'.

## Known donors, the 'limited parent' and grey areas

One aspect that will need to be addressed in future, is the role of the 'limited parent' (Susan B Boyd 'Gendering legal parenthood: Bio-genetic ties, intentionality and responsibility' (2007) 25 *Windsor Yearbook of Access to Justice* 63). Just as adoptive parents may enter into an agreement with a biological parent, some intended parents may wish for the gamete provider to have a role in the child's life.

Regardless of whether all these changes are made to the Act, a sperm donor could still apply as an interested party through ss 23 and 24, which are problematic because of their open ended and vague nature. But these suggested amendments mean a gamete donor, that is not an intended parent, could no longer automatically acquire parental rights and responsibilities.

Ultimately, there are always factors that will supersede even the best written laws, namely -

- an incorrect interpretation of the law by both layman, legal practitioners, and judges, both intentionally or not;
- corrupt legal practitioners and court staff; or
- perjury committed by parties.

In practice, the judiciary exhibits a strong bias in favour of awarding sperm donors' parental rights. The right to know one's biological origins cannot be expected to be realised if the law does not provide certainty to those who use known donors that their choice of family structure will be respected and not undermined.

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By  
Andile  
Mcineka



## Incorrect legal standard applied? Zuma and the Zondo Commission

Certain values in the Constitution were designated as the foundation of our democracy. Such values must then be observed scrupulously because if these values are not observed and their precepts not carried out conscientiously, this would be a recipe for a constitutional crisis of great magnitude in South Africa (SA). This brings the spotlight on the principle of judicial independence, which is fundamental to our democracy and features quite prominently in many international legal instruments. It is also protected and guaranteed by the Constitution, which is why at the adoption of the Constitution, following the thorny issues emanating from Apartheid, the Constitution conceived of a way to give a voice to the poor and marginalised, a beacon of hope, which seeks to heal the divisions of the Apartheid past and seeks to establish a society that is based on democratic values, social justice and human rights.

The Constitutional Court (CC) has over the years, since the attainment of the democratic dispensation, placed the independence and impartiality of the judiciary at the centre of the South African constitutional system. This independence of the judiciary is such that the judiciary should enforce the law impartially and that it should function independently without fear, favour or prejudice. Ironically, it is that constitutional

mandate that has left the courts with the short end of the stick. This is mainly due to the role of the courts, which at times entails thwarting or declaring unconstitutional legislative and executive decisions. As such, the judiciary is denounced for supposedly fashioning their judgments with the objective of advancing or colluding with other entrenched interests. As a result, SA is witnessing a resurgence of the legal and political constitutionalism controversy.

That the courts became embroiled in such situations should not be surprising. Judicial involvement was a mere confirmation of the natural order of things; people fall back on the judiciary when disputes are not resolved, just as they rely on the electoral system to get rid of politicians. The court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) at para 104 held as follows:

‘The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to “administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law”. To this end they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the judi-

cary would be undermined, and in turn, the Constitution itself’.

Undoubtedly, the establishment of the CC was of great significance for SA, considering the history of the country. What this court has done was to extend its jurisdiction to decide also on non-constitutional matters that raise arguable points of the law of general application. It did not come as a surprise in *Economic Freedom Fighters and Others (Democratic Alliance as Intervening Party) v Speaker of the National Assembly and Another* 2018 (3) BCLR 259 (CC), wherein the president failed to implement the Public Protector’s report dated 19 March 2014 and the court found that his conduct and that of parliament were unconstitutional, the court found that the National Assembly failed to put in place mechanisms and processes to hold the president accountable for failing to implement the Public Protector’s remedial action, and issued an order compelling the National Assembly to convene a committee to investigate whether former President Jacob Zuma was guilty of any impeachable conduct under s 89 of the Constitution.

The *Black Sash Trust v Minister of Social Development and Others (Freedom under Law NPC as Intervening Party and Corruption Watch (NPC) RF and Another as amici curiae)* 2017 (5) BCLR 543 (CC), put a nail in the coffin in suggesting that there are untenable situations that the courts find themselves in having to in-

trude into the domain of Parliament. In this case the court was called on to intervene when the Department of Social Development failed to terminate a contract with Cash Paymaster Services (Pty) Ltd, risking millions of South Africans who were in receipt of child support grants, care dependency grants, foster child grants, disability grants, older person grants, war veteran grants and grants-in-aid, in terms of s 4 of the Social Assistance Act 13 of 2004. Indeed, the court itself conceded that this order pushes at the limits of its exercise of a just and equitable remedial power.

On 28 January 2021, the CC handed down its judgment in the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (the Commission) to compel the former President Zuma to appear, and give testimony, before it in the case of the *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* (CC) (unreported case no CCT 295/20, 28-1-2021) (Jafta J (Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring)).

Dan Mafora ('An omnipresent jurisdiction - The problem with direct access' (<https://danmafora.substack.com>, accessed 14-4-2021)) states: 'It held that [former President] Zuma was compelled to comply with the summons issued by the Commission and appear before it on a date it will determine; that he will not have the right to remain silent and, therefore, not answer questions; and that he will still retain his privilege against self-incrimination, but that such privilege would not be a blanket privilege and would have to be invoked against every question an answer to which might incriminate him, if he could show it.'

The constitutional crisis manifests itself in the manner in which the court dealt with direct access. In determining whether direct access should be granted, the CC exercises a discretionary power. Like all discretions, the power must be exercised judicially. What this means is that the court must not misdirect itself in relation to the relevant facts and the applicable law. Should an incorrect legal standard be applied, it cannot be said that the discretion was properly exercised. Section 167(6) of the Constitution empowers litigants to bring cases directly to the CC if it is in the interests of justice to do so and leave is granted.

The Commission's mainstay for seeking direct access was based on urgency. The Commission's lifespan is to come to an end on 31 March 2021 and it argued that very little time remains for it to complete hearings and compile a report. It concluded by submitting that in

these circumstances, it is urgent that the CC makes a final determination of the issues because if it were to approach the High Court, the appeal process, which may ensue would defeat the objective of compelling former President Zuma to testify before the Commission. The Commission argued that the normal procedures are not appropriate in view of the impending termination of its existence. Quite interestingly, the bedrock of the Commission's argument was that anything other than direct access to the CC would result in its tenure coming to an end without hearing former President Zuma's testimony.

It is discernible that the Commission was the architect of its own misfortune. However, the court held that the Commission's maladroitness described, was not considerate of the interests of justice issue. It held that this factor must be weighed against other factors, including those that are in favour of granting direct access. These include enabling the Commission to conduct a proper investigation of matters it is tasked to determine; the fact that the matter is not opposed and that it bears reasonable prospects of success. It went further to state that, the public, whose interest would be frustrated if direct access was refused.

Mafora (*op cit*) notes '[t]he court's reasoning on the direct access point seems to be this:

- (1) the Commission must conduct a proper investigation;
- (2) it has not been able to do so because of its own conduct;
- (3) in order to rectify that, the court has to grant direct access;
- (4) therefore, direct access is granted.'

Mafora (*op cit*) further states that '[t]he court rarely grants direct access applications. Where it does so, guided by the interests of justice standard, exceptional circumstances must exist that justify a departure from its regular procedure. Here, it provides none. Indeed, the court stresses the prejudice that would be suffered by "the public interest" were direct access to be denied. But this is not a principled ground on which to assume jurisdiction.'

Mafora (*op cit*) argues that, '[d]irect access serves as a way of by-passing the normal judicial process, skipping the High Court and Supreme Court of Appeal [SCA] and making the court sit as a court of first and last instance. That is fine, in constitutional matters, where the court already has jurisdiction. But what about when jurisdiction still has to be determined? In this judgment, the court does not even bother with this analysis. It departs, essentially, from the assumption that it already has jurisdiction. The question at the heart of this matter is simply a statutory one: Does the Commissions Act [8 of 1947] oblige a wit-

ness, when summonsed, to appear and give evidence before it? It is a question that the High Court and [SCA] could answer, barring the existence of any exceptional circumstances. So on what basis does the court assume jurisdiction?'

The court's granting of direct access was no more than what was once described by Mogoeng CJ as a 'textbook case of judicial overreach – a constitutionally impermissible intrusion by the judiciary into the exclusive domain of Parliament. The extraordinary nature and gravity of this assertion demands that substance be provided to undergird it, particularly because the matter is polycentric in nature and somewhat controversial'.

The situation in which the Commission found itself would not have arisen if it had timeously invoked its powers of compulsion of former President Zuma. It is not true that it was only during former President Zuma's walk-out in November 2020 that the Commission realised that intervention by a court was necessary. The red lights started flashing in July 2019 when former President Zuma unilaterally decided to withdraw from further attendance. Later in September 2020, having berated the Chairperson for not consulting his legal practitioners, he made it plain that he will not participate in the hearings unless the Chairperson recused himself. This was a build-up to what happened in November 2020.

Indeed, the allegations investigated by the Commission are extremely serious. If established, they would constitute a huge threat to our nascent and fledgling democracy. However, the court's granting of direct access has seen it shoot itself in the foot, sadly. In granting direct access in this particular case, it has in actual fact thwarted its own rules with the objective of advancing or colluding with other entrenched interests which are somehow politicised.

As stated earlier, like all discretions, the power must be exercised judicially. In granting this undeserving direct access to the Commission whereas this matter could have been disposed of by the High Court or the SCA, rewarding it for its self-created misfortune, the court has actually misdirected itself in relation to the relevant facts and the applicable law by virtue of an incorrect legal standard being applied. Accordingly, it cannot be said that the discretion was properly exercised, resulting in a constitutional crisis of great magnitude for our democratic dispensation. This then in turn jeopardises the institutional security of the judiciary.

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Picture source: Gallo Images/Getty

## Should an unrepresented accused enter into plea and sentence agreements?



By  
Nomonde  
Msimanga

A plea is a statement by an accused person tendered in court in response to a charge instituted by the prosecuting authority. Section 105A of the Criminal Procedure Act 51 of 1977 relating to plea and sentence agreements was first statutorily introduced in South Africa (SA) in 2001 – the procedure was informal prior to 2001. Section 105A permits an accused person who has legal representation to enter into a plea – a

plea of guilty, coupled with a sentence agreement. Section 105A(1) prohibits an unrepresented accused from entering into a plea and sentence agreement with the prosecuting authority. In this article I will explore the constitutional impediments contained in s 105A of the Criminal Procedure Act mainly with reference to self-represented accused.

### The introduction of s 105A in our criminal system

The South African Law Reform Commission Act 19 of 1973 established a report on the *Simplification of Criminal Procedure: Sentence Agreements* in 2002, which recommended the introduction of s 106A on plea discussions and plea agreements. The report did not require an accused to be legally represented. In subs 1 of the first draft, the prosecutor and the accused or their legal representative were allowed to hold discussions with a view of reaching an agreement in respect of plea proceedings and the disposal of the case. The Commission clearly was of the opinion that the unrepresented accused should be given the opportunity to participate in plea agreements and negotiations with the state.

In November 2001, in *Hansards on Session III of the First Parliament*, the then Minister of Justice and Constitutional Development, provided reasons that addressed the exclusion of unrepresented accused from plea and sentence agreements. Among those reasons was that the exclusion saved the unrepresented accused from the imbalance in the negotiating process between the accused and the prosecutor (A Botman 'An evaluation of the benefit of plea and sentence agreements to an unrepresented accused' (LLM thesis, University of Western Cape, 2016) at 40), and that the exclusion was used to protect the integrity of plea and sentence agreements and to avoid unnecessary litigation (Botman (*op cit*) at 40). To a certain extent, this was a correct analysis. An unrepresented accused faces more danger if legally unrepresented, but without testing the law first and setting necessary guidelines it was simply premature to perceive the outcome.

### Essential features of s 105A of the Criminal Procedure Act

Firstly, any plea entered into by an accused should be tendered freely and voluntarily (see s 105A(6)(a)(ii)). In *Brady*

v US 397 US 742 (1970), it was held on p 397 that 'the plea is more than an admission of past conduct; it is the defendant's [accused's] consent that judgment of conviction may be entered without a trial – a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.'

The following are the general features that make up s 105A:

- Section 105A(1) of the Criminal Procedure Act encapsulates the functions of a prosecutor during s 105A proceedings, providing that a prosecutor authorised in writing by the National Director of Public Prosecutions, and an accused who is legally represented may before the accused pleads to the charge brought against them, negotiate and enter into an agreement with the prosecuting authority.
- Section 105A(2) states that an accused must be informed of their rights during the proceedings and further lists other formalities to be adhered to.
- Section 105A(3) prohibits judicial participation during s 105A negotiations.
- Section 105A(4) and (5) prescribes compliance with subs (1)(b)(i) and (iii), which states that a 'prosecutor may enter into an agreement ... after consultation with the person charged with the investigation of the case' and 'after affording the complainant or [their] representative ... the opportunity to make representations to the prosecutor'.
- Section 105A(6) stipulates an inquiry the court needs to conduct before recording a s 105A plea of not guilty.
- Section 105A(7) to (9) relates to the adjudication and consideration of the sentence agreement by the court.
- Section 105A(10) contemplates the nullity of the s 105A agreement and the commencement of a trial *de novo*.

### Constitutional considerations – the right to self-representation

Essentially plea and sentence agreements are used to avoid lengthy criminal trials and uncertain outcomes. However, the procedure can deeply affect constitutionally guaranteed rights of an unrepresented accused.

### The right to self-representation

According to s 105A only a legally represented accused person may enter into a plea and sentence agreement. The section explicitly excludes accused persons who may willingly choose to represent themselves.

The constitutionality of self-representation of an accused person was first introduced in the United States in the case of *Faretta v California* 422 US 806 (1975), whereby it was stated that a defendant in a state criminal trial has an independent constitutional right of self-representation and that they may proceed to defend themselves without counsel when they voluntarily and intelligently elect to do so. In this case, the courts erred in forcing an accused against his will to accept a state-appointed public defender and in denying his request to conduct his own defence.

Similarly, in the case of *S v Wildridge* 2019 (1) SACR 474 (ECG), the appellant was convicted of negligent driving. He was sentenced to a fine of R 2 000 or six months' imprisonment suspended for four years. He appealed against his conviction on the basis that the trial had been unfair by representing himself. A feature that rendered the trial unfair was the hostility and impatience displayed by the magistrate towards the appellant. When the appellant in the case was cross-examined by the prosecutor, the magistrate allowed the prosecutor to interrupt the appellant repeatedly so that he was prevented from replying to questions properly and fully. Essentially, what rendered the trial unfair was the magistrate's unwillingness to assist the appellant. Plasket J in *Wildridge* at para 6 with reference to *Rex v Hepworth* 1928 AD 265 at 277, held that 'a presiding officer is not a mere umpire. He or she is "an administrator of justice" whose duty is not only "to direct and control proceedings according to recognised rules of procedure but to see that justice is done".'

