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THE SA ATTORNEYS' JOURNAL

MAY 2021

LIMITING HUMAN RIGHTS DURING COVID-19 – IS IT ONLY LEGITIMATE IF IT IS PROPORTIONAL?

Understanding customary marriages – it is not as straight forward as it seems

Unlocking the door to reserve prices in sales of execution

Are you over the limit? South African law and blood alcohol content





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14 Limiting human rights during COVID-19 – is it only legitimate if it is proportional?

n 11 March 2020, the World Health Organisation declared COVID-19 a pandemic. Governments around the globe reacted by introducing harsh lockdown measures with severe wide-ranging interference with fundamental human rights. These restrictions bring into question the doctrine of proportionality, which prescribes that all statues and regulations that affect human rights should be proportionate. Extraordinary Research Fellow, **Dr Willem van Aardt**, examines the notion that the limitation of fundamental human rights by the lockdown regulations is legitimate only if proportional.

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24 Understanding customary marriages – it is not as straight forward as it seems

Ithough customary marriage was recognised in law through the Recognition of Customary Marriages Act 120 of 1998 (RCMA), the operation, application and subsistence thereof remains subject to interpretation. Senior legal adviser, **Portia Mashinini**, writes that although the RCMA addresses many past imbalances and gender inequalities relating to certain aspects of customary marriages, it is clear that South African communities still lack the required knowledge of the operation and application of the RCMA.

27 Are you over the limit? South African law and blood alcohol content

lobally South Africa is rated the sixth highest per capita consumer of alcohol and according to the Road Traffic Management Corporation, alcohol-related vehicle crashes cost the country R 18,2 billion per annum. The government's solution to this problem is to reduce the blood alcohol content



(BAC) to 0%. Legal practitioner, **Prof Hennie Klopper**, writes that simply introducing a 0% BAC will have no effect unless there is legislation dealing with the entire spectrum of intoxication control of all road users and the proper law enforcement to support convictions.

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What is the difference between the LSSA and the LPC?

have written numerous editorials on the workings of the Law Society of South Africa (LSSA), the relevance of the organisation and its value to legal practitioners (see box below). There is widespread confusion in the profession about the difference between the Legal Practice Council (LPC) and the LSSA. This stems from the fact that many legal practitioners do not know that the functions performed by the LPC are vastly different from those performed by the LSSA.

The LPC is a statutory body that was established in terms of s 4 of the Legal Practice Act 28 of 2014 (the LPA). According to the LPC's website, the LPC 'is mandated to set norms and standards, to provide for the admission and enrolment of legal practitioners and to regulate the professional conduct of legal practitioners to ensure accountability'. The website goes on further to state that the LPC and its Provincial Councils 'regulate the affairs of and exercise jurisdiction over all legal practitioners (attorneys and advocates) and candidate legal practitioners.'

Section 5 of the LPA sets out the objectives of the LPC, which are to:

- '(a) facilitate the realisation of the goal of a transformed and restructured legal profession that is accountable, efficient and independent;
- (b) ensure that fees charged by legal practitioners for legal services rendered are reasonable and promote access to legal services, thereby enhancing access to justice;
- (c) promote and protect the public interest;
- (d) regulate all legal practitioners and all candidate legal practitioners;
- (e) preserve and uphold the in-

- dependence of the legal profession;
- (f) enhance and maintain the integrity and status of the legal profession;
- (g) determine, enhance and maintain appropriate standards of professional practice and ethical conduct of all legal practitioners and all candidate legal practitioners;
- (h) promote high standards of legal education and training, and compulsory post-qualification professional development;
- (i) promote access to the legal profession, in pursuit of a legal profession that broadly reflects the demographics of the Republic;
- ensure accessible and sustainable training of law graduates aspiring to be admitted and enrolled as legal practitioners;
- (k) uphold and advance the rule of law, the administration of justice, and the Constitution of the Republic; and
- (*l*) give effect to the provisions of this Act in order to achieve the purpose of this Act, as set out in section 3.'

In a broader sense, the objectives of the LPC are to represent the public's interest, while regulating and disciplining legal practitioners and candidate legal practitioners. On the other hand, the LSSA's objectives are to:

- be the voice of the profession;
- conduct assessments for entry to the profession;
- offer the best legal education training (mandatory and postqualification professional development);
- represent practitioners' interests in both local and international forums:
- be a forum for practitioners to gather and deliberate;



- offer practice management resources;
- ensure there is transformation of the profession;
- lobby government on crucial issues that are of interest to the profession and the public;
- comment on proposals affecting the profession and society; and
- publish a digital legal journal, for all legal practitioners.

Even though there may be similarities in the work done by the LPC and the LSSA, one important difference is that the LSSA represents legal practitioners, while the LPC regulates legal practitioners.

- What is the relevance of the LSSA? 2021 (March) *DR* 3.
- How does the Law Society of South Africa fulfil its functions? 2020 (Dec) *DR* 3.
- What does the Law Society of South Africa do? 2020 (Nov) *DR* 3.
- LSSA and LPC discuss issues of importance to the legal profession 2020 (March) *DR* 3.
- Calling all attorneys: Have you been part of the establishment of the provincial attorneys' associations? 2019 (Nov) *DR* 3.

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.

Gender-based violence amendment laws in South Africa

With International Women's Day being commemorated on 8 March 2021, it is pertinent that we are once again reminded of the amendments to South African laws set to tighten gender-based violence (GBV) aimed at protecting women and children.

The amendment Bills include the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, Domestic Violence Act 116 of 1998 and Criminal and Related Matters Amendment Bill B17 of 2020. These amendments are aimed to fill in the gaps where perpetrators evade consequences for their criminal acts. The ripple effect is that justice for women and children cannot prevail when perpetrators evade such consequences.

President Cyril Ramaphosa at the 2020 State of the Nation Address stated that the Domestic Violence Act shall be amended to offer better protection to domestic violence victims, the Sexual Offences Act will broaden the categories of sex offenders, whose particulars must be included in the National Register for Sex Offenders, and he further stated that GBV case laws will be passed to tighten bail and sentencing conditions. The President implemented an Emergency Action Plan aimed at:

- improving access to justice for survivors of violence;
- strengthening the criminal justice process:

- prioritising the creation of economic opportunities for women; and
- changing attitudes and behaviour by using prevention campaigns (see South African Government News Agency 'Domestic Violence Amendment Act to better protect GBV victims' (www. sanews.gov.za, accessed 7-3-2021)).

The Criminal Law (Sexual and Related Matters) Amendment Act creates a new offence of sexual intimidation. The amendments to this Act will further protect persons from the offence of incest. Further amendments include a public register of sex offenders containing all particulars and for instances of suspicion of sexual offences being committed against a child, the duties on reporting these offences are allowed for on a greater component. The amendment of the definition of 'domestic violence', in the Domestic Violence Act. includes those who are dating, engaged, 'in customary relationships, and actual or perceived romantic, intimate or sexual relationships'. This amendment Bill further, 'extends the definition of "domestic violence" to include the protection of older persons against abuse by family members' (see Hassan Isilow 'S.Africa announces gender based violence law' (www.aa.com.tr, accessed 7-3-2021)).

The Criminal Matters Amendment Bill allows for regulations relating to the granting of bail will be tightened for perpetrators of GBV and femicide. Offences requiring a minimum sentence are to be imposed and will be expanded.

Law enforcement officials and courts will be imposed with new obligations as

per these new amendments. The above amendments are intended to give women and children the full effect of their rights.

Sandipa Ramkissoon *LLB (UKZN) LLM (Unisa)* is a legal practitioner at SSR Attorneys in Durban.

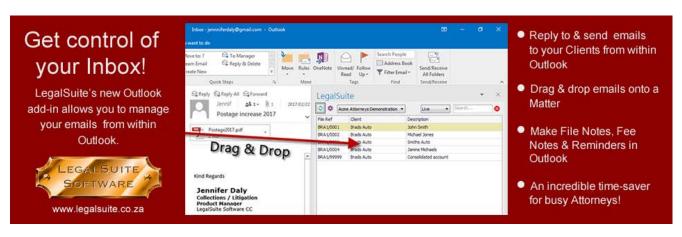
Complaint against the Eastern Cape LPC

We confirm that we represent our client, \mathbf{x}

It was encouraging to read the editorial by Mapula Sedutla 'What is the relevance of the LSSA?' 2021 (March) *DR* 3. At various points in the article, it would appear that the Law Society of South Africa (LSSA) assists attorneys and particularly supports 'the efficient administration of the justice system'. Reference is also made to the LSSA '[speaking] nationally on behalf of the attorneys' profession'. The LSSA also plays 'an advocacy role for the profession' and so on.

We address you in our frustration with a total lack of concern and attention in respect of our client.

During September 2016, our client consulted the writer who addressed a letter of complaint to the Cape Law Society (as it was then known). I do not intend to bore the LSSA with the correspondence, which followed after the complaint, as it will make this letter totally verbose. In essence, we were assured by the Cape Law Society that disciplinary action was being pursued against the attorney in question. In later correspondence we received a let-



ter from the Legal Practice Council (LPC) on 19 June 2019 saying that the complaint would be attended to 'in terms of the new procedure'. Reference was also made to our client pursuing her civil remedies. This has been concluded. Our client still requires the attorney to answer to her complaint.

To put it bluntly, we were shoved from 'pillar to post' by numerous employees of the LPC Eastern Cape Provincial Office. Then on 28 January 2021, we were advised by a representative of the LPC, by way of 'automatic reply' that our e-mail of 26 January 2021 had been acknowledged. We are certain that the LPC will have a file, which you can call for in as far as our ongoing correspondence to that office is concerned.

That it has taken a total of five years to know that 'zero' has happened in respect of our client's complaint. This is certainly an absolute failure and embarrassment in respect of 'the efficient administration of the justice system'. You will note our sense of frustration, as well as our client's frustration. Should our client be the victim of an obvious failure in the 'inefficient' administration of the justice system? We reasonably assume that the LPC has control over its members and its procedures and that it is part of the 'efficient administration of justice'.

It is unacceptable that a person who is compelled to answer a valid complaint enjoys indemnification due to the poor administration of justice. If our client's complaint cannot be dealt with or has not been dealt with, our client deserves to be given a reason. If the matter is to be dealt with and investigated to finality then the client should, in our humble view, be given a communication to that effect, as well as the outcome of whatever the process dictates.

Matthew Yazbek BProc (Unisa) is a legal practitioner at Stirk Yazbek Attorneys in East London.

Response to the complaint by Mr Matthew Yazbek

We refer to the letter by legal practitioner Mr Yazbek and thank *De Rebus* for affording the Eastern Cape Provincial Office of the Legal Practice Council (LPC) the opportunity to respond to the complaint.

In summary, and if our understanding is correct, it appears that the subject matter of the complaint is about the alleged delay in the finalisation of a complaint, which Mr Yazbek submitted on behalf of his client, as well as the lack of feedback/progress report to him and/or his client. However, the details of the complainant and the nature of the complaint have, and understandably so, not been mentioned in the letter.

On receipt of the complaint, I immediately conducted an internal investigation and sought and obtained feedback from the legal officers who are dealing with complaints lodged/submitted against the legal practitioners. In addition, thereto I also reviewed the relevant complaint files involving the clients of Mr Yazbek.

According to our records, there are two complaints in which Mr Yazbek is involved in as representative capacity on behalf of the complainants. The respective complaints are against two different legal practitioners who are enrolled with the LPC as attorneys. The one complaint was lodged with the former Cape Law Society in November 2015, and the other in February 2019. The relevant complaint files were subsequently transferred from the Western Cape Provincial Office of the LPC to the Eastern Cape Provincial Office of the LPC.

The Investigation Committees that have been constituted are seized with the investigation of both the complaints. The investigation of both the complaints by the Investigating Committees have not yet been finalised. Mr Yazbek has been kept informed of the status of the investigation of the complaints. The said complaints, like all the complaints that are submitted to our offices, are being attended to and all the parties involved shall be advised of the outcome on completion of the investigation.

In terms of the Legal Practice Act 28 of 2014, we have an obligation to regulate the legal profession in South Africa in the public interest. This objective cannot be achieved if the finalisation of the investigation of complaints against the legal practitioners is unreasonably delayed. We also recognise that, in the regulation of the legal profession in the public interest, accountability, transparency and responsiveness are also critical values to which we subscribe. In that regard, it is important that all the parties involved in the subject of the complaint being investigated are furnished with regular progress reports, which, according to our records, has been done in respect of the complaints that were submitted by Mr Yazbek on behalf of his clients.

I have since instructed the legal officers to ensure that the Investigation Committees expedite the finalisation of the investigation of the complaints and to advise thereafter all the parties involved of the outcome of the investigation.

I remain accessible and available to address all the concerns in regard to the investigation of complaints. It is only when issues and constructive feedback are brought to my attention that we can strive to improve our internal processes in regard to the investigation of complaints against the legal practitioners. In that regard, I sincerely wish to convey my

gratitude to Mr Yazbek for raising the issues, and hereby give an assurance that all the complaints are being attended to, and that he shall be kept informed of the progress as well as the outcome of the investigation.

Alfred Hona is the Director of the Eastern Cape Provincial Office of the Legal Practice Council.

'Fit and proper' standard

I inquire whether it is possible for law graduates with past criminal convictions to submit applications for a determination as to whether they are 'fit and proper' to enter the legal profession prior to applying for articles/immediately on completion of the degree.

The reason for this is that law firms very often, and understandably so, shy away from applications of law graduates with past criminal convictions because they are uncertain whether the articles are registrable.

It has been a standard practice to submit such applications with the application for registration of the practical vocational training contract, which places a burden on law firms to satisfy the Legal Practice Council (LPC) that a person is 'fit and proper', whereas this is outside their remit or *ultra vires* (ie, beyond the scope of their powers).

Consideration of this matter by the relevant decision-making body of the LPC would be appreciated.

The crux of the matter is what option/recourse does a prospective candidate legal practitioner have in the circumstances as mentioned above, regarding the fact that a past criminal conviction is not an absolute bar to being allowed to do articles or to be admitted to the legal profession.

Saul Nthite *LLB* (*Unisa*) is a graduate in Pretoria.

Response from the LPC

When candidates/graduates with prior criminal convictions apply for a practical vocational training (PVT) contract, those applications are referred to the Legal Practice Council's (LPC's) Provincial Professional Affairs Committees. In instances where the PVT contract is registered, letters are addressed to the applicants to make them aware of the final decision as to whether the candidate/applicant can be considered as a 'fit and proper person' and be admitted as a legal practitioner lies with court and will not be bound by the position of the LPC.

Legal Practice Council National Office, Midrand





Ongoing cybercrime threats

Thomas Harban

he importance of cyber risk management for law firms has received increased international attention following on the widely covered data breach at the Panamanian law firm, Mossack Fonseca & Co, in April 2016. The ransomware attacks against some large international law firms in recent years have also received extensive media coverage.

The Legal Practitioners' Indemnity Insurance Fund NPC (LPIIF) claim statistics show that South African law firms have been the target of cybercriminals for over a decade. The modus operandi in the claims notified is similar, with an email purporting to be from the intended recipient of funds being sent to the party making the payment. The fraudulent e-mail gives the details of a fraudulent bank account into which the law firm is then induced to pay the funds. This is commonly referred to as a 'business email compromise' fraud. Examples of the modus operandi and the questions giving rise to the liability on the part of law firm can be gleaned from the judgments in Jurgens and Another v Volschenk (ECP) (unreported case no 4067/18, 27-6-2019) (Tokota J) and Fourie v Van der Spuy and De Jongh Inc and Others 2020 (1) SA 560 (GP)). This, however, is only one type of cyber-attack. Other methods of cyber-attack include -

- hacking;
- phishing and spear-phishing;
- ransomware;
- website vulnerabilities; and
- fake law firm websites.

The cyber-attacks have become more sophisticated over time and technological advancements, together with the current offsite and virtual working environments, have also provided a fertile ground for the cyber criminals to increase their attacks on law firms. The *modus operandi* has also become more sophisticated. For example, the LPIIF was recently made aware of an incident where a professional indemnity (PI) claim had been settled and the capital amount paid to the plaintiff's legal practitioner. When the party and party costs were due to be paid, the correspond-

ence 'supposedly from the plaintiff's legal practitioner' included a document, which purported to be issued by one of the large commercial banks as proof of the account into which the funds were to be paid. The vigilance on the part of the LPIIF panel attorney and the staff in his office prevented the funds from being paid into the fraudulent account. The panel attorney had also phoned the plaintiff's legal practitioner to alert him to this attempt to defraud him and his client.

In another incident, an information and technology service provider with whom there is an existing contractual relationship issued an invoice for services rendered. The service provider's account has always been held with bank 'X'. Shortly thereafter, a letter purporting to be from the service provider was received with instructions to make payment into a bank account with 'Y' bank. The reason for the change in banking details, claimed the fraudulent letter, was the problems with bank X's system. This occurred soon after problems with 'double-debits' had been experienced by certain customers of bank X, which was covered in the media. The 'explanation' for the request to change banking details, thus seemed, at the time, to be reasonable. Once again, vigilance on the part of the staff in the finance department identified the potential fraud and contacted the service provider who was shocked to learn of the attempt to de-

These two examples of recent cases show the extra vigilance required to avoid falling victim to cyber-attacks.

The extent of cyber threats

The national crime statistics released by the South African Police Service (SAPS) for the 2010/2011 to the 2019/2020 reporting periods show an increase of 0,1% in the category grouped collectively as 'commercial crime' (www.saps.gov. za) in the most recent reporting period. The SAPS statistics, unfortunately, do not give a breakdown of the granular detail in the commercial crime category to show the proportion of cybercrime related matters in relation to the broader

commercial crime category. It is thus not possible to ascertain, from the national crime statistics, the number and value of cybercrime related crimes reported or the targets of this type of crime in South Africa (SA). The production of a detailed breakdown (as has been done with contact crimes and those involving violence, for example) of the cybercrime statistics, showing the respective profiles of the perpetrators and the victims, the monetary values involved, whether the losses are potential or actual, geographical spread and the modus operandi would have given a detailed picture of the extent to which legal practices have been targeted by cyber criminals. It is also not known to what extent law firms are reporting cybercrime incidents to the SAPS. This information will be valuable in an assessment of the cyber risk and in developing appropriate measures to mitigate the risk. It will also assist the insurers in conducting appropriate underwriting exercises on this type of risk in order to appropriately price the risk and determine the terms of cover.

One of the challenges in dealing with cyber risk is a lack of appreciation by some legal practitioners of the nature and extent of this risk and its increasing likelihood in the current operating environment. An analysis of the data extracted from the Fidelity Fund Certificate application system shows that less than a third of practitioners have indicated that they have cyber insurance cover in place. This is a serious cause for concern considering that cyber is a risk faced by all legal practices.

Shanice Naidoo in 'Cybercrime on the rise since start of lockdown' (www. iol.co.za/weekend-argus, accessed 4-4-2021) reports 37% of South African businesses surveyed experienced cyberattacks in the last year. Comprehensive statistics on the extent of cyber-attacks on legal practitioners in SA are not immediately available, but, from the available information, it can be noted that:

 Cybercrime related matters make up 43% of claims rejected by the LPIIF. Claims arising out of cybercrime are excluded from the LPIIF policy (see clause 16(o) of the Master Policy accessible at https://lpiif.co.za). The total value of the claims rejected in terms of this exclusion now stands at R 134 million. The extent to which legal practitioners continue falling victim to cybercrime, despite all the available information, is concerning.

- Using data obtained from an assessment it had conducted, one commercial insurer has broken the perceptions the respondents had of cyber threats into concerns noted in respect of -
- unauthorised access to bank accounts (68%):
- unauthorised access to internal e-mail (47%);
- customer data being stolen (46%)
- systems being locked with ransomware (37%);
- fines and penalties related to the Protection of Personal Information Act 4 of 2013 (18%);
- 9% of the respondents indicating that there were not concerned of any of the listed threats; and
- 37% of the respondents reported having had a cyber related incident in the last year (SHA Risk Specialists 2020 The Annual Risk Review at 34 (www. sha.co.za, accessed 5-4-2021)).
- Cybercrime is a concern for legal practitioners in all jurisdictions around the world. Two examples that can be cited to illustrate the point are New South Wales in Australia where more than 50% of the claims reported in an 18-month period are reported to have arisen from business e-mail compromise ('Cyber Risk - The Facts' (www. lawcover.com.au, accessed 4-4-2021)). In England and Wales, the Solicitors Regulation Authority (SRA) was made aware of losses of nearly £ 2,5 million being stolen from law firms in the first half of 2020 (a threefold increase from the corresponding period in 2019) (see 'Information and cyber security' (www.sra.org.uk, accessed 4-4-2021)).
- The growing scourge of cybercrime has been noted by international or-

ganisations such as the United Nations (UN) and the International Bar Association (IBA). At the Twelfth UN Congress on Crime Prevention and Criminal Justice, the General Assembly adopted Resolution 65/230. In that resolution, the General Assembly: '9. Requests the Commission on Crime Prevention and Criminal Justice to establish, in line with paragraph 42 of the Salvador Declaration, an open-ended intergovernmental expert group, to be convened prior to the twentieth session of the Commission, to conduct a comprehensive study of the problem of cybercrime and responses to it by Member States, the international community and the private sector, including the exchange of information on national legislation, best practices, technical assistance and international cooperation, with a view to examining options to strengthen existing and to propose new national and international legal or other responses to cybercrime.' The IBA has also given extensive coverage to the cyber risk for law firms. An international study conducted by the IBA (Cyber Security Bars Research (www.ibanet.org, accessed 5-4-2021)) includes a reference to the cybersecurity guidelines published by the Law Society of South Africa.

