

## CAN GOVERNMENT MANDATE THE COVID-19 VACCINE AGAINST YOUR WILL? A DISCUSSION ON INTERNATIONAL HUMAN RIGHTS LAW

**Grandchild's claim against grandparent's  
estate: Weighing up child maintenance  
against freedom of testation**

**Medical negligence and criminal  
responsibility** – when the court infringes on a  
medical practitioner's rights to a fair trial



**Navigating the way to  
justice** – a discussion  
on truth, justice and  
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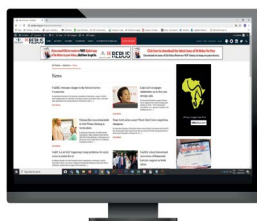




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## 12 Can government mandate the COVID-19 vaccine against your will? A discussion on international human rights law

There has been a great deal of talk about subjecting people to who are not vaccinated to restrictions involving their access to public places, flights, hotels, and continued employment. This indirectly makes vaccinations compulsory. In fact, disciplinary procedures have even been launched against professionals who have publicly expressed their opposition to compulsory vaccination. Extraordinary Research Fellow, **Dr Willem van Aardt**, examines compulsory vaccination through the lens of international human rights law and weighs up a pro-choice versus a pro-mandate approach.

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### 16 Grandchild's claim against grandparent's estate: Weighing up child maintenance against freedom of testation

The case of *Van Zyl NO v Getz NO* [2020] 3 All SA 730 (SCA) presented the Supreme Court of Appeal (SCA) with the opportunity to provide long-awaited clarity on a decade long legal question. As the High Court unfortunately missed the opportunity due to poor strategic litigation and ignominious judicial service, it was then up to the SCA to surmount the jurisprudential hurdle posed by *Barnard, NO v Miller* 1963 (4) SA 426 (C) and develop the common law in terms of the Constitution to recognise a grandchild's claim for maintenance against the estate of a grandparent. Legal practitioner, **Ndivhuwo Ishmel Moleya**, reviews the court's approach in this matter and notes the duty to align South Africa's laws with the Constitution requires collaboration between judicial officers and legal practitioners as officers of the court.

### 20 Medical negligence and criminal responsibility - when the court infringes on a medical practitioner's rights to a fair trial

Legal practitioner, **Dr Llewelyn Gray Curlewis**, discusses *S v Van der Walt* 2020 (2) SACR 371 (CC), which dealt with an application for leave to appeal against a judgment that saw an obstetrician and gynaecologist convicted by a regional court of culpable homicide on the basis that he acted negligently in the care of his patient. The issue before the court was that of a 'fair trial' based on three grounds, namely, the admissibility of various pieces of evidence for the first time in the judgment on conviction; the reliance on evidence of an expert witness by the state; and lack of evidence regarding causation.

### 22 Reconsidering a restorative justice approach in criminal court proceedings

Long before the separation of courts into criminal and civil divisions, wrongful acts could be redressed solely by compensation. Compensation has always been a primary concern for victims who suffer damages. Too much has possibly been made of the criminal court's inability to deal with compensation and perhaps with a few changes criminal courts could be adapted to process claims for compensation. One may ask the question if it is right to force victims of crime to take further civil action if all or most of the damages can be ascertained in a criminal court? Magistrate, **Desmond Francke**, argues that compensation orders in criminal proceedings are desirable as a means of repairing the harm caused by an accused's criminal conduct. Moreover, if criminal courts had access to more comprehensive means of addressing compensation, would victims compensation not be a more satisfactory part of a sentence than harsh penalties?

### 26 Navigating the way to justice - a discussion on truth, justice and reconciliation

Retired physicist, **Haroon Aziz**, writes that the universal lesson from the consequences of the *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (8) BCLR 1015 (CC) judgment is that when good people are exposed to corruption, they have the potential to become corrupt. Furthermore, when drafting the judgment, did Justice Ismail Mahomed anticipated the potentiality of presidents for unconstitutional conduct. In addition, if he had, would there have been a need for the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State?

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# LSSA submissions on legal fees

One of the functions of the Law Society of South Africa (LSSA), in fulfilling its mandate of representing the attorneys' profession, is to comment on legislation and policy documents that affect public interest and the legal profession. In February 2019, the LSSA held a meeting to discuss the International Conference on Access to Justice, Legal Costs and Other Interventions, which was hosted by the South African Law Reform Commission (SALRC) in 2018. The aim of the meeting was to tackle issues connected with legal costs, particularly in view of s 35 of the Legal Practice Act 28 of 2014 (LPA) (see 'Show me the money: A discussion on access to justice v legal fees' 2019 (March) *DR* 3).

The LSSA wrote to the Minister of Justice requesting the suspension of subss 35(1), (2), (3) and (7) up to and including (12), which deals with fees for legal services, until the SALRC has completed its investigation on legal fees and there has been proper consultation. This means that only subss (4), (5) and (6) of s 35 have come into operation.

On 16 March 2019, the SALRC released Issue Paper 36: *Investigation into Legal Fees* (Project 142), which details the organisation's study on -

- the factors and circumstances that give rise to legal fees that are unattainable for most people;
- the desirability of establishing a mechanism responsible for determining legal fees and tariffs;
- litigious and non-litigious matters;
- attorney-and-client costs and contractual freedom;
- contingency fee agreements; and
- legislative and other interventions to improve access to justice by members of the public (see 'Have your say on legal costs' 2019 (June) *DR* 3).

In May 2021, the LSSA considered Discussion Paper 150: *Investigation into Legal Fees, including access to justice and other interventions* (Project 142) published by the SALRC for comment. Following extensive consultation via the LSSA's various professional affairs committees, its constituent members (being the Black Lawyers Association, the National Association of Democratic Lawyers and provincial Attorneys' Associations) and members of the legal profession, and thorough consideration of the SALRC and other stakeholders' comments, the LSSA submitted its comments.

In the introduction of the submitted comments, the LSSA noted: 'The LSSA is well aware of the need for greater access to justice by members of the public

and that legal services are allegedly unaffordable. However, we believe that access to justice can be achieved through less invasive means than implementing a tariff (with or without limited targeting) in respect of attorney-and-client fees. We have no problem with the Legal Practice Council (LPC) issuing guidelines (Option 3, discussed in Chapter 7). In terms of section 35(5)(c) of the Legal Practice Act (LPA), the Commission must take into consideration the interests of the legal profession when undertaking its investigation. There is a conspicuous absence of practicing attorneys on the Commission's Advisory Committee. We believe that, without an acute understanding of the realities of and expenditure associated with operating a law practice, the interests of the legal profession, and in particular small legal firms, could not have been sufficiently dealt with by the Commission. There appears to be little research into a complex legal system, the requirements of legal practitioners and firms, the difficulties experienced by candidate legal practitioners, the costs of equipment, copies, research tools, costs of office rental, etc. Further, while a great deal of attention has been given to the cost of legal services, insufficient attention has been given to identifying the actual economic root cause of the cost of legal services. The allegation that legal services are regarded as unaffordable compels the state to seek ways to reduce these costs, but imposing fee limitations on legal practitioners is not the way to go in solving what is quite evidently a market efficiency problem, not an abuse of dominance problem.'

Considering the practice of attorneys, in its submission, the LSSA added that: 'Coupled to that, are the increased professional expenses of legal practitioners (subscription fees, professional indemnity insurance cover, professional interest membership fees, continuous professional development, top-up insurance and auditors' fees). It takes many



Mapula Oliphant – Editor

years of study and apprenticeship to enter the legal professional, because law is a large and complex field of study and the consequences of providing a poor legal service to a client can be devastating for the client on the receiving end of the poor service. Very little work remains reserved for attorneys. Many tax practitioners and other law firms are opening private companies that do not fall under the regulatory control of the LPC. The legal profession is already highly regulated and if it is over-regulated, it will eventually lose more practitioners to that sector. For the most part the same kind of work can be done without the risk. The recommendations of the Commission, if implemented, will have serious and far-reaching consequences for the legal profession and the public and we believe that, particularly recommendations 5.1, 5.4, 6.11 to 6.13 and 6.15, will lead to job losses within the profession, and this will result in a major loss of professional skills needed to assist members of the public.'

To read the full submission by the LSSA visit [www.LSSA.org.za](http://www.LSSA.org.za).



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By  
Thomas  
Harban

# Risk management window dressing

The effective management of a legal practice is a holistic, multi-faceted exercise. A successful sustainable legal practice requires the constant application of a significant effort across all areas of the enterprise. If any area of the practice does not receive the required attention and effort, that area will soon turn out to be the proverbial weak link in the firm and vulnerabilities will be exposed. The consequences can be severe for the firm, from a financial and regulatory perspective. If the risk materialises, the firm can be exposed to claims or even regulatory action in some circumstances. A tick box approach is not sufficient for effective risk management. Unfortunately, however, there are some legal practitioners who have developed the ability to not only ‘talk a good risk management story’, but to also put it in writing knowing very well that it is not an accurate description of the measures in place in their respective practices.

The documents submitted by legal practitioners when notifying professional indemnity (PI) insurance claims to the Legal Practitioners’ Indemnity Insurance Fund NPC (LPIIF) should include a completed claim form and a background report. The risk management self-assessment questionnaire may either have been completed as part of the application for a Fidelity Fund Certificate (FFC), or as part of the claim notification process. The claim form and the self-assessment questionnaire pose several

pointed questions aimed at generally focusing the mind of the legal practitioner (and all other stakeholders in the firm) on risk management issues and the circumstances or events in the practice that may lead to the PI claim materialising. The purpose thereof is to assist the legal practice in identifying the areas of vulnerability and, in response thereto, developing the necessary enhancements to mitigate the risk of further claims.

Many legal practices provide an honest assessment of where they perceive the vulnerabilities to be and the changes they need to make in order to avoid future claims. Surprisingly, the detail provided by some practices on the risk management measures they have in place would, effectively, almost eliminate the circumstances that led to the claim. These firms make statements that they assume the insurer wants to hear, rather than report on the factual circumstances as they exist. This form of window dressing is unfortunate and unhelpful. In some instances, the practices labour under the mistaken belief that their claims will be rejected if they provide an accurate report of the absence of the risk management measures. The opposite may be true as the provision of false or inaccurate information to the insurer could compromise the firm’s right to indemnification, whether by the LPIIF or a commercial insurer. The insurance relationship is based on the doctrine of utmost good faith (*uberrima fides*) and the intentional provision of incorrect in-

formation will compromise the right to indemnity.

Taking a prescription related claim for example, the practices concerned provide detail of the various internal systems, multiple diaries, the extensive levels of supervision, file audits and a number of other measures that are in place as early alert systems of the looming prescription dates. Others go as far as to describe how the measures suggested by the LPIIF to mitigate the prescription risk are implemented within the practice. On the face of it, these practices would set the benchmark for risk management. In other words, the firm self-diagnoses itself with a perfect bill of health. How, then, have all the measures supposedly implemented in the firm failed is the vexed question that then arises.

Copying and pasting risk management measures from any source without properly applying the suggested measures and regularly assessing the effectiveness thereof is an unhelpful approach. Risk management cannot be a mere tick box exercise.

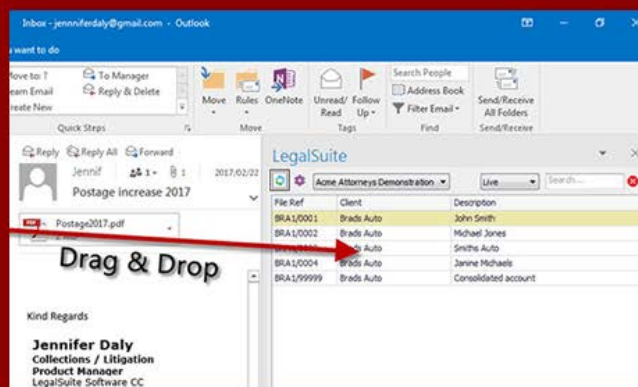
In assessing the claim, a question may arise how then, given the firm’s perfect risk self-diagnosis, a breach has occurred resulting in a claim? This is elucidated in the examination of the claim. Insurers conduct an in-depth assessment of all circumstances when they investigate claims. The examination of the practice’s office file (if available) and the consultations with the affected

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parties in preparation of the defence to the claim often expose a very different reality to the perfect risk management picture painted in the notification or other documents. The confidence of the practitioner in their 'risk management story' may also wane as the matter progresses and more information on the underlying circumstances that resulted in the claim is uncovered. The reality of having to testify in an open court and the prospect of the narrative not withstanding cross-examination also play a part.

One may then ask why the legal practitioner concerned would initially have given inaccurate information regarding the risk management measures they have in place in the practice. In some instances, the legal practitioner may persist in their inaccurate view until very late in the assessment process, despite objective evidence to the contrary. The moment that the claim is notified may be ceased on by some practitioners to set out inaccurate information that they assume the LPIIF, as insurer, wants to hear – they feel a need to paper over the proverbial risk management cracks in order to cover up the real internal breaches that resulted in the claim. The opposite is, in fact, true. The LPIIF seeks an accurate report on the circumstances as they existed in the firm when the circumstances leading to the claim arose. This enables the insurer to assist the firm (and other practices) in developing

appropriate risk mitigation measures after considering the underlying circumstances that resulted in the claim and also in properly assessing the claim.

It is amazing that the legal practitioners concerned go through the effort of considering the type of claim they are faced with and then document all the suggested measures to mitigate the materialisation of the underlying risk, when the actual implementation thereof would have been more effective in preventing a claim in the first place. Some practitioners go so far to note that they will enhance the non-existent measures in place. Do not be left living in a proverbial fool's paradise by pretending that the risk management measures, if any, in your practice are adequate and effective when they are not.

Fortunately for some of the firms concerned, the person who dealt with the claim has left the practice by the time the claim is notified. While the departure of the defaulting party is good news for the firm concerned as it limits the likelihood of further potential breaches (or the truth being uncovered), this can be a challenge for the insurer as that person is not available to assist with the defence of the claim and in assessing whether there has been any breach of the mandate or duty of care on the part of the practice. At the end of the day, the practice is at a disadvantage as the claim will need to be paid (if indemnified), eroding the available limit of indemnity and ex-

posing the firm to the payment of the applicable deductible. The overall risk profile of the firm will also be negatively affected in the assessment of the commercial insurers.