So, is self-representation in s 105A proceedings with the aid of a presiding officer even possible? There are dangers to it. Procedural rights of the accused are typically better protected when the prosecution has a legally educated counterpart (M Kerscher 'Plea bargaining in South Africa and Germany' (LLM thesis, Stellenbosch University, 2013) at 114). This eliminates the danger of procedural abuse towards an uninformed accused who knows nothing of the process and as a result the abuse is diminished. However, the provision seems quite indecisive since the unrepresented accused is able to plead guilty in terms of s 112 of the Criminal Procedure Act and can also be sentenced without the assistance of a representative (*S v Wessels* (FB) (unreported case no 62/2019, 23-5-2019) (Moeng AJ) Loubser J concurring)).

To aid this the court can make a similar inquiry to that used in *Faretta v California* – a judge must allow self-representation if a defendant is competent to understand and participate in the court

proceedings. To determine competency, the judge often weighs factors, such as the –

- defendant's age;
- defendant's level of education; and
- seriousness of the crime with which the defendant is charged.

Judicial approval of a s 105A agreement is extensive enough for an unrepresented accused to participate in s 105A proceedings – taking into account s 105A(6)(a) and (b) (the judicial inquiry). Once the contents of the agreement have been disclosed, the court must question the accused to ascertain whether they confirm the terms of the agreement, as well as the admissions made by them in the agreement (s 105A(6)(a)(i)). An inquiry by the court into whether an accused person understands the contents of the agreement can aid an unrepresented accused in several ways. Firstly, it can iron out any misinformation the accused might have been fed and secondly, it can clearly outline the charges against the accused present in a way that they can comprehend with sufficient clarity.

The court must also question the accused to ascertain whether the agreement was entered into freely and voluntarily, in sound and sober senses and without having been unduly influenced (s 105A (6)(a)(ii)). In *S v Taylor* 2006 (1) SACR 51 (C) at para 19 Yekiso J noted that the court, 'could go further to confirm with the accused that the latter's signature on the agreement and that of his legal representative ... and also confirm with the accused the sentence proposed and any condition attached thereto'.

The aforementioned considerations should be revisited as constitutional provisions reign over the system of criminal procedure. These provisions are the most important sources of criminal procedure rules and thus have to be obeyed (Geldenhuys, Joubert, Swanepoel, Terblanche and Van der Merwe 11ed *Criminal Procedure Handbook* (Cape Town: Juta 2014) at 25).

### Conclusion

In any system of law, it is imperative to apply constitutional values and principles. This adherence will ensure more South Africans benefit lawfully from s 105A proceedings and that it is not only left for the selected few.

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By Sharon  
Phumzile  
Msiza

## A turning of the tide: Exploring the impact of pollution in the shipping industry

Over the past few years, global warming has become an increasingly debated topic and pollution has contributed quite substantially to that global problem. It is almost easy to understand how a burning bush emitting carbon dioxide causes pollution, which contributes to global warming and exactly how the earth suffers from that, but how does shipping and trade contribute to pollution, and exactly how does the marine environment suffer from that pollution?

Surely sailing from one country to another by ship barely causes any threat to the marine environment – right? Well, wrong. There are quite a number of activities within the maritime industry, which cause pollution and sometimes members of society are not well informed on how these activities contribute to pollution. As a result of my recently developed interest in the marine environment, I have decided to discuss and write more about the maritime environment and those pollutants threatening marine life and ecosystems. However, all those pollutants threatening the maritime industry are heavily regulated, and in order to ensure that these incidents are prevented, the maritime community relies heavily on the

application of international conventions developed and published by the International Maritime Organisation (IMO), and the compliance by member states therewith.

In this article, I will discuss three pollutants in the maritime/shipping industry, namely, air pollution, ballast water and oil spills.

### Air pollution

Air pollution in the industry is mostly caused by ships that are powered by diesel engines burning high sulphur content fuel oil, which emits sulphur oxide. This is arguably dangerous to the environment especially when it comes to ships that are involved in long distance voyages and are required to be at sea for more than a week. The *International Convention for the Prevention of Pollution from Ships* (MARPOL) is an international instrument used to regulate the spread of pollution from ships. Annexure VI of MARPOL stipulates that the sulphur content of any fuel oil used on board ships must not exceed 0,5% (mass by mass) as from 1 January 2020, with an exception for ships already using 'equivalent' compliance mechanisms. The IMO believes that the promulgation of this regulation will 'significantly reduce the amount of sulphur oxide ema-

nating from ships and should have major health and environmental benefits for the world, particularly for populations living close to ports and coasts'.

According to *Air Pollution and Climate Secretariat* ('Air pollution from ships' [www.airclim.org](http://www.airclim.org), accessed 4-3-2021), approximately 50 000 people in Europe are killed every year from smokestack emissions from international shipping and that amounts to an annual cost to society of more than €58 billion; while other people do not die, they end up suffering from lung diseases and respiratory problems, which affects their quality of life. This may be one of the reasons why the IMO believes that the introduction of the above regulation will have major health benefits. Although, at the time of writing this article, there has not been a similar study conducted in South Africa, one can assume that the danger of the loss of human life and health complications also exists in our country.

Therefore, it is important that local authorities, as well as ship owners actively participate in conversations about the likelihood of adopting more cost effective and efficient methods of eradicating air pollution in the shipping industry in addition to the reduction of sulphur oxides.



## Ballast water

Ballast water is used to provide stability to a ship during a voyage when the ship is not carrying enough heavy cargo. This water is considered problematic for the preservation of the environment and marine life because it impacts the transfer of water between different ecosystems, which is likely to introduce invasive species produced largely due to expanded trade and traffic volume. The species contained in ballast water are considered alien species when they present danger to the ecosystem where they are discharged. Many alien species are unable to adapt to a new environment and may pose a threat to native plants and animals as they might carry diseases and parasites.

The *International Chamber of Shipping* ('Shipping and World Trade: The World's Major Shipping Flags' [www.ics-shipping.org](http://www.ics-shipping.org), accessed 4-3-2021) states that the international shipping industry is responsible for the carriage of approximately 90% of world's trade and that shipping is the life blood of the global economy. With seaborne trade expanding, this means more ships will be transporting cargo, and thus in need of ballast water. This presents a growing concern on a number of invasive species that will be discharged into the ecosystem with the expansion of seaborne trade. Presently, the emerging concern is not only how to prevent the discharge of alien species, but also how to effectively deal with existing invasions that are dangerous.

Therefore, to regulate this environmental concern, the IMO has published the *International Convention for the Control and Management of Ships' Ballast Water and Sediments*. The Convention aims to prevent the spread of these harmful species from one region to another, by establishing standards and procedures for the management and control of ships' ballast water and sediments. As an intermediate solution, ships are encouraged to exchange ballast water mid-ocean.

However, there are other methods that ship owners can adopt in managing ships' ballast water to prevent the spread of invasive species. Among those, the use of chemicals, which target alien species in ballast tanks before they are discharged to the ocean, is considered as an effective method.

## Oil spills

As mentioned above, most ships are powered by fuel, which may potentially result in oil spills. The maritime community experienced a major oil spill in 2020 in Mauritius when a tanker (*MV Wakashio*) ran aground and resulted in almost 1 000 tonnes of oil being discharged into the ocean causing a major environmental and economic disaster. *The Guardian* ('Mauritius declares environmental emergency after oil spill'

[www.theguardian.com](http://www.theguardian.com), accessed 4-3-2021) reported that *MV Wakashio* struck a coral reef on 25 July 2020 and started spilling oil on 6 August 2020, which subsequently resulted in the Mauritian government declaring a 'state of environmental emergency'. The process of cleaning up the oil spill in this case was intensive and subsequently resulted in the French government providing assistance by sending a military aircraft and a naval boat to assist. France's Minister of Overseas Territories, Sébastien Lecornu, said he was of the opinion that the *MV Wakashio* oil spill clean-up operation would last for approximately ten months, continuing well into 2021.

These kinds of operations are costly and have long lasting ramifications to both the economy and the environment because the longer it takes to clean-up the pollution, the more marine life is exposed to life-threatening substances and the more funds are required. This explains why a United Nations Recovery Fund to the sum of US\$ 2,5 million was launched in support of the clean-up operation in Mauritius.

The IMO has published the *International Convention on Oil Pollution Preparedness, Response and Co-operation* (OPRC), which establishes measures for dealing with marine oil pollution. Although Article 1 of the OPRC mandates all member States to 'undertake, individually or jointly, ... all appropriate measures in accordance with the provisions of this Convention and the Annex thereto to prepare for and respond to an oil pollution incident', there are a number of causes of marine oil spills including, among others, collisions, groundings, sinking and machinery failure, which may not necessarily be easily foreseeable, but with proper compliance to other conventions and regulations that regulate safe navigation of the ship and other precautionary measures necessarily for safety in the marine industry, may easily be preventable.

Although the impact of pollution can be mitigated in some cases, at times it is difficult to completely remove the damage done and unfortunately that might result in some marine species such as animals and plants suffering and or ultimately dying. Therefore, in order to ensure that full compliance is adhered to, governments normally impose penalties for pollution caused by the operation of a ship and one of the first factors to consider is the overall seriousness of the pollution. For example, in the case of an oil spill, the authorities would consider –

- how much oil was spilt;
- how long the spill lasted;
- how it affected the environment; and
- whether or not it will continue to do so.

In a case settled in 2015, Victor Kgo-moeswana notes that 'BP spilled oil in

the Gulf of Mexico in April 2010's Deepwater Horizon incident, it ended up paying \$18.7bn in fines in 2015, while the cost of the accident in penalties, clean-up and others exceeded \$60bn' ('Firm must be held accountable for Mauritius oil spill' [www.iol.co.za](http://www.iol.co.za), accessed 4-3-2021). This goes to show that while penalties are imposed, at times the people responsible end up paying far less than what it actually cost to remedy the damage done by the pollution.

## Prevention

The prevention of pollution aspect requires compliance, while the response aspect requires efficiency. When a ship is involved in an incident which results in pollution, the responsible person has to take the necessary measures to mitigate the impact of the pollution. However, in terms of South African law, should the responsible person not be in a position to do that, the local authorities are required to act swiftly in response thereto. Rule 85(3) of the National Ports Act 12 of 2005 provides that: 'If the person or persons responsible for the pollution or damage to the environment fail to take the necessary measures to prevent, mitigate, combat and clean-up the pollution or damage to the environment, including its associated impacts, the Authority may take the necessary measures. The person or persons who caused the pollution or damage to the environment will be liable for the costs associated with the pollution, damage or degradation to the environment, its associated impacts and any mitigating measures.'

## Conclusion

In conclusion, it is extremely concerning that the shipping industry is considered one of the world's polluting industries reported to contribute between 2 to 3% of the world's total greenhouse gas emissions such as carbon dioxide, which contributes to global warming and extreme weather effects (Kate Whiting 'An expert explains: how the shipping industry can go carbon-free' [www.weforum.org](http://www.weforum.org), accessed 4-3-2021). However, the policy development adopted by the IMO and the maritime community prove to be necessary tools to control and prevent the spread of pollution in the maritime industry, and while more permanent solutions are being discovered, ship owners are encouraged to comply with all the laws, which are promulgated to reduce the spread of pollution within the shipping industry.

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By James  
Dumisani  
Lekhuleni

Picture source: Gallo Images/Getty

## The rescission of divorce orders for purposes of claiming spousal maintenance

**T**he reciprocal duty of support between spouses is one of the invariable consequences of marriage in South African law.

This legal duty operates automatically by operation of law as soon as the marriage is concluded and it cannot be excluded by the parties. The common law reciprocal duty of support between spouses comes to an end on the termination of the marriage, either by death or by divorce (see *Schutte v Schutte* 1986 (1) SA 872 (A)). The duty of support between spouses can be extended by court in terms of s 7 of the Divorce Act 70 of 1979 post-divorce at the dissolution of the marriage (see *Zwiegelaar v Zwiegelaar* 2001 (1) SA 1208 (SCA)). Parties can waive their right to claim spousal maintenance on divorce, but cannot do so when the marriage is concluded (see *ST v CT* 2018 (5) SA 479 (SCA)). An ex-spouse cannot lay a claim for spousal maintenance against a former spouse if an order for spousal maintenance was not made in terms of s 7 when their marriage was dissolved. In recent times, our courts have adopted the approach that in applications for the rescission of divorce orders granted in default, the divorce order should not be rescinded as that may have far reaching consequences to the parties. The courts have expressed

the view that the effect of setting aside a divorce order would in the eyes of the law, automatically result in the parties returning to the state of matrimony and changing their status.

The problem, however, arises where a divorce order was granted in default of a party who seeks to claim spousal maintenance. What compounds the problem even further is that s 7 of the Divorce Act provides that a claim for spousal maintenance can only be granted on divorce. This suggests that where a divorce order was granted in default, an applicant who wants to claim spousal maintenance has to seek a rescission of the whole divorce order in order to claim spousal maintenance as envisaged in s 7 of the Divorce Act. This creates a problem in that the automatic consequences attendant to a marriage in community of property would operate with immediate effect not by choice but by the operation of law if the rescission of the divorce order is granted.

The High Court in *Togo v Molabe and Another* (GP) (unreported case no 29059/14, 26-7-2016) (Wentzel AJ) was faced with a similar situation. This article examines the manner in which the court was constrained in dealing with an application for the rescission of a divorce order, as well as the ancillary or-

ders, which were granted in the absence of the applicant. More importantly, this article examines how the court battled to balance the applicant's right to rescission of the whole divorce order *vis-à-vis* her right to claim spousal maintenance on divorce against the general approach adopted by the courts not to unscramble a divorce order. This article also examines the divergent views expressed by the Western Cape Division of the High Court in Cape Town (WCC) and the Gauteng Local Division of the High Court in Johannesburg on whether or not a claim for maintenance *pendente lite* in terms of r 43 of the Uniform Rules of Court can survive a decree of divorce. It is argued that the approach of the WCC to the effect that pending the finalisation of a divorce action an order in terms of r 43 survives a decree of divorce to the extent that the issues regulated thereby remains unresolved is more expedient and preferable. It will be argued that this authoritative pronouncement should apply to claims for spousal maintenance in cases where the divorce was granted in default and the issues regulated by the divorce order remain unresolved.

### Summary of the facts

In *Togo*, the applicant and the respondent were married in community of prop-

erty. The respondent acting in person issued divorce summons against the applicant in the High Court. The applicant also acting in person defended the matter and sought to file a notice to defend by e-mailing same to the respondent and e-mailing same to the registrar of the court. For some unknown reasons, the applicant's notice of her intention to defend did not find its way into the court file. The respondent ignored the notice to defend forwarded to him by e-mail and proceeded to have the matter enrolled for hearing on an unopposed basis. The presiding judge dealing with the matter finalised the matter on the basis that it was an undefended divorce. The court granted the orders sought by the respondent in the summons.