Risk management suggestions

It goes without saying that cybercrime is one of the main risks that a legal practice must consider when conducting its risk assessment. The vulnerabilities flowing from the remote working environment must also be assessed. Some of the consequences of a cyber risk materialising will include the inability to operate (particularly in the face of a ransomware attack), the reputational damage to the firm and liability to third parties who may have suffered damages because of the attack.

This is also a regulatory and compli-

ance matter. The appropriate internal controls must be developed, implemented and monitored (as required by r 54.14.7 of the Legal Practice Council Rules made under the authority of ss 95(1), 95(3) and 109(2) of the Legal Practice Act 28 of 2014) to mitigate exposure to this risk. The internal controls must include a system of verifying the banking details (and any purported change to the banking details) of the recipient before making payments as prescribed in r 54.13. If trust funds are lost in the cyber scam, the result will be a shortfall in the trust balances (r 54.14.8), the trust account being in debit (r 54.14.9), which must be immediately reported to the Legal Practice Council as required by r 54.14.10 and the shortfall rectified.

Other risk management suggestions are:

- Getting specialist advice from cyber risk specialists and conducting regular vulnerability assessments.
- Contacting the recipient to verify the bank account details before making payments.
- Educating everyone in the firm on the cyber scams.
- Risk transfer measures, such as the purchase of appropriate cyber insurance cover.

It must always be remembered that insurers price the premium of any policy and set the terms of cover according to their perception of the risk. Legal practices will be well advised to ensure that they have the appropriate measures in place to mitigate cyber risks and thus be favourably viewed by insurers.

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





By Monica Korf

The ethical duty of technology competence

he national lockdown accelerated the use of technology by legal practitioners in South Africa (SA). Legal practitioners were forced to work from home and to type and create their own documents. Overnight it became crucial to have the right technology at hand, to be competent in the use thereof and to be aware of the risks involved.

This article aims to highlight the ethical duty of every legal practitioner to obtain basic skills in the use of technology. Any use or avoidance of technology that negatively affects a client could be an ethical violation. Lack of these essential skills can also lead to inefficient and poor work, lower fees, less profits, wasted time and the risk of becoming obsolete.

Baseline competence required

Many legal practitioners feel overwhelmed when confronted with new technology concepts, such as encrypted information, cloud computing, artificial intelligence, e-discovery, data storage and hacking. Being experts in law, a high level of expertise in these concepts cannot be expected from legal practitioners. What is firstly required, is the basic ability to effectively use the technology actually at hand. These are often the more mundane tools, such as e-mail, Internet research, case management, bookkeeping, excel and word-processing software.

Microsoft Word is overwhelmingly the most-used tool in the legal trade. Document preparation, drafting, and editing consume (or waste) a considerable amount of legal practitioner's time. Microsoft Word documents can win or lose cases, save or cost legal practitioners' and clients' money and preserve or destroy relationships between legal practitioners and their clients and colleagues.

United States of America (US) example

In 2012, the American Bar Association revised its Model Rules of Professional Conduct by expressly including a greater duty for technological competency as part of a lawyer's overall duty of com-

petence. A nationwide codification of required ethical and legal obligations for technology competency has since followed.

Many states in the US require technology training as part of its Mandatory Continuing Legal Education. This includes basic technologies, such as spreadsheets, word processing, conversion of files to PDFs, as well as more advanced technologies like scrubbing metadata, cloud-storage, e-discovery, and peer-to-peer collaboration.

South African legislature

The word 'technology' or the required competent use thereof, does not appear in the Legal Practice Act 28 of 2014 or the Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities. The aim of the legislation is, however, 'to regulate the professional conduct of legal practitioners so as to ensure accountable conduct'. It also requires that legal practitioners shall 'use their best efforts to carry out work in a competent and timely manner'.

In today's digital era, 'accountable conduct', 'best efforts' and 'a competent and timely manner' should also include the competent use of technology.

Relevant ethical duties:

To provide competent representation

A legal practitioner must be competent in all matters reasonably necessary for the proper representation of a client. How technology is used affects how well clients are served.

It is embarrassing to be reprimanded by courts and clients for sloppy pleadings, documents with confusing text and numbering, typos and formatting issues. Incompetence and user errors can also cause real-world problems for legal practitioners and their clients.

Incorrect cross-references in a legal document can cause major losses. Should a sale agreement stipulate that the purchaser must pay the deposit contained in clause 1.16, and there is no such clause, the legal practitioner's client (the seller) will not be protected in event of breach by the purchaser.

Missing a deadline, because the legal practitioner is struggling to format the legal document to a presentable state, comes down to failing the client, even though the legal contents of the document may be perfect.

• To charge reasonable fees

Knowingly wasting a client's time and money due to lack of computer skills is unacceptable. A fee may be unreasonable because –

- the legal practitioner was not technologically competent, by wasting time on manually inserting a table of contents or numbering pages and clauses; or
- because the work was not billable legal work, such as routine and repetitive tasks that do not involve independent legal judgment; or
- both points above.

Drafting a document may take long because it is complex or because the legal practitioner is ignorant of the automation functions in Microsoft Word, such as styles, quick parts, templates and other time-saving tools. To charge a client for the time struggling and retyping will be unethical.

• To protect client confidentiality

The lack of competence and knowledge may result in confidential information being exposed. Legal practitioners must be aware of the risk associated with information invisible in their documents, such as hidden text and comments, watermarks, document properties or metadata. Information relating to the document and representation of a client is exposed every time a document is shared or re-used.

The Protection of Personal Information Act 4 of 2013 aims to safeguard the right to privacy. It places obligations also on legal practitioners to comply with the conditions for lawful processing of personal information and the duty of data protection. Failure to comply can lead to punitive action. The restrict editing function in Microsoft Word is one such measure to prevent disclosure of confidential information.

Many legal practitioners re-use old documents from similar matters without

cleaning all the client information. By not using templates or the find-and-replace function in Microsoft Word, a legal practitioner may divulge that in a previous matter the seller had to pay commission to Mr J Corruption on acceptance of a tender.

• To train and supervise

Legal practitioners must create procedures and provide training to ensure compliance with all ethical duties by everybody in the firm. This includes technology training programmes.

Legal practitioners who ignore incompetence of staff members, risk violation of their ethical duty towards clients and staff members. They must have enough knowledge and ability to give direction when they see that a staff member is wasting time by retyping standard clauses or manually numbering pages and multi-level clauses.

Even today still, e-mails are sent by staff members with the firm's letterhead attached in Microsoft Word format including the legal practitioner's signature, without any editing protection. It is the legal practitioner, who must be held liable for failing to make the staff member aware of the risk of fraudulent use of the firm's letterhead and electronic signature in such unprotected format.

• To close the justice gap

It is a legal practitioner's ethical duty to provide legal services to those who do not have the luxury, time or means to access legal services delivered in the old-fashioned way. The technology is here today to automate legal services and make it virtually accessible for everybody from anywhere.

While each case had unique aspects, the drafting of many legal documents, such as divorces, change of marital regimes, rehabilitations, curatorship, loan-, lease-and sale agreements, wills, antenuptial contracts and so on, is quite repetitive.

Legal practitioners are not typically at the forefront of innovative and automated legal services. This becomes clear when the many third-party legal software programs available today and websites offering legal documents (often of poor quality) are considered.

High quality legal documents drafted by experienced practising legal practitioners, made easily accessible and obtainable, will not only serve a bigger portion of the population, but will also enhance the quality of legal documents offered on the Internet nowadays and improve clients' experiences by making legal services more convenient.

Automating legal services need not be

a costly or complicated exercise. By only using the functions in Microsoft Word, legal practitioners can set up basic templates, forms, and spreadsheets that enable the legal practitioner, staff member, or client to simply click on answers to automate the drafting with client specific information.

Conclusion

Legal practitioners can no longer be proudly unaware of technology or profess technological incompetence and still claim to ethically serve the need of their clients', staff and the greater population. Basic competency with the technology used every day and an awareness of the risks of incompetent use by anybody in a legal firm, are every legal practitioner's ethical duty.

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By Odwa Golela

The legal basis of a legal practitioner's liability for negligence in execution of mandate

n adversarial system of dispute resolution, in which the parties at dispute present their cases and a neutral factfinder attempts to resolve the dispute based on the parties' representations, naturally leads to a victor and loser. Hence, this system allows for an appeal (focus is on the factfinder's decision on the merits of the dispute) and a judicial review (focus is on the factfinder's approach to the procedural aspects of the dispute). Another less conventional avenue is that of a losing client building a case against their legal practitioner with a view to proving a case of negligence in the execution of their mandate. The loser (if successful) is then able to claim for relief against the legal practitioner who will in all likelihood claim from the Legal Practitioners' Indemnity Insurance Fund NPC (LPIIF).

In the latter cases, courts have to walk a thin line between –

- preventing the sore loser that is not confident enough to take the case on appeal or judicial review and instead falls back on their legal practitioner's prowess - or the alleged lack thereof; and
- protecting the vulnerable non-lawyer that fell for their legal practitioner's false claim of competence.

In this article, I revisit the legal mechanics relating to the construction of a case against a legal practitioner for alleged negligence in the execution of their mandate to provide guidance on the manner in which courts have walked the thin line between these two extremes.

Contractual liability

As a general rule, the action against a legal practitioner for professional negligence should be based on the contract between the client and the legal practitioner. By accepting the client's instruction and undertaking to provide them with the legal services necessitated by such instruction in exchange for a fee, a contract is formed between the client and the legal practitioner. It is implied in such contract that the legal practitioner represents to the client that they have the necessary skill, knowledge and dili-

gence to perform their duties as would be expected of a legal practitioner with ordinary skill (see *Honey and Blanckenberg v Law* 1966 (2) SA 43 (R) at 46E-F). The legal practitioner will be guilty of negligence if they lack such skill, care and diligence as would be expected of a legal practitioner with ordinary skill and such lack of skill, care and diligence causes harm to their client (see *Honey and Blanckenberg* at 46F). Goldin J set out two riders to these principles in *Honey and Blanckenberg* (see 46H):

- Generally, the legal practitioner will not be guilty of negligence if they took and acted on the opinion of counsel.
- The legal practitioner will not be guilty of negligence if they erred in judgment on legal or discretionary matters. This relates to, for example, instances where the legal practitioner might have erred in their determination of the legal nature of a document or in the interpretation of a statute (see Mouton v Die Mynwerkersunie 1977 (1) SA 119 (A) at 123H-124A). Furthermore, this principle was qualified in Mouton v Mynwerkersunie, in that it will not excuse a legal practitioner where the error in judgment was due to the lack of skill, care and diligence as would be expected of an average legal practitioner (Mouton v Mynwerkersunie para 143A-143B).

Goldin I went on to point out the inherent difficulty in making the value judgment of whether the legal practitioner has used reasonable skill, care, and diligence - the conclusion on this point was that it is ultimately a matter of degree (see Honey and Blanckenberg at 47A). A good illustration of the degree at which the legal practitioner's conduct will not be accepted as being of ordinary competence is available in the case of Mazibuko v Singer 1979 (3) SA 258 (W), where an legal practitioner had allowed a client's claim to prescribe and Colman J concluded that 'no attorney of ordinary competence and diligence' would allow a client's claim, which was clearly of importance to such client to become prescribed (Mazibuko at 264G-H). It can, therefore, be argued that a legal practitioner will be guilty of negligence for harm caused to a client owing to the lack of skill, care, and diligence only where such negligence is manifestly clear from the facts of the case.

It should be noted that the existence of a contractual relationship between the legal practitioner and the client must be proved before the court (see *Broderick Properties (Pty) Ltd v Rood* 1964 (2) SA 310 (T) at 314A-B). In this regard, the client must either have a documented contract with the legal practitioner or demonstrate circumstances that prove the existence of an implied contractual relationship (*Broderick Properties (Pty) Ltd* at 314A - B).

Delictual liability

Should the client fail to prove the existence of a contract or to discharge the onus of proof to succeed in the contractual claim, then a claim in delict may be made in the alternative. In this regard, the client will have to prove the existence of all the elements of delict – conduct, damage, causation, negligence and wrongfulness. While it is important to prove all the elements of delict to succeed, I will only look at some of these elements that have received attention from the courts in cases relating to an legal practitioner's liability for negligence in executing their mandate.

The aggrieved client must prove on a balance of probabilities that the legal practitioner's negligent conduct caused the harm suffered (see for example *Broderick Properties (Pty) Ltd* at 315E-F). That is, the harm must 'fairly and reasonably' be considered to flow naturally from the legal practitioner's conduct and the legal practitioner must have foreseen such consequences for them to be considered as flowing naturally from their conduct (see *Bruce, NO v Berman* 1963 (3) SA 21 (T) at 24A).

Negligence is the 'failure to observe that degree of care which a reasonable [person] would have observed' (*Broderick Properties (Pty) Ltd* at 314H). In particular, the client must prove on a balance of probabilities that the legal practitioner foresaw the harm their conduct would cause but failed to guard against it - the establishment of the duty to care (see

Broderick Properties (Pty) Ltd at 315A).

Moreover, the client must prove on a balance of probabilities that the negligent conduct of the legal practitioner amounted to a failure to exercise the level of skill, care and diligence as would be expected of a reasonable person (see *Broderick Properties (Pty) Ltd* at 315D-E).

Concurrence of action

One needs to take notice of the potential concurrence of action that might be present in these cases – at face value it seems that the client has a choice between a contractual action or delictual action. In a seminal judgment on the issue of concurrence of action, Grosskopf

AJA concluded that delictual liability should not be imputed for a breach of contract (Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd 1985 (1) SA 475 (A) at 501G-H). The Supreme Court of Appeal later clarified the principle set in the Lillicrap case in that it only applies to cases based on the breach of a contractual duty and is not teaching us that delictual liability cannot be imputed in general where a contractual claim exists (Holtzhausen v Absa Bank Ltd 2008 (5) SA 630 (SCA) at para 7). It is. therefore, clear that at the first instance the legal practitioner's liability for negligence in executing their mandate must be based on the breach of the contract between the legal practitioner and their client, only in cases where the existence of such contract cannot be proved should the delictual claim be made. It might be good practice to make the delictual claim in the alternative even if the contractual claim seems to have prospects of success.

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By Deon M Pool

Arbitration in terms of s 12B of the Petroleum Products Amendment Act

he pursuit of power. How to get it, keep it, and use it, have been central questions of politics, business, military strategy, and human relationships for millennia. Nowhere is such pursuit more evident than in the formulation of contracts. South African courts have always taken the view that if you have signed an agreement, it is accepted that you know what it says, and you have agreed to abide by it.

Against the backdrop of a discriminatory patriarchal system - where some people had more power than others - the Constitution came into being, which requires that the interaction between each person is measured against the concepts of fairness, openness, and equality, as one would expect to have in an open democratic society.

The advent of democracy intended to remove the historical barriers, which excluded most for the benefit of the few to 'free the potential' of every person who had a desire to 'improve the quality' of their lives (see preamble of the Constitution). In consequence of these fundamental principles, the National Credit Act 34 of 2005, Consumer Protection Act 68 of 2008 (CPA) and the Labour Relations Act 66 of 1995 are the most well-known, intended to introduce and establish the principle of fairness in unequal bargaining situations.

The unequal bargaining power in the petroleum industry remains pervasive

and presents a form of the inequality that exists in contractual relationships. These issues gave rise to the promulgation of the Petroleum Products Amendment Act 58 of 2003, which introduced the provisions of s 12B.

Section 12B regulates the contractual relationship between the petrol company and the fuel station owner/operator and is intended to address the unequal bargaining power found in the franchise agreement, which regulates the relationship between the two. In simple terms the agreement states that everything on the site of the fuel station belongs to the fuel company, even the goodwill attached to the business.

The fuel company determines the duration of the agreement, if and to whom it can be sold and retains the rights that would generally be equal in other agreements.

The principles that underlie these agreements are generally informed by the duties imposed by our laws to regulate the petroleum industry. The fuel companies are required to act within a legislative and regulatory framework that is as technically challenging as it is restrictive.

A consequence of the regulations is the highly competitive nature of retailing sites and market share. All the associated interests require protection and promotion, which is pursued with ruthless intent. The franchise agreements are fundamentally premised at ensuring that the fuel company maintains the duties imposed by the regulations while promoting its market share and protecting its brand value.

Unfortunately, the agreements also provide the petrol companies with rights that are open to abuse and manipulation to the detriment of the individual fuel station operator given the one-sided nature of the agreement, which imposes only duties on the fuel station operator, while reserving the rights for the fuel company.

It is in instances, which result in the unequal bargaining position between the parties that s 12B is specifically aimed to address. The most profound result of the inequality that is promoted by the terms of the franchise agreement, is that it results in the taking over of a business as a going concern, which is a drastic step and may inflict hardship on the fuel station operator and employees.

South African courts have pronounced themselves on the fairness that ought to be in contracts. However, the court has stated that they will not interfere with the right to contract and the sanctity of contracts. In simpler terms, the court will not make contracts between people.

The Supreme Court of Appeal (SCA) in *Juglal NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* [2004] 2 All SA 268 (SCA) has, however, stated that where a party does implement the terms of an agreement in a manner that is unconscionable, illegal,

or immoral, the court will not come to their aid, which is likened to provisions of the $\ensuremath{\mathsf{CPA}}$

The provisions of s 12B refers to contractual practice and is intended to interrogate the conduct of the parties and not just the terms of the agreement itself. Where a party's conduct aligns with the terms of the agreement, but the conduct is to manipulate the architecture of the agreement to their advantage, in an unconscionable or immoral manner, the offended party has the right to complain to the Controller of Petroleum Products and call for the compliant to be referred to arbitration.

The arbitration is intended to resolve the dispute quickly, fairly and in a cost-effective manner. The referral process is designed to ensure that the fuel companies do not use their deep pockets to divest the operator of their business and litigate them into the ground so that they eventually give up (it needs to be noted that the provisions of s 12B are also available to the fuel supplier).

In the case of *Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Ltd and Others* 2017 (6) BCLR 773 (CC), the issue of the inequality of these agreements came to the attention of the Constitutional Court (CC) and the judgment that followed sets out the manner of the complaint, the discretion of the controller and the powers of the arbitrator.

The CC indicated quite clearly that where a complaint has been referred to the controller, any pending court action is stopped until the process under s 12B has run its course. Although contentious, the CC took the view that the arbitrator

can even go so far as to the re-instate a cancelled agreement. The decision of the arbitrator is final and thus it cannot be appealed.

In the instances where a court is asked to stay eviction proceedings pending a s 12B referral, the court is not required to decide if the complaint has merit. Similarly, where a party is not satisfied with the decision of the controller, the Act provides for an internal appeal process to the Minister of Energy Affairs, who is empowered to reconsider the decision of the controller.

Since the Business Zone decision, there have been a few instances where the High Court has been faced with an application to stay eviction proceedings by a fuel company because of an s 12B referral. Presently, the Gauteng, Limpopo and Northwest Divisions of the High Court have stayed eviction proceedings pending the s 12B process, while the KwaZulu-Natal (KZN) Division of the High Court have maintained a different approach.

The most important of the KZN decisions is that of *Bright Idea Projects 66* (*Pty*) *Ltd v Former Way Trade and Invest* (*Pty*) *Ltd* 2018 (6) SA 86 (KZP), which appears to advise on the general approach in KZN in respect of s 12B referrals.

The decisions in North West and Limpopo Divisions are pending appeal to the SCA, which may result in a decision that resolves the disparity between the divisions, given there is a need for certainty throughout the country on this very issue.

It is important to note that, generally, an operator does not have a contractual expectation to have the agreement renewed. A fuel company does not have to renew the agreement on each instance of the intervening five-year period, but the decision not to renew must be one taken in a transparent and fair manner, premised on legitimate considerations.

The idea that a fuel station operator pours 20 years of their life into a site and is then expected to vacate without any compensation, remains extremely contentious. The Gauteng Division of the High Court in Pretoria has found that 'goodwill' is affected by the term of tenure on the site, as well as a particular locality and it can never be argued that on the termination of the lease that goodwill terminates and remains attached to the site.

Overall, s 12B refers to the concept of an 'unfair or unreasonable contractual practice' as the result of the nature of the franchise agreements, which regulate the commercial relationships between the fuel companies and the fuel station operators. The process is industry specific. The section imposes an equitable standard on contractual relationships, which is nothing new in South African law.

The inherent value of s 12B enabling a party to resolve a dispute through arbitration rather than court proceedings has been recognised and because of the *Business Zone* decision, it is firmly entrenched in South African law.