## Recommendation

The receipt of a claim where allegations of breach of mandate or duty of care on the part of the practice is an unfortunate event. It is understandable that the claim will be a source of considerable stress for the various stakeholders in the firm. However, it also presents an opportunity for the firm to do an honest introspection and assessment of the risk management measures it has in place and to consider enhancements where necessary. The LPIIF, as the insurer, will not stand in judgment of the firm but rather assist it in improving the risk management measures in place. It is in the interests of the insurer that claims against the insured practices are reduced. Proactive and effective risk management is one of the best ways of achieving the required reduction. This can, however, not be effectively achieved if some legal practices still choose to window dress the underlying problems, rather than address the problems pragmatically.

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



By  
Jan de  
Beer

# The importance of a trust audit and the value thereof for the legal practice

**L**egal practitioners hold a high level of trust with their clients and are perceived as trustworthy in the eyes of the public. They have and fulfil a fiduciary duty and obligation towards their clients to manage and safeguard entrusted money and property in terms of the mandates provided. Clients and the public have this inherent expectation that the legal practitioner and firm can be trusted, and that the legal practitioner will act with the highest level of integrity, adhering to legislative requirements, rules, regulations, and code of conduct. Without this high level of trust, the pub-

lic would lose faith in the justice system in South Africa, one of the corner stones of our democracy.

This high level of trust is earned by the profession through their conduct on a day-to-day basis. The annual audit of a trust account practice's trust is a key assurance process that underlies and support the trust of the public in the legal profession. The requirement for an audit is contained in s 87(2)(a) of the Legal Practice Act 28 of 2014 (the LPA) and further set out in r 54.20 to 54.30.

According to the revised audit guide ('Engagements on Legal Practitioners' Trust Accounts' (revised March 2020)),

issued by the Independent Regulatory Board for Auditors in March 2020, a current audit engagement 'is a reasonable assurance engagement within the scope of the International Standard on Assurance Engagements (ISAE) 3000 (Revised)'.

In many instances, legal practitioners consider the requirement for an annual audit as a cumbersome and expensive annual requirement, imposed on them by the regulator (the Legal Practice Council (LPC)) through legislation, which contributes to significant anxiety, stress, and anger. These views are also expressed where legal practitioners are not able to derive value from the annual

audit, which would be to the benefit of their practices.

The most important benefit of the trust account audit relates to the legal practitioner's ability to practice, receive, and hold client's money, while earning their fee for services provided. An independent audit report reflects the compliance status of the legal practice trust account environment for the period the report covers. However, the responsibility for compliance remains with the legal practitioner.

The approval of the trust account practice's annual audit report by the LPC is a significant determining factor whether the legal practitioner will receive their Fidelity Fund Certificate (FFC), which would enable them to practise, having met the requirements of the LPA. An unqualified audit report expresses reasonable assurance to the regulator that the trust account, in all material respects is compliant with the LPA and the Rules. An unqualified report, subject to the assessment and approval by the LPC, would contribute to an easier FFC application process.

If the audit report is qualified or concerns are raised by the LPC, approval will most likely depend on the resolution of the qualification or concerns, to the satisfaction of the LPC. The timeous resolution would require a proactive approach by the legal practitioner and their appointed auditor to ensure that the qualification and concerns are resolved. The auditor would be in the best position to assist and guide the legal practitioner in resolving the matter that gave rise to the qualification or concern where it relates to compliance matters within the scope of the audit.

The audit provides valuable recommendations to business and system improvements and deriving efficiencies. The auditor is required, through their standards and professional code of conduct, to understand the operations of a legal practitioner's trust account environment and must be up to date with

all developments in the legal profession, to accept the appointment. Legal practitioners can benefit from this knowledge to ensure that their trust account practices continually improve their internal control environments.

The existing accounting rules impose certain minimum internal controls on a practice on which the auditor expresses a reasonable assurance opinion on compliance by the trust account practice. In addition, trust account practices must also implement adequate internal controls to ensure compliance with the rules and to ensure that trust funds are safeguarded (r 54.14.7). The minimum internal controls, as contained in the rules would normally be encapsulated in the standard operating procedures and processes of the trust account practice. These procedures and processes will be assessed through the audit process, allowing the auditor to express their opinion.

During an audit, the auditor obtains an understanding of the control environment of the practice. This enables the auditor to identify control weaknesses or deficiencies, which they will report to the legal practitioner. The benefit resides in the experienced guidance contained in the auditor's recommendations to resolve the identified risks. Standard operating procedures can be improved, and the internal control environment will be enhanced. The auditor's recommendations should also consider efficiencies that can be derived through the improvement of processes and internal controls.

These recommendations should be inclusive of system improvements. Where the legal practitioner considers the implementation of new system solutions, or migrating to a new environment, it would be beneficial to include your auditor in the process to provide assurances and make recommendations to address identified risks.

Legal practitioners are encouraged to build and maintain their professional relationship with their appointed audi-

tor. Legal practices do not need to wait to engage with their auditors only on an annual basis. Concerns and clarification can be sought earlier with the auditor, providing an opportunity to rectify matters on a proactive basis.

Throughout the audit process, the auditor must exercise professional judgement and apply their professional scepticism where necessary and will always seek to resolve inconsistencies, as required, and highlighted in the audit guide. Legal practitioners place significant trust in their staff and would thus seek assurances that there is compliance to operating procedures and processes. The audit procedures adopted by the auditor, combined by their approach, even though it is not its primary purpose, can result in the detection of fraud and/or the misappropriation of funds. The audit process should provide the legal practitioner some assurances that entrusted money and property is properly safeguarded.

Where fraud and/or the misappropriation of trust money is detected, or suspected, the auditor is best placed to assist with the identification of the control breakdowns and responsibilities and the quantification of the losses, and the potential rectification thereof.

The audit report is of significant value whereby it provides reasonable assurance on the compliance status of the firm to the LPA and the Rules. Trust account practices can utilise this independently verified status to their benefit in retaining existing clients, where they reinforce their trust relationship, where the legal practitioner wishes to be appointed to client panels, or approach prospective clients, as an effective marketing instrument. Legal practitioners should not hide their compliance status as clients derive significant assurance from the independent auditor's report. It forms a foundation for the trust relationship between the legal practitioner and the existing or prospective client. Clients could require a copy of the audit report as part

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of their due diligence process. It is, however, important that you inform your auditor of the intended use of the report.

As is the case with the trust audit, the same benefits would apply to the audit of the legal practice business accounts. There is value in the auditor also reviewing the business accounts, as well due to the synergies flowing from the audit of the trust account environment. Normally processes, procedures, controls and systems are highly integrated and could be best approached as a combined solution.

In deriving these benefits from your auditor, it is important to ensure that you do not unknowingly impose a scope limitation on the audit, such as fee constraints, which would reduce the value for the audit and engagement with the regis-

tered auditor. Understanding affordability risks, fees would remain a negotiated position between the legal practitioner and the auditor, subject to there being no scope limitations. Equally, it is important that the auditor and their professional staff are experienced and appropriately qualified to conduct a trust audit. If they are not skilled or experienced in this specialist environment, legal practitioners will not derive the anticipated benefits associated with the trust account audit. The appointment of the auditor should be carefully considered, not just on price, but the true value the auditor can provide to the trust account practice.

The trust audit is the most important enabler in obtaining your FFC annually. Without the FFC, a legal practitioner will

not be able to practice, receive and hold client money in trust and earn fees.

Legal practitioners must approach the audit engagement with a view to the value added by the assurance process and reports and not only regard it as a regulatory requirement without business value. To derive the benefits, it is important that you appoint an auditor with the skills and experience that specialise in and understand the uniqueness of a trust account practice.

Jan de Beer *BCompt (Hons) (Unisa)* is a Director at Acute Accountants for Legal Practitioners in Centurion.



By  
Ruan  
Botha

## Sars disputes – receiving an assessment is not the end of the road

**M**any taxpayers have now heeded the South African Revenue Service's (Sars') call to submit their 2020 tax returns, and some have received automatic assessments as a part of Sars' new initiative to collect from those taxpayers who previously refrained from submitting their returns. The ensuing assessments issued by Sars may leave some of these taxpayers aggrieved.

Although some taxpayers might think that this is the end of the road and the assessed amount may not be altered or disputed where it is merited, this notion cannot be further from the truth. In order to understand the taxpayer's specific recourse, we first need to look at the various options available for an aggrieved taxpayer.

### The pre-dispute phase

It is not always necessary for a taxpayer to immediately dispute an assessment issued by Sars as there is a difference between an assessment which is the subject of a substantive dispute and just an error in assessment. There are many different alternatives that may be followed by a taxpayer in order to obtain a faster, less time-consuming and in some instances cost effective result. Some of these pre-dispute options may even equip the taxpayer with some extra

ammunition to put in their arsenal when finally pulling the trigger on the dispute.

#### • Request for correction (RFC)

Section 93 of the Tax Administration Act 28 of 2011 (the Act), makes provision for a taxpayer to request Sars to correct a previous return or declaration submitted. An RFC is available to various tax types namely, income tax, value-added tax (VAT) or Pay-As-You-Earn (PAYE). This remedy is only available to taxpayers where the specific return or declaration has not been selected for verification or audit.

The purpose of this provision is fundamentally to enable Sars to alter an assessment to rectify processing errors and return completion errors where Sars is satisfied that there is an error in the assessment because of an undisputed error by Sars or the taxpayer in a return. The RFC is a quick turnaround mechanism available to taxpayers where they have made an error in their returns or declarations for example, by submitting their returns with an incorrect source code or incorrect amounts.

#### • Request for remission of penalties or interest

Where the tax itself is not disputed, a taxpayer may, in some instances have missed a deadline or under declared certain income or VAT, which results in pen-

alties and/or interest being levied. These are instances where the taxpayer has not adhered to the provisions of the Act and, as such, Sars penalises the taxpayer for non-compliance. A taxpayer does, however, have some recourse where they can justify the non-compliance.

While there are many different types of penalties and related interest charges that Sars can levy, for the purpose of this article, I will focus on non-compliance penalties and related interest charges. These penalties may be made up of fixed amount penalties, as well as percentage-based penalties. A non-compliance penalty levied depends on the type of non-compliance. Examples of these penalties and/or interest are –

- late payment penalties for VAT, PAYE, Unemployment Insurance Fund (UIF) and Skills Development Levies (SDL);
- late payment penalties on provisional tax;
- late payment interest on provisional tax; and
- late payment interest on VAT and PAYE (not UIF or SDL).

#### • Request for reasons (RFR)

When Sars has issued an assessment and where the grounds for the assessment are not provided, or the grounds provided for the assessment are not sufficient to enable the taxpayer to understand the basis of the decision to formu-



late an objection, a taxpayer may request reasons for the assessment. It should be noted that Sars is not required to provide reasons for each, and every assessment issued, but a taxpayer may request reasons only for an adverse decision or assessment both under r 6 of the rules promulgated under s 103 of the Act and s 5 of Promotion of Administrative Justice Act 3 of 2000 (PAJA).

The Supreme Court of Appeal (SCA) in *Commissioner for the South African Revenue Services v Pretoria East Motors (Pty) Ltd* [2014] 3 All SA 266 (SCA), was of the view that Sars must clearly state the grounds on which it bases its assessments and make clear to the taxpayer what it is disputing, so that the taxpayer knows what is required from it to discharge the burden of proof:

'The raising of an additional assessment must be based on proper grounds for believing that, in the case of VAT, there has been an under declaration of supplies and hence of output tax, or an unjustified deduction of input tax. In the case of income tax, it must be based on proper grounds for believing that there is undeclared income or a claim for a deduction or allowance that is unjustified.

...

It is also the only basis upon which it can, as it must, provide grounds for raising the assessment to which the taxpayer must then respond by demonstrating that the assessment is wrong'.

The aim for requesting reasons is to place the taxpayer in a position to properly understand the reasoning behind Sars' decision to issue the assessment and the basis thereof, which will in turn enable the taxpayer to formulate the objection. Furthermore, the RFR will bind Sars to the basis for their assessment, which will preclude it from later raising new grounds for the assessment.

## Sars dispute phase

A substantive dispute means that there is a disagreement on the interpretation of either the relevant facts involved or the law applicable thereto, or of both the facts and the law, which arise due to the assessment. Where a taxpayer is aggrieved by an assessment raised,

outcome of verification or audit, or a decision taken by Sars, there are three main variants to challenge Sars. These mechanisms should only be perused on exhaustion of the pre-dispute phase or where the pre-dispute phase is not applicable.

## • Objections

A taxpayer has the right to object to an assessment raised by Sars where the pre-dispute phase mechanisms mentioned above were not allowed by Sars such as the taxpayer's request for remission of such penalty/interest. An objection in terms of r 7 must be submitted within 30 business days after the date of the assessment or Sars' decision.

The crux of an objection is to submit all of the relevant grounds of the objection the first-time round. The grounds will be a mirror of the reasons why the assessment issued by Sars does not reflect the correct tax stance taken by the taxpayer. The grounds must address the part, or the amount disputed, the specific grounds raised by Sars that are disputed and any documentation that the taxpayer has at its disposal to dispute the grounds raised by Sars.

When the objection is submitted to Sars and then considered, Sars will issue that taxpayer, within 60 business days, an allowance or disallowance letter which will either allow the objection, or partially allow, or disallow.

## • Tax appeals

Where Sars has decided to partially allow or disallow a taxpayer's objection, the taxpayer is able to submit an appeal to the decision, should the taxpayer disagree with the decision taken.

When submitting an appeal, the taxpayer may appeal to either the Tax Board established in terms of s 108 of the Act, or the Tax Court established in terms of s 116 of the Act. A taxpayer must always consider whether they are of the view that the matter is appropriate for alternative dispute resolution (ADR) prior to lodging the appeal. Should the taxpayer be of the view that the matter should be considered for ADR, Sars must first consider dispute resolution process prior

to proceeding with submitting its statement of grounds.