The order granted by the court made provision for the maintenance of the minor children. The order was silent on the payment of spousal maintenance and of the division of the joint estate. Instead, the court simply ordered that each party would retain their own assets. The applicant brought an application for the rescission of the order and averred that the order for the maintenance of the minor children granted by the divorce court was hopelessly insufficient. The applicant further averred that the respondent proceeded to obtain a decree of divorce and other ancillary relief concerning maintenance and the division of the parties' assets on an unopposed basis full knowing that the applicant intended to oppose the action and had e-mailed a notice of intention to oppose to the respondent and filed same at the court.

The respondent opposed the application and averred that as service of the notice of intention to oppose via e-mail was not proper service in terms of the Uniform Rules of Court, he was entitled to ignore it. He did not believe that he had any duty to draw this fact to the attention of the court. At the time the application for rescission was brought, the plaintiff had remarried. This wife was not joined to the current proceedings.

In considering the application, the court was alive to the fact that the rescission of the divorce order would have far reaching consequences in that it would affect the status of the parties, which was not desirable. The court also noted that this would also have disastrous consequences for the respondent who had since remarried. The court noted that a party may not have two valid civil marriages and the inevitable result would be to void the respondent's marriage to his new wife. The court quoted with approval the decision in *M v M* (GP) (unreported case no 52110/2007, 27-5-2011) (Mngqibisa-Thusi J) in which the court left the status of the parties unchanged and only rescinded the proprietary consequences of the decree of divorce accepting that

the marriage between the parties had irretrievably broken down and that both parties wished to remain divorced.

More importantly, the court in *Togo* stated that the impugned divorce order granted had severely curtailed the applicant's rights to spousal maintenance and division of the joint estate to which she was entitled by virtue of their marriage in community of property. The court stressed the fact that if spousal maintenance is not claimed at the time of the divorce, it is forever forfeited and cannot be claimed at a later stage, even in changed circumstances. To this end, the court warned the applicant that should the court adopt the approach, which was applied in *M v M*, this may have the result that she would continue to forfeit her entitlement to spousal maintenance as this must be claimed at the time of the divorce. The applicant consented to such relief and the court eventually rescinded the ancillary orders and left the decree of divorce intact.

## Discussion

The rescission of divorce orders can be tricky and problematic. What is very clear from this case is that spousal maintenance cannot be granted post-divorce. In an application for rescission of a divorce order which is silent on spousal maintenance an applicant forfeits her right to claim spousal maintenance if the final order of divorce is not rescinded. As a result, I submit that in an application for the rescission of a divorce order an applicant who qualifies for spousal maintenance has a choice to, either:

- forfeit the right to claim spousal maintenance and claim only the rescission of the ancillary orders and not the rescission of the decree of divorce; or
- claim for the rescission of the divorce order if one wants to claim spousal maintenance.

The question is, will the court grant the order sought in the above second point if the applicant insists on it and in circumstances where the respondent remarried and the new wife is joined to the proceedings? In *Togo*, the problem that the court faced was simplified when the applicant waived her right to claim spousal maintenance. I submit that if the applicant wanted to claim spousal maintenance against the respondent, she could have insisted on her prayer for the rescission of the whole divorce order so that when the divorce order was granted for the second time she could claim spousal maintenance. I further submit that the court would have been bound to rescind the decree of divorce if the applicant showed good cause.

The following two cases are relevant to the present discussion. In *O v O* (WCC) (unreported case no 6912/13, 21-11-2019) (Loots AJ), the court had to con-

sider an application for the separation of issues in terms of r 33(4) of the Uniform Rules of Court in which the applicant sought an order to have the question of the decree of divorce separated from the remaining issues in the divorce action. The court had to consider among others, whether or not the maintenance order granted in terms of r 43 lapses if the decree of divorce was granted pursuant to the successful application for separation. After reviewing a number of cases, the court found that pending the finalisation of the divorce action, an extant order in terms of r 43 survives a decree of divorce to the extent that the issues regulated thereby remain unresolved. However, in *NK v KM* 2019 (3) SA 571 (GJ), the court was faced with a similar application and it rejected the approach in *O v O*. The court found that once a decree of divorce is granted the provisions of r 43 of the Uniform Rules of Court will find no application. It is my view that the approach in *O v O* is more expedient and preferable. Where the issues between the parties remain unresolved, an existing order of maintenance should remain intact.

## Conclusion

From the discussion above, I submit that where a final divorce order is granted in default and an application for the rescission of the divorce order is sought, it cannot be said that the matter has been finalised. Though the parties may no longer be married it cannot be said that the matrimonial action between them has been finalised. The status of the parties to the action remains that of spouses (see *Carstens v Carstens* (ECP) (unreported case no 2267/2012, 20-12-2012) (Roberson JJ)). I submit that the right to claim spousal maintenance should invariably survive the granting of a divorce order in circumstances where the issues relating to the divorce remain unresolved particularly where the order was granted in default. In those instances, the right to claim spousal maintenance should survive a decree of divorce. This will protect both parties in that the court would still be entitled to consider a claim for spousal maintenance post-divorce without unscrambling the divorce order. I further submit that in *Togo*, the court should have also considered the possibility of developing the common law in terms of the Constitution to recognise a claim for spousal maintenance post-divorce.

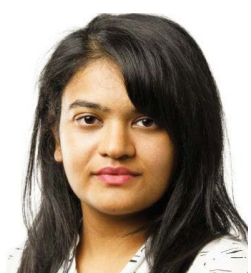
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## Navigating the legal regulatory issues with self-driving cars in South Africa



By  
Charissa  
Chengalroyen

‘What is now proved was once only imagined’ (William Blake *The Marriage of Heaven and Hell* (United Kingdom: Oxford University Press 1975) at 18). This sentiment can be interpreted as encompassing the depth of human innovation and ingenuity, an apt example of which can be found in the idea of automated travel. The testing and development of self-driving cars (SDCs) persisted from the 1920s to 1980s, especially in the United States (US) and faded out hereafter (Erik Lee Stayton *Driverless dreams: Technological narratives and the shape of the automated car* (unpublished Master’s thesis, Massachusetts Institute of Technology, 2015) at 11-22).

With the arrival of the Fourth Industrial Revolution, there has been a resurgence in the experimentation and de-

velopment of SDC technology. This can be seen from the collective efforts of companies like Tesla, Uber, Google and Waymo creating modern SDCs (Christina Mercer and Tom Macaulay ‘Companies working on driverless cars’ ([www.techadvisor.co.uk](http://www.techadvisor.co.uk), accessed 17-6-2020)).

According to former Minister of Transport, Blade Nzimande, even though there are no SDCs currently on the roads of South Africa (SA), there are plans for their introduction (‘South Africa has plans for self-driving cars – but the law needs to change first’ (<https://businessstech.co.za/>, accessed 13-4-2020)). The proposed introduction of SDCs, viewed against the backdrop of SA’s high rates of car accidents, will probably require legal regulation in various forms (Road Traffic Management Corporation’s Annual Report of 2016-2017 ([www.rtmc.co.za](http://www.rtmc.co.za), accessed 27-1-2020)).

In what follows, I will briefly explain where SDC technology currently is. Thereafter, I will outline some of the legal regulatory issues that we will have to think about going forward, if SDCs drive their way into SA.

## What are SDCs?

SDCs are vehicles, which can or should be capable of navigating their way on roads by use of GPS technology and various sensors with minimal to no intervention by the driver or passenger (Richard LoRicco 'Autonomous Vehicles: Why we need them, but are unprepared for their arrival' (2018) 36 *Quinnipiac LR* 297 at 299-303).

SDCs can fall into any of the 0 – 5 SAE levels (SAE International 'SAE International Releases Updated Visual Chart for its "Levels of Driving Automation" Standard for Self-Driving Vehicles' (www.sae.org, accessed 15-4-2020)).

- **Level 0:** Encompasses normal motor vehicles.
- **Levels 1 – 4:** These SDCs are partly automated meaning that at some point during the operation of the vehicle a human passenger or driver needs to intervene. This also requires the individual to remain alert or aware of their surrounding environment.
- **Level 5:** Describes those SDCs that require no intervention from a human passenger or driver, and most likely do not possess steering wheels or brakes, like the Google car (Andrew J Hawkins 'Exclusive look at Cruise's first driverless car without a steering wheel or pedals' (www.theverge.com, accessed 10-9-2020)).

## The overarching issue

The overarching issue surrounding the use of SDCs is the difficulty and uncertainty in establishing where liability lies or with whom if an SDC accident occurs. This is partly due to the fact that SA does not have a clear or situation-specific set of rules to deal with the unique or novel challenges presented by the introduction of SDC's.

## Regulations

Since SDCs are fairly new and are not found operating commonly on public roads, there is an element of risk attached to the operation of these vehicles. In order to minimise this risk, it is recommendable that legislation is enacted which regulates the licensing, testing, and operation of SDCs. Examples of such legislation can be found in the US, such as the HR 3388, 115th Congress, Self-Drive Act, of 2017-2018, Tennessee Senate Bill 151 and the Michigan Senate Bill 996, Bill Analysis.

Section 7 of Self-Drive Act requires manufacturers of SDCs to –

- be certified;

- identify themselves to the appropriate authorities;
- describe the vehicle components being made; and
- submit proof of insurance.

Section 19 of Tennessee Bill and Michigan Senate Bill – Safe Autonomous Vehicle Act (SAVE) project states:

- SDCs made by different manufacturers must operate as an on-demand fleet available to the public.
- If the SDC is in self-drive mode and a rule of the road is infringed liability will accrue to the manufacturer.

These types of regulations will have to be promulgated by government. In SA there are two existing pieces of legislation, which are applicable to motor vehicle accidents, and by extension could be applicable to SDC accidents. That is why it is prudent to analyse the Road Accident Fund Act 56 of 1996 (RAF Act) and the Consumer Protection Act 68 of 2008 (CPA) and potential issues or areas of uncertainty that may arise from their application.

## Road Accident Fund

The main elements of s 17(1)(b) of the RAF Act raise a series of questions in application to SDCs:

- **Motor vehicle:** Section 1 of the RAF Act defines what a 'motor vehicle' is. The essential components of the definition are 'any vehicle'; 'designed or adapted'; 'for propulsion or haulage'; 'by means of fuel, gas or electricity'; 'on a road'. In order to establish whether an SDC is a motor vehicle for purposes of the RAF Act an in-depth assessment of the manner in which an SDC operates is required.

As a starting point an overall subjective and objective test can be utilised to determine what qualifies as a motor vehicle. The subjective test requires one to examine 'the purpose for which the vehicle was conceived and constructed' and the objective test is one where a 'reasonable person would perceive that the driving of the vehicle ... would be extraordinarily difficult and hazardous unless special precautions or adaptation were effected' (*Road Accident Fund v Mbendera and Others* [2004] 4 All SA 25 (SCA) at para 10, *Chauke v Santam Ltd* 1997 (1) SA 178 (A) at 183).

From a subjective perspective, the manufacturers of SDCs were constructed for the purpose of daily use on public roads, which may indicate that it is a motor vehicle. However, the multiple car accidents involving SDCs in the US, might be indicative of SDCs not being a motor vehicle if contemplated under the RAF Act.

- **Driving:** Section 20(1) of the RAF Act defines 'driving' as follows:

'For the purposes of this Act a motor vehicle which is being propelled by any

mechanical, animal or human power or by gravity or momentum shall be deemed to be driven by the person in control of the vehicle'. What is contentious here is whether the person in the vehicle can be deemed to be in control of an SDC and if so, under what circumstances.

According to HB Klopper the physical operation of a car itself is not enough to constitute the act of driving and must be paired with the requisite intention to drive (HB Klopper 'Accidental starting of a motor vehicle and section 20(1) of the Road Accident Fund Act of 1996 – *Oliphant v Road Accident Fund*' (2009) 72 *THRHR* 514 at 517-518). Meeting these requirements would prove problematic in regard to SAE 5 vehicles as the lack of normal mechanical components in such vehicles would suggest that the former requirement cannot be met and that such a vehicle cannot be driven despite the intention to do so.

- **Negligent or wrongful act by the driver:** The way in which SDCs function obfuscates the question: Who is the driver at any given time? If the accident occurred through no fault on the part of the human 'driver', under which Act, or rules can a plaintiff make a valid claim in order to be compensated?

If an SDC accident were to occur, the passenger's or driver's negligence can be examined under the common law rules. Alternatively, it can be argued that the failure of the passenger or driver to take control of the vehicle and prevent an accident would amount to another wrongful or unlawful act as contemplated by the RAF Act (see *General Accident Insurance Co South Africa Ltd v Xhego and Others* 1992 (1) SA 580 (A)).

- **Harm:** The only harm covered by the RAF Act is bodily injuries. That means that compensation for damage sustained to property, such as the other vehicle in an accident must be claimed under alternative Acts or common-law rules.

Sections 19 and 21 of the RAF Act, after the 2005 amendment, prohibited the claiming for emotional shock under the RAF Act. However, the victim is still allowed to claim for emotional shock under the common law.

## Consumer Protection Act

- **Scope of the Act:** According to s 1 of the CPA, the purpose is to protect consumers. It must be determined whether consumers are only those individuals who have purchased a vehicle, or will it include passengers or individuals borrowing the vehicle. In essence one would have to establish who is part of the consumer-supplier relationship.
- **Product failure and defects:** Section 61 says that the 'producer or import-

er, distributor or retailer of any goods is liable for any harm' which results in whole or part due to a 'defect', 'failure', 'hazard' and/or 'unsafe' quality in the goods.

Suppose that while in an SDC, approaching an oncoming car under normal road conditions, the sensor does not detect the car, meaning the SDC is delayed in registering an impending collision with the other car and does not allow the passenger or driver to retake control of the SDC. For our purposes one can assume that the passenger or driver is not at fault, which leaves the liability of the manufacturer to be examined under s 61 of the CPA. Here the SDC did not function in the manner intended and the issues with the sensor rendered the SDC less safe than a person would reasonably expect under the circumstances, which points to a defect or failure in the SDC. The CPA imposes modified strict liability, meaning that the plaintiff does not need to prove negligence on the part of the manufacturer in order for the latter to be held liable.

### Delictual common law

The elements of conduct, wrongfulness, fault, causation and harm must be confirmed in the positive before the driver, passenger or manufacturer can be held liable.

Delictual common law is applicable in cases concerning normal motor vehicle

accidents, and therefore, by extension there is a high possibility that these rules would be applicable in an SDC accident. What needs to be determined is when would these rules come into play. The most logical explanation being that after all legislative remedies are exhausted it would be most appropriate to turn to the common law (Melanie Murcott and Werner van der Westhuizen 'The ebb and flow of the application of the principle of subsidiarity – critical reflections on Motau and My Vote Counts' (2015) 7 *Constitutional Court Review* 43 at 46 – 48).

If one wants to hold a manufacturer liable based on delictual common law fault, the plaintiff must prove all five elements against the manufacturer. This would be difficult as there would be a need for an expert in SDCs and the plaintiff would need to possess an in-depth knowledge of the manufacturing process and supply chain. The former and the latter would not be readily available to a plaintiff and if it were, it would be highly expensive to procure. This would place the manufacturer at an undue advantage and leave consumers vulnerable (Carla Kriek *The scope of liability for product defects under the South African Consumer Protection Act 68 of 2008 and common law – a comparative analysis* (unpublished LLD thesis, Stellenbosch University, 2017) at 75; Jeffery K Gurney 'Sue my car not me: Products liability and accidents involving self-driving vehi-

cles' (2013) 2 *Journal of Law, Technology and Policy* 247 at 265-266).