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(L.E.A.D°)



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he normative standards in international human rights obligate governments to respect, protect and fulfil the human rights of all people in their territory. The World Health Organisation (WHO) declared COVID-19 a pandemic on 11 March 2020, which was followed by many states across the globe introducing harsh lockdown containment measures with severe wide-ranging interference with fundamental human rights on a scale unseen in living memory. Democratic and totalitarian state parties misused their emergency powers with a flagrant disregard for constitutional limits to policymaking. COVID-19-related regulations infringed the fundamental rights of billions of people around the world the right to personal liberty, freedom of assembly and association, freedom of movement, freedom of religion, the right to work and earn a living and the right to education, to name but a few.

The lockdowns have thrown the world into the most severe recession since World War II and the most rapidly developing recession ever seen in mature market economies (Christian Bjørnskov 'Did lockdown work? An economist's cross-

country comparison' (2020) *CESIfo Economic Studies*). According to the World Health Organisation and the World Food Programme, the ramifications of lockdown regulations globally include –

- 1,5 billion children's education disrupted;
- 1,6 billion people potentially losing their livelihood;
- 135 million people facing starvation due to acute hunger; and
- 39 billion in-school meals missed (Kimberly Chriscaden 'Impact of COV-ID-19 on people's livelihoods, their health and our food systems' (www. who.int, accessed 4-4-2021) and Paul Anthem 'Risk of hunger pandemic as coronavirus set to almost double acute hunger by end of 2020' (www. wfp.org, accessed 4-4-2021)).

A pertinent question arising from this scenario is whether the lockdown containment measures adopted by state parties to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI) exceed the limits of what is strictly necessary to combat the spread of an infectious disease with a crude mortality rate of 0,14% in the United States (US) and 0,08% in South-Africa (https://coronavirus.jhu.edu).

This article examines the notion that the limitation of fundamental human rights - by the lockdown regulations of state parties - is legitimate only if it is proportional. Proportionality is the mainstay of the protection of human rights in many Western democracies and the most important standard that must be met with regard to human rights restrictions. It is a substantive requirement as it defines how far governments may go in limiting fundamental human rights (Barak Aharon 'Proportionality and principled balancing' (2010) 4(1) Law and Ethics of Human Rights 1; Luka Anđelković 'The elements of proportionality as a principle of human rights limitations' (2017) 15(3) Facta Universitatis Law and Politics 235).

Proportionality balancing and international human rights law

For the past 60 years' proportionality balancing – an analytical procedure similar to 'strict scrutiny' in the US – has become a primary technique for human rights adjudication in the world. It is the preferred procedure for adjudicating human rights disputes involving a conflict

Country	Deaths per 100 k/pop	Crude mortality rate*	Case fatality rate**
Sweden	127,69	0,127%	1,9%
Taiwan	0,04	<0,001%	1,0%
Japan	6,52	0,006%	1,9%
United States	160,48	0,160	1,8%
United Kingdom	187,60	0,187%	3,7%
Spain	152,25	0,152%	2,7%
France	132,45	0,132%	2,2%
Belgium	194,89	0,194%	2,8%
Italy	165,12	0,165%	3,4%

^{*} calculated by dividing the number of deaths by the total population.

between a fundamental human right and a legitimate state or public interest, such as public health (Alec Stone Sweet and Jud Mathews 'Proportionality balancing and global constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 68 at 72).

The doctrine of proportionality prescribes that all statutes and regulations that affect human rights should be proportionate (Juan Cianciardo 'The principle of proportionality: The challenges of human rights' (2010) 3 *J. Civ. L. Stud* 177). The proportionality analysis involves a two-stage inquiry:

- The question examined in the first stage is whether a measure infringes on human rights protected by international human rights law.
- The examination performed in the second stage determines the compliance of the measure with four sub-components that comprise proportionality, namely: Legitimacy, adequacy, necessity and proportionality *stricto sensu*.

In principle, each element is assessed cumulatively, and failure of a legislative measure to comply with one of the components will render the measure unjustified and illegitimate (Francisco J Urbina 'A critique of proportionality' (2012) 57 *Am. J. Juris.* 49).

Legitimacy

The first sub-component, legitimacy, establishes that the measure that interferes with a right has to have a legitimate aim and an objective of sufficient public importance (Urbina (*op cit*)).

There can be no argument that it is a legitimate aim of state parties to act in protecting the public against an infectious disease (United Nations Economic and Social Council *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights,* UN Doc E/CN.4/1985/4, Annex (1985) at para 25).

Adequacy

The second sub-component, adequacy,

establishes that the statute, which affects a human right, must be suitable to achieve the purpose sought by the state party. In other words, once the state party has defined the end that it aims for and the means that it has designed to obtain such end, it then needs to be verified to establish whether the means is capable of, in actual fact, achieving such end (Cianciardro (*op cit*)).

In analysing the data there seems to be no evidence that the lockdown containment measures have any positive effect in achieving the desired end result of reducing the number of infections and ultimately the number of deaths. In fact, the most recent data from the WHO shows that there is no significant statistical difference in crude mortality rates (sometimes called the crude death rate that measures the probability that any individual in the population will die from the disease; not just those who are infected, or are confirmed as being infected, and is calculated by dividing the number of deaths from the disease by the total population), case fatality rates and infection rates between countries that instituted hard lockdowns such as the US, Spain, France, Belgium, the United Kingdom (UK) and Italy and those that did not, such as Sweden, Japan and Taiwan. Peter Geoghegan states: 'We now know with certainty what public health experts have long predicted: a light-touch coronavirus approach does not work. Sweden has recorded far higher death rates than its Nordic neighbours Even the country's king thinks it has "failed". However, his conclusion that the Swedish model did not work is based on an extremely narrow comparison between Sweden and other Nordic countries death rates only (P Geoghegan 'Now the Swedish model has failed, it's time to ask who was pushing it' (www.theguardian.com, accessed 6-4-2021)). Although Sweden, Japan and Taiwan all had different strategies in terms of various elements of their CO-VID-19 responses what they have in common is that none of these three coun-

tries instituted hard lockdowns on their populations (Alex Berenson Unreported Truths about COVID-19 and Lockdowns: Part 1 and 2 (Blue Deep Inc 2020)) (see also L du G Huang 'Japan may have beaten coronavirus without lockdowns or mass testing. But how?' https://time. com, accessed 6-4-2021); S Feder 'Japan avoided a lockdown by telling everyone to steer clear of the 3 C's. Here's what that means' www.businessinsider.com, accessed 6-4-2021); Fight COVID Taiwan 'FAOs from foreign media' https:// fightcovid.edu.tw, accessed 6-4-2021); K O'Flaherty 'How Taiwan beat Covid-19' (www.wired.co.uk, accessed 6-4-2021)).

It is also interesting to note that Sweden's excess mortality rate (the number of deaths from all causes during a crisis above and beyond what we would have expected to see under normal conditions) were lower than countries that imposed hard lock downs such as England, Belgium, France, Spain, Netherlands, Poland and the US:

- Belgium 12,2%
- England 10,5%
- France 6,7%
- Netherlands 7,2%
- US 12,9%
- Poland 14,4%
- Sweden 1,5% (U Parildar, R Perara, J Oke 'Excess mortality across countries in 2020' (www.cebm.net, accessed 6-4-2021)) (see also 'US Mortality Monitoring - Deaths, Excess, Z-Scores, Maps, Historical' (www.usmortality.com, accessed 6-4-2021); C Giattino, H Ritchie, M Roser, E Ortiz-Ospina and J Hasell 'Excess mortality during the Coronavirus pandemic (COVID-19)' (https://ourworldindata.org, accessed 6-4-2021); G Iacobucci 'Covid-19: UK had one of Europe's highest excess death rates in under 65s last year' (www.bmj.com, accessed 6-4-2021); and 'Tracking COVID-19 excess deaths across countries' (www.economist. com, accessed 6-4-2021)).

In addition to the crude mortality rate and case fatality rate data, this further

^{**} calculated by dividing the number of deaths by the total number of people diagnosed with the disease. (https://covid19.who.int/ and https://coronavirus.jhu.edu/data/mortality (accessed 8-3-2021)).

proves the point that the lockdowns did not work in achieving the purpose of reducing deaths. In fact, Sweden did better than many countries that imposed hard lockdowns. If lockdowns worked then Sweden's excess mortality rate should have been significantly higher than the UK, Belgium, France, Spain, Netherlands and the US that imposed hard lockdowns.

There are numerous recent authoritative studies, which conclude that there are no causal connections between lockdowns and any decrease in infection rates or death rates. These studies clearly demonstrate that lockdowns do not control, nor curb the spread of CO-VID-19 (American Institute for Economic Research 'Lockdowns do not control the Coronavirus: The evidence' (www.aier. org, accessed 4-4-2021) and Paul E Alexander 'The catastrophic impact of COVID forced societal lockdowns' (www.aier. org, accessed 4-4-2021)).

Necessity

The third sub-component, necessity, evaluates whether the state party has chosen, among the measures capable of obtaining the desired end the one that is the least restrictive. The measure should impair the affected human right as little as possible (Urbina (op cit)). It will only pass the test of necessity if it is the measure among those similar in efficacy, which is the least restrictive on the affected human right (Cianciardo (op cit)) and AL Bendor and T Sela 'How proportional is proportionality?' 2015 13(2) International Journal of Constitutional Law 530).

An alternative to the hard lockdown measures adopted by many countries around the globe is the approach from Sweden, who never imposed hard lockdowns, left its economy open, left schools open and made social distancing mostly voluntary. Moreover, it yielded similar or better results than countries that instituted hard lockdowns, such as the US, Spain, France, Belgium, UK and Italy (www.folkhalsomyndigheten.se, accessed 4-4-2021).

• Proportionality s*tricto sensu*

Once it has been established that the infringing containment measure complies with the first, second and third subcomponents, it needs to be determined whether the measure is reasonable stricto sensu or not. Proportionality stricto sensu calls for a cost-benefit analysis of the balance between the advantages and disadvantages brought about by the public health lockdown measures (Cianciardo (op cit)). It is often depicted by a pair of scales, one of which weighs the benefits while the other one measures what is lost due to the restriction (Anđelković (op cit)). The measure has to represent a net gain, when the reduction in enjoyment of the right is weighed against the level of realisation of the aim of the measure (Urbina (*op cit*) and Cianciardo (*op cit*). A measure with a cost proportionate to its benefit is reasonable, while a measure with a cost that is disproportionate to its benefits is unreasonable and illegitimate. An infringement of socially important human rights in the fulfilment of a minimal social benefit cannot be justified (Urbina (*op cit*) at 29–35).

This may be evaluated with the following formula: Using a scale from RC1 to RC10 to evaluate the degree of restriction and societal cost of the infringing measure or regulation (RC10 being the most restrictive and costly measure) and a scale from SB1 to SB10 to evaluate the societal benefit derived from the infringing measure (SB10 deriving the most benefit):

- If Measure A's degree of restriction and societal cost is RC1 and the societal benefit SB5, then the measure would be considered proportional.
- If Measure B's degree of restriction and societal cost is RC5 and the societal benefit SB6, then the measure would still be considered proportional given that there is a net gain.
- If Measure C's degree of restriction and societal cost is RC5 and the societal benefit SB4, then the measure would not be considered proportional given that there is not a net gain and, therefore, the measure is disproportional and illegal.
- If Measure D's degree of restriction and societal cost is RC10 and the societal benefit SB1, then the measure would be considered disproportional and illegal.

COVID-19 is a highly infectious disease with a low crude mortality rate that has led to the mortality of - at the time of writing this article - 2,35 million or 0,03% of the estimated 7,8 billion people in the world over a period of 12 months. In South-Africa, COVID-19 has led to the mortality of 46,869 or 0,08% of the estimated population of 58,8 million (https://covid19.who.int/, accessed 10-2-2020). A recent cost benefit analysis shows that the lockdowns cost a minimum of five times more 'wellbeing years' than they saved, and more realistically, cost 50 to 87 times more without including the collateral damage to disrupted healthcare services, disrupted education, famine, social unrest, violence, and suicide nor the major effect of loneliness and unemployment on lifespan and disease (AR Joffe 'COVID-19: Rethinking the lockdown groupthink' (2020) Frontiers in Public Health). Weighing the enormous cost against the marginal benefit of attempting to protect the population against a disease with a crude mortality rate ranging between 0,05% and 0,19% it stands to reason to conclude that the harsh lockdown measures do not represent a net gain, but a significant loss.

Conclusion

As states rush to balance public health with politics in their response to the CO-VID-19 pandemic, they are side-lining human rights rather than protecting them. It is crucial that states respect, protect and fulfil human rights in infectious disease control in their COVID-19 responses (BM Meier, HE Huffstetler and R Habibi 'Human rights must be central to the International Health Regulations' (www.hhrjournal.org, accessed 4-4-2021)).

In responding to the COVID-19 pandemic state parties around the globe have taken extensive actions that restrict human rights without any effort to explain the legitimacy, adequacy, necessity or proportionality of such measures. Containment measures are proportional only if found to be –

- legitimate;
- adequate to the end;
- the least restrictive on human rights among all the other adequate options; and finally
- proportionally stricto sensu balanced because more benefits or advantages are derived from them than impairments of other fundamental human rights.

The United Nations has urged countries to maintain human rights 'without exception' as they fight the COVID-19 pandemic (UN News 'Human rights must be maintained in beating back the CO-VID-19 pandemic, "without exception" - UN experts' (https://news.un.org, accessed 4-4-2021)). The global health community has spent decades implementing evidence-based strategies to contain the spread of disease and protect the public's health without violating human rights. There was and is no reason to respond differently to COVID-19 than to other infectious diseases with similar mortality rates, such as flu, pneumonia, and other respiratory-related illnesses.

Human rights norms and principles, such as the Siracusa Principles specific to public health emergencies, contain effective standards that state parties need to adhere to in order to honour their covenant obligations with regard to protecting and ensuring fundamental human rights to all within their respective borders (United Nations Economic and Social Council (*op cit*)).

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Does subrogation constitute a new cause of action to be pleaded?



By Alno **Smit**

he doctrine of subrogation has boggled the minds of legal practitioners and judges alike for decades. Some argue that subrogation constitutes a new cause of action that must be pleaded accordingly, while others contend that same is irrelevant and not worthy of procedural recognition. This article will focus on what subrogation entails, whether it should be disclosed and whether it constitutes a new cause of action, which must be pleaded and proved. A brief discussion on the issue of double compensation within the context of subrogation will also follow.

Subrogation

Subrogation - which is predominantly relevant in insurance law - refers to the assumption of one party's right of recourse by a third party following a reimbursement of the former by the latter. The third party may then, through subrogation, exercise those assumed rights by claiming damages from the wrongdoer and reimbursing itself out of the proceeds.

The following practical example will illustrate the operation of subrogation: A and B were involved in a motor vehicle collision caused by B. Since A has suffered patrimonial harm, A has a delictual claim for damages against B. However, instead of claiming from B, A claims from his insurer, X, with whom he has an insurance policy. X compensates A accordingly. By virtue of subrogation, X assumes A's right of recourse against B. X is now entitled to claim damages from B to the value of A's damages.

One must be cautious not to confuse subrogation with cession. Cession refers to a transfer of rights from the cedent to the cessionary. The cessionary, as the new holder of the ceded rights, now enjoys the full benefit of those rights while the cessionary falls away. Subrogation on the other end does not entail a 'transfer' of rights, but rather an 'assumption' of rights. The insurer never replaces the insured as with cession. Instead, the insurer only becomes entitled to exercise the insured's rights of recourse as if it was the insured itself exercising those rights. From there the obiter: 'the insurer effectively steps into the shoes of the insured' (see Smith v Banjo [2011] 2 All SA 577 (KZP) at para 11). In doing so the insurer can then reimburse itself from the proceeds of the claim which the insured has, or may have, against the wrongdoer. The insurer's right to reimburse itself stems from the personal right it has against the insured. The personal right came into existence the moment the insurer reimbursed the insured.

In order for subrogation to take place, the following requirements must be met:

- Firstly, a valid and enforceable insurance contract must exist between the insured and the insurer.
- Secondly, the insurer must have indemnified (reimbursed) the insured in terms of the insurance contract.
- Thirdly, the insured must have a right of recourse against the wrongdoer, which is susceptible to subrogation.

In regard to the third requirement, it is important to note that the only rights,



Picture source: Gallo Images/Getty

which can be subrogated are those which the insured has against the wrongdoer. If the insured limits or waives its rights, say for example by concluding a settlement agreement with the wrongdoer or by acknowledging debt, then the insurer can only subrogate those rights, which survived the limitation or waiver. Where there are no rights, subrogation cannot take place. Subrogation is no magic formula by which the insurer can revive rights that have been limited or waived.

In practice, most insurers cover themselves against a limitation or waiver of rights by inserting a clause in the insurance contract in terms of which the insured undertakes not to limit or waive its rights in any way. Where the insured then limits or waives its rights the insurer has a contractual right of recourse against its own insured. This is to guarantee that the insurer never draws the short straw.

The insured has little to no say in the insurer's decision to institute subrogated litigation, although they are required to give their cooperation insofar as it may be necessary, for instance by testifying at trial. The insurer is always the one driving the litigation and also the one carrying the risk of litigation.

Separate cause of action or undisclosed fact?

There is still a great debate over whether subrogation must be disclosed and whether or not it constitutes a new cause of action, which must be pleaded and proved. This is a relevant question since subrogated litigation is almost always conducted in the name of the insured with little to no disclosure of the insurer's involvement.

In Goodwin Stable Trust v Duohex (Ptv) Ltd and Another 1998 (4) SA 606 (C) the court held that it is generally not permissible for a person to litigate in the name of another without disclosing that fact and the legal basis therefore. The underlying rationale is that such a non-disclosure undermines the integrity of the administration of justice as it is misleading. It was further held that subrogation is a 'special case' as it is only applied in insurance law. Because of its specialised application, litigants involved in insurance litigation will be aware of subrogation and ought not to be misled nor taken by surprise. This *dictum* provides authority for the proposition that subrogation needs not be disclosed and, by implication, not be pleaded.

Following the decision in *Goodwin*, the jurisprudence was that subrogation need not be disclosed or pleaded. Then came the decision of *Nkosi v Mbatha* (KZP) (unreported case no AR20/10, 6-7-2010) (Madondo J), which overturned the position. In *Nkosi* the insurer compensated the insured (Nkosi) for damages suffered

as a result of a motor vehicle collision The insurer then instituted a subrogated action against the wrongdoer. The action was instituted in the name of the insured. The court a quo dismissed the action on the basis the plaintiff lacked *locus standi*. The court a quo reasoned that only the insurer had locus standi because it had already compensated the plaintiff and that subrogation must have been pleaded accordingly. The plaintiff unsuccessfully appealed to the High Court. In dismissing the appeal, the court of appeal held that subrogation must be pleaded and proved. This implied that subrogation is a new cause of action

However, before the ink of the *Nkosi* judgment could dry, the matter of *Smith* came before the same court of appeal as *Nkosi*. In *Smith* the court held that the involvement of an insurer in a lawsuit is irrelevant as it is *res inter alios acta* (a matter between others). All that needs to be pleaded and proved are those facts necessary to sustain a cause of action. Subrogation is not a necessary fact, but a collateral one, which does not have to be pleaded or proved. It was accordingly held that *Nkosi* was wrong and not binding on future courts.

There has been some debate as to whether a subrogated insurer may litigate in the name of its insured. It has been argued that a subrogated insurer ought to litigate in its own name in order to promote transparency. The generally accepted practice, however, is that subrogated litigation takes place in the name of the insured, meaning that the insured will be cited in all papers and not the insurer. This practice was criticised by the Supreme Court of Appeal in Rand Mutual Assurance Co Ltd v Road Accident Fund 2008 (6) SA 511 (SCA) as being outdated and undermining of transparency. Despite the court's criticism the court did not abolish the practice by judicial fiat as the court was reluctant to interfere with settled legal principles. At the same time, the court had not as yet held that the insurer is not entitled to sue in its own name. An insurer may, therefore, litigate either in its own name or in the name of the insured.

While legal certainty on this point is surely desirable, I submit that the practice of litigating in the name of the insured ought to prevail. The underlaying premise for this submission is that litigation in the name of the insurer will necessitate subrogation to be pleaded and proved in order to avoid an exception or special plea of *locus standi*. This has the potential of opening a whole new can of worms, which will unnecessarily cloud the real issues to be decided. It is noteworthy that the Smith case reaffirmed the position that an insurer may litigate in the name of its insured, thereby suggesting that this practice is indeed preferable. The court furthermore held that subrogation has no bearing on the insured's *locus standi*.

Double compensation

With subrogation often comes the defence of double compensation - the defendant will argue that the insurer has already compensated the insured, hence there can be no claim against the defendant. This is incorrect. The fact that the insured has been indemnified does not absolve the defendant from delictual liability, it only means that the insured may not benefit from the litigation. Only the insurer may benefit. In Nkosi the court correctly remarked that the moment the insurer indemnifies the insured, the latter becomes a trustee of the former for any compensation, which may be received after the indemnification. The insured would be legally obliged to hand over to the insured any and all compensation received after the fact (see Ackerman v Loubser 1918 OPD 31).

Agreed, there are instances where an optimistic insured, claims from both the insurer and the defendant in order to make a quick buck. Assuming both the insurer and the defendant compensated the insured, the insurer would not be able to subrogate any rights. Instead, the insurer will have a claim against its insured for unjustified enrichment.