Should Sars not deem the matter appropriate for ADR the matter may be directed to the Tax Board, which hears tax appeals involving a disputed amount not exceeding of R 1 million. Both the taxpayer and Sars must agree that the matter be heard by the Tax Board. The decisions made by the Tax Board are binding between the parties, not appealable, does not have precedent value and may be heard on a *de novo* basis in the Tax Court.

Where the Tax Board is not the appropriate platform, the matter will be heard in the Tax Court, which deals with tax appeals lodged in terms of s 103 of the Act; and may also hear other interlocutory applications pertaining to the appeal. In the Tax Court there is no restriction on the monetary jurisdiction and any matter may be ventilated herein. The decisions of Tax Courts are not binding on other courts, but hold persuasive value in other Tax Courts, the High Courts and the SCA. The judgments are, however, only binding between the parties.

## • Other courts

If taxpayers so wish they may approach the High Court for review applications or appeals from the Tax Court. Where the taxpayer is still aggrieved and wishes to pursue the matter even further, they may appeal to the SCA and where it is merited to the Constitutional Court.

## Conclusion

With all the possible remedies available to the taxpayer, it is clear that where a taxpayer receives an assessment that does not reflect the correct tax position, a four-eyes principle can be taken to obtain the correct result, by either utilising the pre-dispute or dispute mechanisms.

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By  
Peter  
Desmond

# Data privacy laws in South Africa

In this information age, customer data is an important resource for any organisation. Due to the sensitive nature of personal information, organisations are required to take measures to ensure the data entrusted to them is safe from breaches or exposure to unauthorised parties. In South Africa (SA), the Protection of Personal Information Act 4 of 2013 (POPIA) offers the regulations and guidelines surrounding the collection and processing of personal information.

Initially, the right to data privacy and protection was covered under s 14 of the Constitution and common law. In both instances, the right to privacy was limited, and it was fairly difficult to prove infringement. Established under the European Union (EU) directive, POPIA was enacted to provide clear guidelines that organisations are required to follow, making it easier to prove non-compliance.

POPIA applies to all organisations and businesses collecting and processing of personal information of South African customers. This article discusses the main principles of POPIA that businesses are required to follow to ensure compliance and how these apply across borders.

## POPIA

In recognition of the right of privacy enshrined in the Constitution, POPIA provides the mandatory mechanisms and procedures for handling and processing personal information in SA. Since the Act was formulated under the EU directive, it is similar to the General Data Protection Regulation (GDPR), lubricating the cross-border handling and processing of personal information between the EU and SA.

POPIA provides eight main principles to govern the processing of personal information regarding direct marketing, automated decision making, and how the cross-border flow of data is regulated.

## The eight principles of POPIA

- 1 Lawful collection:** The collection of personal information should be done in a manner that is lawful and fair to the subject.
- 2 Limited use:** The information collected should only be used for the

purpose for which it was originally intended, and for which the subject has given consent.

- 3 Limited processing:** Further processing of personal information is limited by POPIA. Processing more information than that which the data subject agreed to is thereby prohibited.

- 4 Information quality:** It is the responsibility of the party collecting information to ensure it is of quality by taking steps to ensure the data they get is not misleading, complete, accurate, and up to date.

- 5 Transparency:** There should be openness where the processing of personal information is involved. As such, both the Information Regulator and the data subject should be aware – and agree – to the collection of the data.

- 6 Security:** The party collecting the information should take measures to prevent the loss, destruction, damage, and unauthorised access or processing of the data. To prevent data from falling into unauthorised hands, organisations should embrace information technology asset disposition (ITAD) as part of their data security measures. The ITAD protocols set in place are aimed at ensuring that organisations protect their information technology assets to prevent the breach or exposure of personal information and to ensure regulatory compliance.

- 7 Participation:** The data subject should have a way of accessing the data stored on them and be able to correct the information if need be.

- 8 Compliance with regulation:** It is the responsibility of the party processing personal information to take measures to ensure their activities comply with the principles of POPIA.

## Data flow and privacy across borders

POPIA limits the transfer of information across borders to prevent organisations from circumventing the set data protection legislation. The cross-border transfer of data is only permitted if the recipient country is governed by data regulation similar to the POPIA principles.

If the recipient country is not subject to such regulations, a contractual rela-

tionship can be drafted, laying down the duties of the recipient party as required by the POPIA principles. The organisation wishing to transfer the data across the border should also obtain the consent of the data subject.

## Data privacy offences and penalties in SA

There are not a lot of penalties and offenses listed in POPIA. The two major offenses are:

- Obstructing or preventing the Information Regulator – the South African supervisory authority – from performing its duties and obligation as outlined in Part A of Chapter 5 of POPIA.
- Failing to protect the account number of a data subject.

If convicted of the offenses above, the person will face a fine or an imprisonment period of no more than ten years, or both a jail term and a fine.

It is an international consensus that the collection, processing, and use of personal information should be regulated by a governing body. The presence of uniform regulations for the handling of personal information will not only protect individuals and organisations from costly breaches, but also makes it easier for international trade since information privacy concerns can be a major barrier to cross-border trade.

Peter Desmond MSc in Market Research (National University of Ireland Cork) is a Digital Content and Marketing Specialist at Wisetek in Cork.

## Fact corner

- According to [www.saica.co.za](http://www.saica.co.za), advocate Pansy Tlakula was appointed as the Information Regulator with effect from 1 December 2016. Advocate Lebogang Stroom, and Johannes Weapond were appointed as full-time members and Prof Tana Pistorius and Sizwe Snail were appointed as part-time members. They will serve a term of office of five years.

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# Can government mandate the COVID-19 vaccine against your will?

## *A discussion on international human rights law*



By Dr  
Willem  
van Aardt

Australian Prime Minister, Scott Morrison, asserted that a COVID-19 vaccine will be 'as mandatory as you can possibly make it' while South Africa's President Cyril Ramaphosa, on the other hand dismissed rumours that the COVID-19 vaccination program will be compulsory for all citizens and made clear that 'nobody will be given this vaccine against their will' ('Scott Morrison says a coronavirus vaccine would be "as mandatory as you can possibly make it"' ([www.sbs.com.au](http://www.sbs.com.au), accessed 2-6-2021); Marchelle Abrahams 'Ramaphosa details SA vaccine rollout plan: "Nobody will be given vaccine against their will"' ([www.iol.co.za](http://www.iol.co.za), accessed 2-6-2021)).

There has been a great deal of talk about subjecting people who are not vaccinated to restrictions involving their access to public places, flights, hotels, and continued employment, thereby indirectly making vaccination compulsory. Disciplin-

ary procedures have even been launched against professionals who had expressed publicly their opposition to compulsory vaccination (Luisa Regimenti 'No obligation to be vaccinated and a ban on discrimination against people who do not wish to be vaccinated' ([www.europarl.europa.eu](http://www.europarl.europa.eu), accessed 20-4-2021)).

Viral vaccine misinformation, distrust in government institutions and a politicised vaccine development process have numerous people sceptical of COVID-19 vaccines. According to the *Journal of the American Medical Association*, 56% of Americans want to get the COVID-19 vaccine, while 39% of Americans say they will definitely not or probably not get the COVID-19 vaccine when it becomes available to them (Heather Skold 'To vaccinate or not: Americans split on whether to get Covid-19 vaccine' ([www.krdo.com](http://www.krdo.com), accessed 20-4-2021) and Cary Funk and Alec Tyson 'Intent to get a COVID-19 vaccine rises to 60% as confidence in research and development process increases' ([www.pewresearch.org](http://www.pewresearch.org), accessed 20-4-2021)).

The topic of vaccination evokes strong opinions and emotions, now more than ever in the COVID-19 era. Many are grateful and relieved to get the COVID-19 vaccine, and others are indignant and exasperated at the prospect of COVID-19 vaccination mandates.

An important question arising from this is whether an individual can be compelled by government to be vaccinated against their will in terms of international human rights law?

### Pro-choice v pro-mandate

The COVID-19 vaccination debate has two distinct viewpoints, one 'pro-mandate' and the other 'pro-choice'.

The proponents of the pro-mandate perspective strongly support mandatory vaccination policies and, <i>inter alia</i> , argue that:	The pro-choice perspective strongly opposes mandatory vaccinations and, <i>inter alia</i> , argue that:
<p><b>All healthy people that can be vaccinated should be mandated in order to achieve herd immunity.</b> Government officials are best qualified to make vaccination decisions. ‘Government [should] ensure that a sufficiently high percentage of people vaccinate to preserve societal herd immunity’ (Louise Kuo Habakus and Mary Holland <i>Vaccine Epidemic: How Corporate Greed, Biased Science, and Coercive Government Threaten Our Human Rights, Our Health, and Our Children</i> (New York: Skyhorse 2012) at 20-26).</p>	<p><b>Vaccination choice is a fundamental human right.</b> Because vaccination poses a risk to life, liberty, and security of person, only an individual may decide how, when, and whether to vaccinate (Kuo Habakus and Holland (<i>op cit</i>)). The theory of herd immunity is not an adequate rationale for state compulsion to vaccinate. When dealing with a disease with a crude mortality rate (‘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’) ranging between 0,001% and 0,5% natural infection is preferable for all people not in vulnerable groups (Dr Willem van Aardt ‘Limiting human rights during COVID-19 – is it only legitimate if it is proportional?’ 2021 (May) <i>DR</i> 14).</p>
<p><b>COVID-19 vaccines are overwhelmingly safe and effective, and the benefits vastly outweigh the risks.</b> Adverse events are extremely rare. The World Health Organisation (WHO), European Union (EU) and the United States (US) and other health authorities approved the vaccine and, therefore, it is safe (Sarah Lynch and Kanneboyina Nagaraju ‘6 important truths about COVID-19 vaccines’ (www.theconversation.com, accessed 30-3-2021)).</p>	<p><b>COVID-19 vaccine safety science is in its infancy, not rigorously tested and incomplete.</b> The COVID-19 vaccines have been invented, developed, and approved at a lightning-fast pace in less than one year. Testing of vaccine efficacy and the safety of the COVID-19 vaccines were limited and insufficient. According to the World Economic Forum and the WHO the average development time for almost all other safe vaccines have been between ten and 15 years. US Centers for Disease Control and Prevention said they ‘will continue to provide updates as we learn more about the safety of the ... vaccine in real-world conditions’ essentially admitting that the health authorities are busy with a ‘real-world’ medical experiment (Douglas Broom ‘5 charts that tell the story of vaccines today’ (www.weforum.org, accessed 30-3-2021). All COVID-19 vaccines received the ‘Emergency Use Authorisation’ and not the time-tested ‘Biologics License Application’, where rigorous and thorough testing and analysis preceded the issuance of such a license (DJ Opel; DA Salmon; EK Marcuse ‘Building Trust to Achieve Confidence in COVID-19 Vaccines’ (https://jamanetwork.com, accessed 30-5-2021)).</p>
<p><b>COVID-19 vaccine refusers are dangerous and selfish.</b> People who elect not to vaccinate are selfish, irrational, and threaten the right to life and the right to health of others with a deadly disease (Kuo Habakus and Holland (<i>op cit</i>)).</p>	<p><b>COVID-19’s crude mortality rate ranges between 0,001% to 0,5%</b> (see <a href="https://covid19.who.int/">https://covid19.who.int/</a>, <a href="https://covid.cdc.gov">https://covid.cdc.gov</a>, <a href="https://coronavirus.jhu.edu">https://coronavirus.jhu.edu</a>, accessed 10-6-2021). 99,5% of all people under the age of 75 that contract COVID-19 will survive. No mass vaccinations are reasonably required to combat a disease with a crude mortality rate ranging between 0,001% to 0,5%. According to Dr Michael Yeadon (former vice president and Chief Scientist of Pfizer) ‘You do not vaccinate people who aren’t at risk from a disease’ (NH Web Desk ‘No need for vaccines, COVID pandemic is over, says former Vice President of Pfizer’ (www.nationalheraldindia.com, accessed 30-3-2021); Steve Stecklow and Andrew Macaskill ‘The ex-Pfizer scientist who became an anti-vax hero’ (www.reuters.com, accessed 30-3-2021); and AIER Staff ‘Open letter from medical doctors and health professionals to all Belgian authorities and all Belgian media’ (www.aier.org, accessed 30-3-2021)).</p>
<p><b>‘Mandatory vaccination is typically justified on Millian grounds’:</b> According to John Stuart Mill, a justifiable ground for the use of state coercion (and restriction of liberty) is when one individual risks harming others (Julian Savulescu ‘Good reasons to vaccinate: Mandatory or payment for risk?’ (2021) 47 <i>Journal of Medical Ethics</i> 78).</p>	<p><b>If extremely safe, why are pharmaceutical companies protected from liability?</b> In terms of the US Public Readiness and Emergency Preparedness Act of 2005 for medical countermeasures against COVID-19, covering ‘any vaccine, used to treat, diagnose, cure, prevent, or mitigate COVID-19’ precludes ‘liability claims alleging negligence by a manufacturer in creating a vaccine’.</p>

**At least 70% to 90% of the adult population need to be vaccinated to achieve herd immunity.** Irrespective of whether people have already been infected with COVID-19 and already have antibodies in their system they need to be vaccinated (Vanderbilt University Medical Center (victr.vumc.org, accessed 30-3-2021)).

**Significantly less people need to be vaccinated to achieve herd immunity.** In terms of a recent estimate, 55% of Americans have already had COVID-19 vaccine and already have antibodies in their system. There is no need to vaccinate people that already have antibodies. Only 25% to 45% of Americans need to vaccinate to achieve herd immunity and not the 70% to 90% claimed by the US CDC (Aria Bendix 'A Johns Hopkins professor predicts the US will reach herd immunity by April, but many experts aren't so optimistic' (www.businessinsider.com, accessed 31-3-2021); CDC 'Estimated Disease Burden of COVID-19' (www.cdc.gov, accessed 31-3-2021); Jonathan Allen and Dan Whitcomb 'Americans celebrate Christmas Eve under spiralling COVID pandemic' (www.reuters.com, accessed 31-3-2021); and Saba Aziz "Significant underestimation": Canada's COVID-19 case count likely much higher than reported' (https://globalnews.ca/, accessed 31-3-2021).

**Vaccine exemptions based on religious and other objections should be abolished.** People should lose their freedoms if they choose not to vaccinate. They should not be allowed to travel, attend public events or resume life as normal (Sam Shead 'What people might not be allowed to do if they don't get vaccinated' (www.cnn.com, accessed 30-3-2021)).