### Conclusion

It might be that the above rules and provisions are inadequate and thus we might have to rethink our legal regulation of these cars if they are to be introduced on the public roads of SA. Hence the potential benefits to be gained from SDCs and potentially the Fourth Industrial Revolution will be negated without the requisite clarity on the above issues.

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### Fact corner

- According to Forbes.com, Waymo (Google's self-driving car division) is the front-runner in the self-driving race. It has been ferrying paid passengers around Phoenix in its minivans for the past year. And often with no human 'safety driver' standing by to grab the wheel if something goes wrong (www.forbes.com).

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By  
Lincoln  
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## Lifestyle audits: Bringing legal and ethical considerations under scrutiny

The reported request by the Gauteng Provincial Premier, David Makhura, for the State Security Agency (SSA) to conduct lifestyle audits on Members of the Executive Council (MECs) warrants some probing as to its alignment with institutional legal mandates within the context of public administration governance (Pearl Magubane 'State Security Agency to conduct lifestyle audits on Makhura, MECs' (www.sabc.com, accessed 12-8-2020)). Directing the request to the particular institution, infers that it has a legal obligation that assigns it either a direct or shared accountability role in the matter. Additionally, the request brings both legal and ethical considerations under scrutiny.

### The issue

The importance and placement of the mandate in the governance context is deliberated in that it is theoretically being conjoined to the understanding of jurisdictional integrity. The latter term is formulated as: '[T]he political and legal competence of a unit of government to operate within a spatial and functional realm' (Chris Skelcher 'Jurisdictional integrity, polycentrism, and the design of democratic governance' (2005) 18(1) *Governance - an International Journal of Policy Administration and Institutions* 89). Based on the description of the word, it can thus be assumed that the Premier's request presupposes that the SSA has the legal mandate to provide assistance. If by deductive reasoning it can be concluded that directing the request to the appropriate entity suffices, it would also imply that the request falls within the confines of good governance or corporate governance practices. The governance foreseen outcomes (as derived from the concept description by the Institute of Directors South Africa's King IV Report on Corporate Governance for Southern Africa: 2016) would,

therefore, be aligned to the exercise of ethical and effective leadership directed towards the sustainment of -

- an ethical culture;
- good performance;
- effective control; and
- legitimacy (www.iodsa.co.za, accessed 12-8-2020).

The relevance in referencing corporate governance in particular is juxtaposed against the background of how the request came about. Briefly, the much-publicised allegations of tender corruption in the securing of health-related goods and services involving senior public officials was accompanied by calls for action to address the seemingly growing number of cases thereof. Notwithstanding the foregoing, the request also illuminates the ethics element insofar as it pertains to balancing the legal standards with the aspect of personal judgment on the matter (Nomfundo Jele 'Can ethics be taught?' 2014 (April) *DR* 8). In this instance, the assertion is made that the request from the Premier could be considered as part of the possible acceptance of non-binding forms of cooperation in government entities when dealing with governance issues. However, such a development would seek 'to supplement traditional forms of regulation in areas in which command and control processes have not been effective' (David M Trubek and Louise G Trubek 'New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation' (2007) 13 *Columbian Journal of European Law* 539). Hence also, the applicability of the International Federation of Accountants' (IFAC) fundamental principles on public administration governance directing, among others, for the -

'controls established by the top management of the [respective organs of state] to support it in achieving the entity's objectives, the effectiveness and efficiency of operations, the reliability of internal and external reporting, and

compliance with applicable laws and regulations and internal policies' (IFAC 'Governance in the Public Sector: A Governing Body Perspective' Study 13, August (2001) (www.ifac.org, accessed 7-8-2020)).

In considering the above, the question still remains whether the premier's request was appropriately directed?

### The legal context

The generally acceptable view holds that the conducting of lifestyle audits is not only part of a proactive anti-corruption strategy, it also forms part of governance best practice. A read of the National Strategic Intelligence Amendment Act 67 of 2002 informs that the SSA's mandate includes, among others, a counter-intelligence responsibility. Derived from this responsibility is the SSA's explicit task to conduct security vetting in all organs of state on individuals that are new appointees, or those considered to be employed (or retained) in sensitive or high-risk job functions. This is to provide the necessary assurance that any such individual does not pose a security risk to the state. The concept of security vetting is formulated as 'the prescribed investigation followed in determining a person's security competence' (Carmen Charmaine Lucas *Vetting investigations for organs of state in a constitutional democracy - the South African context* (LLM thesis, University of Pretoria, 2018) (https://repository.up.ac.za, accessed 16-8-2020)).

A lifestyle audit, in turn, is described as:

'[A]n audit carried out with specific attention on income received by individuals, and these reports are an amalgamation of reports from a variety of databases that aim to give a snapshot of certain related aspects of the life of an employee' (E Munjeyi and S Mujuru 'Is it worth investing in "Lifestyle Audit" in Zimbabwe?' (2018) 7(8) *International Journal of Innovative Research in Sci-*

ence, *Engineering and Technology* (www.ijirset.com, accessed 15-8-2020)).

Theoretically, it can be deduced that the two concepts, security vetting and lifestyle audit, do not carry the same meaning and purpose. Based on these differences, it can also be surmised that from a practical stance, the vetting process includes the acquiring of lifestyle-related information as part of the formal action steps. Additionally, both practitioners and scholars consent to the fact that lifestyle audits can be conducted by any employer where there is suspicion of fraud. This can further be contrasted with the mandate of the South African Revenue Service (Sars), which conducts lifestyle audits to ensure compliance with liabilities under applicable tax Acts. Case law, with reference to *Commissioner for the South African Revenue Services v Brown* (ECP) (unreported case no 561/2016, 5-5-2016) (Smith J), underscores this view. Flowing from its defined mandate, the opinion holds that Sars is thus able to detect possible incidents of under-reporting of income or where there is not full disclosure of assets that can constitute potential tax evasion. Whether it has a clearly defined mandate to conduct lifestyle audits on the Executive in the manner intended by the request from Premier Makhura is not expressed. Also, the judgment from *Commissioner, South African Revenue Service v Public Protector and Others* 2020 (4) SA 133 (GP), adds to the reasoning. In this instance, a ruling was made on matters of taxpayer confidentiality and, to a degree, proposing other means of acquiring lifestyle information than being reliant on Sars. This case has been taken under review. Although there can be no dispute that from a practical point, both Sars and the SSA are suitable to the task (ie, they have institutional expertise), their legal mandates do not assign any direct obligation. Still, at present, the most appropriate entity considered, is the Office of the Public Protector. This can be derived from the mandatory tasks assigned to the Public Protector under s 3 of the Executive Members' Ethics Act 82 of 1998. More so, s 4 of this legislation permits the incumbent to investigate any complaint, for example, against any MEC of a provincial government, lodged by either the president or any premier. Furthermore, ss 110 to 114 of the Constitution assigns the Public Protector the responsibility of investigating cases such as the alleged procurement corruption. Case law pertaining to *Minister of Home Affairs and Another v Public Protector of the Republic of South Africa* [2018] 2 All SA 311 (SCA) applies in this instance.

## Findings

Based on the legal texts consulted, the presence of suitability for the task being vested in different state entities, as well

as the role of the Office of the Public Protector more clearly defined, infers that there is an absence of a coordinated and standardised process to conduct lifestyle audits on the Executive. To elucidate:

- Scholarly research on lifestyle audits, coupled with the 2019 State of the Nation Address by President Cyril Ramaphosa on the subject, supports this analysis (Cyril Ramaphosa 'President Cyril Ramaphosa: State of the Nation Address 2019' (www.gov.za, accessed 17-8-2020)).
- The Western Cape Provincial government concluded its own lifestyle audit in 2020 with focus covering the period of 1 June 2017 to 31 May 2019 (Western Cape Provincial government 'Premier Alan Winde on lifestyle audits of Western Cape cabinet members' (www.gov.za, accessed 31-8-2020)). The relevance of this matter to the request by Premier Makhura can also be extrapolated to a 2018 complaint by the opposition Democratic Alliance in the Gauteng provincial government (Penwell Dlamini 'Gauteng will do lifestyle audits on the executive ... sometime' (www.timeslive.co.za, accessed 27-2-2021)). The premise of the complaint was the delay in conducting lifestyle audits on the provincial MECs. The response at the time was that the Premier sought to secure the assistance of the relevant institutions to give effect to the task. This also raises the question as to how a comparable entity of the state concluded a related exercise.
- At a practical level, the realisation of the request could also be aligned to perceived resource challenges. Of particular importance is the SSA's presentation to the Standing Committee on Public Accounts in 2019. As part of its submission, the SSA highlighted that it had a huge vetting backlog with insufficient personnel and funding to carry out the background checks. This briefing related to a 2012 government decision to have all public officials involved in supply chain management vetted. This vetting commenced in 2014. With a reliance on other government agencies for information, the total applications for vetting in the supply chain management sector saw only 48% of the vetting applications completed. The SSA also raised the concern that some government departments and state entities refused to have their employees vetted (Standing Committee on Public Accounts 'State Security Agency on vetting of officials: Research Unit on Audit outcomes, with Minister' 15 October 2019). It is my opinion that any such refusal is contrary to the SSA's legal obligation under s 2A of the National Strategic Intelligence Act 39 of 1994. The latter directs that the SSA 'shall be responsible' for vetting in those cases it is

applicable. The Public Service Regulations, 2001 under s B.1(f) asserts the same obligation under 'Conditions for appointment'. It similarly instructs that an executive authority 'shall require an employee to be subjected to security clearance only where the duties attached to the post are such as to make security clearance necessary'. Both tasks denote a mandatory must be done. Following on from the Standing Committee briefing, the SSA cautioned that the situation left the state vulnerable to crime, corruption, fraud and mismanagement of state funds.

- While annual financial disclosures are already a mandatory requirement for all public officials such declaration can be defined as an event rather than a process. However, it is the view that this compliance exercise can form the premise on which lifestyle audits can be constructed and managed.
- Based purely on the appraisal of applicable legislation, the placement of the SSA as directly involved with the task seems to potentially pose both an ethical and legal concern. This reasoning can be framed in relation to the request being contrary to conformance as a good governance principle. In this instance it denotes how 'the organisation uses its governance arrangements to ensure it meets the requirements of the law, regulations, published standards and community expectations of probity, accountability and openness' (National Institute for Governance, Canberra 'Better Practice Public Sector Governance' (www.anao.gov.au, accessed 26-2-2021)).

## Conclusion

The articulation of, and adherence to, defined mandates should not only continue to promote good governance practices but should also emphasise compliance with the associated ethical standards. Furthermore, the unfolding COVID-19 related events of alleged corruption are regarded as further motivation to address identified legal constraints in order to promote constitutionally enshrined good governance practices in public administration.

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# COMPETITION LAW

## Remove, withdraw or postpone? The principle of double jeopardy in competition law



By  
Tshepo  
Mashile

In the case of *Competition Commission of South Africa v Beefcor (Pty) Ltd and Another* [2020] 2 CPLR 507 (CAC), the Competition Appeal Court of South Africa (CAC) considered the question whether the withdrawal of a complaint by the Competition Tribunal (the Tribunal) initiated in terms of s 49B(1) of the Competition Act 89 of 1998 (the Act) serves to put an end to the proceedings before the Tribunal, on the basis that the complaint cannot be reinstated.

The complaint in question was initiated against the respondents, Beefcor (Pty) Ltd (Beefcor) and Cape Fruit Processors (Pty) Ltd (CFP). The respondents were alleged to have entered into a contract not to compete in the market for the processing of wet peels and citrus pulp used in the production of livestock feed. It was contended that such conduct amounted to a division of markets or an allocation of customers in contravention of s 4(1)(b)(ii) of the Act. The respondents denied contravening the Act and they both separately opposed the referral.

The case was set down to be heard by the Tribunal for three days, commencing Monday 2 July 2018. On 26 June 2018 the Competition Commission (the Commission) informed the respondents, of its desire to engage in settlement negotiations. That same day the Commission advised the respondents that the Commission had taken the decision to 'withdraw the matter in order to give the negotiations a fair chance' and served them with the notice of withdrawal (*Competition Commission v Beefcor (Pty) Ltd and Another* [2019] 2 CPLR 574 (CT)). Immediately thereafter, CFP advised the Commission to 'hold off' from serving the withdrawal notice as the discussions between them had not progressed to the point where a settlement had been reached. Thereafter and within minutes, the Commission accordingly filed its notice of withdrawal. Beefcor accepted the Commission's withdrawal. It, however, expressed no intention of entering into settlement negotiations with the Commission save in so far as it related to costs. At 7:19 pm, the Commission fur-



ther expressed the view that it was entitled to take the decision to withdraw the case on the basis that it could be reinstated at a later stage if settlement negotiations did not bear fruit. It explained that it had opted for withdrawal rather than postponement as it believed that this would provide a better platform for the settlement negotiations.

CFP, on the other hand, advised the Commission that if it wanted more time to engage in settlement discussions, it should have applied for a postponement of the matter in terms of r 50(2) of the Rules for the Conduct of Proceedings in the Competition Tribunal rather than withdraw it. It advised the Commission that it did not find the settlement terms proposed by the Commission acceptable and invited the Commission to recall its withdrawal of the matter in order for the hearing to proceed on the Monday. The Commission refused this invitation and remained adamant that the Commission could reinstate a withdrawn referral.

The parties' legal practitioners requested urgent clarity from the Tribunal on the situation. Faced with these circumstances, on Friday 29 June 2018, the Tribunal's Head of Case Management –

- notified the parties that in view of the Commission's notice of withdrawal the matter had been removed from the roll;
- noted that the Commission had not tendered costs and directed the parties' attention to r 50(3); and
- stated that if the Commission in future wished to reinstate the matter, it should file an application for reinstatement.

The contemplated settlement negotiations never took place. Instead, some two months later, the Commission referred a fresh complaint to the Tribunal, under a different case number but dealing with the same conduct complained of in the withdrawn referral. In these new proceedings, the respondents raised the point that s 67(2) of the Act precluded the Commission from doing so. The Tribunal then issued a directive that the Commission should bring an application for reinstatement.

The Commission sought to comply with the directive and brought the reinstatement application, which was dismissed by the Tribunal. The Commission appealed to the CAC against such a refusal. Central to the inquiry is the meaning of the word 'completed' in s 67(2) of the Act.

In *SAPPI Fine Paper (Pty) Ltd v Competition Commission of South Africa and Another* [2003] 2 CPLR 272 (CAC) the CAC identified the mischief to be addressed by s 67(2) as double jeopardy. An analogy was thus drawn between the statutory scheme created by the Act and the criminal procedure. The court held as follows: 'The legislature enacted the

relevant provisions to avoid a firm being "tried" twice for the same or substantially the same conduct. Put differently, the aim of the legislature in introducing s 67(2) was to avoid "double jeopardy".'