Conclusion

In conclusion, an insurer is entitled, after having reimbursed its insured, to subrogate the insured's rights to itself and institute action against the insured's wrongdoer to reimburse itself from the proceeds of the action. The insurer may elect to litigate in either its own name or the name of its insured, albeit general practice is to litigate in the name of the insured. There is no duty to disclose subrogation. Subrogation does not constitute a separate cause of action; hence it does not have to be pleaded or proved.

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Fact corner

 According to www.investopedia. com, subrogation makes obtaining a settlement under an insurance policy go smoothly. In most cases, an individual's insurance company pays its client's claim for losses directly, then seeks reimbursement from the other party, or his insurance company.





By Dr Ciresh Singh

n 22 December 2017, r 46A of the Uniform Rules of Court (Uniform Rules) was amended to provide, inter alia, for a discretion for courts to set a reserve price for a sale in execution. More than two years have passed since the implementation of these regulations and there is still much uncertainty and inconsistency with the application of this provision. In particular, there is confusion as to what factors the court should consider when determining a reserve price and which assessments should be undertaken when calculating such a figure. Moreover, there is great concern and uncertainty of the process that follows when a reserve price is not met at the Sheriff's sale in execution. This article accordingly seeks to highlight some of the challenges with r 46A in respect of the setting of reserve prices for sales in execution and further seeks to provide some suggestions on how the current process may be improved.

The calculation of a reserve price

As indicated, r 46A provides the court with the discretion to set a reserve price for a sale in execution. Unfortunately, the provision does not go any further in guiding the court as to how such a determination is to be made. Rule 46A(9) merely provides that the court must consider the market value and municipal rates of the property. No mention is made to other factors applicable for a forced sale, such as –

- transfer costs;
- potential eviction costs;
- holding or insurance fees;
- sheriff fees;
- legal practitioner fees; and
- other contingency costs.

Consequently, there has been some confusion among legal practitioners, banks and courts as to how a reserve price is to be calculated, what factors are to be considered, and what a fair reserve price should be.

Since the implementation of r 46A, the court has generally set high reserve price

in line with the market value or forced sale value of the property (see C Singh 'A consideration of r 46A (9) and the setting of court set reserve prices for sales in execution' 2019 (Dec) DR 8). In most instances, these properties are not sold at the sale in execution due to the high reserve price. This accordingly results in the matter having to be referred back to the court for the court to reconsider the reserve price. I submit that such a process and delay is detrimental to both the debtor and creditor as its results in increased litigation and municipal costs, disinterest in the property, and the deterioration of the dwelling.

Accordingly, such scenarios should be avoided and a just and equitable balance needs to the struck by the court when determining a reserve price ensuring that the interests of debtors, creditors and other interested parties are protected.

When determining a reserve price, the court should step into the shoes of a reasonable bidder or purchaser and consider what price they would willingly bid for the property under distressed or forced market conditions. I submit that a diligent purchaser at a sale in execution considers several factors before bidding for a property at a sale in execution, these include, *inter alia*, general transfer and conveyancing fees, costs of resale of the property, such as estate agents commission, electrical and compliance certificates, maintenance, upgrading or renovation costs, and possible eviction

costs. These factors are currently not considered by the court when determining a reserve price.

Accordingly, it is suggested that a uniform procedure be established for the determination of a fair reserve price (see C Singh A critical analysis of the home mortgage foreclosure requirements and procedure in South Africa and proposals for legislative reform (PhD thesis, University of KwaZulu-Natal, 2018) (https:// researchspace.ukzn.ac.za, accessed 4-4-2021)). It is recommended that a reserve price should be approximately 70% of the forced sale value (FSV) of the property minus outstanding rates and taxes. For example, a property with a forced sale value of R 1 million, with outstanding arrear rates of R 50 000, the reserve price of the property should be calculated using the conservative formula: (FSV x 70%) - rates. In our example, a reserve price of R 650 000 would be estimated as (R 1 million x 70%) - R 50 000 = R 650

The question must, however, be asked whether or not the idea of having a court set the reserve price is favourable in the South African economy. I submit that while the setting of a reserve price may potentially resolve the problem of homes being sold at low prices, the disclosure of a reserve price by the court may reduce the potential selling price of the property at the sale in execution, as buyers will reduce their bidding prices in accordance with the court-set reserve price. On the other hand, should the court set the reserve too high and the amount cannot be met, buvers will detach themselves from these sales and this may result in some homes becoming non-equitable, and will leave mortgagees without any security.

The venues for sales in execution

Over the decades, there have been several allegations of abuse of process at sales in execution (see South African Human Rights Commission Report on the public hearing on housing, evictions and repossessions, 2008, www.sahrc.org. za, accessed 5-4-2021). The allegations of collusion and corruption during sales in execution have significantly tarnished the image of the judicial sale in execution process. Currently most sales in execution are still performed at the Sheriff's office at the sole oversight of the Sheriff. There is no judicial oversight or governance over proceedings, and there still appears to be room for abuse of process, fraud and corruption at these sales.

I submit that the current sale in execution process is unfavourable and it is recommended that all sales should be performed at the court of execution (ie, the court in which the judgment was

granted) as opposed to the Sheriff's office. It is also recommended that the sale should occur by the Sheriff with the Registrar of the court present – the Sheriff being the auctioneer and the Registrar being the administrator of the auction proceedings. Further, it is suggested that all sales in execution should be listed on the court roll.

I submit that the introduction of judicial oversight in the sale in execution process will eradicate the potential for fraud and corruption. Moreover, it is contended that the Constitution and rules governing judicial oversight mandate the courts to play an active role in the sale in execution process. The involvement of the courts will allow for a more uniform process, which will prevent potential abuse. Such a process will allow for the openness and transparency of proceedings, mitigate the risk of fraud and corruption, as the sale will involve two independent court officials, and possibly increase the number of bidders at auctions as there is generally a larger audience at courts (see C Singh 'To foreclose or not to foreclose: Revealing the "cracks" within the residential foreclosure process in South Africa' (2019) 31(1) South African Mercantile Law Journal 145 and C Singh 'Eeny, meeny, miny, moe, to which court will foreclosures go? A brief analysis of recent foreclosure proceedings and a consideration of the need for specialised foreclosure courts in SA' 2019 (October) DR 31).

Court set reserves not met

In cases where the court reserve price is not reached at the Sheriff's sale in execution, there is a lot of inconsistency as to whether or not this simply results in a 'no-bid no-sale', or whether the Sheriff is allowed to start the auction with fresh bidding until it reaches a bid as close as possible to the reserve price. In other words, if at the auction, after the Sheriffs reading of the conditions of sale and disclosure of the court reserve, there are no persons willing to bid at that reserve price, does this result in the sale simply being declared as a 'no-bid no-sale', or is the Sheriff permitted to allow bidders to place bids below the reserve and raise them up to or as high to the reserve (as with a normal traditional auction sale). This is particularly important as if the Sheriff opens the floor for bidding, the court can approve the highest reasonable bid from the sale, even if it is below the court set reserve. It also gives the court an indication of what buyers are prepared to pay for the property and this can be considered if a new reserve price is required to be set. Alternatively, if it is a simple 'no-bid no-sale', then there is no such information at hand.

At present, in cases where the initial

court set reserve is not met at the sale in execution, an application in terms of r 46(9) of the Uniform Rules is required to be made to have the reserve price reconsidered. In practice, such an application can take between six to eight months to be finalised. This results in extensive time delays and increased costs. If sales in execution are held at court, as recommended above, the matter can be set down immediately by the Registrar and the Sheriff. This process will be much quicker and more effective than the current process.

Conclusion

The burning question remains whether or not reserve prices should be set for a sale in execution. It must be accepted that sales in execution, which by their very nature are forced sales, will not always achieve market value prices. Auctions create an open sale environment allowing the property to be sold to the highest bidder, and the setting of high reserve prices may deter buyers from this traditional selling process. During a foreclosure the discretion is always with the judgment debtor on whether to voluntarily sell the property privately under normal market conditions, as opposed to having the property forcibly sold at a sale in execution. The general consensus is that banks only proceed to sale in execution as an absolute last resort in cases where there is no hope of rehabilitation, and non-cooperation by the debtor. Accordingly, the sale in execution is a valuable remedy in ensuring that creditor rights are protected and enforced, and alterations of its rules could prove damaging to the economy. It is thus vital that procedural checks are in place to ensure that all outcomes from the sale in execution process are in line with our constitutional values.

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Fact corner

 According to www.thelionshead. co.za, documents prepared by the conveyancer for the registration of the transfer of ownership have to be signed in black ink and certified. If the buyer is married and the marriage is governed by foreign law, the signature of the buyer's spouse is also required.

Picture source: Gallo Images/Getty

The maritime implications of spilling oil in the ocean





By Nicholaas Kade Smuts

ccording to Priyanka Ann Saini in the article 'The Wakashio oil spill in Mauritius – what happened and lessons learnt' (www.shippingandfreightresource.com, accessed 4-4-2021) the *MV Wakashio* struck a coral reef on 25 July 2020 and subsequently became grounded. Initial reports indicated that there was no oil discharge from the vessel and the Mauritius coast guard immediately made use of booms and other preventive measures in conjunction with the government activating its National Oil Spill Contingency Plan the following day. Things subsequently

took a turn for the worse and by 5 August 2020 as minor oil discharge could be seen surrounding the vessel. At this point there was still a strong sense of optimism that the measures already taken were sufficient to mitigate any harm and that 'the risk of oil spill was still low'.

However, according to Wikipedia (https://en.wikipedia.org, accessed 4-4-2021), subsequent to the initial assumption of a low-risk events got out of hand. More oil began to discharge from the vessel and the authorities in Mauritius attempted to control the rate of discharge and mitigate environmental harm by isolating sensitive areas of the coast, while awaiting assistance from abroad to remove an estimated 3,894 tonnes of oil remaining on board. The vessel began flooding and sinking after splitting in two. Resulting in at least 1 000 tonnes of oil spilling into the Indian Ocean.

On 7 August 2020, Mauritius authorities declared a national environmental emergency. Minister of Blue Economy, Marine Resources, Fisheries and Shipping, Sudheer Maudhoo, said that 'this is the first time that we are faced with a catastrophe of this kind and we are insufficiently equipped to handle this problem'. Mauritius pleaded for international help, as the magnitude of the incident became obvious and conceded that the national contingency plan alone was

unlikely to remedy the incident (Timothy Walker and Christian Bueger 'Lessons for Africa from devastating Mauritius oil spill' (www.dailymaverick.co.za, accessed 4-4-2021)).

Clean up efforts were prevented by strong winds and high waves and information collected by Finnish Iceye satellites reflected an increase in the size of spill from 3,3km² on 6 August 2020 to 27km² on 11 August 2020. When the ship split apart on 15 August 2020, there were still 166 tonnes of fuel inside and high waves prevented any further attempts at removing the oil spill. Thereafter, MV Wakashio's bow was moved into the open ocean and scuttled on 24 August 2020 (Wikipedia (op cit)).

Investigations were subsequently conducted with crew members on board who indicated that the crew had been celebrating the birthday of a sailor on board the vessel at the time of the grounding and the vessel had sailed near shore for a Wi-Fi signal. However, local police refuted these allegations saying that looking for a phone signal would not have required sailing so close to land. The ship subsequently failed to respond to warnings of the errant course.

On 18 August 2020, the ship's Captain and Chief Officer were arrested on suspicion of negligence in operating the vessel (Wikipedia (*op cit*)).

Environmental impact

This incident has been widely reported due to the dangers it posed towards the world-famous coral reefs and lagoons. The island is currently struggling with efforts to remedy the incident following the spill which is likely to cause damage to its coral reefs and lagoons (Saini (*op cit*)).

Oceanographer and environmental engineer, Vassen Kauppaymuthoo, claims just under 50% of the place of incident is covered by environmentally sensitive areas (Wikipedia (*op cit*)).

Oklahoma State University Ecotoxicologist, Christopher Goodchild, claims that due to the chemistry of the oil and its ability to merge with the surrounding matter, removing the oil will prove difficult (Wikipedia (*op cit*)).

Media outlets, such as the BBC have reported that the place of incident is a cause for concern. Furthermore, the incident took place in an area, which contributes greatly to the economy of Mauritius and the oil spill is likely to adversely affect the marine scenery and animals. Greenpeace stated that 'thousands of species ... are at risk of drowning in a sea of pollution, with dire consequences for Mauritius' economy, food security and health' (Wikipedia (op cit)).

It is common knowledge that these types of spills expose the marine life to dangerous elements and harm their environment (Saini (op cit)). According to the National Oceanic and Atmospheric Administration oil spills result in birds and mammals suffering from hypothermia. Furthermore, oil spills harm the ability of mammals to insulate themselves from the cold water. It also harms the ability of birds to repel cold water. Flakes from the coating on the hull toxify the marine fauna and flora on the reef and surroundings similarly to the Great Barrier Reef (Mphathi Nxumalo 'Port oil spill sparks concerns' (www.iol.co.za, accessed 4-4-2021)).

It has been claimed by reputable outlets that the effects of this incident are likely to be felt for decades to come (Wikipedia (*op cit*)).

The government of Mauritius has claimed that this incident has been the largest disaster the country has had to grapple with and that they are unable to mitigate the harsh effects accordingly (Wikipedia (*op cit*)).

The country has requested compensation for the damage and are holding the owners of the vessel liable and in terms of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001, the owners of the vessel are responsible for oil damage. The ruling treaty for the circumstances of the incident is the Convention on Limitation of Liability for Maritime Claims, 1976,

which prescribes a maximum pay out of 2 billion Japanese Yen in the original draft to which Mauritius is a signatory, and 7 billion Yen according to a 1996 amendment signed by Japan. The vessel is insured for up to US \$1 billion and it is expected that there will be some form of payment to assist with remedying the situation. Mauritius has requested Japan for up to \$34 million in damages (Wikipedia (*op cit*)).

The backstory

According to Christian Bueger 'Mauritius oil spill: Potential government failures should be investigated' (www.downtoearth.org.in, 4-4-2021) Mauritius has received significant funding to combat oil spills since the late 1990s. The country has benefited through massive projects, namely the Western Indian Ocean Island Oil Spill Contingency Plan and the Western Indian Ocean Marine Highway Development and Coastal and Marine Contamination Prevention Project.

Since 2016, Mauritius has been warned to be better prepared for maritime disasters of this scale. However, these warnings were ignored. Engineers like Mr Kauppaymuthoo have voiced concern in this regard and have said: 'The sad thing is that we had a sign four years ago with *MV Benita*, the ship first grounded at Le Bouchon' (Saini (*op cit*)).

Experts have warned that the various maritime zones need to be surveyed to determine how the environmental needs have changed in order to better prepare for a possible disaster. Preventive measures like booms have been encouraged in order to better equip the country to combat these massive spills (Nxumalo (op cit)).

Officials have yet to disclose why the vessel was sailing so close to the island, which is now suffering with an environmental disaster and investigations are currently ongoing and, in the meantime, the ship's Captain, alongside the Chief Officer of the ship, have been charged under the Piracy and Maritime Violence Act 2011 (Saini (op cit)).

Clean-up measures

There are various ways to address and clean up oil spills, namely –

- using oil booms;
- using skimmers;
- using sorbents;
- burning in-situ;
- using dispersants;
- · hot water and high-pressure washing;
- using manual labour;
- bioremediation;
- chemical stabilisation of oil by elastomers; and
- natural recovery ('10 methods for oil spill cleanup at sea' www.marineinsight.com, accessed 17-4-2021).

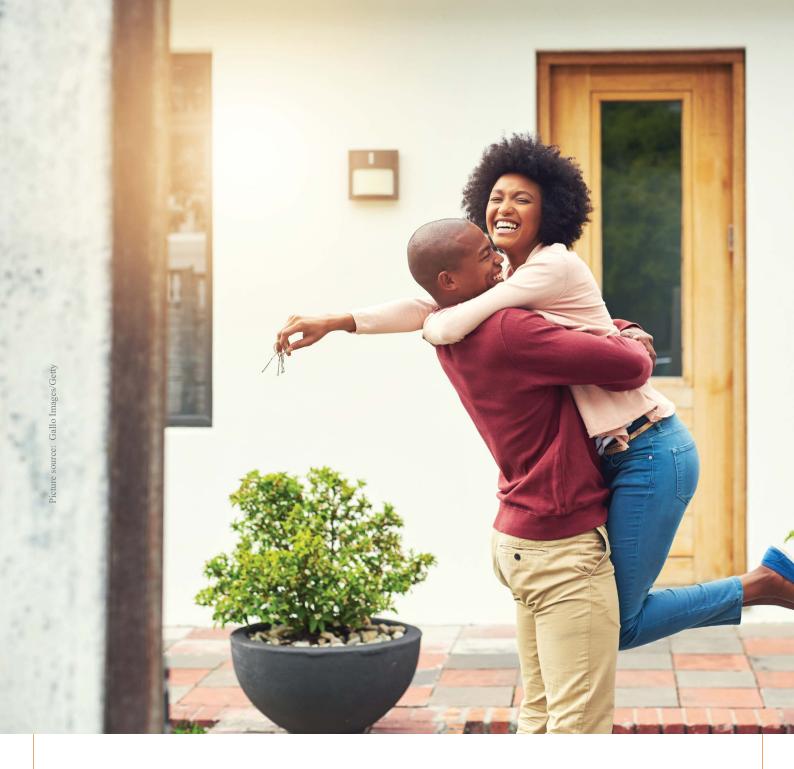
Conclusion

The state requires up-to-date information to plan future responses to similar incidents. Improved access to resources and skills at various levels are required to prevent similar disasters that pose similar or greater threats. Improved accountability and transparency mechanisms are also crucial in this regard. One could argue that as the state had been warned to better prepare for such a catastrophe and failed to do so perhaps that state is not the appropriate custodian of the surrounding ocean. Perhaps it is time to consider the privatisation of the ocean as radical as the idea may seem.

In this instance and under international convention the owners of the *MV Wakashio* have offered to pay damages to remedy the harm caused by the oil spill. However, in other cases, it might not be as easy to track down the owners to determine liability and recover compensation.

It is time for Africa and their various maritime institutions to evaluate their current models and develop suitable mechanisms and plans in the event of future maritime disasters. This will allow for efficient and timely action when a maritime disaster (such as the current one) happens again. For the time being oil will be shipped and, therefore, Africa and its communities need to be better prepared to deal with any possible incidents that occur. This can coincide with the implementation of the 2050 Africa's Integrated Maritime Strategy. This strategy aims to allow for results to be reported seamlessly to various organisations at different levels all over the continent and for better collaboration. Another aspect that might assist the continent going forward is a more decentralised model where organisations are more localised instead of a massive body trying to regulate the entire continent thereby allowing these local organisations to be able to deal more appropriately with incidents that are more common to their oceans. These communities will have better insight on how to deal with their oceans and incidents that occur therein than a bureaucratic body far from such oceans with no real insight into the communities, their oceans or the shipping patterns. Relief for maritime incidents are costly, but they are not as controversial as other issues in the maritime industry such as creating security networks and demarcating boundaries.

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Understanding customary marriages – it is not as straight forward as it seems



By Portia Mashinini he topic of customary marriage under South African law has been debated and considered extensively through different media and lately it has been the subject of debate on television and social media platforms.

Customary marriages were first recognised in South African law through the Recognition of Customary Marriages Act 120 of 1998 (RCMA). Although recognised in law, the operation, application and subsistence thereof remains a subject for interpretation.

What is customary marriage?

Customary marriages come about through a series of events or principles derived from different customs and traditions.



A customary marriage is one that is concluded in accordance with customary law, and the RCMA defines 'customary law' as 'the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples'.

However, for a customary marriage to be considered valid in terms of the RCMA, some requirements must be met, namely –

- the prospective spouses must be above the age of 18 years;
- both spouses must consent to be married to each other under customary law; and
- the marriage must be negotiated and entered into or celebrated in accordance with customary law.

The requirement that 'the marriage must be negotiated and entered into or celebrated in accordance with customary law' is one that has proven to be problematic in its application as it has created uncertainty and ambiguity on whether *lobola* negotiations alone are sufficient to conclude a valid customary marriage or whether a celebration of such marriage is required in accordance to customary law.

In this article, I unpack the requirement that the marriage must be negotiated and entered into 'or' celebrated in accordance with customary law:

The 'or' in the above sentence implies that the marriage can either be celebrated or not, namely, a celebration is not a prerequisite for the valid existence of the marriage.

The marriage must be 'negotiated and entered into' in accordance with customary law. This could generally mean that lobola negotiations are held, and parties enter into a marriage in terms of their customs, which could entail introducing a bride or exchange of gifts. It is this portion 'and enter into or celebrated' that creates certain challenges in the application as one could interpret this to mean that following lobola negotiations, there must be certain traditions that are performed, which could very well be the celebration of the marriage or handing over of the bride, and on the other hand, the contrary can be argued.