**Vaccination exemption rights must expand, not contract.** Individuals have the right to free and informed consent for all medical interventions, including COVID-19 vaccination (The Nuremberg Code 1947).

## International human rights law and mandatory vaccination

The foremost principle in the Nuremberg Code (1947) is that 'the voluntary consent of the human subject is absolutely essential'.

Article 7 of the legally binding International Covenant on

Civil and Political Rights (ICCPR) (that was ratified by 113 governments world-wide) clearly dictates that 'no one shall be subjected without his free consent to medical or scientific experimentation'.

Article 3 of the United Nations Educational, Scientific and Cultural Organisation (UNESCO), Universal Declaration on Bioethics and Human Rights determines that '[h]uman dignity, human rights and fundamental freedoms are to be fully respected' and '[t]he interests and welfare of the individual should have priority over the sole interest of science or society' while art 6 explicitly states that '[a]ny preventive, diagnostic and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned, based on adequate information'. While the UNESCO Declaration does not establish enforceable rights, it is persuasive concerning what the global standard for informed consent should be (Kuo Habacuz and Holland *op cit*).

Article 5 of the Convention for the Protection of Human Rights and Dignity of the Human Being regarding the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (Oviedo Convention) specifically determines that: 'An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it. This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks. The person concerned may freely withdraw consent at any time.' Although the Oviedo Convention is only legally binding on the European Union Member States that ratified the convention it clearly sets a standard regarding the protection of human rights in the biomedical field.

In terms of the WHO's 'Guidance for Managing Ethical Issues in Infectious Disease Outbreaks' (2016), the bioethical foundation for the support of emergency use medical interventions 'is justified by the ethical principle of respect for patient autonomy, in other words the right of individuals to make their own risk – benefit assessments in light of their personal values, goals and health conditions' (www.who.int, accessed 15-5-2021).

## Limitation of fundamental human rights

Fundamental human rights and freedoms are not absolute. Their boundaries are set by the rights of others and by the le-



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gitimate needs of society. Generally, it is recognised that public health justifies the imposition of restrictions on the exercise of fundamental rights subject to such restrictions being reasonable and proportionate.

In order to determine whether a government may impose vaccine mandates, the proportionality analysis, which is a standard legal test for adjudicating human rights disputes, needs to be applied to determine the legitimacy, adequacy, necessity and proportionality of any restriction on human rights (Alec Stone Sweet and Jud Mathews 'Proportionality balancing and global constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 68 at 72). The proportionality test consists of four stages, determining whether:

- The measure pursues a legitimate purpose (legitimacy). It is a legitimate aim of state parties to take action to protect 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).
- The measure must be adequate to achieve the purpose (adequacy). According to the WHO and US CDC, fully vaccinated people still need to social distance and adhere to a number of COVID-19 preventative measures given uncertainty with regard to whether the:
  - COVID-19 vaccines would be effective against other variants.
  - COVID-19 vaccines would provide long term immunity (vaccine efficacies are based on short-term data only).
  - COVID-19 vaccines would prevent people that received the vaccine from spreading the virus (Tamara Bhandari 'New evidence COVID-19 antibodies, vaccines less effective against variants' (<https://medicine.wustl.edu>, accessed 14-4-2015); Atanu Biswas 'A statistician explains: What does "90% efficacy" for a Covid-19 vaccine mean?' ([www.scroll.in/](http://www.scroll.in/), accessed 14-4-2021); and CDC 'Frequently Asked Questions about COVID-19 Vaccination' ([www.cdc.gov](http://www.cdc.gov), accessed 14-4-2021)). There seems to be no consensus that mass mandatory vaccinations would achieve the desired outcome of achieving herd immunity and returning society to normality and as such the measure cannot be deemed adequate.
- The measure infringes human rights no more than absolutely necessary to accomplish the purpose (necessity). An alternative to mass mandatory vaccinations would be to only vaccinate those in vulnerable groups after they have given their informed consent and people that choose to be vaccinated. Another alternative is the use of Ivermectin as a prophylaxis in the treatment of COVID-19. Meta-analyses based on 18 randomised controlled treatment trials of Ivermectin in COVID-19 have found large, statistically significant reductions in mortality, time to clinical recovery, and time to viral clearance. Furthermore, results from numerous controlled prophylaxis trials report significantly reduced risks of contracting COVID-19 with the regular use of Ivermectin (Pierre Kory; Gianfranco Umberto Meduri; Joseph Varon; Jose Iglesias; and Paul E Marik 'Review of the emerging evidence demonstrating the efficacy of Ivermectin in the prophylaxis and treatment of COVID-19' ([www.ncbi.nlm.nih.gov](http://www.ncbi.nlm.nih.gov), accessed 31-5-2021)). Given the various alternatives, vaccine mandates would not pass the necessity stage of the proportionality analysis.
- The measure does not have a disproportionately adverse effect (proportionality *stricto sensu*). The legislative measure must represent a net gain when the reduction in enjoyment of rights is weighed against the benefits achieved by the infringing measure. Vaccine mandates cannot result in a net gain as it would effectively discriminate against and deny approximately 30% to 40% of the world's population that do not want to be vaccinated with an experimental COVID-19 vaccine their most basic human rights to life, liberty, freedom of movement and education in order to combat a disease

with a population level crude mortality rate ranging between 0,001% - 0,5%.

Given that a mandatory vaccination measure would fail on the adequacy, necessity and proportionality *strictu sensu* stages, mandatory vaccinations would *per se* be disproportionate and, therefore, unlawful.

Importantly, Article 4 of the ICCPR and Siracusa Principle 58 specifically determines that: 'No state, including those that are not parties to the Covenant, may suspend or violate, even in times of public emergency freedom medical or scientific experimentation without free consent' (Siracusa Principles (*op cit*)).

## Conclusion

The distinguished health and human rights professor Jonathan M Mann, MD, MPH, asserted that:

'Unfortunately, public health decisions to restrict human rights have frequently been made in an uncritical, unsystematic and unscientific manner. Therefore, the prevailing assumption that public health ... is an unalloyed public good that does not require consideration of human rights norms must be challenged. For the present, it may be useful to adopt the maxim that health policies and programs should be considered discriminatory and burdensome on human rights until proven otherwise' (Jonathan M Mann, Lawrence Gostin, Sofia Gruskin, Troyen Brennan, Zita Lazzarini, Harvey V Fineberg 'Health and human rights' (1994) 1.1 *Health and Human Rights Journal* 6 at 14 - 15).

International human rights law affords the individual a right to make informed choices about vaccination and all medical interventions. The underlying principle is that those who undergo the risk of medical treatment should make the final decision about their own participation after they are informed of the purpose, risks, and benefits of the treatment.

COVID-19 vaccines are experimental, and citizens have the right to refuse such a vaccine (Nuremberg Code, ICCPR Art 4 (*op cit*) and the Siracusa Principle 58 (*op cit*)). The right of refusal, therefore, stems from the fact that Emergency Use Authorisation products are, by definition, experimental.

Governments should comply with international human rights law and make COVID-19 vaccinations voluntary and not mandatory. There should also be no discrimination against those who choose not to be vaccinated, like not being allowed to travel, attend school, shop, attend social gatherings or not being employed.

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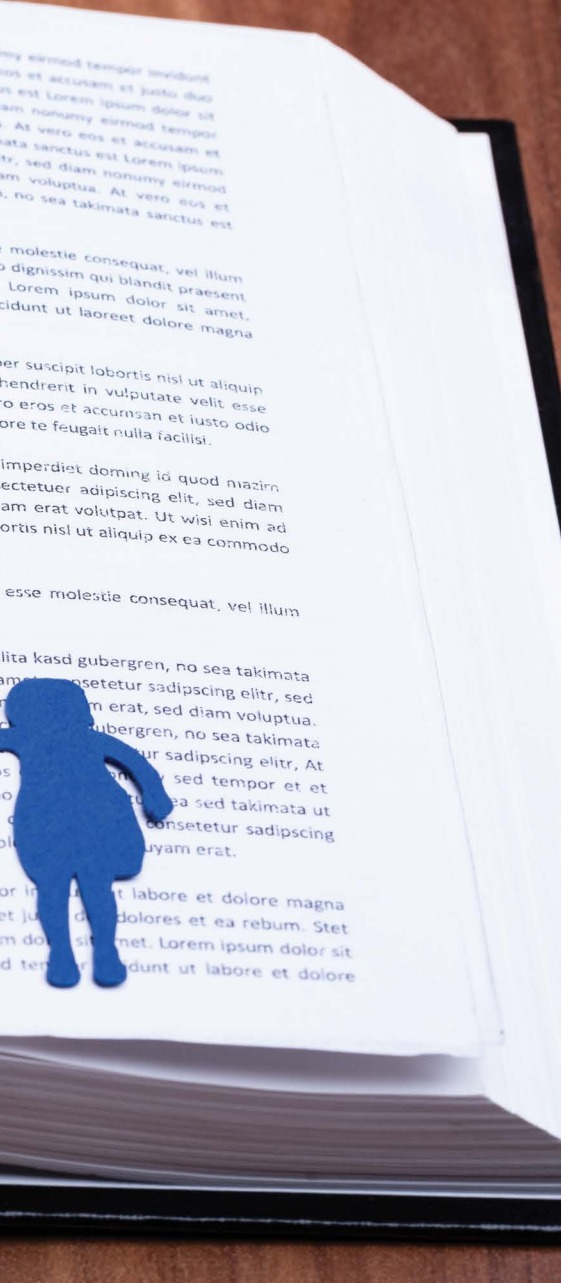
## Grandchild's claim against grandparent's estate: Weighing up child maintenance against freedom of testation



By  
Ndivhuwo  
Ishmel  
Moleya

The case of *Van Zyl NO v Getz NO* [2020] 3 All SA 730 (SCA) presented a golden opportunity for the Supreme Court of Appeal (SCA) to provide the long-awaited clarity regarding a legal question that has been surrounded by uncertainty for decades. Unfortunately, the opportunity was missed owing to poor strategic litigation and ignominious judicial service in the High Court. However, the SCA's approach is not beyond reproach as it could have done more than it did in the interests of justice and legal certainty. The 'further reason' for its conclusion is potentially problematic as it may unduly fetter the powers of the courts to develop the common law in terms of ss 8(3) and 39(2) of the Constitution. This article is a critique to the court's approach.





## The factual and litigation background of the case

B a minor stayed with her mother and her father left South Africa (SA) to reside in the United States (US). The appellant (B's curatrix *ad litem*) alleged that her father could not be traced. She also alleged that B's mother could not meet B's financial needs. When B's grandfather died, she lodged a maintenance claim against his estate and alleged that the deceased was able to maintain B during his lifetime and that his estate was able to do so after his death. The claim was rejected by the executors of the estate on the basis that the common law, as enunciated in *Barnard, NO v Miller* 1963 (4) SA 426 (C), does not recognise such a claim. The appellant instituted legal proceedings in the Western Cape Divi-

sion of the High Court (WCC) claiming damages against the executors for their failure to recognise B's claim. On agreement between the parties, the issues for determination were separated in terms of r 33(4) of the Uniform Rules of Court and were determined without leading any evidence. The High Court made an order in favour of the respondent, without furnishing reasons. On appeal to the SCA, the parties agreed to have the matter determined without oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013 and based on the stated case containing both facts and assumptions. The allegations made by the appellant, although some were denied by the respondent, were assumed for purposes of adjudicating the stated case.

To surmount the jurisprudential hurdle posed by *Barnard*, the appellant implored the SCA to develop the common law in terms of ss 8(3) and 39(2) of the Constitution to recognise a grandchild's claim for maintenance against the estate of a grandparent.

She argued that a failure to recognise the claim is inconsistent with ss 10 and 28 of the Constitution. The respondent argued that the agreed and assumed facts do not support the suggested development and that there are constitutional and public policy considerations that militate against judicial interference with the right of individuals to arrange their private affairs. Lastly, that the proposed development should be 'left to Parliament as the major engine for law reform' as it goes 'beyond the ordinary scope of judicial functions'. The suggested development was to occur against the backdrop of conflicting judgments in *Barnard* and *Lloyd v Menzies, NO and Others* 1956 (2) SA 97 (N) at 102. In *Lloyd*, the court held that 'it would be illogical not to maintain the liability upon the estate of anyone who, if living, is under the duty to provide support' and rejected the argument that recognising the claim would 'interfere unduly with freedom of testation' and that it would be '*contra bonos mores*'. However, the reasoning in *Lloyd* was rejected by the court in *Barnard* on the basis that the claim could not be recognised based on 'presumed illogicality' and that the question is not 'whether it would be illogical' to recognise the claim but whether doing so is 'warranted by our law'. It stated that recognising it based on 'supposed logic' would be to usurp the functions of the legislature.

The SCA stated that the common law develops incrementally through the rules of precedent and that the development does not occur in a 'factual vacuum'. It found that the suggested development was not supported by the agreed and assumed facts and that it entailed a complete change of a common law rule

which could only be undertaken 'after hearing all the evidence' and in 'light of all circumstances of the case, with due regard to all the relevant factors'. It found that the inability of B's father to support B had not been established and that the obligation could not be assumed or transferred to B's grandparents or their estates. Moreover, that the inability of B's living grandparents to support her had not been established. The court also observed that the suggested development implicated the right to human dignity, equality, and freedom of testation and that it was 'inappropriate' because of its 'nature' and 'effect' 'on the law of succession and other foundational values of the Constitution'. The court concluded that the development was 'quite drastic' as it dealt with 'social policy' regarding the maintenance of children by their parents and the freedom of testation of grandparents and that only Parliament should 'decide whether the common-law rule should be developed and, if so, how'.