In a defining case in relation to the constitutional values underlying the protection against double jeopardy, the Supreme Court of the United States in *Green v United States* 355 US 184 (1957) famously said the following: 'The State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty'.

In South African law as per s 35(3)(m) of the Constitution, it is specifically enacted to allow the state to bring another prosecution on the same charge after an accused has pleaded would be unconstitutional. The inquiry in this case is whether the same constitutional protections are deserved in relation to the procedures under the scheme, which are *sui generis* in nature.

It is widely accepted that certain processes under the scheme resemble criminal procedures. The CAC aptly expressed the position in *Competition Commission v Pioneer Foods (Pty) Ltd* [2010] 2 CPLR 195 (CAC) at para 11. A comparative examination of the process of withdrawal in criminal procedure and under the scheme, with a view to understanding whether similar constitutional protections, which are accorded to an accused as part of the right to a fair trial were intended by the legislature to apply to the withdrawal under the scheme as part of the right to fair administrative process should be undertaken.

Section 49B of the Act provides for the initiation of a complaint by the Commission and the submission of a complaint by any person. The Commission may, at any time 'after initiating a complaint', refer it to the Tribunal. In terms of the form prescribed (Form CC 1) a concise statement of the conduct, as well as the dates on which the conduct occurred are required. A complaint is, therefore, defined by the facts relied on. This has similarities to the drawing of a charge against an accused person. On initiating or receiving a complaint, the Commissioner must direct an inspector to investigate the complaint as quickly as practicable. If the investigation reveals that no prohibited practice or abuse has occurred, the Commission may not refer the complaint to the Tribunal. It may then issue a notice of non-referral if the complaint was submitted to it by a third party, in which case the third party may refer the complaint to the Tribunal. This notice of non-referral has similarities to

the *nolle prosequi*, which may be issued in a criminal proceeding so as to allow for private prosecution.

The investigation process under the Commission is unilateral. It requires neither the Tribunal's involvement nor any judicial oversight. In *Loungefoam (Pty) Ltd and Others v Competition Commission South Africa and Others, Feltex Holdings (Pty) Ltd v Competition Commission South Africa and Others* (CAC) (unreported case no 102/CAC/Jun10, 6-5-2011) (Wallis J (Davis JP and Ndita AJA concurring)) the Commission's powers of investigation were aptly described as 'inextricably linked to the Act's referral system in respect of complaints of anti-competitive conduct' and the court explicitly compared an investigation by the Commission to a criminal investigation. Part B of the Act provides the Commission with a number of powers that are couched in the language of criminal procedure. In fact, the wording of s 47(2) of the Act is almost identical to the wording of s 22(b) of the Criminal Procedure Act 51 of 1977 (CPA). Accordingly, it is clear that the Commission's investigative powers, especially the power to enter and search premises without a warrant, bear a strong resemblance to criminal procedures.

The referral of the complaint to the Tribunal triggers the exercise of the Tribunal's adjudicative powers. The rules allow the Commission to engage the jurisdiction of the Tribunal by referral of the complaint and to disengage such referral from such jurisdiction by means of withdrawal. This is the Commission's prerogative and is a power, which is analogous to the powers of the Director of Public Prosecutions (DPP), which may under s 6 of the CPA withdraw a criminal matter. Central to the inquiry as to the meaning of s 67(2) is whether the consequences of a withdrawal under s 67(2) should, on the basis of the respondents' right to fair administrative process, be commensurate with the operation of withdrawal in the criminal sphere.

On the Commission's interpretation, the scope for the abuse of power is manifest. Such an interpretation allows the Commission unilaterally to 'postpone' cases, which it has referred to the Tribunal at a time of its choosing and for a period of its choosing, irrespective of the prejudice which may be occasioned to the respondent. The Commission argued, however, that on its interpretation of s 67(2), a respondent would not be without a remedy in that the courts could be approached for relief under the doctrine of abuse of power. It seems that this would be of little comfort to a respondent who contends that he is being subjected to harassment and abuse by repeated prosecutions. After all, were it accepted that the Commission is allowed the facility of withdrawal with impunity,

a respondent would be hard pressed to prevent its use by the Commission. The broad nature of the powers, which the Commission already has militates against the construction contended for by it. Such powers have now also been considerably extended by the decision in *Competition Commission of South Africa v Pickfords Removals SA (Pty) Limited* 2020 (10) BCLR 1204 (CC).

The concept of seeking a postponement from an adjudicative body is well-known. If one of the parties, in complaint proceedings before the Tribunal, requires further time, it can apply to the Tribunal for an extension of time or, in the case of proceeding set down for a specified date, a postponement. Applications for postponements are common in the Tribunal's proceedings. Familiar considerations apply. If the Commission for any reason considers that it should not be required to proceed with a case on a specified date, it is right and proper

that it should satisfy the Tribunal that there is a case for postponement. A respondent in the proceedings is similarly placed. If the postponement is justified, it will be granted; if it is not justified, it will be refused, and this is as it should be, because the Tribunal is entitled to regulate its own processes. It is not only unnecessary, but amounts to irrational differentiation, that one party (a powerful state organ) should have the unilateral alternative of a withdrawal and reinstatement while the other party (a private entity) does not.

The double jeopardy protection in s 67(2) would be of limited value to a respondent if it allowed for repeated harassment in the context of all that the process entails. A further consideration militating against the Commission's interpretation is that the notion of 're-instating' a withdrawn complaint referral finds no mention in the Act or the Tribunal's rules. The Tribunal did not

explain the source of its power to reinstate withdrawn proceedings. One would have expected such a procedure to have been expressly regulated if it was envisaged. Section 67(2) must be interpreted broadly and as a constitutional protection, which is analogous to that created under s 106(4) of the CPA. The word 'completed' in its ordinary and natural meaning can be applied to proceedings which have come to an end in one way or another – whether following a trial on the merits, a consent order or an abandonment of the proceedings by way of withdrawal.

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By  
Merilyn  
Rowena  
Kader

# THE LAW REPORTS

February [2021] 1 All South African Law Reports  
(pp 311 – 622); February 2021 (2) Butterworths  
Constitutional Law Reports (pp 101 – 216)

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

## Abbreviations

CC: Constitutional Court  
ECG: Eastern Cape Division, Grahamstown  
ECL: East London Circuit Local Division  
GP: Gauteng Division, Pretoria  
KZD: KwaZulu-Natal Local Division, Durban  
LC: Labour Court  
SCA: Supreme Court of Appeal  
WCC: Western Cape Division, Cape Town

## Civil procedure

**Exceptions to claim for ‘moral damages’:** In *Trustees for the Time Being of the Burmilla Trust and Another v President of the Republic of South Africa and Another* [2021] 1 All SA 578 (GP) the plaintiffs’ claim was for constitutional damages, said to arise from the drastic curtailment of jurisdiction and capacity (shuttering) of an international tribunal, before which the plaintiffs and others had a case pending against the Kingdom of Lesotho. Of the three claims set out in the amended particulars of the claim, the first was for loss of profits – a claim said to have been ceded to the first plaintiff (Burmilla). The second claim was said to have been suffered personally by the second plaintiff (Mr van Zyl) as ‘moral damages’ for humiliation and indignity caused by harassment and intimidation. The third was for the wasted costs incurred in cases in other *fora*, all of which were from the plaintiffs’ perspective ultimately unsuccessful, in an effort to prevent or reverse the shuttering or to have their claims against Lesotho heard in another forum.

Mr van Zyl was a South African who controlled various Lesotho companies.

The plaintiffs’ cause of action was that the South African government violated the plaintiffs’ rights through its conduct in relation to the Southern African Development Community Tribunal (the SADC Tribunal). In brief, the government was a party to a series of decisions of

the Southern African Development Community (SADC), which sought to restrict the jurisdiction and reach of the SADC Tribunal, a body that the SADC had created. The intention behind those decisions was to render the SADC Tribunal unable to pronounce on a pending case before the SADC Tribunal brought by the plaintiffs and the Tributing Companies against Lesotho, as well as three other cases then pending before the SADC Tribunal.

The defendants raised 14 exceptions to the particulars of the claim. The court did not deal with all of them individually because there were certain issues of principle on which some of the exceptions had to be upheld and because the exceptions in some respects overlapped.

A question in this case was whether the law should recognise liability under the South African Constitution to pay monetary compensation to a non-South African national for acts committed by South Africa (SA) in breach of our Constitution and in violation of international law, outside our borders, which caused the economic loss, which was suffered outside our borders. The court, as per Tuchten J, held that morality, the convictions of the South African community and policy do not require that SA should be held liable to compensate a non-national where the South African government breached international law in circumstances such as the present. The plaintiffs’ particulars of the claim, therefore, did not establish legal causation, on the plaintiffs’ claim for monetary compensation. The exceptions to the claim for moral damages were upheld. The court also upheld three other exceptions but dismissed the remainder.

The plaintiffs were granted leave to amend their particulars of the claim.

## Corporate and commercial

**Contract – claim for payment:** In *Astral Operations Ltd t/a Early Bird Farm v O’Farrell NO* [2021] 1 All SA 350 (KZD) the plaintiff (Astral) produced chicken

in large quantities for ultimate sale to the consumer market. Most were sold directly to major supermarket chains, while smaller outlets were generally serviced by wholesalers who bought from Astral. One such wholesaler was a trust (Nambitha) in which the defendants were trustees. Nambitha was a competitor of another wholesaler (Dawoods). In 2011, Nambitha found itself out-traded by Dawoods and its business of selling Astral products collapsed, leaving an unpaid balance owing to Astral.

In its claim against Astral, Nambitha averred that the debt arose from its purchase of the product from Astral. Nambitha contended that it was entitled to lower prices for the product in question, and that a debatement of Astral’s account of its claim against Nambitha would reveal a lesser debt. In a claim-in-reconvention, Nambitha contended that throughout 2011 it was entitled to lower prices than those which were actually charged, and that it should be compensated for loss of profits, as well as the collapse of its business as it was out-traded by Dawoods because Astral afforded Dawoods better prices. Nambitha argued that it was entitled to the same prices.

The first issue in *Astral Operations Ltd t/a Early Bird Farm* was the proper interpretation of the terms of the contract between the parties with specific reference to Astral’s allegation that it charged its ‘usual prices’ to Nambitha at the time of dispatch of the goods. The second issue was whether the prices charged by Astral for the goods sold were the usual prices in the sense contended for by Nambitha (ie, not favouring any other wholesale customer). That led to the question of whether Astral breached the contract in supplying other wholesalers at lower prices than those allowed to Nambitha.

Regarding the first issue, it had to be determined whether ‘the usual price’ referred to in the contract between Astral and Nambitha meant the best wholesale price not undermined by the grant to

any other wholesale customer of rebates or discounts or advertising allowances more advantageous than those afforded to Nambitha. Reliance was placed on an enforceable trade usage or trade practice, or the importation of a tacit term into the agreement. The difficulty was that what Nambitha contended for was not clear or certain, and contradicted the express terms of the contract. That conclusion answered the first question against Nambitha and rendered the second issue irrelevant. It also addressed the third issue, in that it could not be found that Astral breached the contract by charging Dawoods more favourable prices than Nambitha.

A fourth issue raised by Nambitha's was that it had been induced to buy the goods, which it would not otherwise have purchased, through false representations by Astral. The evidence, however, revealed no misrepresentations. There was no inducement to buy the goods underlying Astral's claim.

Judgment was granted in Astral's favour, and Nambitha's counter-claim was dismissed.

## Courts – jurisdiction

**High Court's concurrent jurisdiction with Labour Court:** The applicant in *Baloyi v Public Protector and Others* 2021 (2) BCLR 101 (CC) was a former Chief Executive Officer of the Public Protector (PP), employed as such on a five-year contract that provided for a six-month probation period, which could not be extended for more than 12 months. At the end of the probation period, the employer would be entitled to either terminate the applicant's appointment or confirm it. Several months after the applicant's probation period ended, she was informed that the employer was unable to confirm her permanent employment. The applicant launched an urgent application in the High Court contending that the termination of her employment was unlawful and that the PP had not complied with her constitutional obligations in terms of s 181(2) of the Constitution. The High Court dismissed the application on the basis that it lacked jurisdiction to deal with it. The applicant then appealed directly to the CC. She sought a review of the decision to terminate her employment and an order for her reinstatement. She also sought a declaratory order that the PP violated her constitutional obligations under s 181(2) of the Constitution. The applicant challenged the High Court's ruling that it lacked jurisdiction to deal with the matter.

The CC granted leave for a direct appeal in relation to the jurisdictional challenge. However, it refused leave to appeal in relation to the merits, that is, the review relief and the declaratory relief.

The central issue was thus whether, in terms of the Labour Relations Act 66 of

1995 (the LRA), the High Court and LC enjoyed concurrent jurisdiction over an alleged unlawful termination of a fixed-term contract of employment. Section 157(2) of the LRA provides that '[t]he Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution ... and arising from (a) employment and from labour relations; (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the state in its capacity as an employer; and (c) the application of any law for the administration of which the Minister [of Labour] is responsible'. The court affirmed that s 157(1) does not afford the LC general jurisdiction in employment matters. Section 157(1) provides that '[s]ubject to the Constitution and section 173, and except where [the LRA] provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of [the LRA] or in terms of any other law are to be determined by the Labour Court'. By virtue of s 157(2) of the LRA, the High Court and the LC share concurrent jurisdiction in respect of employment-related disputes over which the LC does not have exclusive jurisdiction. This means that the High Court's jurisdiction is not ousted by s 157(1) simply because a dispute falls within the overall sphere of employment relations. The LC's exclusive jurisdiction extends to disputes for which the LRA creates specific rights and remedies, including, for example, unfair dismissal disputes.

The court, as per Theron J (Mogeng CJ, Jafta, Khampepe, Madlanga, Majiedt, Mhlantla, Tshiqi JJ, Mathopo and Victor AJJ concurring) held that the termination of a contract of employment has the potential to found both a claim for relief for infringement of the LRA and also a contractual claim for enforcement of a right that does not emanate from the LRA. The litigant must decide which cause of action to pursue. The applicant had advanced a claim for contractual breach and had expressly disavowed reliance on the provisions of the LRA. While the applicant might also have a claim for unfair dismissal in terms of the LRA, nothing in the LRA required her to advance that claim in the LC. As for the public law basis for the review relief and the declaratory relief based on s 182(1) of the Constitution, neither of those claims fell within the exclusive jurisdiction of the LC, in terms of s 157(1) of the LRA. The High Court had erred in dismissing the applicant's application on the basis that it was 'essentially a labour dispute' and that the High Court's jurisdiction was not engaged. The applicant's appeal against the High Court's finding

on jurisdiction thus had to be upheld. The CC remitted the matter to the High Court for hearing *de novo*.