In the case of $M \vee K$ (LP) (unreported case no 2017/2016, 7-11-2018) (Makgoba JP), the High Court considered whether the handing over of the bride is an element to be taken into account when considering the validity of a customary marriage, and provided that the mere fact that lobola was handed over to the bride's family - significant as it is - is not conclusive proof of the existence of a valid customary marriage. The handing over of the bride is not only about celebration with the attendant feast and rituals. It also encompasses the essential aspect associated with the married state, namely 'go lava' that is coaching or briefing of both the bride and groom by the elders of their rights, duties and obligations, which a marriage imposes on them. The court regarded this as the most important and final step in the chain of events.

The court held that the handing over of the bride is what distinguishes mere cohabitation from marriage. Until the bride has formally and officially been handed over to the groom's people, there can be no valid customary marriage. Based on this argument the court found that there was no valid customary marriage entered into between the plaintiff and the defendant, despite the payment of *lobola* in full by the plaintiff there has not been any handing over of the defendant to the plaintiff.

There are several High Court decisions where the ruling is similar or aligned to the views held in the above-mentioned case. However, we have seen contrary interpretations through the lens of the Supreme Court of Appeal (SCA).

In Tsambo v Sengadi (SCA) (unreported case no 244/19, 30-4-2020) (Molemela JA (Maya, P and Mbha and Zondi JJA and Mojapelo AJA concurring)), the SCA found that the custom of the handing over of the bride was an important element, but not a key determinant of a valid customary marriage. The SCA shed some insight into the fact that certain customs, which were practiced long ago, have been replaced with western customs. The court stated that rituals and customs have never been static or frozen in time, as they develop and change along with the society in which they are practiced. The insights of the SCA teaches us that customs are not static, the world is evolving, and times have changed. Accordingly, customs as they were applied in ancient times cannot strictly be applied in the same manner and form in the modern age because such strict application may result in undesirable consequences.

In Mbungela and Another v Mkabi and Others [2020] 1 All SA 42 (SCA), the SCA highlighted that 'the importance of the observance of traditional customs and usages that constitute and define the provenance of African culture cannot be understated. Neither can the value of the custom of bridal transfer be denied. But it must also be recognised that an inflexible rule that there is no valid customary marriage if just this one ritual has not been observed, ... especially spousal consent, have been met, ... could yield untenable results'. The SCA held that the purpose of the ceremony of the handing over of a bride is to mark the beginning of a couple's marriage and introduce the bride to the groom's family. It is an important but not necessarily a key determinant of a valid customary marriage. Thus, it cannot be placed above the couple's clear will and intent.

It is evident from the interpretations of the SCA that a valid customary marriage will be considered to have been concluded where the parties are of age, consented to the marriage, and *lobola* negotiations took place. To that end, one will be considered to be validly married even though certain customs and traditions were not observed, such as the handing over of the bride.

Registration of a customary marriage

The RCMA provides that a customary marriage must be registered within three months after the conclusion of the marriage. The RCMA further provides in s 4(9) that a 'failure to register a custom-

ary marriage does not affect the validity of that marriage'. This weakens the requirement for registering a customary marriage as s 4(9) has made registration optional. However, it is highly advisable for a customary marriage to be registered to avoid the trouble of going through the court of law to query the validity of such marriage.

In the unfortunate event of death, unregistered customary marriages may also prove to be problematic to the executor in an estate or the Master when an estate is reported, especially where family members are disputing the validity or existence of the marriage. For this reason, the Master may insist or request proof of registration of a customary marriage as it serves as proof of the existence of the marriage.

Proprietary consequences of customary marriages

Section 7(1) and (2) of RCMA provides:

- '(1) The proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law.
- (2) A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract, which regulates the matrimonial property system of their marriage.'

Parties married under customary law are married in community of property unless such consequences are specifically excluded in an antenuptial contract, which regulates the matrimonial property system of their marriage. In other words, if parties to a customary marriage do not conclude an antenuptial contract before entering into the said marriage, such marriage will be in community of property. It is, therefore, advisable that if parties to a customary marriage intend to be married out of community of property, they must conclude an antenuptial contract before the marriage is entered into

The contentious position of the RCMA in respect of the proprietary consequences of a customary marriage is that it does not deal with the marital property rights

of spouses in polygynous marriages entered into before the commencement of the RCMA. Consequently, this means that polygynous marriages are still governed by customary law.

In Gumede v President of the Republic of South Africa and Others 2009 (3) BCLR 243 (CC), the Constitutional Court (CC) debated and put forward that any distinction between proprietary consequences of customary marriages entered into before and/or after the RCMA came into effect is discriminatory and inconsistent with the Constitution.

In Ramuhovhi and Others (Maphumulo as Intervening Party) v President of the Republic of South Africa and Others (Trustees of the Womens' Legal Centre Trust as amicus curiae) 2018 (2) BCLR 217 (CC), the CC found that s 7(1) limits the right to human dignity and not to be unfairly discriminated against. Accordingly, the court held that '[p]ending the remedying of the legislative defect, a husband and his wives in pre-Act polygamous customary marriages would share equally in the right of ownership of, and other rights attaching to, family property, including the right of management and control of family property; and a husband and each of his wives in each of the marriages constituting the pre-Act polygamous customary marriages must have similar rights in respect of house property'.

In July 2019, the Cabinet approved the submission of the Recognition of Customary Marriages Amendment Bill B12 of 2019. The Bill aims to amend s 7(1) and (2) of the RCMA to ensure alignment with the judgments of the CC.

Dealing with divorce

It is a common understanding that under many customs and traditions, 'divorce' is not recognised where a customary marriage is concerned. To address the unfavourable consequences of this 'understanding', the RCMA makes provision for the dissolution of a customary marriage.

Section 8 of the RCMA provides that '[a] customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage'. Important to note is that the RCMA does not provide that such marriage must be registered before it can be dissolved. Therefore, all valid

customary marriages, whether registered or not, can be dissolved by the court.

Despite provisions being made in the RCMA for a dissolution of a customary marriage, many couples married under customary law informally separate and move on with their lives respectively, without formally getting a decree of divorce. The issue with such informal separation is that such couples are unaware that despite their informal separation, they are still considered to be validly married to each other.

As most customary marriages are in community of property (where an antenuptial contract was not concluded), couples that just separate informally are not aware that they remain legally entitled to an equal division of the joint estate and to claim certain benefits from the other party. Failure to dissolve a customary marriage may also create barriers for a party that wants to marry again; for example, a spouse in a customary marriage will be prevented from entering into a civil marriage with another during the subsistence of a customary marriage.

Conclusion

As much as the RCMA has addressed many imbalances of the past and gender inequalities relating to certain aspects of customary marriages, it is clear that South African communities still lack the required knowledge of the operation and application of the RCMA.

It is advisable for couples married under customary law to:

- Register their marriage as it serves as proof of the existence of the marriage.
- Conclude an antenuptial contract before the marriage is entered into if they wish to be married out of community of property.
- Obtain a divorce through the court in situations where the marriage has broken down.
- Seek legal advice to ensure that informed decisions are taken.

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Are you over the limit? South African law and blood alcohol content



By Prof Hennie Klopper lobally South Africa (SA) is rated as the sixth highest per capita consumer of alcohol. The Road Traffic Management Corporation (RTMC) State of Road Safety Report: Calendar January – December 2018 (RTMC Safety Report) shows that the road fatalities for 2018 were 12 921 (www.rtmc.co.za, accessed 21-4-2021). Of these, fatalities between 38% and 60% were pedestrians and 51% of road fatalities (58% according to the World Health Organisation (WHO)) involve alcohol where the blood alcohol content (BAC) exceeds the current legal limit of 0,05% (0,02% for professional drivers). According to the RTMC alcohol-related vehicle crashes cost our country R 18,2 billion per annum. The government's response to this problem is to reduce the BAC limit to 0%.

International BAC limits

A 0% legal BAC limit applies in very few Western democracies and, if applied, is largely restricted to new or inexperienced drivers. Most Western countries apply a 0.05% BAC limit (https://en.wikipedia.org, accessed 8-4-2021).

Relevance of BAC

The BAC level is an indicator of the effect of alcohol intake on a person's behaviour and driving ability and is used for medical and legal purposes.

According to Wikipedia (*op cit*), the table on p 28 shows that reducing the BAC from 0,05% to 0% will have little or no significant effect on the prevention of crashes due to alcohol-induced impaired ability.

Actual problem - effectiveness of BAC limit reduction

According to H Haghpanahan, J Lewsey, D Mackay, E McIntosh, J Pell and A Jones ('An evaluation of the effects of lowering blood alcohol concentration limits for drivers on the rates of road traffic accidents and alcohol consumption: A natural experiment' (2019) 393 *Lancet* 321 (www.thelancet.com, accessed 8-4-2021)) research shows that lowering the BAC limit does not have a direct effect on road crash fatality numbers or alcohol consumption behaviour. A 2014 Scottish study ('Impact of legislation

BAC level	Behaviour	Impairment
0,001 - 0,029	Appears to be normal	Only determinable with special tests
0,030 - 0,059	Decreased social inhibition Joyousness Mild euphoria Relaxation Increased verbosity	Decreased powers of concentration
0,060 - 0,099	Alcohol flush reaction Reduced affect display Disinhibition Euphoria Extraversion Increased pain tolerance	Depth perception Glare recovery Peripheral vision Reasoning

to reduce the drink-drive limit on road traffic accidents and alcohol consumption in Scotland: a natural experiment study') tracked the results of a reduction of BAC from 0,08% to 0,05%. After this reduction in BAC limit for drivers (compared to Road Traffic Accidents (RTA) in England and Wales, where no reduction in BAC limit for drivers occurred) there was a 7% increase in weekly Scottish RTA rates. Similar findings were observed for serious or fatal RTAs and single-vehicle night-time RTAs. The change in legislation in Scotland was associated with no change in alcohol consumption, measured by per-capita off-trade sales, but a 0.7% decrease in alcohol consumption measured by per-capita on-trade sales. In 1996 the BAC in SA was reduced from 0,08% to 0,05%. In that year, road deaths were 9 848 (G Setswe 'Impact of drunken driving on motor vehicle accidents and the "Arrive Alive" campaign in South Africa' (2005) 16(5) *Epidemiology* at 13). The RTMC Safety Report reported the road crash death rate in 2018 was 12 921.

Drunk pedestrians and drugged driving

Reduction of the BAC to 0% applies only to drivers and ignores that 38% - 60% of road fatalities are pedestrians. In December 2017, 60% of pedestrians killed on Western Cape roads consumed one or more alcoholic drinks (Jason Felix 'Drunk pedestrians are a danger to road-users' (www.iol.co.za, accessed 8-4-2021)). According to Western Cape experience, 72% of pedestrian fatalities had BAC over the limit. Blood-alcohol tests on injured pedestrians showed 58% were 0,02 mg and higher, 14% were between 0,08 mg and 0,19 mg and 3% had some alcohol but less than 0,08 mg. The remaining 25% were alcohol-free. A study at Groote Schuur Hospital found that half of injured pedestrians were chronic alcoholics and 70% had signs of dagga in their urine (Taslima Viljoen 'Lawmakers target drinking and walking' (www.iol.co.za, accessed 8-4-2021)). A multicentric sampling of pedestrians in SA found that 16% of pedestrians were at BAC levels of 0,08% and accounted for 72% of adult pedestrian deaths (Setswe (*op cit*) at 9).

Jade Liebenberg, Lorraine du Toit-Prinsloo, Gert Saayman and Vanessa Steenkamp ('Drugged driving in South Africa: An urgent need for review and reform' (2019) 67 South African Crime Quarterly 7) show that substance intoxication is being ignored. Driving under the influence of drugs (DUID) is regulated by s 65 of the National Road Traffic Act 93 of 1996 (NRTA), which prohibits driving under the influence of a drug with a narcotic effect. There are several prescription medications, which impair driving ability but do not have a narcotic effect. They call for the amendment of s 65 of the NRTA to include DUID (Viljoen (op cit)). Examples of such drugs are amphetamines (eg dexamphetamine or selegiline), clonazepam, diazepam, flunitrazepam, lorazepam, methadone, morphine or opiate and opioid-based drugs (eg codeine, tramadol, or fentanyl), oxazepam and temazepam. In the United Kingdom it is an offence to drive while using these medicines if their use impairs driving ability (see 'Drugs and driving: The law' (www.gov.uk, accessed 8-4-2021)). A study has shown that drug use accounts for 13% of road deaths in SA (Setswe (op cit) at 9).

Why does the reduction of BAC in isolation not improve road crash outcomes?

A plausible explanation is that legislative change is not suitably enforced for example with random breath testing measures (Haghpanahan, et al (op cit)). This phenomenon has significant policy implications when reducing the BAC limit. Rowan Dunne (Levels of alcohol intoxication: An assessment of Perceptions, Knowledge, Attitudes, Practices and Breath Alcohol Levels (MSSc thesis, UCT, 2012) (https://open.uct.ac.za, accessed 6-4-2021) found that in his sample group of 180 drivers licence holders, 76 (42,2%) of those surveyed had previously been through a roadblock after drinking,

while 61 (33,9%) indicated they had been stopped by a law enforcement officer after drinking. Despite these encounters, only 12 (6,7%) were arrested for drinking and driving. He suggests that to increase the perceived risk of arrest for drinking and driving, the number of roadblocks and arrests should be increased (see also in this regard Amanda Delaney, Kathy Diamantopoulou and Max Cameron 'Strategic Principles of Drink-Driving Enforcement' (www.monash.edu, accessed 8-4-2021)). This conclusion is supported by Australian experience.

In Victoria State in the five years before 1987, more than 110 drivers and motorcycle riders who lost their lives each year had a BAC greater than 0,05%. This was reduced in 2011 to 2015 to an average of 28 drivers and riders with a BAC greater than 0,05% losing their lives each year. In 2016, there were 34 drivers and riders who lost their lives with a BAC greater than 0,05%. This 32% reduction in fatalities was the result of a concerted BAC enforcement action. Since 1997, Victoria Police have breath tested more than 24 million drivers and riders from Booze Bus operations, apprehending more than 75 000 drivers and riders with an illegal BAC during this period. Currently the vast majority (99,7%) of drivers tested do not exceed their legal blood alcohol levels. To place the Victorian BAC testing into perspective: Victoria has 4,3 million licenced drivers ('Drivers Licences in Australia' (www.bitre.gov.au, 20-4-2021)).

In the quest against intoxicated driving, Australia, and New Zealand and lately Kerala in India employ mobile DUI and DUID enforcement units, which are colloquially referred to as 'Booze Buses' in Australia and New Zealand in their regular random roadblocks. These vehicles are mid-sized buses equipped with blood alcohol and drug testing equipment where the blood of suspected drunk drivers is drawn and tested in situ. It incorporates two interview rooms (for a schematic of the design see F Cotter 'Do the right thing! VicPol ADT BBW-Iveco "Booze Bus" (www.busnews.com.au. accessed 8-4-2021)). In addition to Booze Buses and regular roadblocks, Victoria has introduced mandatory fitting of alcohol interlock ignition devices for six months at the driver's expense (AU\$ 1 605) in cases where a driver whose licence has been cancelled blows above 0,07%. The lock requires a driver to breathe into the interlock and the car will not start if a blood alcohol limit of 0,02 is reached. It uses technology ensuring that the correct person breathes into the device and preventing bypassing. The lock is only removed after five months if a driver did not violate the conditions of the interlock and attempted to drink and drive. Australia is mooting the interlock as a standard feature of all new vehicles in Australia (see 'Alcohol interlock devices mandatory in Victoria for drink-drivers who have licences cancelled' (www. abc.net.au, accessed 8-4-2021)).

South African DUI enforcement

South Africa has 12 million registered vehicles (J van der Post 'You'll never guess how many vehicles are registered in SA' (www.news24.com, accessed 8-4-2021)). Based on the Dunne study, only 6,7% of drivers who consume alcohol before driving are arrested for DUI and less than 50% are detected by roadblocks. A considerable number of intoxicated drivers remain undetected. The reported figure for DUI arrests for 2019 was 82 912.

It was reported in 2015 that for a variety of reasons 44 526 DUI cases were withdrawn from South African courts in the 2012/2013 financial year (Wilmot James 'The state of forensic chemistry laboratories in SA' (www.politicsweb. co.za, accessed 8-4-2021)). A substantial number of these withdrawals were because of inadequacies in the maintenance and operation of technical equipment (including breathalyser apparatus), inadequate or inappropriate sample retention and storage, as well as invalid sample analysis (see Ursula Ehmke-Engelbrecht, Lorraine du Toit-Prinsloo, Christelle Deysel, Joyce Jordaan and Gert Saayman 'Combating drunken driving: Questioning the validity of blood alcohol concentration analysis' (2016) 54 South African Crime Ouarterly 7).

According to South Africans Against Drunk Driving, the DUI conviction rate is 7% (https://sadd.org.za, accessed 8-4-2021). Official DUI conviction statistics could not be accessed. The statistics in the National Prosecuting Authority Annual Report 2019/2020 and the Department of Justice and Constitutional Development Annual Report 2018/2019 do not deal with individual crimes. Generally, only certain crimes' conviction rates are reported and used (see T Leggett 'The Sieve Effect - South Africa's conviction rates in perspective' (2003) 5 South African Crime Quarterly 11 (www. researchgate.net, accessed 8-4-2021)). The low conviction DUI rate is partially attributable to obstacles in using BAC detection equipment in BAC/DUI prosecutions, which would include the recently introduced Evidentiary Breath Alcohol Testing devices (see Ehmke-Engelbrecht et al (op cit) and S v Hendricks [2011] 4 All SA 402 (WCC); Price v Mutual & Federal Insurance Co Ltd 2007 (1) SACR 501 (SE); L Fouché, J Bezuidenhout, C Liebenberg and AO Adefuye 'Medico-legal aspects regarding drunk driving: Experience and competency in practice of community service doctors and proving DUI cases' (2018) 60(2) South African Family Practice 63). In a 2014 News24 report, an anonymous police officer alleged an estimated 80% to 90% of DUI prosecutions fail because of botched blood samples or straightforward corruption and prosecutors withdrawing charges. Other contributing factors are that DUI convictions are not a priority with either police officers or prosecutors ('Anger over drunk driving conviction rate' (www.news24.com, accessed 8-4-2021) and Stephan Hofstatter and Pearlie Joubert 'Drunk-drive botchup' (www.timeslive.co.za, accessed 8-4-2021)). The WHO rates South African BAC enforcement at 25% (G Crouth 'Consumer Watch: Zero-tolerance drunk driving law a "smokescreen" (www.iol.co.za, accessed 8-4-2021)).

Harassment and prosecution of the innocent

The Dunne study shows that 72.9% of the population are either lifetime or current teetotallers. With 0% BAC a substantial section of the driving population is at risk of being unjustifiably harassed and even prosecuted. The following may give false positive BAC results: Consuming certain medications such as for asthma (albuterol, salmeterol, budesonide, and similar medications), over-the-counter medications (Vicks and other cold medications), oral gels used to treat pain from canker sores and toothaches and some mouthwashes and breath fresheners. Medical conditions, such as acid reflux and diabetes, recent dental work and very rarely auto brewery syndrome. Ingestion of certain foodstuffs -

- ripe fruit (pulp of ripe fruits contains ethanol at concentrations of up to 0.9%).
- protein bars (these bars are filled with odourless syrupy substances that increase BAC);
- alcohol containing hot sauces;
- sugar-free gums (containing sugar alcohols replacement to provide sweetness):
- white breads (sourdough and white breads contain a certain amount of alcohol); and
- vanilla extract (see www.quora.com, accessed 8-4-2021).

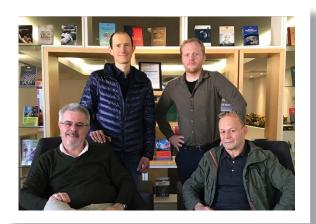
Conclusion

Road crash fatalities cannot simply be reduced by introducing 0% BAC. The reduction of our BAC from 0,08% to 0,05% for drivers in 1996 had and the current initiative will have no effect unless there is legislation dealing with the entire spectrum of intoxication control of all road users and consistent, effective, and proper law enforcement including identification, revision, and removal of all obstacles to effective law enforcement and BAC, and DUI convictions. Behaviour of alcohol and drug consuming road users will not change if there is no real threat of certainty of detection, successful prosecution, and conviction. Etienne Blais and Benoit Dupont note '[f]or example, Homel [(R Homel Policing and punishing the drinking driver (Springer-Verlag New York Inc 1988); 'Drink-driving law enforcement and the legal blood alcohol limit in New South Wales' (1994) 26 Accident Analysis & Prevention 147)] assessed the effect of the New South Wales random breath testing initiative (RBT) on the annual volume of fatal road accidents. In Australia, the law allows police officers to block roads and test the blood alcohol concentration [BAC] of every driver, independently of the doubt that they have regarding their level of intoxication. Australian police organisations are equipped with mobile laboratories to test as many drivers as possible. The introduction of RBT, combined with stigmatising media campaigns, has been followed by an abrupt reduction in fatal accidents. The RBT implementation was characterised by a significant increase of BAC testing. This adjustment in the level of police repressiveness positively influenced the likelihood of being detected for [driving while intoxicated]. Even if an increase in the probability of being arrested is needed to start the deterrence process, the improvement of the road-accident rate does not stem directly from the punishment of those who drink and drive: The principal opportunity for criminal law to be effective in reducing drunk driving is paradoxally (sic), not by affecting the apprehended law violators, who stand within its power. Rather, it lies in affecting unapprehended individuals who are sensitive to the threat that, should they behave illegally, they will be punished [(HL Ross Confronting Drunk Driving: Social Policy for Saving Lives (New Haven, CT: Yale University Press 1992)]' (E Blais and B Dupont 'Assessing the Capability of Intensive Police Programmes to Prevent Severe Road Accidents: A Systematic Review' (2005) 45 The British Journal of Criminology 914).