## Analysis

The way the case was litigated and adjudicated in the High Court is undoubtedly ignominious. Instead of sanctioning the ill-considered procedural choices of the litigants, the High Court should have exercised its discretion as the 'upper guardian in matters involving the best interests of the child' and ordered a full hearing of the matter (*Kotze v Kotze* 2003 (3) SA 628 (T) at 630F). Absent the critical facts underscored by the SCA and a reasoned High Court judgment, the SCA was implored to develop the common law in a 'factual vacuum' and as a court of first instance. This could not be done. The 'delicate and difficult' task of developing the common law should begin in the High Court (*Lee v Minister for Correctional Services* 2013 (2) SA 144 (CC) at para 79). The process requires 'close and sensitive interaction' among the High Courts, the SCA and CC (*Car-michele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at para 55). Therefore, the 'views and approach' of the High Court – not just the SCA – 'are of particular significance and value' when developing the common law (*Lane and Fey NNO v Dabelstein and Others* 2001 (2) SA 1187 (CC) at para 5). For these reasons, one can hardly fault the SCA for declining to develop the common law in this case. But did it do enough as the custodian of the common law? I think not. The court should have devised means to clear the identified procedural labyrinths to enable the necessary development of the common law. It could have called for and received further evidence in terms of s 19(b) of the Superior Courts Act regarding the



skimpy factual details. Alternatively, it could have remitted the matter to the High Court for a full hearing with necessary instructions in terms of s 19(c). The court enjoys inherent powers to protect and regulate its own process (s 173 of the Constitution) and was at liberty to explore the potential viability of a grandchild's claim against an estate of a grandparent without making a finding on the facts of the case. This attractive approach was adopted by the Constitutional Court (CC) in *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC). It was arguably in the interests of justice for the SCA to provide clarity on this area of the common law given the fact that it implicated the rights of the most vulnerable of our society – children. Moreover, *Lloyd* and *Barnard* are judgments of different divisions of the High Court and, a division of the High Court is not necessarily bound by a decision of another division (*The Law of South Africa* vol 10 3ed (Durban: LexisNexis) at p 527). As Mohamed Paleker rightly observed, 'the courts have not overwhelmingly rejected such claims, nor have they strongly endorsed them' (Mohamed Paleker 'A grandchild's claim to maintenance from a deceased grandparent's estate' (2014) 1 *Acta Juridica* 41). Therefore, both *Lloyd* and *Barnard* are good law as they have not been expressly overruled by the SCA. The fact that the common law in this area is in a 'state of flux' calls for the SCA's authoritative voice. It is necessary to re-evaluate both *Lloyd* and *Barnard* against extant public policy and constitutional values as the two judgments are from a pre-constitutional dispensation.

The SCA's 'further reason' for declining to develop the common law is, with respect, unconvincing as it implies that, even with all the relevant facts, the court would have declined to develop the common law. The upshot of it is that the suggested development is drastic and overreaching and should be left to the legislature to undertake. Short of its linguistic veneer, it is a separation of powers

argument. The argument is unconvincing and was rightly rejected by the court in *Lloyd*. The argument may have held sway then, but it cannot now – at least not assuredly. Sections 8(3) and 39(2) of the Constitution bestow the courts with explicit and extensive powers to develop both the common law and customary law as required by the spirit, purport, and objects of the Bill of Rights. Deferring development of the common law to the legislature is no longer fashionable. The courts have indeed handed down judgments that drastically changed the rules of the law of succession both in the common law and customary law areas (*Petersen v Maintenance Officer, Simon's Town Maintenance Court, and Others* 2004 (2) SA 56 (C) and *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC)). In some instances, they have altered legislation governing the law of succession (*Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 (4) SA 97 (CC) and *Hassam v Jacobs NO and Others* 2009 (5) SA 572 (CC)). This is emblematic of the extensive nature of the courts' powers to align the law with the dictates of the Constitution. The invocation of the doctrine of separation of powers as the basis for refusing to develop common law rules is therefore unconvincing to say the least (*Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) at para 115). More so in this case because the courts have, on several occasions, developed the common law rules governing succession, untrammelled by the doctrine. Judicial development of the common law cannot be considered 'inappropriate' simply because it implicates foundational values of the Constitution or a panoply of constitutional rights. If anything, that invites judicial intervention to balance the contesting values and rights ap-

propriately. The courts should be wary of deferring common law development to Parliament as the latter is always at liberty to alter the common law through legislation even after the courts have developed it. Doing so, without compelling reasons, may be considered an abdication of responsibility.

## Conclusion

The way the *Van Zyl NO* case was litigated and adjudicated in the High Court deserves the censure expressed by the SCA. Both the High Court and the litigants should have done better. However, the SCA could, arguably, have done more than it did. The litigation and adjudicative bloopers in the High Court simply demonstrate that the duty to align our laws with the dictates of the Constitution requires a collaborative effort between judicial officers and legal practitioners as officers of the courts. Thus, transformative adjudication requires legal practitioners to assist the courts by properly identifying constitutionally misaligned areas of the law and choosing apposite litigation techniques to align them. Such a collaborative approach would foster incremental and timely transformation of the South African legal system. As Van der Westhuizen J observed extra-curially, the suffusion of the South African legal system with constitutional values requires a 'massive joint effort' from various role players, including the legal profession (Van der Westhuizen J 'A few reflections on the role of courts, government, the legal profession, universities, the media and civil society in a constitutional democracy' (2008) 8 *AHRLJ* 251 at 257).

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# Medical negligence and criminal responsibility – when the court infringes on a medical practitioner's rights to a fair trial



By Dr  
Llewelyn  
Gray  
Curlewis

Picture source: Gallo Images/Getty



**T**he application for leave to appeal in *S v Van der Walt* 2020 (2) SACR 371 (CC) was served before the Constitutional Court (CC) against the judgment of the Mpumalanga Division of the High Court. The facts were as follows: Dr D, an obstetrician and gynaecologist was convicted by the regional court of culpable homicide. The basis was that he acted negligently in the care of his patient, the late P, after she had given birth, and that this negligence caused her death. Dr D was sentenced to five years' imprisonment. He unsuccessfully appealed to the High Court against both the conviction and sentence. The Supreme Court of Appeal (SCA) refused special leave to appeal, which resulted in the application in the CC. Regarding the conviction, Dr D contended that the way the regional court handled the trial infringed on his rights to a fair trial, more specifically, his constitutional right as an accused to adduce and challenge evidence as protected under s 35(3)(i) of the Constitution. Regarding the sentence, Dr D submitted that the sentence was 'shockingly inappropriate' and an infringement of s 12(1)(a) of the Constitution. The challenge regarding a 'fair trial' is based on three grounds. First, the regional magistrate decided on the admissibility of various pieces of evidence for the first time in the judgment on conviction. In essence, when the applicant elected not to testify, he did so without knowing the full ambit of the case. The state's evidence com-

prised of the evidence of three witnesses and numerous exhibits. Dr D assumed that each exhibit – except for those whose admissibility he contested – was admitted as it was handed in. Surprisingly, the regional magistrate pronounced on the admissibility of all the exhibits, when he was handed down judgment on the conviction and admitted some exhibits, but not others. The crux of the matter is that the non-admission of some of the exhibits meant that the evidence elicited through their cross-examination was also rejected, a fact, which Dr D came to know only at the stage of conviction. The applicant complained that this was at odds with the law (*S v Molimi* 2008 (3) SA 608 (CC); *Ndhlovu and Others v S* [2002] 3 All SA 760 (SCA) at para 18).

The second ground was that by relying on the evidence of one Dr T, also an obstetrician and gynaecologist and an expert witness by the state, the court *a quo* conducted its own research and relied on medical textbooks not referred to in testimony. Dr D contended that, because textbooks were not presented as evidence, he was denied an opportunity to challenge them, which was an alleged contravention of his s 35(3)(i) rights.

Thirdly, Dr D submitted that he was convicted without there being any evidence regarding an essential element of the relevant offence, namely, causation.

On sentence, the applicant submitted that a doctor convicted of an offence arising from professional negligence cannot be treated like, for example, a driver whose negligent driving resulted in someone's death. He contended that in society doctors play a special role (a right enshrined in s 27(1)(a) of the Con-

stitution). A just sentence, therefore, required that imprisonment only be imposed in the most serious cases of negligence, which must be determined in accordance with the views of the medical profession.

## Decision of court

The court rejected the argument by the state that once the applicant had contested the admissibility of certain exhibits, the magistrate interrogated the admission of all other exhibits applying legal requirements for admission and that the findings therefore appeared to have been correct. The court also rejected the state's argument that the applicant was aware of the adverse consequences in failing to testify, in that 'the *prima facie* case of the State would be left to speak for itself'. The fact that this issue was raised and decided on appeal and taken into account, made no difference. The contention by the state that the High Court, having done so, correctly concluded that – even with that evidence – the state had nevertheless proved its case beyond a reasonable doubt, was also rejected.

The second point regarding the references to the literature was not proven and the state's contention that this merely fit in with the factual evidence of the expert witness, Dr T, and that it was this evidence, which was the basis of the finding of guilt, was also unsuccessful. The state's argument being that the applicant elected not to testify, and that the expert testimony of Dr T was not disputed and thus constituted *prima facie* evidence of the applicant's negligent conduct, also did not succeed.



The third point in argument by the state, that the evidence of Dr T was sufficient in establishing causation, and that the correct test was applied, was also rejected.

Relating to sentence, the state's submission that the court *a quo* exercised its discretion properly and must therefore stand, was conceded.

### • Jurisdiction and leave to appeal

The pronouncement on admissibility at the stage of conviction and the reliance on medical literature not proved in testimony implicated Dr D's right to a fair trial. The right to a fair trial embraces a concept of substantive fairness, which is not to be equated with what might have passed muster in courts before 1996 (*S v Zuma and Others* 1995 (2) SA 642 (CC) at para 16; *Shabalala and Others v Attorney-General of the Transvaal and Another* 1995 (12) BCLR 1593 (CC) at para 29). It is broader and more context-based than pre-constitutional notions of trial fairness, which was based on non-compliance with formalities (*S v Steyn* 2001 (1) BCLR 52 (CC) at para 13). In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at para 133 Ackermann J said:

'[I]t is salutary to bear in mind that the problem cannot be resolved in the abstract but must be confronted in the context of South African conditions and resources – political, social, economic and human. ... One appreciates the danger of relativising criminal justice, but it would also be dangerous not to contextualise it.'

Not all procedural irregularities are, therefore, sufficiently serious as to constitute an infringement of this right. In *S v Mdali* 2009 (1) SACR 259 (C) at para 10, for example the court held that a magistrate's failure to allow an accused to call a particular witness, was serious and vitiated the proceedings. The principles of admissibility must not be confused with the probative value of evidence. If proceedings are found not to be in accordance with justice, the accused's right to a fair trial (his right to adduce and challenge evidence), is grossly violated.

The Constitution requires all criminal trials or criminal appeals to give content to 'notions of basic fairness and justice' (see the *S v Zuma* case at para 16). The court must determine what types of irregularities are sufficiently serious to undermine fair trial rights. *In casu*, the irregularities alleged by the applicant are to be of a nature that is impermissible and vitiated the fairness of the trial. The CC refrained from engaging the issue regarding causation, since it merely deals with settled principles.

In the application for leave to appeal against the sentence, reliance was placed

on constitutional jurisdiction only. Mention was made of an arguable point of law of general public importance. Since this was not substantiated, *in casu*, nothing needs to be said about it. In the absence of any other constitutional issue, the CC will not entertain an appeal on sentence merely because there was an irregularity, there must be proof of a failure of justice (*Bogaards v S* 2012 (12) BCLR 1261 (CC) at para 42). The notion that doctors must receive special punitive treatment, lest s 12(1) be infringed, is without any basis. No reason exists for an exception to be made where doctors are found to be guilty of causing the death of patients. The court, *in casu*, with reference to the jarring analogy of drivers who kill people as a result of negligent driving, finds that those that die at the hands of doctors who act negligently are terminally denied the most important right, namely, the right to life. The law demands a higher standard of care from doctors, where the conduct complained of relates to the area of expertise (*Mukheiber v Raath and Another* [1999] 3 All SA 490 (A) at para 32, with reference to *Van Wyk v Lewis* 1924 AD 438 at 444). Leave to appeal against the sentence was refused.

### • Fair trial

The right to a fair trial must instil confidence. Proceedings in which little respect is recorded to the fair trial principles have the potential to undermine the fundamental adversarial nature of judicial proceedings (see the *S v Molimi* case at para 42). An accused is not at liberty to demand the most favourable possible treatment under the guise of the fair trial right (*S v Shaik and Others* 2008 (2) SA 208 (CC) at para 43). A court's assessment of fairness requires a substance over form approach (*S v Jaipal* 2005 (4) SA 581 (CC) at paras 27-8; *S v Rudman and Another; S v Mthwana* 1992 (1) SA 343 (A)).

### • Admissibility

A timeous ruling on the admissibility of evidence is crucial. It sheds light on what evidence a court may consider. This enables an accused to make an informed decision on whether to close his case or not. Without a timeous ruling, which will act as a procedural safeguard, on all evidence that bears relevance to the verdict, an accused may be caught unawares, when he can no longer do anything (see the *Ndhlovu* case at para 18) with reference to s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988. For a fair trial, the applicant must know what the case against him is and not be ambushed by the late pronouncement on the admissibility of the exhibits. Nobody can guess with any degree of accuracy what impact evidence – if tendered – might have had on the outcome of the matter

(see also *John v Rees and Others; Martin and Another v Davis and Others; Rees and Another v John* [1969] 2 All ER 274 at 274; *Psychological Society of South Africa v Qwelane and Others* 2017 (8) BCLR 1039 (CC) at para 45; HWR Wade *Administrative Law* 6ed (Clarendon Press 1988) at 533-4).

### • Medical literature

It is trite that an expert witness may rely on information in a textbook (*Menday v Protea Assurance Co Ltd* 1976 (1) SA 565 (E) at 569G-H). *In casu*, the state argued that the medical literature was provided by the expert assessor who assisted the regional magistrate to confirm the evidence of Dr T, similarly in the way that a court may refer to case law or academic sources in a judgment. The literature did not introduce new or different evidence, but merely confirmed the evidence of the expert. Dr D countered this submission by arguing that the judgments made it plain that the regional magistrate did rely on the literature. The court favoured this submission. Whether the applicant would have been able to challenge the textbook evidence successfully is irrelevant and the question was whether the applicant had the opportunity to challenge it. The reliance on unproved medical literature infringed the applicant's s 35(3)(i) right.