## Criminal law and procedure

**Admissibility of evidence found as result of unlawful search:** In *Ndlovu and Others v S* [2021] 1 All SA 538 (ECG) the appellants were charged in the High Court with various charges arising from ten incidents of rhino poaching that occurred over a period of three years at various farms and nature reserves. They were convicted on almost all the charges and were sentenced to lengthy periods of imprisonment, resulting in an effective sentence of 25 years' imprisonment. They unsuccessfully applied for leave to appeal against their convictions and the sentences imposed but were granted leave on petition on two limited and narrowly defined grounds.

The questions on appeal were whether –

- the trial court, acting in terms of s 35(5) of the Constitution, correctly allowed physical evidence found as a result of the unlawful search of a premises to become part of the evidential material placed before it by the state; and
- or not the cumulative effect of the sentences imposed by the trial court rendered the sentences shockingly disproportionate.

Regarding the first question, it was common cause that the police had entered and searched a chalet in which the appellants were present without a search warrant. The trial court found that the admissibility of evidence that has been obtained in a manner that violates rights guaranteed in s 35(5) of the Constitution unlawful. Section 35(5) envisages a two-step process. First, the evidence sought to be excluded must have been obtained in a manner that infringed on a right guaranteed by the Bill of Rights. If it is found that the impugned evidence was so obtained, the second step is to determine whether the admission of the evidence will render the trial unfair. The section does not provide for the automatic exclusion of evidence that was obtained in violation of a protected right. The court, as per Van Zyl DJP (Griffiths and Roberson JJ concurring), held that the appellants were not in any way compelled to participate in the discovery of the articles in the chalet. Further, the breach of the appellant's right to privacy did not operate to undermine the reliability of the evidence. The articles were relevant real evidence that existed independently of any of the actions of the police officials and would have been revealed independently of the appellant's right to privacy. Accordingly, the admission of the evidence did not render the trial unfair. The determination of wheth-

er the admission of the evidence would be detrimental to the administration of justice required a value judgment. The court was satisfied that the trial court correctly found that the evidence ought to be admitted, as its exclusion would cause harm to the administration of justice.

It was also not found that the sentences imposed were too harsh.

The appeal was dismissed.

**Evidence – credibility and reliability of witnesses:** The present appeal dealt with the death of a 15-year-old boy (the deceased). The state and the defence presented mutually destructive versions of the circumstances surrounding the boy's death.

The main witness for the state, Mr Pakisi, testified that the appellants in *Doorewaard and Another v S* [2021] 1 All SA 311 (SCA) assaulted, mishandled, and threw the deceased out of a moving van, and assaulted, kidnapped and intimidated him. He had been walking towards a sunflower field when he heard a gunshot. He then saw the second appellant holding a firearm and running towards a quad bike, which he drove towards the first appellant, who was in a van with an unknown white man. Mr Pakisi testified that he heard the deceased crying in the back of the van, before the second appellant threw him out of the moving van. After the appellants picked up the deceased again, they drove into the field, and on re-emerging, they confronted Mr Pakisi about what he had seen. He alleged that he was kidnapped, threatened and assaulted by the appellants. He stated that he subsequently attempted to lay charges against the appellants but was met by a lack of cooperation by the police.

The appellants denied all the charges against them. They alleged that on that day they had noticed two boys stealing sunflower heads from their employer's farm. They had traced one of the boys, which was the deceased. The appellants alleged that the boy had agreed to take them to the other boy, and had sat in the back of their van, but had jumped out of the moving van during the drive, injuring himself.

The appellants were convicted in the High Court on charges of murder, kidnapping, intimidation, theft, and the pointing of a firearm. They obtained leave to appeal against their convictions.

The state bears the onus to prove the guilt of an accused beyond a reasonable doubt. Where there are two mutually destructive versions, as in this case, the court must consider the credibility and reliability of the witnesses. Evidence that is reliable should be weighed against the evidence that is found to be false and, in the process, measured against the prob-

abilities. In the final analysis the court must determine whether the state has satisfied the requirement of proof beyond a reasonable doubt.

In this case, there were serious evidentiary deficiencies due to the manner in which the case was handled and investigated by the police. There were also material discrepancies in the evidence of Mr Pakisi, who was a single witness with no corroboration to his evidence. The inference drawn by the trial court that the deceased had been thrown from the van was not supported by the facts. Even though the appellants' version regarding how the deceased vanished from their vehicle was unsatisfactory, the state did not prove its case beyond a reasonable doubt. Consequently, the appeal was upheld and the appellants were acquitted.

In a minority judgment it was stated that the murder charge should be replaced with one of culpable homicide in that the appellants had negligently caused the death of the deceased by not providing any medical assistance after he was injured.

## Family law and persons – succession

**Right to inherit from child's estate:** In *Wilsnach NO v TM and Others* [2021] 1 All SA 600 (GP) the first and second respondents were respectively the parents of a child born in 2013 and diagnosed with cerebral palsy. The child died in 2018. The second respondent and the child lived with the third respondent (the second respondent's mother) who provided them with a home and took care of their basic needs.

On the child's death, all three respondents laid claim to his estate. The first and second respondents based their claim on their status as parents, and the third respondent on her having been awarded parental rights and responsibilities by the court.

Kollapen J held that it had to be determined whether each of the respondents qualified as a parent for the purpose of inheriting as contemplated in s 1(1)(d) of the Intestate Succession Act 81 of 1987.

The first respondent had nothing to do with his child since birth, largely because of the child's condition. He, therefore, at no time fulfilled his parental obligations in terms of the Children's Act 38 of 2005. To then regard him as a parent in terms of the Intestate Succession Act would offend against the constitutional scheme on which that Act was founded. The court ruled that the first respondent did not meet the factual or legal requirements of parenthood and was not entitled to inherit from the estate of the child.

While the second respondent's performance of her duties as mother was open to some question, she did care for the

child in the first two years of his life. She was recognised as a parent in terms of both the Children's Act and the Intestate Succession Act.

The primary caregiver and dominant parental figure in the child's life was the third respondent. The court described the pivotal role she played in the child's life and concluded that she was a parent for the purpose of inheriting as contemplated in s 1(1)(d) of the Intestate Succession Act.

The second and third respondents were to inherit in equal shares from the estate of the child.

## Insurance law

**Interpretation of indemnity clauses:** In March 2020, the COVID-19 pandemic was declared a national disaster in South Africa. Regulations were then issued in an attempt to curb the spread of the virus including a national lockdown and a prohibition on the sale of alcohol.

The applicants in *Grassy Knoll Trading 78 CC t/a Fat Cactus and Another v Guardrisk Insurance Company Limited* [2021] 1 All SA 503 (WCC) operated restaurants in Cape Town. The impact of the pandemic led to a decline in their business, exacerbated by the alcohol ban. In order to reduce overall losses, the applicants closed their restaurants. In June 2020, the applicants submitted claims to the respondent (Guardrisk) under a business interruption section of their insurance policy, for losses, which they suffered. The 'disease clause' on which they relied, insured them against loss resulting from interruption of, or interference with their business due to 'notifiable disease occurring within a radius of 50 km of the premises'. The claims were rejected on the ground that the applicants had not provided evidence that their loss was a consequence of a confirmed case of COVID-19 within the specified radius of their premises. Guardrisk maintained that the business interruption suffered by the applicants was not caused by the occurrence of COVID-19 within a 50 km radius of their premises, but by the global COVID-19 pandemic and the government's response to it, which in Guardrisk's submission were not perils covered by the policy.

The applicants sought a declaratory order that Guardrisk was obliged to indemnify them under their insurance policy.

It was held by Norton AJ that insurance contracts must be interpreted in accordance with the usual rules of interpretation, having regard to their language, context and purpose, and preferring a commercially sensible meaning over one that is insensible or at odds with the purpose of the contract. A commercially sensible meaning, in respect of an insurance contract, is a meaning that



both the prospective insured and the insurer must have regarded as meeting their aims in concluding the policy.

The first aspect addressed by the court was the required causal relationship between the notifiable disease peril and the business interruption in the policy. The general approach, unless a different intention appears from the insurance contract, is that the insured peril must be the factual cause and the legal cause of the loss or occurrence, which is covered by the contract. When there are two or more possible causes of the loss or occurrence, which is covered by the contract, a court must determine which is the proximate cause. The disease clause in this case was found to provide cover where the insured peril was the factual and legal cause of the insured's business interruption, and the proximate cause if there were other competing causes.

On a proper interpretation of the disease clause, the court concluded that the clause provided cover for business interruption caused by the COVID-19 pandemic and the government's response to it, provided that there had been an occurrence of COVID-19 within the specified radius of the insured's premises. The applicants were granted the declaratory relief sought regarding Guardrisk's liability to indemnify them for losses resulting from the business interruption.

## Legal practice – unprofessional conduct

### Ethical duties of legal representatives:

In *Mzayiya v Road Accident Fund* [2021] 1 All SA 517 (ECL) an application for default judgment was made by the plaintiff in a motor vehicle accident case. In his particulars of the claim, the plaintiff alleged that an unidentified motor vehicle had collided with him on 20 March 2019. Compensation was sought from the defendant.

In an affidavit deposed to on 18 August 2020, the plaintiff's legal practitioner (Mr Klaas) admitted that the allegation that the accident occurred on 20 March 2019 was false, and it was stated that the accident in fact occurred on 15 February 2007, more than 12 years earlier.

In *Mzayiya* several issues were of concern to the court. No explanation was given for the misrepresentation and no amendment was sought to correct the date. Another troubling aspect raised by the court was the possibility that someone other than the plaintiff might have signed the affidavits. The affidavit in support of the claim was commissioned by the same advocate who appeared in court for the plaintiff. The court questioned the propriety of the advocate's subsequently appearing in a matter

where he had commissioned one of the affidavits relied on in support of the application, he being at all material times under an ethical duty to maintain his independence in relation to his client and the litigation.

The court, as per Kroon J, held that the claim was a bogus one based on the incorrect premise that the accident occurred on 20 March 2019 and that future medical expenses and loss of earnings should be calculated from that erroneous date onwards. How the incorrect date came to be used in the papers was a matter of concern as the accident reports clearly showed the correct date. Moreover, a draft order presented to court reflected the correct date, suggesting an attempt to obtain relief by way of a draft order containing facts materially different to what was contained in the particulars of claim and affidavit deposed to in support of the default application, and without the knowledge of the defendant.

The issues raised led the court to explain the ethical standards required of legal practitioners. A legal practitioner has a pre-eminent duty to the court not to embark on a litigation plan that will mislead the court.

As the particulars of claim on which the application for default judgment was sought referred to a non-existent

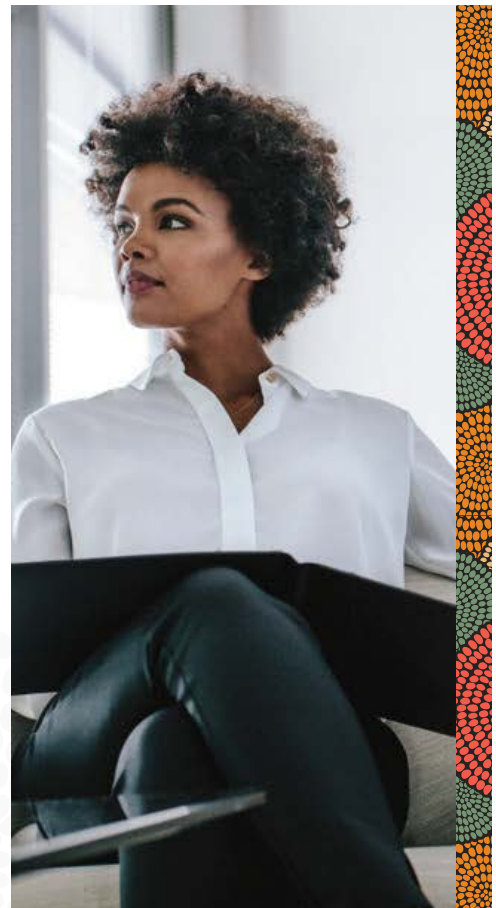
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accident, the relief sought could not be granted. In any event, given the manner in which the plaintiff's legal representatives approached the court, the matter could not be entertained, and was accordingly struck from the roll. The court questioned whether the legal representatives who were responsible for lodging and prosecuting the claim and seeking default judgment might have been guilty of unprofessional conduct. As a result of the questions about their *bona fides*, the matter was referred to the appropriate bodies for further investigation. Should the plaintiff wish to proceed with the claim he was required, within 21 days, to bring a substantive application for leave to amend his particulars of the claim to reflect the correct date of the

accident and was required to give a full explanation as to the matters raised in the court's judgment.

### Other cases

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

- administration of estates, heirs and legatees unworthy of inheriting by testament or intestacy;
- administrative law not applying to disputes where cause of action and remedy covered by the Labour Relations Act;
- appropriate test, which must be used when determining the guilt of the accused person;
- banker and client relationship and

non-disclosure of limitations of a security system;

- constitutional right to adequate medical treatment of prisoners;
- conventions, treaties and judicial cognisance of existence of treaties and its contents;
- interrogation and compulsion to answer notwithstanding possibility of self-incrimination; and
- unlawful and irrational lawfulness of shortening of notice period for termination of contract/tender of Road Accident Fund panel attorneys.

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By  
Phillip  
Stoop

# New legislation

Legislation published from  
1 – 28 February 2021

## Bills

Division of Revenue Bill B3 of 2021.  
Appropriation Bill B4 of 2021.  
Special Appropriation Bill B5 of 2021.

## Promulgation of Acts

**Public Investment Corporation Amendment Act 14 of 2019.** *Commencement:* To be proclaimed. GN44 GG44160/15-2-2021 (also available in Afrikaans).

## Selected list of delegated legislation

### Basic Conditions of Employment Act 75 of 1977

Earnings threshold for the exclusion from certain sections of the Act: R 211 596.30. GN77 GG44137/8-2-2021.

### Broad-Based Black Economic Empowerment Act 53 of 2003

Exemption of the Department of Mineral Resources and Energy for its Risk Mitigation Independent Power Producer Procurement Programme. GN R91 GG44157/12-2-2021.

Exemption of the Tourism Equity Fund. GN R102 GG44172/19-2-2021.

### Cross-Border Road Transport Act 4 of 1998

Amended regulations: Revised fee adjustments, 2021. GenN R79 GG44197/26-2-2021.

### Defence Act 42 of 2002

Notice of the authorisation of the extended deployment of 2 122 members of the Defence Force to assist with the enforcement of lockdown regulations. GN78 GG44138/10-2-2021.

### Disaster Management Act 57 of 2002 (COVID-19)

#### • Education

Directions regarding measures to address, prevent and combat spread of COVID-19: Re-opening of schools in 2021. GenN42 GG44154/12-2-2021.

#### • General regulations

Extension of a National State of Disaster under the COVID-19 lockdown to 15 March 2021. GN R86 GG44150/11-2-2021.