The proposed change in BAC level for drivers ignores the question of drunken pedestrians who make up a significant proportion of alcohol-related road deaths. Driving under the influence of drugs is also excluded. These questions deserve the legislator's attention. A 0% BAC limit unnecessarily exposes a large proportion of law-abiding drivers to the possibility of unwarranted harassment and prosecution. Regular and consistent random roadblocks with Booze Buses (as done in Australia and New Zealand) and inevitable conviction in conjunction with alcohol interlocks seems to be the key to solving the DUI and DUID problem and changing drivers' attitude to drinking and taking drugs (if and when regulated) when driving a motor vehicle.

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THE LAW REPORTS



By Johan Botha and Gideon Pienaar (seated); Joshua Mendelsohn and Simon Pietersen (standing). March 2021 (2) South African Law Reports (pp 1 - 321)

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 GP: Gauteng Division, Pretoria

KZD: KwaZulu-Natal Local Division, Dur-

ban

LAC: Labour Appeal Court

LC: Labour Court

SCA: Supreme Court of Appeal

Business rescue

Whether practitioner may commence retrenchment process under LRA before conclusion of business rescue process: In South African Airways SOC Ltd (In Business Rescue) and Others v National Union of Metalworkers and Others 2021 (2) SA 260 (LAC), the appellant, South African Airways (SAA), went into business rescue. Before the business rescue practitioners (the second and third appellants) finalised the business rescue plan. they issued notice under s 189(3) of the Labour Relations Act 66 of 1995 (LRA) informing employees that they could be dismissed for operational requirements (retrenched) and that they should enter into consultations with SAA on, inter alia, ways to avoid retrenchment. The business practitioners also offered voluntary separation packages that were accepted by some employees.

Under s 189 of the LRA retrenchments are prohibited during the 60-day consultation process. The unions argued that moratorium on retrenchments during business rescue proceedings also prevented practitioners from seeking to secure voluntary retrenchments. The first respondent, Numsa, together with other unions representing SAA's employees

(the unions), refused to take part in the consultation process and applied to the Labour Court (LC) for a ruling that the s 189 notices were premature and unlawful because they were issued before the production of a business rescue plan. The unions asked that the consultation process be halted pending the execution of the plan. The LC ruled in favour of the unions. The judgment hinged on the interpretation of s 136(1) of the Companies Act 71 of 2008, which states that employees retain their jobs during business rescue and that any retrenchment 'contemplated in the . . . business rescue plan is subject to [LRA] section 189 and 189A'. The LC ruled that s 136 of the Companies Act offered complete protection against dismissal during business rescue proceedings. It found, however, that nothing prevented practitioners from offering a voluntary severance package to avoid retrenchment.

SAA appealed to the LAC and the unions counter-appealed, attacking the LC's ruling on voluntary severance. The LAC (per Phatshoane ADJP, with Davis JA and Musi J concurring) ruled that s 136 of the Companies Act had to be interpreted in light of the business rescue procedure's aim to rescue the whole company, not just its business or parts of it, and thus to retain jobs. The words 'any retrenchment of any such employees contemplated in the . . . business rescue plan' in s 136(1)(b) of the Companies Act signified a plan that would conceptualise the commercial rationale for retrenchments. The raison d'être for the enactment of s 136(1)(b) was to safeguard employees from being subjected to retrenchment without a business rescue plan. And s 150 of the Companies Act made it plain that the rescue plan, which under subs (2) had to explain its effect on the number of employees, had to precede any retrenchment. This, the LAC held, put paid to any suggestion that the retrenchment process could begin without one. Therefore, the LAC concluded that the LC's ruling in the issuing of the LRA s 189 notice by the practitioners – absent a business rescue plan – was premature and unfair and had to be withdrawn. It accordingly dismissed the appeal.

As to the counter-appeal, the LAC held that the LC did not make any appealable order regarding the offer of voluntary retrenchment packages, and in any event, no reason why the practitioners could not unilaterally offer voluntary severance packages to the employees. Therefore, it concluded that the cross-appeal had no merit and would be dismissed.

See also:

- Tinotenda Mparutsa 'Retrenchments and business restructuring' 2020 (Nov) DR 35; and
- Monique Jefferson 'Employment law update - Retrenchments during business rescue' 2020 (Oct) DR 38.

Constitutional law

Freedom of religion, property rights and the call to prayer: Can a homeowner successfully sue to silence Muslim calls to prayer coming from a neighbouring property? This was the question posed in *Ellaurie v Madrasah Taleemuddeen Islamic Institute and Another* 2021 (2) SA 163 (KZD). The applicant, Mr Ellaurie, from Isipingo Beach, Durban, lived oppo-

site the first respondent, a Madrasah (an institute for Islamic studies). The second respondent was the eThekwini Municipality, a local authority, which did not participate in the litigation.

The Madrasah, which had around 340 students and housed a mosque and accommodation for staff and students, was separated from Mr Ellaurie's property by about 20 metres. The properties were in a residential suburb in the jurisdictional area of the Municipality, which had granted the Madrasah an approval for a cluster residential development.

Mr Ellaurie, a Hindu, unabashedly opposed to the Islamic faith propagated by the Madrasah. Citing Hindu scripture, he believed that Islam discriminated against non-Muslims, promoted cultural racism, did not uphold the divinity of man, and lacked commitment to the truth and the pursuit of truth. In his view, Islam was not protected under the Constitution because everything it stood for was unconstitutional.

Mr Ellaurie stated that his family moved to Isipingo Beach in 1966 and that the Madrasah, having acquired a neighbouring property in 1999, had, in collusion with the Municipality, continuously developed the property in clear violation of its residential status. He argued that Isipingo Beach was a diverse, quiet residential suburb but that the Madrasah was turning it into a Muslim enclave.

Mr Ellaurie's principal complaint, however, was about the calls to prayer that emanated from the Madrasah five times every day, against which he sought an interdict. More drastically, he also wanted an order banning the Madrasah from the area and directing that its property be sold to the state or a non-Muslim entity.

Mr Ellaurie argued that the call to prayer, which was electronically amplified, was a foreign sound that bore down on him, invading his private space, depriving him of the enjoyment of his property and disturbing his peace of mind. It disrupted his sleep and interfered with his enjoyment of music and his ability to meditate. The call to prayer, he said, gave the suburb a distinctly Muslim atmosphere, attracted people of the Islamic faith and kept non-Muslims away.

Mr Ellaurie claimed that, in seeking to ban the Madrasah from the area, he was acting on his own behalf, as well as in the public interest. The Madrasah, which did not deny that the call to prayer was meant for the neighbourhood, objected in principle to being interdicted from issuing it.

Approached to mediate between the parties, the South African Human Rights Commission recommended, among other things, that the Madrasah decrease the amplification of the call to prayer to make it less intrusive. The Muslim parties to the mediation had found the rec-

ommendation to be reasonable but the matter nevertheless proceeded to trial.

In its judgment the KZD, per Mngadi J, pointed out, in the first place, that since Mr Ellaurie had presented no evidence as to which members of the public shared his sentiments on Islam, his averment that he was acting in the public interest could not be sustained. The KZD ruled in this regard that no individual could claim to act on behalf of the public on an issue on which the public was likely divided.

The KZD also ruled Mr Ellaurie's attempt to portray Islam as a false religion was misguided. The Constitution guaranteed freedom of religion and there could be no doubt that Islam was a religion. In addition, the KZD was in no position to analyse scripture to decide whether Islam was a false religion. Courts should in any event refrain from getting involved in disputes of this nature. The KZD concluded this facet of its judgment ruling that Mr Ellaurie's attempt to have the Madrasah banned on religious doctrinal grounds was doomed to failure.

As to the matter of the alleged intrusiveness of the call to prayer, the KZD held that, while the Constitution in s 15(1) guaranteed freedom of religion, it did not guarantee freedom of practice or manifestations of religion. The call to prayer, while a manifestation of Islam, was not Islam itself. Mr Ellaurie had the right to enjoy the use of his home and others were obliged to respect it. Since the Madrasah never argued that it was essential to the practice of its religion that the call to prayer be made in such a way that it interfered with Mr Ellaurie's right to the use and enjoyment of his private space, or that the current interference interfered least with it, Mr Ellaurie only had to prove interference. Moreover, an order that the Madrasah ensure that its calls to prayer were not audible inside Mr Ellaurie's house would not negatively affect the manner in which it practiced its religion.

The KZD concluded that, while an interdict should never be lightly granted, Mr Ellaurie had established a clear right to the enjoyment of his property and interference with it by the Madrasah's call to prayer. For Mr Ellaurie to instead move to another area was too extreme a measure to amount to a realistic alternative remedy to the situation. Accordingly, Mr Ellaurie was entitled to an interdict directing the Madrasah to ensure that its calls to prayer were not audible within the buildings on his property.

See also:

- Kirsten-Ann Toohey 'Is the alliance between church and state still proving to be an unholy one?' 2020 (Nov) DR 39; and
- Saadia Gani 'The South African drama: Where Shakespeare and Disney collide' 2020 (Nov) DR 45.

Contract

A further exception to principle of autonomy of a performance guarantee from underlying contract? Performance guarantees are generally considered in South African law to be autonomous from the underlying contract to which they relate, so that performance under the guarantee is independent of compliance with the underlying contract. In Joint Venture Aveng (Africa) (Pty) Ltd/ Strabag International GmbH v South African National Roads Agency SOC Ltd 2021 (2) SA 137 (SCA), it was argued that South African law should be developed to recognise an exception to this 'autonomy principle' so that, where the underlying contract restricted or qualified a beneficiary's right to call up the guarantee, the contractor would be entitled to interdict a beneficiary from doing so until the conditions in the underlying agreement were met.

The facts were that the first respondent (Sanral), as employer, and the appellant (the JV), as contractor, were parties to a civil engineering contract (the underlying contract). The second respondent, as guarantor, had issued a performance guarantee in favour of Sanral, as beneficiary, in respect of this contract. However, the work to be performed was disrupted by violent civil unrest, prompting the JV to give Sanral notice to terminate the underlying contract on the basis of force majeure. Sanral denied force majeure, and so insisted the JV return to site. When the latter refused to do so, Sanral too purported to terminate the contract. The question of whether the civil unrest amounted to force majeure was referred to arbitration. Pending determination thereof, JV sought Sanral's assurance that it would not call up the performance guarantee. Sanral refused to comply with this request. This prompted the JV to institute proceedings in the GP to interdict Sanral acting on the guarantee, on the ground that to do so would be unlawful as Sanral had not met certain conditions in the underlying contract limiting its right to call up the guarantee, namely proof that it was entitled to an amount under the contract through the application of certain clauses, and that it was in a position to cancel the contract. The High Court, per Makhuvele J, dismissed the application purely on the basis that the JV had failed to make out a prima facie case that the disruption of the project amounted to force majeure. The JV appealed to the SCA, which, unlike the High Court, addressed the question of the development of the law in the manner favoured by the IV.

The SCA, per Makgoka JA (Navsa JA, Saldulker JA, Goosen AJA and Unterhalter AJA concurring), stated that there was room in South African law to follow

the approach taken in Australia and England, such that, if the underlying contract clearly and expressly prevented the beneficiary from making a demand under a guarantee, it could be restrained by the court from doing so. The SCA, however, stressed the need for a caveat to this exception: That it would only apply if the contractor could show that the other party would breach a term of the underlying contract by having recourse to the performance guarantee. The terms of the underlying contract could not readily be interpreted as conferring the right.

The SCA, however, ruled that the guarantee in question, based on its terms and those of the underlying contract, was unconditional. The second respondent was obliged to pay on receipt of a written demand from Sanral, which demand could be made if, in Sanral's opinion and sole discretion, the JV had for any reason failed to complete the services in accordance with the conditions of the contract. The JV's failure to complete the project, be it due to force majeure or otherwise, fell into this category. The reason for such failure was irrelevant, and Sanral was entitled to payment before any underlying dispute between it and the JV was determined.

The SCA accordingly dismissed the appeal.

Persons

The process under r 57 for obtaining a declaration that someone is of unsound mind and incapable of managing his affairs: In Scott and Others v Scott and Another 2021 (2) SA 274 (KZD) involved on the one hand the son, three daughters and brother of 91-year-old Mr Scott, and on the other Mr Scott and his wife. Mr Scott had amassed a fortune through his involvement in the footwear industry and the establishment of a leading shoe store in Durban in the 1970s, and was also the co-owner with his brother of a highly successful thoroughbred stud farm in the Nottingham Road area of the Natal Midlands. Apart from his interests in horse racing at a local level, Mr Scott owned valuable racehorses in Ireland, as well as valuable paintings, antiques and investments in the United Kingdom and South Africa worth several hundred million rand. What the applicants, who suspected their father had Alzheimer's disease, sought was appointment of a curator ad litem under r 57 of the Uniform Rules of Court, an order compelling Mr Scott to undergo medical examinations for purposes of the curator ad litem's report, and an interdict on Mr Scott's wife bringing him home from hospital to a place under her control. Mr Scott, who insisted that he was of perfectly sound mind, found the applicants' attitude perplexing and upsetting. In dismissing the application, the KZD, per Chetty J point-

ed out that the onus was on the applicants to prove that the appointment of a curator was a necessary step. The KZD remarked on a 'significant undercurrent' to the applicants' case which suggested a concern to ensure that Mr Scott's financial affairs did not come under the control of his wife, whom they disliked and had vilified in the papers. The KZD emphasised that a court should not grant orders for the appointment of a curator ad litem for the purpose of investigating or digging up medical evidence to show that Mr Scott was incapable of managing his affairs, and that even if it accepted that Mr Scott had Alzheimer's, this was insufficient to conclude that he was incapable of managing his own affairs, of which there was no evidence. After issuing a warning about the scope for abuse of the r 57 procedure, the KZD ruled that, all things considered, the applicants failed to make out a case for the relief sought, and dismissed the applica-

Practice

Rescission of judgment declaring an immovable property especially executable where property already sold in execution and transferred to purchaser and circumstances in which the court could reinstate the judgment debtor's ownership: In Absa Bank Ltd v Mare and Others 2021 (2) SA 151 (GP), the Full Bench of the GP were faced with the situation of an application for rescission of a judgment declaring an immovable property specially executable, where such property had subsequent to the granting of the default judgment been sold in execution and transferred to a bona fide purchaser who had had no knowledge of the claim of the owner at the time of registration of transfer of ownership into their name. The main question to be addressed was, should the GP, if deciding to grant rescission, also reinstate the judgment debtor's registered ownership of the property? The background was as follows: In terms of a loan agreement entered into between them, the first respondent, Ms Mare, had borrowed a sum of money from the applicant, Absa Bank Ltd, which sum was secured with a mortgage bond over a property she owned. She fell in arrears with her payments, as a result of which, Absa launched summons preceded by a s 129 notice. The Sheriff served the summons by fixing it to the grass of Ms Mare's property - her chosen domicilium citandi et executandi - a smallholding with a residence. Absa ultimately obtained default judgment ordering Ms Mare to pay the loan sum, as well as declaring the property to be specially executable. The property was subsequently sold in execution to, and registered in the name of, the second respondent. Ms Mare alleged that she only learnt of what had happened when the second respondent visited the property. She was prompted to bring an application for rescission to the GP. The GP, per Kubushi J, rescinded the default judgment. It also declared to be null and void and set aside the attachment and sale, and directed the registrar of deeds, the fourth respondent, to re-register the property in her name. In respect of these latter decisions the GP granted Absa leave to appeal to the Full Bench.

Meyer J (with whom Mia J and Moosa AJ concurred) noted the principle that, as a general rule, a property sold at a sale in execution in terms of an existing judgment could not be vindicated from a bona fide purchaser once the property had been transferred to the purchaser. The rescission of the judgment did not in itself provide a ground for vindication. The principle, however, only applied where a valid judgment was in existence at the time of the execution sale and where a valid execution sale complying with the essential applicable rules of GP and statutory measures had taken place. Where there was no judgment, or where the judgment was void ab initio, or where the essential statutory formalities pertaining to the sale of an immovable property had not been complied with, the immovable property in question could in principle be vindicated even from a bona fide purchaser who had taken transfer of the property.

The GP went on to provide that a default judgment would be considered a nullity ab initio in circumstances in which there was no power to grant the judgment in the first place. And this would be the case, the GP held, where service of the process commencing GP proceedings did not occur in accordance with the rules of the GP. The GP found that to be the case on the facts, rendering the judgment void ab initio, and the subsequent sale and transfer of the property invalid. Uniform Rule 4(1)(a) (iv) allowed for service where 'the person so to be served has chosen a domicilium citandi, by delivering or leaving a copy thereof at the domicilium so chosen'. A further requirement for proper 'delivery' was that delivery should take place in a way such that in the ordinary course the notice or process would come to the attention and be received by the intended recipient. The Sheriff's leaving the summons on the grass, where it could be blown away, taken away or be invisible, was not an appropriate manner of delivery. The GP suggested that proper delivery would have been achieved by handing the summons to Ms Mare personally, by giving it to her employee, slipping it under or fixing it to the front door, or depositing it in the post box.

The GP found that it was open to Ms

Mare to vindicate the property; and that the order of reinstatement of ownership should stand. The GP then dismissed the appeal.

Workmen's compensation

Constitutionality of exclusion of domestic workers from statutory protection: In Mahlangu and Another v Minister of Labour and Others 2021 (2) SA 54 (CC) the CC considered the confirmation application of the GP's declaration that s 1(xix)(d) (v) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) was constitutionally invalid. This insofar as it excluded domestic workers employed in private households from the definition of 'employee', thereby denying them compensation in the event of injury, disablement or death in the workplace.

The majority judgment of the CC (per Victor AJ, with Mogoeng CJ, Khampepe J, Madlanga J, Majiedt J, Theron J and Tshiqi J concurring), while agreeing with the GP's declaration, differed on the constitutional rights infringed. The majority held that COIDA must be read and understood within the constitutional framework of s 27 and its objective of achieving substantive equality, so that social security assistance in terms of COIDA was a subset of the right of access to social security under s 27(1)(c) of the Constitution. Furthermore, the obligation under s 27(2) to take reasonable legislative and other measures, within available resources, included the obligation to extend COIDA to domestic workers. The failure to have done so in the face of the state respondent's admitted available resources, constituted a direct infringement of s 27(1) (c), read with s 27(2) of the Constitution.

The majority further held that the differentiation between domestic workers and other categories of workers was arbitrary and inconsistent with the right to equal protection and benefit of the law under s 9(1); and – applying the concept of 'intersectionality' – it also amounted to indirect discrimination, under s 9(3). Domestic workers have endured the indignity of multiple intersecting forms of discrimination. The exclusion of domestic workers from benefits under COIDA also had an egregious discriminatory and deleterious effect on their inherent dignity (s 10).

The first minority judgment (per Jafta J with Mathopo J concurring) found no infringement of ss 9(3), 10 or 27, and would have disposed of the matter on the basis of an s 9(1) infringement alone.

The second minority judgment agreed with the main judgment, except in respect of the s 27 infringement (where it agreed with the first minority judgment).

In the second minority judgment Mhlantla J concurred with the majority but underscored the historical significance of the case and its intersectional nature. The judge set out the historical role and plight of the domestic worker

and the reasons for their past exclusion from COIDA. Mhlantla J concluded her judgment by pointing out that while domestic workers were still being exploited, they were no longer invisible or powerless but had a voice.

The CC accordingly confirmed the GP's declaration of s $1(xix)(\partial)(v)$ constitutional invalidity, with immediate and retroactive effect from 27 April 1994.

See also:

 Tanya Calitz 'A victorious CC ruling on social security benefits and relief for domestic workers' 2021 (March) DR 31.

Other cases

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

- freedom of speech;
- the Public Protector;
- servitudes;
- the right to privacy; and
- the classification of goods for customs duty.

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Petitioning creditor found liable to pay the costs of sequestration

By Kgomotso Ramotsho

FirstRand Bank Ltd v Master of the High Court (Pretoria) and Others (SCA) (unreported case no 1120/19, 7-4-2021) (Mabindla-Boqwana AJA (Wallis, Saldulker and Dlodlo JJA and Goosen AJA concurring))

n this case the Supreme Court of Appeal (SCA) had to determine the meaning of s 106, read together with ss 89(2) and 14(3) of the Insolvency Act 24 of 1936 (the Act), which deals with the liability for –

- costs of sequestration when there is no free residue or free residue is sufficient:
- whether secured creditors relying solely on their security are liable to contribute; and
- whether a petitioning creditor is solely liable.