### Conclusion

It was ordered that the conviction must be set aside. The concomitant effect is that the sentence must also fall away. Arguably, if the sentence automatically falls away, as it does, it was not necessary to determine the application for leave to appeal against the sentence. This is correct, however, to avert the same argument being raised, if the applicant were again convicted and a sentence, he considered excessive was once again imposed, the court deemed it prudent considering the order handed down. A court of appeal is entitled to make such 'other' orders as justice requires (s 322(1)(c) of the Criminal Procedure Act 51 of 1977). The applicant's conviction was not set aside on the merits, but as a result of the irregularities. The Director of Public Prosecutions may decide whether the applicant should be re-arraigned. In my mind, the CC correctly applied the principles of the law of evidence.

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By  
Desmond  
Francke

# Reconsidering a restorative justice approach in criminal court proceedings

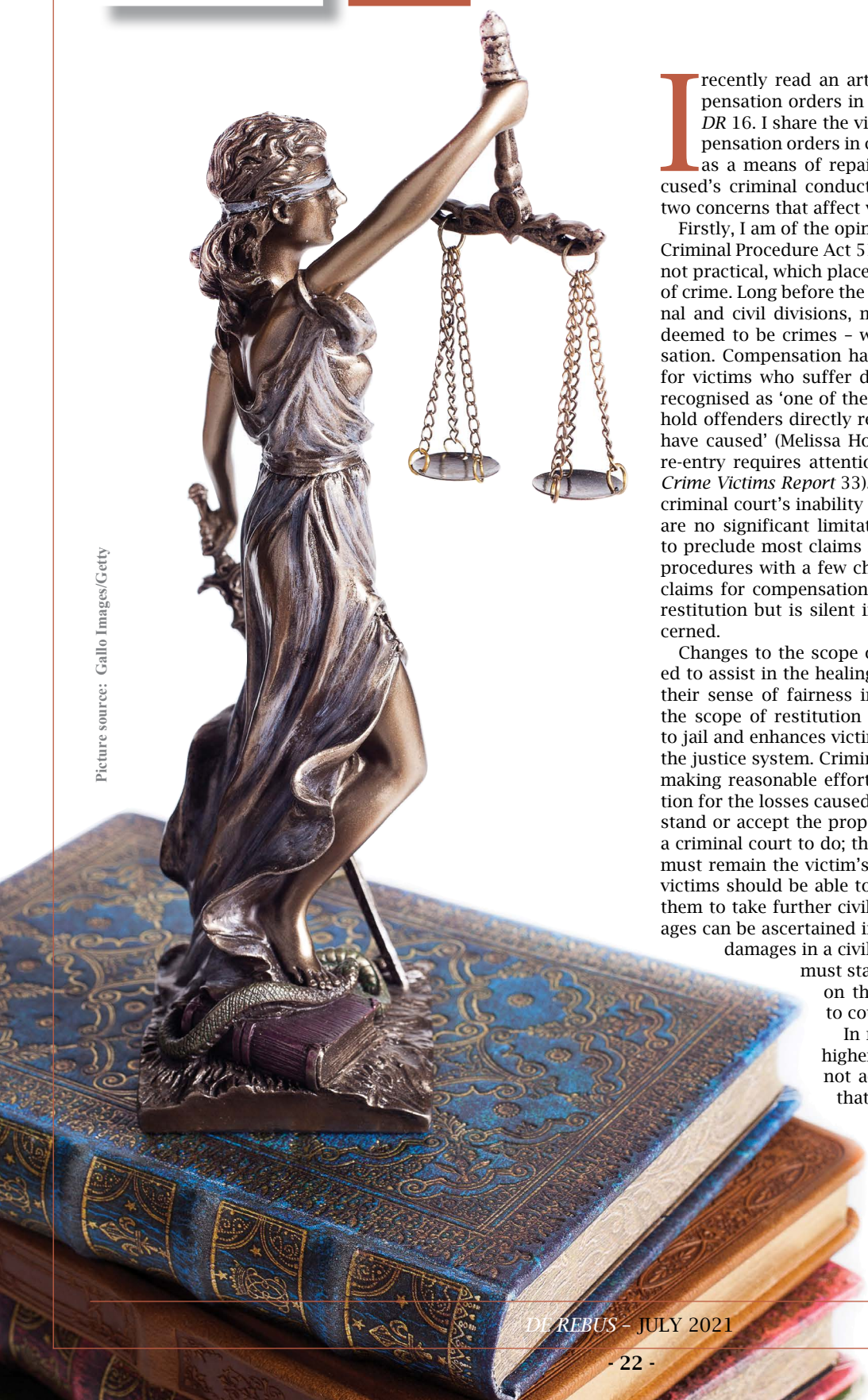
I recently read an article by John Ndlovu titled 'Compensation orders in criminal proceedings' 2018 (Aug) DR 16. I share the views of the author insofar as compensation orders in criminal proceedings are desirable as a means of repairing the harm caused by the accused's criminal conduct. Reading the article highlighted two concerns that affect victims of crimes adversely.

Firstly, I am of the opinion the provisions of s 300 of the Criminal Procedure Act 51 of 1977 (the Act) are archaic and not practical, which places an additional burden on victims of crime. Long before the separation of the court into criminal and civil divisions, many of the wrongful acts – now deemed to be crimes – were redressed solely by compensation. Compensation has always been a primary concern for victims who suffer damages. Compensation is widely recognised as 'one of the only ways that crime victims can hold offenders directly responsible for the harm that they have caused' (Melissa Hook and Anne Seymour 'Offender re-entry requires attention to victim safety' (2001) 5 *The Crime Victims Report* 33). Too much has been made of the criminal court's inability to deal with compensation. There are no significant limitations in a criminal court process to preclude most claims for compensation. Criminal court procedures with a few changes can be adapted to process claims for compensation. Chapter 29 of the Act refers to restitution but is silent in so far as the procedure is concerned.

Changes to the scope of victim compensation are needed to assist in the healing journey of victims and to foster their sense of fairness in the justice system. Broadening the scope of restitution provides meaningful alternatives to jail and enhances victim participation in and respect for the justice system. Criminal courts owe victims the duty of making reasonable efforts to ascertain and award restitution for the losses caused by crime. Few victims will understand or accept the proposition that what they cannot get a criminal court to do; they might get a civil court to do. It must remain the victim's choice. Within reasonable limits, victims should be able to apply to either court. Why force them to take further civil action if all or most of the damages can be ascertained in a criminal court? Pursuing their damages in a civil court is not always easy. Victims must start all over again. They are entirely on their own in bringing the offender to court and in proving their damages.

In many respects, what some of our higher courts assume victims want does not accord with what researchers find that victims want or with this court's experience of what victims want (see Andrew Sanders *Taking Account of Victims in the Criminal Justice System: A Review of the Literature* (Edinburgh: The Scottish Central Research Unit 1999)). While some victims

Picture source: Gallo Images/Getty





want revenge, as expressed in harsh sentences, most victims want their losses covered. The more victims are involved in the system, the more the focus shifts from revenge to compensation, from punishment to rehabilitation (see *S v Tabethe* 2009 (2) SACR 62 (T)). If criminal courts had access to a more comprehensive means of addressing compensation, directly from offenders and indirectly through a victim compensation fund, for many victims' compensation could be a more satisfactory part of a sentencing plan than harsh penalties. A comprehensive compensation option, in many respects, serves the interests of victims, offenders, and the community.

Within the following guidelines, victims seeking restitution should not be sent to another court to process their claims:

- **Ability to pay:** Before imposing a large fine, the courts are bound by statute to assess the offender's ability to pay. There is no such statutory requirement in imposing a restitution or compensation order. The court in *Vaveki v S* (WCC) (unreported case no A414/10, 3-12-2010) (Matthee AJ) said it must endeavour to establish whether such a person is in fact in a position to pay such an amount at all and/or within the time frames stipulated. Unlike a fine, a restitution order, if not made part of probation, is only enforceable through civil remedies. Further, it may be paid off much later when an offender can afford to do so. Accordingly, large restitution orders can be ordered, despite the current inability of an offender to pay. There is one important constraint on the amount and timing of a restitution order. If rehabilitation is part of a sentencing plan, the amount and timing of restitution must not significantly undermine an offender's will and capacity to pursue rehabilitation. However, demonstrating the ability to take responsibility for their behaviour by compensating victims can be an integral part of a rehabilitation plan for many offenders. It is a direct, concrete action that gives meaning to an apology.
- **Ascertainable damages:** There is good reason to send the parties off to a civil court, if complex legal arguments are required to resolve the cause or amount of damage. There is not always good reason for the criminal courts to abandon the task of ascertaining damages just because damages are not readily ascertainable. This sets far too low a benchmark for what criminal courts can and should do. If victims choose to pursue their damages in a criminal court, the criminal court ought to provide restitution, if the cause and number of damages can be reasonably ascertained. If the dam-

ages cannot be reasonably ascertained on the information immediately available, then at least one further hearing dedicated to determining damages should be held.

- **Restitution determined at time of sentence:** Since the amount of a compensation order must be taken into consideration in assessing the overall severity of the sentence, the amount should be ascertained at the time of sentencing. This may require adjourning a sentencing hearing as the police and state may not have the necessary information. The victim's interests cannot be ignored because the sentencing hearing moves ahead too quickly. To ensure sentencing takes place in a timely manner, victims must be notified and assisted in gathering the requisite information to substantiate a claim.

My second concern is that the legislature has taken the initiative to broaden the principles of restorative justice as far as restitution is concerned and children with conflict with the law is concerned. Section 74(2) of the Child Justice Act 75 of 2008 reads:

'A child justice court may consider the imposition of any of the following options as an alternative to the payment of a fine:

(a) Symbolic restitution to a specified person, persons, group of persons or community, charity or welfare organisation or institution;

(b) Payment of compensation to a specified person, persons, group of persons or community, charity or welfare organisation or institution where the child or his or her family is able to afford this'.

I am of the opinion the Act and, more specifically, s 300 of the Act should be amended to provide for restitution as envisaged in s 74 of the Child Justice Act. Parliament and the courts have acknowledged the importance of restorative and community justice initiatives. Reconciliation and healing, both central objectives of community justice, are advanced by restitution. Community justice practices revive the importance of compensation and call for developing new ways to compensate victims for the adverse impacts of crime. If the words of Mocumie J at paras 19 and 20 in *S v Mfana* (FB) (unreported case no 103/2009, 11-6-2009) (Mocumie and Molemela JJ) are to be anything more than empty words insofar as they direct the acknowledgment of the harm done to victims and the community, the court must seek to consider the broader interests those words are meant to encompass. Courts must focus on the restorative goals of repairing the harms suffered by individual victims and by the community as a whole, promoting a sense of responsibility and an acknowl-

edgment of the harm caused on the part of the offender, and attempting to rehabilitate or heal the offender.

Restitution is a part of the punishment. It is of critical importance to state restitution is not compensation. The purpose of a restitution order is to punish the offender, not to compensate the victim and/or community. A restitution order is a process for imposing a financial penalty as part of a criminal sentence, with provision for that penalty to be paid to the victim and/or the community rather than the state. (I am of the view that promoting of a sense of responsibility in offenders, and acknowledgement of the harm done to victims and the community is one of the objectives of sentence. It is about restoring the damaged caused). The measure of restitution is determined, not by the loss incurred by the victim or community, but rather by reference to the fundamental principle of sentencing. The requisite proportionality can be achieved only by a subjective assessment of the gravity of the offence and the culpability of the offender. For that reason, a restitution order, as an element of a sentence, cannot be the result of an arithmetic calculation. The starting point for determining the quantum of a restitution order is the total sentence (which might comprise one or more of a term of imprisonment, a fine, a term of probation and a restitution order) which would be proportionate to the gravity of the offence and the responsibility of the offender.

The constitutional justification, which forms part of a victim-centred approach permitting restitution orders is that restitution is a part of the punishment. Where punishment is exacted in the form of a restitution order, there should be a corresponding reduction in other forms of punishment, which might be imposed. In some cases, a restitution order will be a significant factor, while in others it will be trivial, depending on the circumstances, but it must be included as a factor in the totality of the punishment imposed. Crime generally affects at least three parties, namely, the victim, the community, and the offender. A restorative justice approach seeks to remedy the adverse effects of crime in a manner that addresses the needs of all parties involved.

Under South Africa's current legislation, a child in conflict with the law may in terms of s 74(2) of the Child Justice Act be ordered to make payment of compensation to a group of persons, community, charity or welfare organisation as part of restitution. In terms of the Act an adult may not be sentenced as such due to the Act not providing for it (see *S v Stanley* (SCA) (unreported case 269/96, 27-9-1996) (Olivier JA)).

Breaking the cycle of criminal behav-



jour that locks many offenders into reoffending and thereby into progressively longer jail sentences requires engaging resources that social agencies can bring to sentencing (treatment, training, housing, literacy, financial and other supports). These resources are often required to extract the full potential of sentencing as a catalyst force for change. While the court is not a social agency, it can provide the opportunity for many social agencies to combine their services with those of the court to forge a plan that serves the interests of offenders, victims, and communities. Government resources are, however, depleted, overcrowded, and not functioning optimally due to various constraints, which include budget and personal constraints. Concerned people in the community are far more knowledgeable about the effect of crimes than

those employed by probation or corrections. It is the community that has responded to this need, not governments. These organisations in our communities are battling financially due to poor economy, lack of sponsorship etcetera. Imposing a sentence in accordance with s 74(2) of the Child Justice Act will provide a remedy to the concerns refer to above.

If criminal courts shut out the voices of key participants, we cannot expect to foster either public respect for, or acceptance of the justice system.

Lastly, to generate viable solutions, courts must be open to appreciate and respond to the dynamics and needs in each case. Doing so will require pushing, bending and, at times, breaking longstanding attitudes and notions about sentencing practices, and especially about victim participation. For

sentencing to generate pivotal changes in the lives of victims, offenders and the community, courts must be open to question longstanding legal practices. If criminal courts shut out the voices of key participants, we cannot expect to foster either public respect for, or acceptance of the justice system. No institution that ignores voices for change survives. If we exclude victims, if we fail to directly face and respectfully explain the principles and practices that shape our processes, we will not survive as a valuable contributor in responding to the harm crime imposes.