Amendment of the regulations issued in terms of s 27(2): Alert level 3 during the COVID-19 lockdown. GN R92 GG44158/13-2-2021 and GN R93 GG44159/13-2-2021.

Determination of alert level: Level 1. GN R151 GG44201/28-2-2021.

Amendment of the regulations issued in terms of s 27(2): Alert level 1 during the COVID-19 lockdown. GN R152 GG44201/28-2-2021.

#### • Justice

Directions regarding measures to address, prevent and combat spread of COVID-19 in all courts, court precincts

and justice service points. GN R73 GG44133/3-2-2021.

#### • Social development

Directions regarding measures to address, prevent and combat the spread of COVID-19: Social grants and adoptions. GN111 GG44174/22-2-2021.

#### • Transport

Directions regarding measures to address, prevent and combat spread of COVID-19 at sea ports during adjusted alert level 3. GN79 GG44140/10-2-2021.

### Disaster Management Act 57 of 2002 (Floods)

Classification of a national disaster: Strong winds and floods due to tropical storm Eloise and summer seasonal rains. GN90 GG44156/12-2-2021 and GN117 GG44184/24-2-2021.

### International Trade Administration Act 71 of 2002

Regulations governing the Automotive Production and Development Programme Post 2020 (APDP Phase II) effective from 1 July 2021. GN R80 GG44144/11-2-2021.

### Long-Term Insurance Act 52 of 1998

Penalty for failure to furnish the Financial Sector Conduct Authority with returns: R 6 950. GN119 GG44186/26-2-2021.

### National Education Policy Act 27 of 1996



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Amended 2021 public school calendar. GN95 GG44162/16-2-2021.

#### **National Environmental Management Act 107 of 1998**

Adoption of a Generic Environmental Management Programme for the Working for Ecosystems Programme. GN105 GG44173/5-2-2021.

Adoption of a Generic Environmental Management Programme for the Working for Water Programme. GN106 GG44173/5-2-2021.

Adoption of a Generic Environmental Management Programme for the Working with Wetlands Programme. GN107 GG44173/5-2-2021.

Identification of procedures to be followed when applying for or deciding on an environmental authorisation application for large scale wind and solar photovoltaic facilities occurring in a renewable energy development zone. GN142 GG44191/26-2-2021.

Identification of procedures to be followed when applying for or deciding on an environmental authorisation application for the development of electricity transmission and distribution infrastructure occurring in a renewable energy development zone. GN145 GG44191/26-2-2021.

Identification of geographical areas of strategic importance for development of large-scale wind and solar photovoltaic energy facilities (renewable energy development zones). GN144 GG44191/26-2-2021.

Identification of geographical areas important for the development of strategic gas transmission pipeline infrastructure. GN143 GG44191/26-2-2021.

#### **National Environmental Management: Biodiversity Act 10 of 2004**

Commencement of the alien and invasive species lists, 2020 and alien and invasive species regulations, 2020. GN115 GG44182/24-2-2021.

#### **National Health Act 61 of 2003**

Regulations relating to standards for emergency medical services. GN94 GG44161/16-2-2021.

#### **National Minimum Wage Act 9 of 2018**

Amendment of the minimum wages contained in sch 1 and 2 to the Act with effect from 1 March 2021. GN76 GG44136/8-2-2021.

#### **National Student Financial Aid Scheme Act 56 of 1999**

Repeal of reg 1 of the regulations on additional functions assigned to the National Student Financial Aid Scheme (NSFAS). GN67 GG44128/1-2-2021.

#### **Protection of Personal Information Act 4 of 2013**

Commencement of regulations relating to the protection of personal information. GenN75 GG44191/26-2-2021.

#### **Public Finance Management Act 1 of 1999**

Exemption of the Industrial Development Corporation of South Africa from certain

provisions of the Act for a period of three years. GN110 GG44173/5-2-2021.

National revenue, expenditure and borrowings as at 31 January 2021. GenN78 GG44195/26-2-2021.

#### **Short-Term Insurance Act 53 of 1998**

Penalty for failure to furnish the Financial Sector Conduct Authority with returns: R 6 950. GN118 GG44185/26-2-2021.

#### **South African Geographical Names Council Act 118 of 1998**

Approval of certain official geographical names in the Eastern Cape. GN114 GG44181/23-2-2021.

#### **South African Schools Act 84 of 1996**

Amendment of the regulations pertaining to the National Curriculum Statement Grades R - 12. GN104 GG44173/5-2-2021.

#### **Tax Administration Act 28 of 2011**

Extension of the deadline to file country-by-country returns. GN100 GG44170/18-2-2021 and GN101 GG44171/19-2-2021 (also available in Afrikaans).

### **Draft Bills**

Draft Disaster Management Amendment Bill, 21 (Private Member's Bill). GenN46 GG44166/18-2-2021.

### **Draft delegated legislation**

- Draft Gas Act rules in terms of the Gas Act 48 of 2001 for comment. GN74 GG44134/3-2-2021.
- Draft proposal on the implementation of s 74 of the Higher Education Act 101 of 1997 for comment. GN108 GG44173/5-2-2021.
- Integrated Crime and Violence Prevention Strategy of the Civilian Secretariat for the Police Service for comment. GenN50 GG44173/5-2-2021.
- Admission policy for ordinary public schools in terms of the National Education Policy Act 27 of 1996 for comment. GenN38 GG44139/10-2-2021.
- Draft Critical Skills List (2020) in terms of the Immigration Act 13 of 2002 for comment. GN96 GG44164/18-2-2021.
- Proposed amendments to the listing requirements of A2X in terms of the Financial Markets Act 19 of 2012 for comment. BN8 GG44191/26-2-2021.
- Proposed levies on medical schemes in terms of the Council for Medical Schemes Levies Act 58 of 2000 for comment. GenN57 GG44179/23-2-2021.
- Draft amendment of the customer care standards regulations applicable to postal services licensees in terms of the Independent Communications Authority of South Africa Act 13 of 2000 for comment. GN148 GG44196/26-2-2021.

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By  
Samuel  
Mariens

# A purposive interpretative approach to the calculation of mineral royalties

*Commissioner, South African Revenue Service v United Manganese of Kalahari (Pty) Ltd 2020 (4) SA 428 (SCA)*

In *United Manganese of Kalahari (Pty) Ltd*, the taxpayer, United Manganese of Kalahari (Pty) Ltd (UMK), conducted manganese mining operations and generated profit from the sale of manganese, as an unrefined mineral resource, both locally and internationally. In exchange for the right to mine and trade manganese, the Mineral and Petroleum Resources Royalty Act 28 of 2008 (Royalty Act) obliges UMK to pay royalties to the South African Revenue Service (Sars). A mining company's liability for royalties due is determined by a formula set out in s 4(2) of the Royalty Act. The formula is determined by a process of calculation, which takes into account the gross sales of the mining company during the tax year. The mining company's gross sales are determined in accordance with s 6 of the Royalty Act.

When UMK trades manganese to foreign buyers, the sales are carried out on either a 'free on board' (FOB) or 'cost, insurance, freight' (CIF) basis. It is unnecessary to describe in technical detail the process of a sale on either a FOB or CIF basis. It is only important to know that when UMK sold manganese to foreign buyers, it incurred costs relating to the transport, insurance or handling of the manganese ore (TIH costs) and the TIH costs were incurred after the manganese had reached the condition specified in sch 2 to the Royalty Act, which related to the grade of the ore and its required chemical components. In determining its gross sales for royalty purposes, UMK sought to deduct the TIH costs incurred from the income received or accrued to it from trading manganese. In respect of the 2010 and 2011 tax years, UMK furnished Sars with its royalty returns. Sars challenged the correctness of UMK's royalty returns. The Supreme Court of Appeal (SCA) was approached with two conflicting interpretations of s 6 and was tasked with deciding the correct method of calculation for determining the gross sales of a mining company in a particular tax year for the purposes of calculating the mining company's liability for royalties due.

## Conflicting interpretations adopted by Sars and UMK

The material part of s 6, which the SCA was called on to interpret was the phrase 'without regard to any expenditure incurred in respect of transport, insurance and handling' of the manganese ore after it had reached the condition contemplated in sch 2. The appeal turned on the proper meaning and effect of the aforementioned phrase. Sars contended that it was only when a mining company sold the manganese at a price, which specifically accounted for any TIH costs in arriving at the global price that the specific amounts representing TIH costs were to be deducted in order to determine the gross sales of the mining company. UMK contended that it was irrelevant whether a mining company specifically made provision for TIH costs in the purchase price. UMK argued that if a mining company was able to show that it actually incurred TIH costs in any of the circumstances described in s 6(3)(b), a deduction of such expenditure had to be made in order to determine the gross sales of the mining company.

## The interpretative approach adopted by the SCA

The SCA reiterated that the purposive interpretative approach is the correct approach to statutory interpretation as decided in the landmark judgment of *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA). The purposive interpretative approach entails an objective, unitary exercise which considers the –

- language of the provision with due regard to the ordinary rules of grammar and syntax;
- context of the relevant provision;
- apparent purpose for which the legislature introduced the provision; and
- material known to the legislature at the time of enacting the provision.

In the event that more than one interpretation prevails, each interpretation must be weighed in accordance with the

forementioned factors. The purposive interpretative approach outlined by the SCA in *Endumeni* was approved by the Constitutional Court in *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* 2019 (2) BCLR 165 (CC).

## Purpose of the Act

The SCA noted that the background to the Royalty Act recognised that South Africa (SA) is a country with vast mineral wealth, which has historically been subjected to exploitation by private enterprises. The SCA held that the purpose of the Royalty Act was to ensure that mining companies paid royalties to Sars – the amount of which was determined by the value of the minerals extracted – in exchange for being granted the right to exploit SA's mineral resources. The SCA held that the purpose of s 6(3)(b) was to ensure that a mining company's liability for royalties due did not include the TIH costs incurred and recovered in the purchase price.

## Material known to the legislature

Considering the contracts of sale for the exportation of the manganese submitted by UMK, the SCA observed that the contracts entailed trading in a denominated foreign currency, namely the United States Dollar. The SCA observed further that the purchase price of the manganese was fixed in dollars per ton on either FOB or CIF terms. The SCA noted that irrespective of whether the sale took place on a FOB or CIF basis, UMK would incur TIH costs. The SCA expressed the view that the foreign buyer would not be concerned with the TIH costs incurred by UMK, but would rather be desirous of fixing a global price for the sale of the mineral up to the point of delivery. The SCA held that the aforementioned information must have been known by the parties responsible for the legislation, including the Department of Mineral Resources and Energy (the Department). The SCA referred to the annual South African Mineral Industry reports and

found that the Department was aware of all the mining activities and trading patterns in the mining industry. Therefore, the SCA held that when interpreting s 6, it would be proper to bear in mind that the responsible parties had knowledge of the 'common, if not invariable, trading patterns'. Consequently, the SCA accepted that the responsible parties were aware that the sale of minerals would occur at fixed prices on either FOB or CIF terms (and that such prices would not specifically take into account the TIH costs incurred by the seller). The SCA found that there was nothing to indicate that the responsible parties only contemplated contracts of sale, which specifically stipulated a breakdown of the price by recording the cost of the mineral and amounts reflecting the TIH costs separately.

### History of s 6(3)(b)

The SCA noted that the original form of the section provided that gross sales were to be determined 'without regard to any amount received or accrued' in relation to TIH. The SCA remarked that the original form of the section was confusing as TIH costs are not receipts or accruals, which comprise a taxpayer's gross income, but are rather expense items. The SCA noted that the section was amended in 2010 to employ the phrase 'without regard to expenditure incurred' (the SCA was called on to interpret the section as

it stood in 2010). The SCA noted further that the section was amended in 2019 to employ the phrase 'after deducting any expenditure actually incurred'. Effectively, the SCA illustrated a pattern of the legislature amending the language of the section to reflect its intention, which pointed to the deduction of TIH costs in determining gross sales, irrespective of whether separate amounts reflecting TIH costs were specifically stipulated in the purchase price. In amplification of the aforementioned, the SCA referred to the explanatory memorandum that accompanied the Bill containing the latest amendment to s 6(3)(b). The extracts of the explanatory memorandum showed that the legislature intended to exclude the TIH costs from the calculation, because its inclusion would unintentionally increase the amount of gross sales and, consequently, increase the taxpayer's liability for royalties due. All of the aforementioned clearly showed that the legislature's intention and policy rationale coincided with UMK's interpretation of s 6(3)(b).

Consequently, the SCA rejected the interpretation adopted by the Commissioner for Sars and found in favour of UMK. As the Commissioner's interpretation was devoid of any legal basis, the SCA mulcted the Commissioner with a costs order, which included costs incurred in the employment of two counsel.

### Conclusion

The SCA's application of the purposive interpretative approach illustrated that a consideration of the context of a statute is fundamental for its interpretation. The background to which a particular statute is enacted provides the context for its interpretation. In circumstances where the creation of the statute was carried out by a commission of inquiry or a specialised drafting committee, it is permissible to refer to their reports, which may assist in contextualising the statute. Interpretational uncertainty may be clarified with due consideration to the legislative history of the enactment. Furthermore, the general background to the statute (such as, the nature of the concerns to which the legislature sought to ameliorate, the purpose for the statute, the nature of the areas to which the statute deals with, etcetera) may provide useful context. Before calling on the court to decide on the interpretation of a statutory provision, a practitioner should ensure that the interpretation argued on behalf of the client is founded in law, failing which the court may exercise its discretion to mulct the client with an adverse costs order.

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By  
Nadine  
Mather

## Suspension without pay

In *American Products Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2021] 1 BLLR 64 (LC), the employee was employed by American Products Services (the Company) as a truck driver and was involved in a motor vehicle accident that resulted in damage to the Company's vehicle. The next day, the Company suspended the employee pending an investigation into the accident. The suspension was without pay and the employee was denied access to the Company's premises.

The Company thereafter instructed the employee to produce an eye test report and informed the employee that a failure to produce the report would result in his 'instant dismissal'. The employee failed to produce the eye test report by the stipulated date and was dismissed following a disciplinary hearing, which he failed to attend.

Prior to his dismissal, the employee referred an unfair labour practice dispute concerning his suspension to the Commission for Conciliation, Mediation and Arbitration (CCMA). At the CCMA, the Commissioner noted that there were two types of suspension. The first type of suspension was a 'holding operation' where the suspension is not designed to impose discipline, but is rather for reasons of good administration. The second type of suspension serves as a form of disciplinary action. The Commissioner found that the first type of suspension applied to the employee because the Company suspended him pending an investigation into the accident. The Commissioner held that it is unlawful to sus-

pend an employee without pay pending disciplinary action.

Regarding the procedure followed by the Company, the Commissioner found that while there was evidence that the employee was involved in alleged serious misconduct, which required investigation, there was no evidence that justified denying the employee access to the workplace. Further, the employee had not been provided with an opportunity to make representations before he was suspended by the Company.

In the circumstances, the Commissioner found that the employee's suspension was both substantively and procedurally unfair and ordered the Company to pay the employee an amount equivalent to six months' remuneration as compensation.