The SCA said the issue has been a subject of controversy for a while within the insolvency law academic circles and added that the debate centred on the question of which creditors are liable to pay a contribution for costs where there is a shortfall in the free residue. Whether the burden to contribute lies with all creditors who have proved their claims against the estate. The SCA pointed out that these questions engaged Vilakazi AJ in the Gauteng Division of the High Court in Pretoria (the High Court).

The SCA first looked at the background of the case. On 7 October 2009, the Body Corporate (second respondent) launched an application in the High

Court for sequestration of the insolvent's estate on the basis that the insolvent owed it R 22 000 arrear levies. A year earlier it had obtained a default judgment against the insolvent in the Pretoria Magistrates' Court for payment of the sum of R 8 895,64. The insolvent Mr Msimango prior to his sequestration, owned two sectional title units, which were separately bonded, one to Nedbank Limited in the amount of R 577 800 (property A) and the other to First National Bank (FNB), a division of the appellant FirstRand Bank Ltd (FirstRand) in the amount of R 645 840 (property B) respectively. The unit mortgaged in favour of Nedbank (property A) fell within the sectional title scheme administered and managed by the second respondent.

The Body Corporate approached the High Court on the strength of a *nulla bona* return issued by the Sheriff, which rendered the insolvent's conduct an act of insolvency within ambit of s 8(*b*) of the Act. In its sequestration application the Body Corporate contended that '[b]oth properties will be sold when the respondent [the insolvent] is sequestrated and that as such the probability of a substantial dividend becoming available to concurrent creditors is very likely'.

A security was issued by the Master of the High Court in Pretoria (the Master) stating that sufficient security had been given by the Body Corporate for the payment of all fees and charges necessary for the prosecution of all sequestration proceedings, and of all costs of administering the estate until a trustee had been appointed and if no trustee was appointed, all fees and charges necessary for the discharge of the estate from sequestration.

The SCA added that a final order of sequestration was granted by the High Court on 14 June 2010 and the third and fourth respondents were appointed as trustees and confirmed on 12 August 2011. Nedbank proved its claim of R 679 512,82 at the second meeting of creditors held on 22 November 2012. Property A was sold for an amount of R 350 000 and transferred to the buyer. To effect registration of transfer, the municipality was paid an amount of R 14 643,44 and the Body Corporate R 178 647 from the sale of proceeds in accordance with s 15B(3)(a)(i)(aa) of the Sectional Titles Act 95 of 1986. The property was further sold by its buyer to another purchaser for R 580 000. The Body Corporate did not prove a claim.

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The SCA said that the appellant alleged to the High Court that it had no knowledge that the insolvent had been sequestrated. That it had started a foreclosure process prior to sequestration and property B was sold at a sale in execution on 15 September 2010 for the sum of R 330 000. It was then registered in December 2010 in the name of the purchaser. The proceeds from the sale in execution were paid to FNB. FNB proved a claim of R 617 686,86 together with interest thereon at 9,25% at a special meeting of creditors on 17 May 2015. It had indicated in its affidavit lodged in terms of s 44(4) of the Act that it relied solely on its security in satisfaction of its claim. Subsequent to that, FNB was called on by the trustees to refund the insolvent estate an amount of R 30 697,91 made up of costs relating to realisation of the security in terms of s 89(1) of the Act (R 13 587,89), a contribution to the costs of sequestration in the amount of R 17 028,82 and costs of a special meeting at R 81.20.

The appellant did not take issue with the s 89(1) costs for the special meeting but felt aggrieved with being required to pay a contribution towards the costs of sequestration. It accordingly delivered a written objection to the Contribution Accounts (the L&D account) to the Master on the basis that, as the petitioning creditor, the Body Corporate was the creditor liable to pay the contribution as envisaged by s 14(3) of the Act. The Master's response to this objection was, inter alia, that while a petitioning creditor would be liable to contribute to the costs of sequestration in terms s 14(3) of the Act, there was an exception to this rule. Relying on some parts of a publication authored by Dr David Burdette. The appellant took the decision on review to the High Court on the basis that the Master incorrectly interpreted s 14(3) with s 106 of the Act and misapplied the *Nel NO v Body Corporate of the Seaways* Building and Another 1996 (1) SA 131 (A) and Barnard NO v Regspersoon van Aminie en 'n Ander 2001 (3) SA 973 (SCA) decisions.

The appellant sought an order directing the trustees to amend the L&D account to reflect that the Body Corporate was solely liable to pay the contribution of R 46 663,16 alternatively that the Body Corporate, FNB and Nedbank were liable *pro rata* to pay the contribution. The SCA said that s 44(1) of the Act provides that any person or representative of a person who has a liquidated claim against an insolvent estate the cause of which arose before the sequestration of that estate may at any time before the financial distribution of the estate, prove that claim in the manner provided.

A claim is proved by way of an affidavit as envisaged in s 44(4) detailing

among other things, the nature, and particulars of the claim and, if a creditor holds a security, the nature of that security. The SCA added that s 89(2) stipulates that where a creditor relies for the satisfaction of his claim solely on the proceeds of the property which constitutes his security, he shall not be liable for any costs of sequestration other than the costs specified in s 89(1) and other costs for which he may be liable under paras (a) and (b) of the proviso to s 106.

The SCA added that s 16 provides, which mechanism for determining which creditors must contribute towards the costs of sequestration, when there is no free residue, or it is insufficient. The SCA said that the s 106 must be read together with ss 14(3) and 89(2). FirstRand contended that in terms of s 89(2) of the Act it had no obligation to contribute to the cost of sequestration except in the circumstances set out in either subs (a) or (b) of s 106. FirstRand's submission was made against the practical background that the primary cause of the shortfall in the free residue was the costs of sequestration incurred by the Body Corporate and paid to its attorneys.

The SCA said the Body Corporate thus made a full recovery of the arrear levies and FirstRand, which gained no benefit from the sequestration, was mulcted in a contribution towards the costs of sequestration incurred by the Body Corporate. Furthermore, it had no practical connection with this Body Corporate as its mortgage was over a unit in a different scheme. The SCA pointed out that a case that dealt with a question similar to the one before it was Snyman v the Master and Others 2003 (1) SA 239 (T), which was cited by the amicus curiae in advancing her submission. In that case the sequestration was a friendly one.

The SCA said that the analysis illustrated that Snyman was wrongly decided. It further confirms that the Master was wrong in absolving the Body Corporate from paying the contribution on the basis of his reasoning relying on the selected parts of a publication by author Dr David Burdette. The SCA added that the High Court erred by holding FNB and Nedbank liable as co-contributors to the costs of sequestration together with the Body Corporate and for that its decision must be set aside. In conclusion the SCA said that having determined the meaning of ss 106, 89(2) and 14(3), it is clear that the Body Corporate as the petitioning creditor is solely liable to pay the costs of sequestration as the other two creditors FNB and Nedbank are secured creditors who relied solely on security.

The SCA said there had been other creditors found to have been liable to contribute. It would have had to contribute in proportion to the amount of its claim in the petition (R 22 000). The

SCA added that it is, however, not necessary to have regard to that amount, as the Body Corporate had been found to be solely liable for payment of the entire R 43 680,35 in respect of the taxed bill of costs. The SCA pointed out that since the matter was not opposed there would be no order as to costs.

The SCA made the following order:

- '1. The appeal is upheld.
- 2. Paragraph 3 of the order of the Gauteng Division of the High Court, Pretoria is set aside and replaced with the following order:
- "3. That the third and fourth respondents are directed to amend the first and final liquidation, distribution, and contribution account to reflect that the second respondent is solely liable to pay the contribution of R 46 664.16."

There is no order to costs'.

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





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By Zinhle Mokoena and **Nokulunga** Bulo

Hold your horses: Delictual liability flowing from a failure to prevent wandering livestock

De Pontes v Kegge (ECP) (unreported case no 1773/2018, 26-1-2021) (Ronaasen AJ)

n the recent judgment of De Pontes, the court determined whether a livestock owner has a duty of care to a motorist to take reasonable steps to prevent animals under their control from straying onto a public road and whether a livestock owner is liable for the harm caused by an animal as a result of the breach of such duty of care. The court also had to decide whether a person injured as a result of a stray animal can be said to have contributed to the cause of the harm occasioned to the person.

On 25 June 2017 at approximately 6am, the plaintiff in the matter, was travelling from Seaview, Port Elizabeth to the Volkswagen Factory in Uitenhage. He noticed a vehicle approaching from the opposite direction, which, he said, was travelling rather fast. He glanced at the vehicle as it approached him, possibly taking his eves off the road for a moment, immediately after which, an impact occurred. The plaintiff recalled seeing a creature's 'eye' moments before his vehicle struck a horse belonging to the defendant. As a result of the accident, the plaintiff suffered bodily injuries, but survived, unlike the horse, whose injuries resulted in it being euthanised.

Under cross-examination during the trial of the matter, the plaintiff confirmed that he travelled to Uitenhage frequently for work, using the same road approximately three to four times per week. He knew the road well. The plaintiff confirmed that, at the time of the collision, it was still dark and patches of mist were visible.

The defendant conceded that the horses were kept in a fenced enclosure behind a gate, locked with a carabiner, and that anyone could have opened the gate on the day of the collision. The defendant further admitted that he owed a duty of care to the plaintiff to prevent the horse from escaping onto the public road.

The court held that, when assessing the conduct of the defendant, the issue was whether a reasonable person in the position of the defendant would have taken further precautions to prevent his horses from straying onto the road. The court noted that the enclosure for the defendant's horses was secured by just one gate, which did not have a lock or an automatic closing mechanism to ensure that it could not be left open. It was probable that the gate was left open by someone who had accessed the property on the day in question. The court remarked that the identity of the person responsible for leaving the gate open was irrelevant. The owner of the horses was responsible for taking reasonable steps to prevent his animals from escaping and straying onto a public road.

The court accordingly found that the defendant's failure to secure the gate with a lock, amounted to a breach of a duty of care, which the defendant owed to the plaintiff and, as a result, his negligence was causally linked to the collision and the injuries the plaintiff sustained.

In determining whether the plaintiff negligently contributed to the collision, the court considered the driving conditions on the day in question. The collision occurred during the early hours of the morning, and it was still dark and misty. The horse was haplessly in the road at the time of the impact. The court found that the plaintiff's ability to see clearly would likely have been affected by the mist on the road. The plaintiff accordingly, was in no position to take reasonable steps to prevent the collision from occurring and was not in any way negligent.

The plaintiff had, however, admitted taking his eyes off the road to glance at a vehicle travelling in the opposite direction before suddenly seeing the eye of the horse with which his vehicle collided. The court apparently did not believe that this demonstrated a degree of negligence on the part of the plaintiff, even though a failure to keep a proper lookout when driving a vehicle is an established ground of negligence in our law. Had the court found otherwise, the damages awarded to the plaintiff would have been reduced in proportion to the degree of negligence of both parties.

This judgment should serve as a cautionary tale to livestock owners, who must ensure that their animals do not stray into public spaces where they may cause harm to members of the public. The court re-emphasised the principle that livestock owners owe a duty of care to the public and should take additional precautionary measures to ensure that their animals are kept in a secure space if these additional measures can be achieved easily and inexpensively.

Considering the risk of liability which inherent in owning livestock, livestock owners should ensure that they are covered with the necessary insurance to mitigate any losses that a member of public may suffer as a result of their animals straying into public spaces.

Zinhle Mokoena LLB (UJ) is a legal practitioner at Fairbridges Wertheim Becker Attorneys who was assisted by Nokulunga Bulo in the Johannesburg Office. This article was supervised by legal practitioners Ayanda Nondwana and Matthew van der Want.















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New legislation

Legislation published from 1 – 31 March 2021

By Philip Stoop

Commencement of Acts

Social Assistance Act 13 of 2004, ch 4 (ss 24-28). *Commencement:* 1 April 2021. Proc2 *GG*44299/19-3-2021.

Science and Technology Laws Amendment Act 9 of 2020. *Commencement:* 1 April 2021. Proc3 *GG*44333/26-3-2021 (also available in isiZulu).

Promulgation of Acts

Airports Company Amendment Act 17 of 2020. *Commencement:* To be proclaimed. GN 82 *GG*44225/4-3-2021 (also available in Afrikaans).

Air Traffic and Navigation Services Company Amendment Act 18 of 2020. *Commencement:* To be proclaimed. GN83 *GG*44226/4-3-2021 (also available in Afrikaans).

Selected list of delegated legislation

Agricultural Pests Act 36 of 1983

Control measures relating to Asian citrus psyllid (*Diaphorina citri*) and Citrus greening (Asian and American strains) (*Candidatus Liberibacter asiaticus* and *Candidatus Liberibacter americanus*). GN R209 *GG*44258/12-3-2021.

Amendment of control measures (fees payable). GN224 and GN225 *GG*44293/19-3-2021.

Animal Identification Act 6 of 2002 Amendment of regulations. GN259 *GG*44333/26-3-2021. Antarctic Treaties Act 60 of 1996 Antarctica and Southern Ocean Strategy

2021. GN234 *GG*44293/19-3-2021. **Auditing Profession Act 26 of 2005**

Fees payable to the Independent Regulatory Board for Auditors from 1 April 2021. BN13 *GG*44257/12-3-2021.

Companies Act 71 of 2008

Mandatory submission of annual financial statements using iXBRL by entities using Generally Recognised Accounting Principles as from 1 October 2021. GN207 *GG*44257/12-3-2021.

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Amendment of sch 4 (manner of calculating compensation), increases in monthly pension and increase of the maximum amount of earnings on which assessment of an employer shall be calculated. $GN184\ GG44238/5-3-2021$.

Inclusion of domestic employees under the Act, benefits and registration of claims procedure. $GN106\ GG44250/10-3-2021$.

Revised return of earnings prescribed form. GN242 *GG*44302/19-3-2021.

Revised CF-2B application for the revision of the assessment prescribed form. GenN132 GG44329/25-3-2021.

Revised CF-2A return of earnings prescribed form. GenN133 GG44330/25-3-2021.

Increase in medical tariffs. GenN146 GG44344/29-3-2021 (Ambulance Gazette 2021), GenN147 GG44345/29-3-2021 and GenN148 GG44346/29-3-2021 (Dental Gazette 2021), GenN153 GG44356/30-3-2021 (Wound Care Gazette 2021), GenN154 GG44357/30-3-2021 (Social Worker Psychology Gazette 2021), GenN149 GG44347/30-3-2021 (Orthotists/Prosthetists Gazette 2021), GenN151 GG44354/30-3-2021

(Chiropractor Gazette 2021), GenN152 GG44355/30-3-2021 (Renal Care Gazette 2021) and GenN155 GG44358/30-3-2021 (Private Hospital Gazette 2021).

Continuing Education and Training Act 16 of 2006

National Policy on Students and Community Support Services for Community Education and Training Colleges. GN208 *GG*44257/12-3-2021.

Deeds Registries Act 47 of 1937

Amendment of regulations. GN R153 GG44202/1-3-2021 (also available in Afrikaans).

Disaster Management Act 57 of 2002 (COVID-19)

Education

Amendment of directions regarding measures to address, prevent and combat spread of COVID-19: Re-opening of schools in 2021. GenN145 *GG*44339/27-3-2021.

Directions on a national framework and criteria for management of 2021 academic year in public and private higher education institutions. GN277 *GG*44342/29-3-2021.

• Environment, forestry and fisheries

Amendment of directions regarding measures to address, prevent and combat the spread of COVID-19 at biodiversity auctions. GN187 GG44246/5-3-2021.

• General regulations

Extension of National State of Disaster under the COVID-19 lockdown to 15 April 2021. GN R193 GG44256/11-3-2021.

Amendment of the regulations issued in terms of s 27(2): Alert level 1 during the COVID-19 lockdown. GN R284 GG44367/30-3-2021.

• Health

Amendment of directions regarding



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measures to prevent and combat the spread of COVID-19 in Health: Disposal of mortal remains. $GN240\ GG44297/19-3-2021$.

Labour

COVID-19 Temporary Employee/Employer Relief Scheme (C19 TERS) Direction, 2021. GN R167 GG44222/3-3-2021.

• Transport

Amendment of directions on measures to address, prevent and combat the spread of COVID-19 in air services. GN158 *GG*44208/1-3-2021.

Amendment of directions regarding measures to address, prevent and combat spread of COVID-19 in public transport services during alert level 1. GN255 GG44325/25-3-2021.

Taxi relief fund to mitigate the impact of COVID-19 in the taxi industry. GN290 *GG*44381/31-3-2021.

Division of Revenue Act 4 of 2020

Stopping of funds in respect of non-spending provinces and re-allocation to other provinces. GN157 *GG*44207/1-3-2021

Electronic Communications Act 36 of 2005

Amendment of the Standard Terms and Conditions Regulations for Class Licences, 2010. GenN131 GG44328/25-3-2021. Amendment of the Information and Communications Technology (ICT) COV-ID-19 National Disaster Regulations. GenN165 GG44374/31-3-2021.

Regulations on the use of television white spaces, 2018. GenN164 GG44373/31-3-2021.

Sports Broadcasting Services Amendment Regulations, 2021. GenN163 GG44372/31-3-2021.

Regulations in respect of limitations of control and equity ownership by historically disadvantaged groups and the application of the ICT sector code. GenN170 *GG*44382/31-3-2021.

Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947

Regulations relating to the tariffs for the registration of fertilizers, farm feeds, agricultural remedies, stock remedies, sterilizing plants and pest control operators. GN R265 GG44394/26-3-2021.

Health Professions Act 56 of 1974

Annual fees payable by registered practitioners. BN16 GG44300/19-3-2021. Rules relating to fees payable to the council. BN17 GG44301/19-3-2021.

Income Tax Act 58 of 1962

Determination of the daily amount in respect of meals and incidental costs for purposes of s 8(1)(a)(ii)(aa). GN173 GG44229/5-3-2021 (also available in Afrikaans, Tshivenda and isiXhosa).

Fixing of rate per kilometre in respect of motor vehicles. GN174 *GG*44229/5-3-2021 (also available in Afrikaans, Tshivenda and isiXhosa).

Independent Communications Authority of South Africa Act 13 of 2000

Municipal Elections Broadcasts and Political Advertisements Amendment Regulations, 2021. GenN161 *GG*44370-31-3-2021.

Justice and Constitutional Development Department

Establishment of Specialised Crime Courts in Limpopo, Mpumalanga, North West and Northern Cape. GenN157 *GG*44361/30-3-2021.

Labour Relations Act 66 of 1995

Essential Services Committee: Variation of designation of 'essential services'. GenN122 *GG*44293/19-3-2021.

Medical Schemes Act 131 of 1998

Adjustment to fees payable to brokers with effect from 1 January 2021 (R 101,91 plus VAT). GN206 GG44257/12-3-2021 and GenN118 GG44278/12-3-2021.

Medicines and Related Substances Act 101 of 1965

Exclusion of sch 2, sch 3 and sch 4 from certain provisions of the Act. GN252 *GG*44322/25-3-2021.

Regulations relating to a transparent pricing system for medicines and scheduled substances (dispensing fee to be charged by persons licensed in terms of s 22C(1)(*a*)). GenN139 *GG*44333/26-3-2021.

Annual single exit price adjustment of medicines and scheduled substances for the year 2021. GN267 *GG*44398/26-3-2021.

Military Pensions Act 84 of 1976

Determination of amounts. GN R222 GG44292/19-3-2021 (also available in Afrikaans).

National Forests Act 84 of 1998

List of protected tree species. GN155 GG44204/1-3-2021.

National Nuclear Regulator Act 47 of 1999

Regulations on the long-term operation of nuclear installations. GN R266 GG44394/26-3-2021.

Occupational Diseases in Mines and Works Act 78 of 1973

Increase of pension benefits. GN R168 GG44223/2-3-2021 (also available in Afrikaans).

Increase of benefits. GN268 *GG*44399/26-3-2021.

Adjustment of levies paid by controlled mines and works. $GN269 \ GG44400/26-3-2021$.

Occupational Health and Safety Act 85 of 1993

Regulations for hazardous chemical agents, 2021. GN R280 *GG*44348/29-3-2021 and GN R283 *GG*44366/31-3-2021. **Perishable Products Export Control Act 9 of** 1983

Levies on perishable products. GenN121 GG44293/19-3-2021.

Plant Improvement Act 53 of 1976Amendment of the regulations relat-

ing to establishments, varieties, plants and propagating material. GN R221 *GG*44292/19-3-2021.

Promotion of National Unity and Reconciliation Act 34 of 1995

Regulations relating to assistance to victims in respect of higher education and training: Publication of increased amounts. GN R177 and GN R178 GG44230/5-3-2021 (also available in Afrikaans).

Public Service Act 103 of 1994

Amendment of sch 1 (substitution and assignment of designations with effect from 1 April 2021). GN172 *GG*44229/5-3-2021 and Proc1 *GG*44253/10-3-2021 (also available in Afrikaans).

Security Officers Act 92 of 1987

Amendment of regulations. GenN150 GG44350/29-3-2021.

Skills Development Act 97 of 1998

National Register of Artisans Regulations, 2020. GN235 GG44293/19-3-2021.

Social Assistance Act 13 of 2004

Increase in respect of social grants. GN R286 *GG*44377/31-3-2021.