**Desmond Francke Bluris (UWC) is a magistrate in Ladysmith.**



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## Navigating the way to justice – a discussion on truth, justice and reconciliation



By  
Haroon  
Aziz

The Truth and Reconciliation Commission's (TRC) Final Report in 2003 referred about 300 cases to the National Prosecuting Authority (NPA) for investigation and prosecution. Nothing much happened until 2007 when Thembi-sile Nkadimeng took legal action, relating to the kidnapping, torture, and murder of 23-year-old African National Congress (ANC)/uMkhonto we Sizwe operative Nokuthula Simelane. Her remains had not

been found (see *Nkadimeng and Others v National Director of Public Prosecutions and Others* (GP) (unreported case no 32709/07, 12-12-2008) (Legodi JJ)).

The case lifted the veil on unconstitutional presidential interference in the modes of existence and operations of the organs of state power. The supporting affidavit of advocate Vusumzi Pikoli, the former National Director of Public Prosecutions (NDPP), helped lift the veil.

On 23 September 2007, former President Thabo Mbeki suspended Mr Pikoli from duty because he had authorised the prosecution of a former commissioner of police on corruption charges. Mr Pikoli had also decided to pursue prosecutions of Apartheid-era perpetrators who had not applied for amnesty or had been denied amnesty by the TRC.

In 2008, the Ginwala Commission's Report of the Inquiry into the Fitness of Advocate VP Pikoli to hold the Office of National Director of Public Prosecutions found that the government had failed to justify Mr Pikoli's suspension and that he was a fit and proper person to hold the NDPP position. However, acting President Kgalema Motlanthe dismissed Mr Pikoli from his post. In 2009, Mr Pikoli obtained a High Court order that restrained President Jacob Zuma from appointing a suc-

cessor to his position, but he accepted a monetary out-of-court settlement from the Zuma administration.

Section 179(1) – (4) of the Constitution and s 32 of the National Prosecuting Authority Act 32 of 1998 (NPA Act) guarantee the independence of the NDPP and the NPA.

Former President Mbeki, on receipt of the TRC report announced in Parliament that the prosecution of perpetrators who did not participate in the TRC process was to be left to the NPA as part of the 'normal legal processes'.

On 23 February 2004, the Director-Generals' Forum appointed a Task Team to report on the mechanism to effect presidential objectives. On 1 February 2005, the Priority Crimes Litigation Unit (PCLU) of the NPA, had been tasked with handling TRC cases under advocate Anton Ackermann SC.

In November 2004, Dr Silas Ramaite SC, the Acting NDPP, had decided to prosecute three Security Branch members, namely, Colonel CL Smith, Captain GJLH Otto, and Captain HJ van Staden for the attempted murder of Reverend Frank Chikane in 1989. However, was ordered to suspend all TRC cases pending new guidelines for TRC cases.

On 1 December 2005, Parliament



passed the amendments to the Prosecution Policy, which permitted backdoor amnesty, plus the launch of Former President Mbeki's special dispensation on political pardons.

In February 2006, Mr Pikoli authorised the prosecution of the Security Branch members for attempted murder. They used legal chicanery to escape prosecution by lying that they were indemnified in terms of the Indemnity Act 35 of 1990 though it was repealed in 1995.

Simultaneously, former Police Commissioner, Jackie Selebi, objected to Ackermann's participation in PCLU on the alleged grounds that Ackerman had the intention to prosecute the ANC leadership.

In mid-2006 there was a meeting in the Presidency between Pikoli, Chikane, Director Generals of Justice and National Intelligence Agency, Selebi, the Secretary of the Defence Secretariat, and Mr Loyiso Jafta. Mr Selebi repeated his objection to Mr Ackermann.

Later in 2006, Ms Thoko Didiza, the Acting Justice Minister, summoned Mr Pikoli to a meeting at Minister Zola Skweyiya's residence. Present were the Minister of Safety and Security and the Minister of Defence, and Mr Jafta. On the agenda was the *Chikane* case. The meeting expressed its fear that the *Chikane* prosecution would open the door to prosecutions of ANC members for their pre-1994 alleged crimes.

Also in 2006, a further meeting was held at the Office of the Presidency where it was decided that the Task Team would await inputs from other departments.

On 25 October 2006, the Task Team meeting received an audit report on all PCLU cases from Mr Ackermann. On 6 November 2006, the Task Team discussed the *Chikane* matter when Mr J Lekalakala (of the South African Police Service) reported that Mr Selebi believed that Chikane was not interested in prosecution though Chikane had clearly left the matter to the NPA. In December 2006, Mr Selebi further alleged that Chikane had not been consulted.

On 17 August 2007, while Mr Pikoli was on compassionate leave, Adriaan Vlok, Johann van der Merwe, and the three Security Branch members were successfully prosecuted for the attempted murder of Chikane but they were given suspended sentences.

Mr Pikoli considered the presidential interference in his work as 'unwarranted interference in my constitutional duty to prosecute without fear, favour or prejudice'. It 'impinged upon my conscience and my oath of office'. The interference was tantamount to criminal obstruction in terms of the NPA Act.

The NPA/Scorpions and (later the State Security Agency) became an open field for rogue units to indulge in criminal activi-

ties in pursuit of ordinary citizens as cover. The Scorpions were created out of the remnants of the Security Branch, the Brixton Murder and Robbery Unit, and 'terrorism trial' prosecutors with unchecked investigative and prosecutorial powers.

There were not only costs to the state in billions of Rands but also in social and psychological costs to ordinary citizens. The human rights abuse was not a theory to its victims and survivors, but it bit into their core. The nation went into a mute mode.

## How did the nobility of the Constitution mutate into ignobility?

The legal basis of the mutation can be traced back to the case of *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (8) BCLR 1015 (CC). The second applicant was Nontsikelelo Biko.

The application was for an order declaring s 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995 unconstitutional. The section permits the TRC Amnesty Committee to grant amnesty to perpetrators. They also argued that the state was obliged under international law to prosecute perpetrators of human rights violations and that authorising amnesty to the perpetrators was a breach of the Geneva Conventions of 1949.

Judge Ismail Mahomed DP delivered the majority judgment.

He established the legality of amnesty provision of the Constitution by using the three criteria of criminal liability, civil liability, and the state's civil liability. He relied on the provision for amnesty on the postamble to the Interim Constitution: 'In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives'.

He made reconciliation and reconstruction the central political aim of the ANC government, against the (unstated) back-drop of the ANC's Reconstruction and Development Programme and the 'sunset clause'. He uses 'epilogue' 26 times and 'amnesty' 94 times in the judgment.

In making an argument to close the book on the past he refers to the epilogue as an eloquent expression of this fundamental philosophy. He also gives amnesty equal footing with the right of individuals to have disputes settled by an impartial forum.

On criminal liability, he argues that amnesty is necessary for the discovery of truth and reconciliation but there is insufficient evidence to charge individuals. He encouraged victims and survivors 'to unburden their grief publicly' in a new nation. He also argued that the incentive of

amnesty would elicit information about the past and find out 'the truth through amnesty from criminal liability' (KL Martin 'Tackling the Question of Legitimacy in Transitional Justice: Steve Biko and the Post-Apartheid Reconciliation Process in South Africa' 2015 *CUREJ*).

He stated: 'The families of those unlawfully tortured, maimed, or traumatised become more empowered to discover the truth, the perpetrators become exposed to opportunities to obtain relief from the burden of guilt ... transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for the "reconstruction and reconciliation" ... [for the] painful objectives of the amnesty articulated in the epilogue.'

On civil liability, he argued that there is not anything in the wording of the Constitution that would grant amnesty from criminal prosecution but would not grant the same for civil damages. He made a fine distinction and said that acts and omissions are in addition to offences in the epilogue, which shows that amnesty expands beyond solely criminal liability.

On state's civil liability, he argued that the epilogue was open-ended on the forms of amnesty and that Parliament had the right to protect the state from civil damages. He had in mind the limitation of rights clause in the Constitution by law of general application (s 33(1)).

He dismissed the arguments based on international law as irrelevant to the application.

Justice Mahomed acted, primarily, in the interests of the state and, secondarily, in those of victims. This is what also used to happen under Apartheid 'justice'.

It took one private initiative by Imtiaz Cajee in the Ahmed Timol re-inquest 21 years to obtain justice for a victim and restore his human dignity after he was killed in detention 46 years earlier and 27 years after the birth of democracy.

In 2017, Parliament in welcoming the new Timol verdict expressed that it 'trusts that the verdict will lead to the [NPA] prosecuting former members of the police, who sought to evade justice through perpetuating lies'. It also supported the private 'campaign towards a wider programme that seeks justice for other political activists who disappeared at the behest of the apartheid regime.'

The political interference was further confirmed by two senior NPA officials in sworn affidavits filed on behalf of the NDPP in *Rodrigues v National Director of Public Prosecutions of South Africa and Others* (Sooka and others as amici curiae) [2019] 3 All SA 962 (GJ), as an outcome of the Timol re-inquest. The Full Bench in that matter criticised the NPA for succumbing to such pressure and not adhering to its constitutional and legal obligations (paras 55 – 65).

## Did Justice Mahomed not err in equating his level of noble consciousness to that of victims and of perpetrators?

The TRC received testimonies of about 20 000 victims. About 7 500 perpetrators applied for amnesty, of whom 1 500 were granted amnesty.

Contrast the 7 500 against the 34 378 SAP members and the 18 000 Permanent Force SADF members (1970) with a combined budget of R 1,58 billion (1977). Totalitarianism provided the atmosphere for crimes against humanity.

In the TRC Amnesty hearing of Daniel Siebert (1997), the legal counsel for the Biko family established a *prima facie* case of the murder of Steve Biko not only against Siebert but also against his four accomplices without the need for rigorous application of the law of inferential evidence. However, in 2003 the Department of Justice announced that it would not pursue criminal prosecution because of 'insufficient evidence'. In 2020, the Department of Justice reiterated that the government would be financially hard-pressed to restart the process. It said 'if you reopen the process more than 20 years later, we have to reset the TRC, col-

lect submissions and re-evaluate as the TRC did.'

The Department of Justice and Constitutional Development controls the President's Fund, supposedly for victims. It has a cash asset of R 1 686 628 000, of which R 6 million is invested in 'Isibaya' and the rest in the Public Investment Corporation (PIC) (President's Fund Annual Report 2019/20 at p 22).

A victims' initiative called the 'Apartheid Era Victims' Families and Support Group' (AVFG), after the historic victory in the Timol re-inquest, is continuing the struggle for legal justice as a component of transitional justice from Apartheid to democracy. There is a need for the legal community to get involved in the massification of legal justice. Otherwise, human rights projects will remain vanity projects.

## Were the families of Steve Biko, Imam Haron, and others justified in their refusal to participate in TRC proceedings?

The judgment aroused fears and hopes. While the fears remain, the hopes lie in ashes.

Should judges and magistrates not be seen to transform the criminal justice

system from a judicial colony of medieval Rome, Holland, and England to a liberated judicial space by creating new case laws based on the Constitution?

The universal lesson from the consequences of the Justice Mahomed judgment is that when good people are exposed to corruption, they have the potential to become corrupt.

Had the judgment anticipated the potentiality of presidents for unconstitutional conduct, would there have been a need for the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (the Commission)? Should the Constitutional Court not sanction presidents for indulging in unconstitutional conduct?

Justice Mahomed when crafting the idealistic judgment, did he have the Mbekis, Mothlanthes, and Zumas or the Pikolis in mind?

Did he succeed in the historic task of laying the foundation of new jurisprudence in a new democratic nation?

Haroon Aziz is a retired physicist, author, and researcher and is part of the leadership collective of the AVFG. Mr Aziz writes in his personal capacity.



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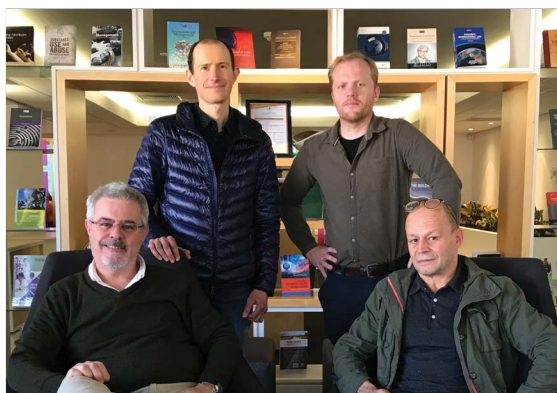
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# THE LAW REPORTS



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

May 2021 (3) South African Law Reports  
(pp 1 – 321); May 2021 (1) South African  
Criminal Law Reports (pp 463 – 578)

This column discusses judgments as and when they are published in the South African Law Reports, the All South African Law Reports, the South African Criminal Law Reports and the Butterworths Constitutional 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

CAC: Competition Appeal Court  
CC: Constitutional Court  
GP: Gauteng Division, Pretoria  
SCA: Supreme Court of Appeal  
WCC: Western Cape Division, Cape Town

## Administrative review

**Delay by a municipality in bringing a review of its own decision – was it reasonable, and if not, nonetheless excusable?** In *Altech Radio Holdings (Pty) Ltd and Others v Tshwane City* 2021 (3) SA 25 (SCA), the Tshwane City Municipality (the City) sought a legality review of its own decision. The facts were as follows: In June 2015 the City, then under the rule of the African National Congress, awarded a tender to the first appellant (Altech) for the construction of a fibre Internet network for the City. Pursuant thereto, the City incorporated the second appellant company (Thobela), which would contract with Altech to perform the construction, and which would afterwards operate the network. To this end, the City, in May 2016 concluded an agreement with Thobela for the construction and operation of the network. Thereafter, in August 2016, an agreement was entered into between the City, Absa Bank Ltd and Thobela under which Absa would loan sums of money to Thobela to meet its obligations to the City under its build-and-operate agreement with the City.

Meanwhile, in parallel to the conclusion of the loan agreement, municipal elections brought the City under the control of the Democratic Alliance, which in

August 2017 instituted proceedings for the review of its decisions to award the tender to Altech and to conclude the operations and loan agreements.