Disgruntled by the outcome, the Company took the Commissioner's award on review. The Company alleged that the Commissioner failed to apply his mind to the facts and had committed a gross irregularity in reaching the conclusion that the employee's suspension was substantively and procedurally unfair. The question before the Labour Court (LC) was accordingly whether the Commissioner, in making the award, came to a decision that no reasonable decision-maker could reach.

The LC noted that s 186(2)(b) of the Labour Relations Act 66 of 1995 provides for an unfair labour practice involving 'the unfair suspension of an employee or any other unfair disciplinary action short of dismissal'. It is now settled that this includes both suspension imposed as a disciplinary sanction and 'precautionary' suspension pending disciplinary action. The latter form of suspension must be on full pay. The court held that the Commissioner had correctly found that the suspension was a 'holding operation'

and not a disciplinary sanction. While no disciplinary action may have taken place had the employee submitted the eye test report, the court found that this was irrelevant to the finding that the suspension without pay was unlawful.

As regard to the failure by the Company to provide the employee with an opportunity to make representations prior to the suspension, the court referred to the Constitutional Court (CC) judgment of *Long v South African Breweries (Pty) Ltd and Others* [2019] 6 BLLR 515 (CC) in which it was held that where the suspension is precautionary and not punitive, there is no requirement to afford the employee an opportunity to make representations. This said, the CC found that generally, where suspension is on full pay, 'cognisable prejudice will be ameliorated'.

In the present case, however, the prejudice caused to the employee had been exacerbated by the Company's decision to suspend him without pay. The court was of the view that given the punitive nature of the suspension, the employee ought to have been provided with an opportunity to make representations prior to any action being taken. This would not have been the case had the employee been suspended with pay.

The court accordingly found that the decision by the Commissioner was one that a reasonable decision-maker could reach, and the Commissioner could not be faulted for awarding the employee six months' compensation. The review application was dismissed with costs.

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

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By  
Moksha  
Naidoo

## Polygraph test and circumstantial evidence

*Goldplat Recovery Pty Ltd v CCMA and Others* (LC) (unreported case no JR488/2019, 3-2-2021) (Tlhotlhamajale J).

In September 2018 an employee of the applicant was found with 1,5 kg of gold concentrate in his possession. The product was kept in a restricted area, which the employee did not have access to. Having been released on bail and at his internal inquiry, the employee said that a syndicate was operating out of the employer's premises but refused to identify those involved. The employee was subsequently dismissed.

In light of this information and on the employer's request, employees who had access to the restricted area underwent a polygraph test. Of those who were polygraphed, only the third respondent employee failed the test. This employee was charged for 'suspicion of theft of company goods' and later dismissed, whereafter he referred a dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).

At arbitration, the employer led the evidence of its Human Resources (HR) Manager and Mine Superintendent. Their evidence before the arbitrator was:

- That the employee was a team leader and had access to the restricted area by virtue of his responsibilities.
- Although there were security guards in the restricted area, it was unclear whether the guards searched employees each time they entered or exited the area. Furthermore, it was possible that the security guards may have been a part of the suspected syndicate.
- Both witnesses were not involved with administering the polygraph test.
- There were other employees who had access to the restricted area.
- The employee who had been dismissed for possession of the gold concentrate and the employee *in casu*, worked the same shift the day the former attempted to steal the gold concentrate.

The employee's version was simply that he was not involved in the attempted theft of the gold concentrate.

In his award the arbitrator found that:

- Since the employee in whose possession the product was found, did not have access to the restricted area, he could only have obtained possession of the gold concentrate from someone who had access to the restricted area.
- In the absence of leading any direct evidence in support of the charge, the employee relied solely on circumstantial evidence in an attempt to discharge its onus.
- Due to the fact that the employee was not the only person who had access to the restricted area, there was more than one inference to be drawn from the circumstantial evidence.
- The employer failed to lead any expert evidence on the reliability and accuracy of the polygraph test.

Following the above findings, the arbitrator found the employee's dismissal substantively unfair and awarded him 12 months' compensation.

On review, the employer attacked the award on numerous grounds, namely:

- The employer argued that the arbitrator adopted the incorrect standard of proof when assessing the circumstantial evidence in that the question he ought to have asked is whether the inference drawn by the employer was the most likely one and not whether it was the only inference that could have been drawn.
- The arbitrator failed to take into account the fact that the employee was dishonest and hence an unsatisfactory witness.
- The results of the polygraph test corroborated the employee's dishonesty.
- It was unreasonable for the arbitrator to award the employee maximum compensation.

The court began by stating that the test on review is trite. An arbitrator's error in law or fact, their flaws in their reasoning, their reliance on irrelevant facts or failure to place weight on material facts, are on its own, not enough to set aside an award. It is only when it can be demonstrated that these irregularities ultimately led the arbitrator to embark on the incorrect inquiry or resulted in the arbitrator arriving at a finding, which falls outside the band of reasonableness, would the award be susceptible to being set aside.

Turning to the merits, the court found that it was the results of the polygraph test, which formed the basis of the employer preferring charges against the employee, and subsequently dismissing him. While administering a polygraph test is in itself not unfair only where there is reason to suspect wrongdoing, an employer cannot solely rely on the employee failing the test in order to establish dishonesty on their part.

Additionally, the onus remains on the employer to prove the cogency and reli-

ability of the polygraph test. To this end, the employer failed in its duty. Neither the HR Manager, nor the Superintendent were experts in this field or even administered the test. Thus, other than submissions on the results of the polygraph test, there was nothing further the arbitrator could have considered on this point.

On the common cause facts, together with the employer's own version, in particular that the security guards at the restricted area were not trustworthy and could have been complicit in the attempted theft; it was not unreasonable for the arbitrator to find there were other reasonable inferences that could be drawn, which did not implicate the employee in any way.

Regarding the second and third ground on review, the employer argued that the arbitrator ought to have drawn the inference that the employee was dishonest and unreliable following that his defence amounted to a bare denial, together with the fact that he did not challenge the results of the polygraph test. In rejecting this argument, the court held that absent any direct evidence of the employee's involvement in the attempted theft, the employee's lack of knowledge of such events could not strengthen the employer's suspicion that he was involved in the incident.

In relation to the maximum compensation awarded to the employee, the court held:

'The approach in determining what constitutes just and equitable compensation was reiterated in *ARB Electrical Wholesalers (Pty) Ltd v Hibbert* [2015] 11 BLLR 1081 (LAC)], and essentially, the factors to be looked at include but are not limited to the nature and seriousness of the infringement, the circumstances in which it took place, the behaviour of the employer and the extent of the complainant's humiliation or distress.

In this case, in considering the amount of compensation, the Commissioner had regard to the fact that the dismissal of [the employee] was "grossly unfair", and further that he had long service. Furthermore, there cannot be anything unfair when maximum compensation is awarded, in circumstances where an employer had hopelessly failed to discharge the onus placed on it under sections 192(2) and 188(1)(a)(i) of the [Labour Relations Act 66 of 1995], and where as the Commissioner had found, that the dismissal was grossly unfair.'

The review application was dismissed with costs.

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By  
Kathleen  
Kriel

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<i>DJ</i>	De Jure	University of Pretoria	(2020) 53
<i>EL</i>	Employment Law Journal	LexisNexis	(2020) 36.6 (2020) 37.1
<i>ILJ</i>	Industrial Law Journal	Juta	(2020) 42
<i>ITJ</i>	Insurance and Tax Journal	LexisNexis	(2020) 35.4
<i>JCLA</i>	Journal of Comparative Law in Africa	Juta	(2020) 7.1
<i>LitNet</i>	LitNet Akademies (Regte)	Trust vir Afrikaanse Onderwys	(2020) 18(1)
<i>PLD</i>	Property Law Digest	LexisNexis	(2020) 24.4
<i>SAJCJ</i>	South African Journal of Criminal Justice	Juta	(2020) 33.2
<i>SJ</i>	Speculum Juris	University of Fort Hare	(2020) 34.2
<i>TPCP</i>	Tax Planning Corporate and Personal	LexisNexis	(2020) 34.6 (final issue)
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By Mohau  
Romeo  
Tsusi

# WhatsApp Saga – a reminder of the importance of POPIA in South Africa

**T**he recent announcement by Facebook, which is the parent company of WhatsApp, regarding the modification of their data collection structure to its terms and conditions, was met with caution and cynicism the world over.

The protection and privacy of personal information has been a much-debated issue in the past decade. The alleged data breaches at Cambridge Analytica and Yahoo! in the United States are quickly brought to the fore by proponents of stricter data protection policies, in light of the fact that in the case of Yahoo! a class action had to be settled eventually.

Subsequently, privacy policies of entities that collect personal data (responsible parties) have undergone major revamps with governments putting in place measures that encourage responsibility and transparency in the handling of personal information. The General Data Protection Regulation (GDPR), which came into effect in May 2018 in Europe, is one such measure.

South Africa enacted the Protection of Personal Information Act 4 of 2013 (POPIA), which provides in s 2, that it seeks to 'give effect to the constitutional right to privacy, by safeguarding personal information when processed by a responsible party, subject to justifiable limitations'. POPIA came into effect on 1 July 2020 with a grace period of 12 months, although some of its sections had commenced in 2014.

To comply with POPIA in the process-

ing and gathering of personal information, responsible parties must adhere to POPIA in general and, in particular to the eight conditions provided in its regulations, namely:

- The achievement of 'accountability' involves the alignment of data collection procedures and measures to be solely aimed in line with compliance.
- 'Processing limitation' is aimed at the gathering of information for the purpose it was collected for, coupled with consent for such particular purpose.
- The data subject must know the exact and explicit purpose why personal information is required for the responsible party to comply with the condition of 'purpose specification'.
- 'Further processing limitation' places an obligation on the responsible party to request further authorisation should the purpose for which the information was collected for initially, substantially alters. Further authorisation is, however, not necessary for ancillary purposes, which fall within the ambit of the originally authorised purpose.
- The collected information is to be validated so that it is accurate, complete and not misleading. This is what is provided for in compliance with the condition of 'information quality'.
- 'Openness' requires that the data subject be aware to the fact that their information is being collected and given clear reasons why.
- Unauthorised access, disclosure, mod-

ification and destruction of the gathered information must be avoided at all costs. The responsible party must put 'security safeguards' in order to achieve such.

- 'Data subject participation' demands that the data subject be involved in the collection, amendment or obliteration of the data.

POPIA is applicable in the workplace too, whereby the employees' personal information must be collected in compliance with the conditions set out above for operational reasons.

It is imperative that responsible parties put measures in place to fully comply with POPIA on or before 30 June 2021, prior to the lapse of the 12-month grace period. The Act aims to eradicate the unlawful processing of personal information and it remains to be seen how successful it will be.

In the meantime, companies must ensure that their terms and conditions, particularly their privacy policies, comply with POPIA.

**Mohau Romeo Tsusi LLB (UWC) is a Chief Executive Officer and legal practitioner at MRT Law in Cape Town.**



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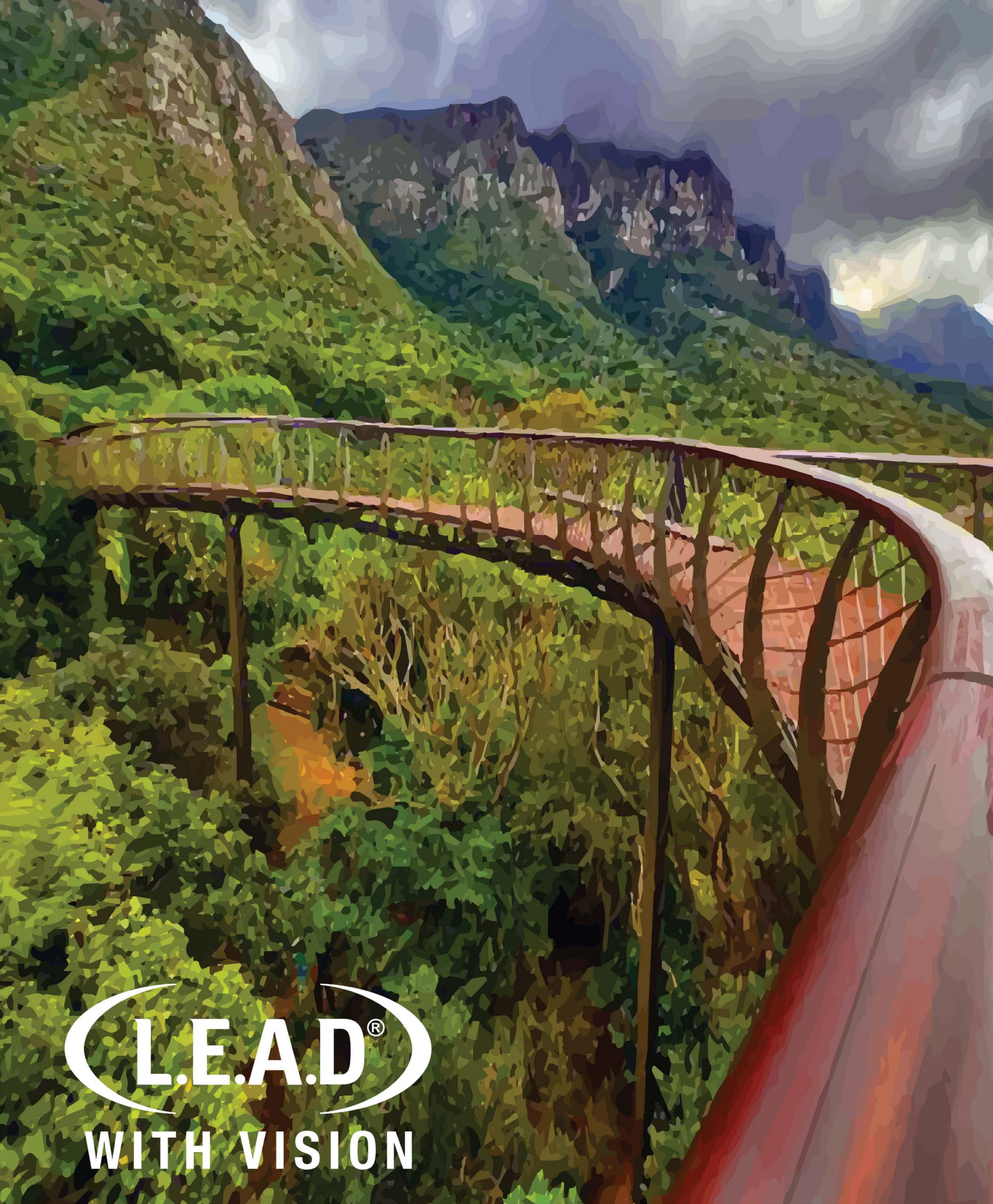
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## Classified advertisements and professional notices

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### Anthony V. Elisio

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## SMALLS

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  - e-mail address;
  - age;
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  - when can you start your articles; and
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- Please remember that this is a public portal, therefore, **DO NOT include your physical address, your ID number or any certificates.**

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