South African Maritime Safety Authority Levies Act 6 of 1998

Determination of levies. GN243 *GG*44303/19-3-2021.

Determination of charges. GN238 *GG* 44293/19-3-2021 and GN244 *GG*44304/19-3-2021.

South African Schools Act 84 of 1996

Amended national norms and standards for school funding. GN192 *GG*44254/10-3-2021.

South African Weather Service Act 8 of 2001

Regulations regarding fees for the provision of aviation meteorological services. GN212 *GG*44271/12-3-2021.

Traditional Leadership and Governance Framework Act 41 of 2003

Recognition of King Ahlangene Cyprian Sigcau as the King of AmaXhosa. GN175 *GG*44229/5-3-2021.

Draft Bills

Draft South African Postbank Soc Ltd Amendment Bill, 2021. GenN115 GG44266/12-3-2021.

Draft delegated legislation

- Regulations in terms of the Geoscience Act 100 of 1993 for comment. GenN84 GG44228/4-3-2021.
- Draft Revised National Biodiversity Framework 2019-2024 in terms of the National Environmental Management: Biodiversity Act 10 of 2004 for comment. GN171 GG44229/5-3-2021.
- Amendment of the Civil Aviation Regulations, 2011 in terms of the Civil Aviation Act 13 of 2009 for comment. GN R182 GG44230/5-3-2021.
- Road Accident Fund Medical Tariffs in terms of the Road Accident Fund Act 56 of 1996 for comment. GN191 *GG*44252/10-3-2021.

- Draft amendment regulations regarding mandatory blending of biofuels with petrol and diesel in terms of the Petroleum Products Act 120 of 1977 for comment. GN R211 GG44265/12-3-2021.
- Amendment to the regulations relating to the integrated rare systems in terms of the National Land Transport Act 5 of 2009 for comment. GN215 *GG*44274/12-3-2021.
- Amendment of the compulsory specification for cement (VC 9085) in terms of the National Regulator for Compulsory Specifications Act 5 of 2008 for comment. GN216 GG44275/15-3-2021.
- Proposed amendments to the Code of Professional Conduct for Registered Auditors in terms of the Auditing Profession Act 26 of 2005 for comment. BN15 GG44293/19-3-2021.
- Amendment of the Curriculum and

- Assessment Policy Statement to make provision for Coding and Robotics Grades R-9 in terms of the National Education Policy Act 27 of 1996 for comment. GN230 *GG*44293/19-3-2021.
- Draft amendment to the regulations and notices regarding extended producer responsibility, 2020 in terms of the National Environmental Management: Waste Act 59 of 2008 for comment. GN239 GG44295/19-3-2021.
- Amendments to the forms, rules and regulations of the Competition Commission in terms of the Competition Act 89 of 1998 for comment. GN247 *GG*44309/23-3-2021 and GN249 *GG*44319/25-3-2021.
- Proposed regulations of non-binding advisory opinions in terms of the Competition Act 89 of 1998 for comment. GN248 *GG*44310/23-3-2021.
- Regulations relating to assisted con-

- ception of persons in terms of the National Health Act 61 of 2003 for comment. GN251 *GG*44321/25-3-2021.
- Draft regulations under the Rental Housing Act 50 of 1999 for comment. GN262 *GG*44333/26-3-2021.
- Draft national norms and standards for the treatment of organic waste in terms of the National Environmental Management: Waste Act 59 of 2008 for comment. GN275 GG44340/29-3-2021.
- Draft Equipment Authorisation Regulations in terms of the Electronic Communications Act 36 of 2005. GenN162 *GG*44371/31-3-2021.

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Employment law update



By Nadine Mather

Can an employer engage replacement labour if a strike has been suspended?

In National Union of Metalworkers of South Africa obo Members v Trenstar (Pty) Ltd [2021] 3 BLLR 281 (LC), members of the National Union of Metalworkers of South Africa (NUMSA) commenced strike action against Trenstar (the Company) in pursuit of a demand for a onceoff taxable gratuity payment.

The strike ran for approximately one month until NUMSA notified the Company of its intention to suspend the strike and for its members to return to work. In doing so, NUMSA informed the Company

that the suspension of the strike should not be construed as a withdrawal of the demand for a once-off taxable gratuity. The Company responded by serving a lockout notice and commenced employing replacement labour. As a result, NUMSA approached the Labour Court (LC) for an order interdicting the Company from engaging replacement labour on the basis that the lockout was not in response to a strike.

Before the LC, NUMSA contended that an employer may only use replacement labour while implementing a lockout in response to a strike only for as long as the strike subsists. The strike had, however, ceased and its members had tendered their services. The Company, however, contended that NUMSA could not defeat the lockout simply by suspending the strike. The underlying dispute remained alive and NUMSA's members could go on strike at any time without giving notice. In these circumstances, the lockout was in response to the strike.

The court noted that s 76(1)(*b*) of the Labour Relations Act 66 of 1995 (the LRA) provides that an employer may not take into employment any person for the purposes of performing the work of any employee who is locked out, unless the lockout is in response to a strike.

The court referred to the judgment of *National Association of South African Workers obo Members v Kings Hire CC* [2020] 3 BLLR 312 (C) in which it was held that where the underlying issue in dispute remains unresolved and an

employer has implemented a lockout, the employer is entitled not to accept the employees' tender of services. As NUMSA had not abandoned the demand that informed the industrial action, the underlying dispute remained alive and NUMSA's members retained the right to strike without giving the Company further notice. In these circumstances, the court found that the Company's lockout in response to the strike was perfectly lawful, even though the strike had been suspended.

Having said this, the court found that the matter did not concern the lawfulness of the lockout, it concerned whether the Company could lawfully engage replacement labour when employees are no longer engaging in strike action. It was common cause that NUMSA's members had tendered their services even though they had not abandoned their demand. The court found that although s 76(1)(b) refers to a 'strike', a proper interpretation of the section strongly suggests that the legal precondition for the use of replacement labour is not a strike but a lockout. The word 'strike' in s 76(1) (b) simply functions to identify the kind of lockout during which replacement labour may be used, namely a lockout in response to a strike.

Accordingly, the court held that the clear purpose of s 76(1)(*b*) is to permit employers to engage replacement labour when a union has initiated a strike and a lawful lockout has been instituted in response to that strike. The fact that the

EMPLOYMENT LAW

strike had been suspended by NUMSA shortly before the lockout was instituted was not determinative. All that was required was that the lockout was in response to a strike that was occurring at the time.

In the circumstances, the court found that NUMSA had not made out a case for the relief sought and the application was dismissed.

When can a dismissal for operational requirements be referred to arbitration?

In *PGC Group of Companies (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2021] 3 BLLR 287 (LC), PGC Group of Companies (the Company) sought to restructure its operations and commenced a retrenchment process in terms of s 189 of the Labour Relations Act 66 of 1995 (LRA). The employee concerned unsuccessfully applied for a new position within the Company's revised operational structure and was subsequently retrenched.

The employee referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). Following conciliation, the dispute remained unresolved and the CCMA issued a certificate of outcome recording that the dispute must be referred to the Labour Court (LC) for adjudication. Notwithstanding this, the employee referred the dispute to arbitration before the CCMA in terms of s 191(12) of the LRA.

Section 191(12) of the LRA provides that an employee who is dismissed as a result of an employer's operational requirements has the election to refer the dispute to arbitration or to the LC if:

"(a) the employer followed a consultation procedure that applied to that employee only, ...;

(b) the employer's operational requirements led to the dismissal of that employee only; or

(c) the employer employs less than ten employees, irrespective of the number of employees who are dismissed'.

Before the CCMA, the Company submitted that s 191(12) of the LRA did not apply as more than one employee had been dismissed, alternatively that the Company did not follow a procedure that applied to the employee only. The CCMA, therefore, did not have jurisdiction to entertain the dispute. The employee, on the other hand, submitted that the Company had dismissed him after a consultation procedure that applied to him only and he was thus entitled to refer the matter to arbitration.

Based on the evidence provided, the CCMA Commissioner found that the employee was consulted on his own as an individual and that the other dismissed employees did not form part of the consultation procedure with the employee concerned. On this basis, the CCMA Commissioner held that the employee may elect to refer the matter to arbitration in terms of s 191(12) of the LRA. The Company took the CCMA Commissioner's ruling on review.

On review, the LC noted that s 191(12) provides that employees dismissed for operational reasons may choose to refer the dispute either to adjudication or arbitration if the employer had consulted and dismissed only one employee. The certificate of outcome issued by the CCMA does not bind the parties in this regard. In the present case, the employee had chosen the latter course, and the CCMA Commissioner had accepted his unchallenged evidence that he was the only employee who had been consulted and dismissed.

The court found that the purpose of s 191(12) is to provide for speedy and less expensive dispute resolution process. Although it was common cause that the employee was consulted as part of a general process involving other affected employees, the test was whether the Company followed a consultation procedure that applied to the employees separate from the rest of the employees.

The Company relied on the fact that the employee competed with two other employees for an available position and applied the 'last in, first out' principle as a selection criterion for its submission that the employee formed part of a consultation process with other affected employees. The court found that the mere fact that the employee applied for a newly created position in competition with others did not mean the Company did not follow a consultation procedure that applied only to that employee.

In this regard, the court noted that the Company referred to the 'process' and the 'procedure' interchangeably. Section 191(12)(a) of the LRA, however, specifically refers to the consultation procedure and not the process. When having regard to the evidence, it was clear that there was a process in general that encompassed several affected employees, as opposed to the procedure followed in respect of the employee concerned. The procedure that the Company adopted was to consult with the employee on his own. While the wider process was continuing, the Company consulted with the employee separately from the other affected employees and an s 189(3) notice was issued to him personally.

In the circumstances, the court held that the CCMA Commissioner had correctly found that the Company had adopted a consultation procedure that applied to the employee only and that the CCMA had jurisdiction to arbitrate the dispute.

The review application was dismissed with costs. In addition, leave to appeal was refused and the Labour Appeal Court dismissed a petition for leave to appeal. The Constitutional Court also dismissed a further application for leave to appeal.

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By Kathleen Kriel

Recent articles and research

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Abbreviation	Title	Publisher	Volume/issue
Advocate	Advocate	General Council of the Bar	(2019) 33.3
ADRY	African Disability Rights Yearbook	Pretoria University Law Press (PULP)	(2020) 8
DJ	De Jure	University of Pretoria	(2020) 54
JCCLP	Journal of Corporate and Commercial Law and Practice	Juta	(2020) 6.2
SA Merc LJ	South African Mercantile Law Journal	Juta	(2020) 32.1 (2020) 32.2
SAIPLJ	Southern African Intellectual Property Law Journal	Juta	(2020) 8
SAJEJ	South African Judicial Education Journal	South African Judicial Education Institute, Office of the Chief Justice	(2020) 3.1
SAJELP	South African Journal of Environmental Law and Policy	Juta	(2020) 25.1
SAJHR	South African Journal on Human Rights	Taylor & Francis	(2020) 36.2-3
SLR	Stellenbosch Law Review	Juta	(2020) 31.3

Administrative law

Pieterse, M 'Out of the shadows: Towards a line between party and state in South African local government' (2020) 36.2-3 *SAJHR* 131.

Vos, W 'Personal cost orders: Protecting the public purse' (2020) 31.1 *SLR* 138.

Banking law

Schulze, WG 'The reversal of electronic payments under South African law: Possible guidance from recent developments in European Union Law' (2020) 32.1 *SA Merc LJ* 22.

Children's rights

Lauwereys, H 'Sentencing primary caregivers in South Africa: The role of the child's best interests' (2020) 36.2-3 *SA-JHR* 154.

Magaya, I and Fambasayi, R 'Giant leaps or baby steps? A preliminary review of the development of children's rights jurisprudence in Zimbabwe' (2021) 54 *DJ* 16.

Commercial law

Unterhalter, D 'The Commercial Court: The *status quo*' (2020) 33.3 *Advocate* 44.

Company law

Oaker, W 'Unfettered discretion is paramount: The governance relationship between the private equity firm and the underlying portfolio investee company' (2020) 31.1 *SLR* 158.

Olivier, EA 'The impact of the capacity provisions in the Companies Act 71 of 2008 on the insolvency-remoteness of limited capacity special purpose vehicles

used in securitisation schemes' (2020) 6.2 *JCCLP* 82.

Rahmani, A 'No reflective loss: The English approach reconsidered' (2020) 6.2 *JCCLP* 1.

Subramanien, D 'Section 165(5)(*b*) of the Companies Act 71 of 2008: A discussion of the requirement of good faith' (2020) 6.2 *JCCLP* 212.

Timoney, K and Veldhuizen, PJ 'Courtencouraged mediation: Circumstances where it is appropriate and those where it is not – how the Companies Tribunal can help' (2020) 3.1 *SAJEJ* 73.

Competition law

Brink, GF 'On "dumping" and the Competition Act of South Africa: No "double remedy" (2021) 54 *DJ* 1.

Du Plessis, Q 'The role and nature of the

public interest in South African Competition law' (2020) 32.2 SA Merc LJ 234.

Radebe, S 'A critical analysis of the competition authorities' treatment of the element of causation in exclusionary abuse cases' (2020) 6.2 *JCCLP* 49.

Constitutional law

Van der Linde, DC 'Considering the constitutionality of South Africa's anti-gang legislation in light of the principle of legality' (2020) 36.2-3 *SAJHR* 221.

Visser, CJ 'Revisiting the constitutionalisation of the common law of personality: Transformative constitutionalism and *Le Roux v Dey*' (2020) 36.2-3 *SAJHR* 242.

Consumer law

Tait, AM 'Analysis: Accommodation establishments and the cancellation of advance bookings: The challenge of determining a reasonable cancellation fee' (2020) 32.2 *SA Merc LJ* 277.

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Nkoane, P 'Appraising the scope and application of the market-price rule in upheld contracts' (2020) 32.2 *SA Merc LJ* 253.

COVID-19

Advocate 'COVID-19: Bar survey #2' (2020) 33.3 *Advocate* 60.

Deetlefs, U 'A George perspective' (2020) 33.3 *Advocate* 57.

E Câmara, S 'After the COVID storm: Imagine' (2020) 33.3 *Advocate* 56.

Iheme, WC and Mba, SU 'Coping with the COVID-19 pandemic: A comparative study of the capabilities of the Kenyan and Nigerian insolvency frameworks' (2020) 6.2 *JCCLP* 112.

Katz SC, A and Perumalsamy, K 'Separation of powers in a national state of disaster: South Africa's response to the COVID-19 pandemic' (2020) 33.3 *Advocate* 41

Masendeke, E 'Disability, Cyclone Idai and the COVID-19 pandemic: Preparedness of African countries for disability-inclusive responses in emergency situations' (2020) 8 *ADRY* 243.

Meiring, J 'May it please the court or how to zoom clear of disaster' (2020) 33.3 *Advocate* 46.

Mgijima-Konopi, I and Auma, M 'Health emergencies post COVID-19: What guidance can Africa's Disability Protocol provide?' (2020) 8 *ADRY* 253.

Rabkin, F 'Law matters' (2020) 33.3 *Advocate* 62.

Vaughan, B 'Emerging from the COVID storm: Senior members looking forward' (2020) 33.3 *Advocate* 58.

Wainwright, P 'Emerging from COVID: A junior member's perspective' (2020) 33.3 *Advocate* 59.

Williams, M 'COVID-19 and the courts' (2020) 33.3 *Advocate* 32.

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Non-variation clauses: Academic error should not become erroneous legal precedent

By Stuart Hayward

ounsel: 'My Lord, authority for my argument is Professor Smith's commentary'

Judge: 'Does Professor Smith sit on the SCA bench?'

The above courtroom exchange is a humorous reminder of the pitfalls of counsel's bare reliance on academic commentary, and not on the law itself. Legal academics perform an invaluable service for legal practitioners by accurately recording the development of the law, allowing for efficient legal research. I am only too grateful for the help of academic commentary in my commercial practise at the Johannesburg Bar, without which, court preparation and drafting would be far more onerous.

A problem, however, arises when respected academic commentators draw erroneous conclusions from landmark case law, posing the risk that these mistakes find their way into court judgments, thereby becoming law. Of particular concern, is a view expressed by RH Christie and GB Bradfield on SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere 1964 (4) SA 760 (A) having implied that Shifren confirmed as law that unprotected non-variation clauses are themselves vulnerable to non-written variation, thereby exposing the rest of the agreement to oral variation.

Shifren is a landmark decision. It confirmed the enforceability of non-variation clauses amidst oral amendment, and was constitutionally approved in *Brisley v Drotsky* 2002 (4) SA 1 (SCA) and *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

Non-variation clauses generally hold that all subsequent variations must be in writing, lest they be unenforceable in court, achieving much needed certainty as to rights and obligations.

A practical example of a non-variation clause that does not protect itself against non-written variation is:

'In order to be enforceable, variations to this agreement must be recorded in writing and signed by both parties'.

A practical example of a non-variation clause that does protect itself against non-written variation is: 'In order to be enforceable, variations to this agreement and this clause must be recorded in writing and signed by both parties'.

Graham Bradfield states in ch 12.2.2 of

Christie's Law of Contract in South Africa 7ed (Durban: LexisNexis 2016) at p 519:

'A non-variation clause that does not entrench itself against variation may itself be cancelled or varied by express agreement, and this agreement may be informal. This proposition was accepted in *Shifren* by Steyn CJ and is supported by subsequent authority'.

The excerpt above implies that the Appellate Division in *Shifren* confirmed, as part of South African law, that a non-variation clause that is not itself 'entrenched' (protected) from non-written variation can be varied by non-written means, thereby exposing the rest of the contract to non-written variation.

The Law of Contract in South Africa textbook is deservedly venerated in legal circles as an exceptional resource. I was thus astonished, after forensically dissecting Shifren, to discover what I believe to be glaring factual and legal inaccuracies in the above commentary.

In my view, Steyn CJ's *Shifren* majority judgment does not 'accept', create or confirm existing law in terms of an unprotected non-variation clause being vulnerable to non-written variation. The footnote referenced 'subsequent authority' does not either support their position (*Impala Distributors v Taunus Chemical Manufacturing Co (Pty) Ltd* 1975 (3) SA 273 (T) at 278A and *Clemans v Russon Brothers (Pty) Ltd* 1970 (3) SA 686 (E) at 689F).

In the Shifren case, the non-variation clause in the lease was unprotected (see 764A-C) and the appeal was dismissed in favour of the enforcement of said unprotected non-variation clause. The appellant pleaded, as a defence a quo, that the subsequent oral agreement had included a tacit term whereby the landlord had waived its right to require all cessions to be in writing, and that the landlord had waived its right to have all variations to the written agreement be in writing (see 764A-C). The dismissal of the appeal, faced with an unprotected non-variation clause and an attempt to vary the nonvariation clause itself, suggests the antithesis of what the authors propagate: Shifren more likely implies that a nonvariation clause need not protect itself. Were the commentary accurate, the appeal should have succeeded, because the unprotected non-variation clause would have been ruled to be validly amended by waiver, allowing for the subsequent oral agreement of cession to be binding.

The *Shifren* judgment does admittedly include reference to the utility of a protected non-variation clause, it being the ultimate indication that the parties intended that the agreement could not be verbally amended (see 766G – 767A). It is, however, a stretch to conclude from this passage that Steyn CJ 'accepted' that unprotected non-variation clauses are vulnerable to non-written variation. These remarks were in any event *obiter* (not part of the *ratio decidendi*), and thus not binding precedent.

Logically speaking, it makes no sense for a non-variation clause itself to require protection, this is because the non-variation clause obviously forms part of the written agreement, it already expressly protects the entire written agreement from non-written variation.

You may be asking: Why the fuss? Non-variation clauses protect significant personal and commercial interests, and are found in virtually every written agreement. The majority of contracts I come across contain unprotected non-variation clauses, and parties often ignore the formal requirements, a recipe for unnecessary dispute if the offending commentary is blindly followed. *Shifren* is also written in Afrikaans, which most legal practitioners and judges do not understand, and are thus prone to rely on the commentary without interrogating the decision.

Legal practitioners must assist the court in ensuring that an academic error does not become an erroneous legal precedent, particularly where key authorities are scribed in Afrikaans. Academic opinion should be a starting point only during litigation, as should this article, because I could be wrong on *Shifren* or the commentary excerpt. Always scrutinise and consider every angle and make up your own mind. Avoid the temptation to blindly rely on commentary at all costs, worse still ... never robotically regurgitate the views of an opinionated advocate, who once wrote an article in *De Rebus*.

Stuart Hayward *BCom LLB (Stell)* is a legal practitioner at Advocates Group 21 in Johannesburg.

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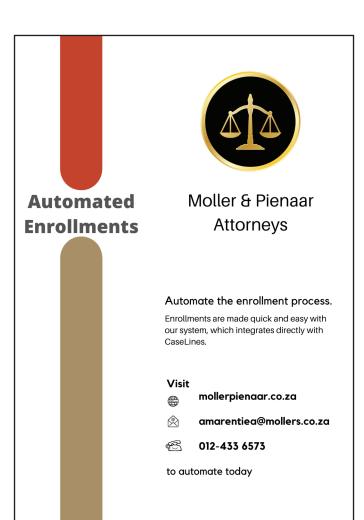
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