That review was heard in May 2018, and in July 2019 the GP set aside the decisions and declared the operations and loan agreements unenforceable. In September 2019 the GP granted leave to appeal to the SCA. The issue before the court was whether the City's delay in bringing the review was unreasonable and, if so, whether it could be condoned.

The SCA, per Ponnar JA (Wallis JA, Dambuzza JA, Molemela JA and Sutherland AJA concurring), began by alluding to the recent emergence of state self-review as a subspecies of review and pointing out that its use in public procurement cases was particularly worrisome. These were invariably legality reviews, so that the time constraints imposed by the reviews under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) did not apply. Either way, the objective of self-review should be the promotion of accountable government, not the evasion of constitutional obligations. Here, the City had apparently invoked an administrative-law remedy to strike a better bargain for itself. It wanted to use the review to evade, rather than assert, its constitutional obligations.

The SCA found that the City's delay in bringing the review – ten months from the time it knew all the facts supporting review and proceeding with it – was indeed unreasonable. In the light of this, the City's explanation that it needed time to investigate the tender rang hollow. In addition, the prejudice flowing

from the delay was substantial as Altech and Thobela had incurred R 610 million in costs by January 2018 and by the time the review was heard in May 2018, 34% of the network had already been built, after which the project was frozen. The City's conduct left the appellants financially exposed. Its failure to warn them of the irregularities in the process and the likelihood that the transactions would be impugned, was unconscionable. There was no escape from the facts: The delay was stark and the City's egregious conduct even starker. Much of this was ignored by the GP, which had been far too receptive to the City's case and lost sight of the fact that it was engaged in a multi-factor and context-sensitive inquiry in which a wide range of factors had to be weighed before it exercised its discretion. It should not have condoned the delay. The appeal was upheld with costs.

## Appeals: Execution

**Whether an order granting leave to execute is always suspended on lodging of an urgent appeal against such execution order:** The SCA, before hearing the matter of *Knoop NO and Another v Gupta and Another* 2021 (3) SA 88 (SCA) (see 'companies' law report below), was required to hear an appeal in related interlocutory proceedings: The GP, when granting the business practitioners leave to appeal, also granted the respondent, Gupta, leave in terms of s 18(1) and (3) of the Superior Courts Act 10 of 2013 (the Act), to immediately execute (execution order) the order removing the business practitioners. The business practitioners



(as appellants) were prompted to lodge an extremely urgent appeal to the SCA against such execution order, which they were entitled to do by virtue of s 18(4)(ii) and (iii) of the Act. The judgment in that matter, referred to here, was cited as *Knoop NO and Another v Gupta (Execution)* 2021 (3) SA 135 (SCA).

Of significance was the following: In terms of s 18(4)(iv) of the Act, the operation of an execution order itself is suspended pending the outcome of an urgent appeal against that order. This should have meant that the lodging of the appeal under s 18(4)(ii) in effect suspended the original removal order. However, here, the directors of Islandsite and Confident Concept in fact removed the appellants as business rescue practitioners and appointed new ones, who purported to subsequently terminate business rescue proceedings. Justification for such conduct was sought in the execution order granted by the High Court. That order expressly (in a so-called 'suspension order') provided that '[a]ny present or future appeals, applications and petitions by any party relating to this judgment shall not suspend the operation' of the original removal order.

The SCA, per Wallis JA (Mbha JA, Mocumie JA, Eksteen AJA and Mabindla-Boqwana AJA concurring), before addressing the merits of the appeal, saw it fit to address the validity of the GP's above 'suspension order'. It held that it was invalid in the face of s 18(4)(iv), whose wording was explicit and allowed for no misunderstanding. The court held 'the operation of an execution order was suspended pending the outcome of an urgent appeal against that order'. That, the SCA stressed, was the statutory position and a court could no more grant an order contrary to a statute than it could order a party to perform an illegal act. The SCA added that the inherent power of a court to regulate its own procedure could not be used to override the provisions of a statute directly governing the issue in question. The SCA went on to hold that, following from the fact of the nullity of the suspension order, the execution order was suspended pending this appeal, and the removal order was not yet effective. In turn, the appointment of the new business rescue practitioners, and the latter's termination of business rescue proceedings, were also invalid.

On the merits, the SCA found there were no exceptional circumstances present justifying the granting of leave to execute. When dealing with someone's removal from an office such as that of a business rescue practitioner, the mere fact that the court rules that they should no longer fill that office does not in itself constitute an exceptional circumstance. There had to be something more in the circumstances of the case that made the

immediate implementation of the removal order necessary. The SCA consequently upheld the urgent appeal.

## Companies

**Grounds for removal of directors:** *Knoop NO and Another v Gupta and Another* 2021 (3) SA 88 (SCA) dealt with some of the business affairs of the infamous Gupta clan currently under investigation by the Zondo Commission of Inquiry into Allegations of State Capture. Because of the myriad allegations made against the Guptas, companies run by them became 'unbanked' because banks were not prepared to deal with them. Two of these companies, Islandsite and Confident Concept, bankrupted by this turn of events, were placed under supervision, and went into voluntary business rescue. The appellants, Messrs Knoop and Klopper, were appointed as their business rescue practitioners. As such, they were obliged to conduct themselves as officers of the court and company directors under s 140(3) of the Companies Act 71 of 2008 and were subject to removal for various forms of misconduct under s 139(2) of the same Act.

The respondent, Ms Chetali Gupta and her husband Mr Atul Gupta were, together with other members of the Gupta family, the shareholders in the companies. After the appointment of Knoop and Klopper, Ms Gupta applied for their removal under s 139(2) on various grounds. These included –

- their staff were incompetent;
- they ignored and undermined the business rescue plans;
- they ignored offers for assets; and
- they insisted on sales by auction rather than private agreement.

She made a string of other allegations against them, *inter alia* that they failed to pay value added tax (VAT), were *mala fide*, careless and conflicted, and did not conduct themselves like officers of the court or company directors.

The GP upheld the application, ordered the practitioners removed, and granted them leave to appeal to the SCA.

In upholding the appeal, the SCA, per Wallis JA (Mbha JA, Mocumie JA, Eksteen AJA and Mabindla-Boqwana AJA concurring), pointed out that the allegations against Knoop and Klopper had to be substantiated by evidence. They had to know what they were being charged with and how their conduct of the business rescue operations was said to be deficient. However, the judgment of the GP contained no analysis of the case made by Ms Gupta, nor did it make any factual findings about her allegations. To remedy this, the SCA launched its own analysis of the facts. The SCA ruled that the facts failed to support the competence, business rescue plan, competitive offer or VAT complaints. The SCA found

that the GP had, by relying on irrelevant considerations and issues not raised in the papers, erred in failing to examine whether the evidence supported Ms Gupta's case. Every ground advanced by the GP in support of its conclusion that Knoop and Klopper should be removed was unfounded. In view of this the SCA upheld the appeal and replaced the GP's order with one dismissing Ms Gupta's application.

During the course of its judgment, the SCA investigated –

- the discretion of a court to remove a business rescue practitioner when one of the grounds in s 139(2) of the Companies Act was established;
- the general principles applying to removal of business rescue practitioners;
- the grounds of incompetence or failure to perform their duties (s 139(2)(e));
- failure to exercise proper care (s 139(2)(b));
- engagement in illegal acts (s 139(2)(c));
- conflict of interest and lack of independence (s 139(2)(e));
- the implications of a business rescue practitioner being an officer of the court (s 140(3)(a)); and
- subject to the duties of a director (s 140(3)(b)).

## Competition law

**Prohibited practice complaint in the removals business: strict time bar incapable of condonation?** In *Competition Commission of South Africa v Pickfords Removals SA (Pty) Ltd* 2021 (3) SA 1 (CC) the CC investigated the nature of the time bar in s 67(1) of the Competition Act 89 of 1998 (the Act) in order to decide whether it was a prescription provision or a procedural bar, and what event had triggered it. Section 67(1) provides that a complaint may not be referred to the Competition Tribunal (the Tribunal) if it was initiated more than three years after the alleged anti-competitive conduct had ceased.

The applicant, the Competition Commission, had referred a complaint regarding collusive tendering by furniture removal firm Pickfords and several of its competitors, to the Tribunal. The issue between the Commission and Pickfords arose pursuant to an exception raised by Pickfords before the Tribunal to the effect that most of the counts against it were time-barred.

The Commission alleged that Pickfords and other firms had engaged in 'cover quoting'. This was the illegal practice – also known as 'bid rigging' – of producing artificially high quotes from competitors to win a contract. The Commission contended that Pickfords had requested and provided cover quotes in response to various requests for quota-

# LEGAL PRACTITIONERS ARE VULNERABLE TO MONEY LAUNDERING



Due to the broad spectrum of services they provide, legal practitioners may be used by criminals as conduits for laundering money and hiding the proceeds of crime. These practitioners may unwittingly be abused by criminals for money laundering and terrorist financing purposes, and in some cases, may intentionally facilitate criminal activity.

Money laundering and terrorist financing causes damage to financial institutions, the economy, society and the rule of law. Services such as conveyancing and the establishment of private companies and trusts are but two of the common channels financial criminals use to launder money and hide the proceeds of crime.

It is thus important for legal practitioners to be aware of how financial criminals may use their services opportunistically, and that appropriate safeguard measures be taken against the risks of unknowingly being drawn into criminal activity.

As part of their role as accountable institutions, and in helping to defend against financial crime, legal practitioners must report certain information to the Financial Intelligence Centre (FIC). The information contained in these reports assists the FIC in its development of financial intelligence which law enforcement, prosecutorial authorities and other competent authorities can use for their investigations and applications for asset forfeiture where necessary. These reports include:

## Cash threshold reports (CTRs)

Section 28 of the FIC Act requires accountable institutions to file a report when a transaction is concluded with a client, in cash, above the prescribed threshold of R24 999.99.

Cash includes coin, paper money and travellers' cheques, either in rand or another currency. CTRs must be submitted to the FIC as soon as possible but no later than two days after becoming aware that a cash transaction(s) has exceeded the prescribed threshold.

## Suspicious and unusual transaction reports (STRs)

Where the legal practitioner suspects that a transaction or an activity involves money laundering, terrorist financing or a contravention of financial sanctions, they must report this suspicion to the FIC as an STR.

A suspicion may involve several factors that on their own could seem insignificant but taken together may arouse suspicion concerning that situation. A reporter should evaluate the transactions, as well as the client's financial history, background, and behaviour, when determining whether a transaction or activity is suspicious or unusual.

STRs must be filed within 15 days of a person becoming aware of the facts which give rise to a suspicion. The legal practitioner can elect to continue with the transaction even if the STR has been submitted to the FIC.

## Terrorist property reports (TPRs)

When a legal practitioner become aware that they possess, are in control of property of a person or entity which has committed or facilitate terrorist activities and/or is listed on a targeted financial sanctions list, they must submit a TPR.

These reports must be filed within five days of becoming aware that the institution possesses or controls property of a person or entity which has committed or attempted to commit a terrorist act. Persons are listed on sanctions lists due to terrorist or related activities, threats to international peace and security, which includes the proliferation of weapons of mass destruction, oppressive regimes and/or human rights abuses. These lists are accessible on the FIC website.

Not only is there a reporting obligation where a client is a sanctioned person, there is also an obligation to freeze all assets. In other words, when filing a TPR it is an offence to continue with the transaction or dealing with the property in question.

## Can I report if the communications are privileged?

Section 37 of the FIC Act protects the common law right to legal professional privilege between an attorney and their client in respect of communications made in confidence relating to legal advice or litigation. However, the FIC Act does override any secrecy and confidentiality obligations that may apply in South African law when it relates to complying with the FIC Act.

It is important to remember that the fact that a communication was made in confidence does not mean that this communication is privileged. It is only where the communication is made for the purpose of obtaining legal advice or litigation where privilege would attach. As such, any statement unconnected with the giving of legal advice or litigation will not be privileged, even if made in confidence. In addition, privilege does not apply if the client obtains legal advice in order to perpetrate a crime. No duty of secrecy or confidentiality, aside from privilege in the circumstances indicated, prevents an attorney from complying with an obligation to file a report under the FIC Act.

## Register before reporting

It is important to remember that as a first step, before any accountable institution can submit reports to the FIC, they need to first register with the FIC. Registration with the FIC is free and must be done via the FIC's online registration and reporting system called goAML accessible via [www.fic.gov.za](http://www.fic.gov.za).

## For more

compliance information and guidance offered to accountable institutions, refer to the FIC website ([www.fic.gov.za](http://www.fic.gov.za)). You can contact the FIC's compliance contact centre on +27 12 641 6000 or log an online compliance query by clicking on: <http://www.fic.gov.za/ContactUs/Pages/ComplianceQueries.aspx>.





tions from customers going as far back as 2008. The Commission alleged that the practice amounted to illegal price fixing.

Central to the case was the timeline of the complaint against Pickfords. It was as follows: In November 2010, the Commission initiated a complaint (the 2010 initiation) that cited several removal firms, indicating that they were 'the main companies implicated' but which did not mention Pickfords. In a further initiation in June 2011, Pickfords was added as a respondent (the 2011 initiation). The Commission then filed a prohibited practice (price fixing) complaint against Pickfords in 2015 (the referral).

Pickfords excepted to the referral on the grounds that, of the 37 counts of prohibited practices levelled against it in the 2011 initiation, 14 took place more than three years earlier, and were therefore time-barred under s 67(1) of the Act. The question was thus which referral, 2010 or 2011, had triggered the running of the three-year period. The Tribunal found in favour of Pickfords that its inclusion as a respondent in the 2011 referral was not an amendment of the 2010 referral, but rather a self-standing initiation. The Tribunal ruled that its powers of condonation did not extend to s 67(1).

In an appeal, the CAC found that while the 2011 referral was merely an amendment of the 2010 referral, Pickfords nevertheless became a named party only in 2011. The CAC held that the purpose of s 67(1) was to bar investigations into practices that had ceased and no longer endangered the public weal. It agreed with the Tribunal that the time bar in s 67(1) was absolute and incapable of condonation.

In an application for leave to appeal to the CC, Pickfords argued that permitting condonation would allow the Commission to 'turn back the clock', thereby defeating the purpose of s 67(1) and offending the principle of legality.

The CC, per Majiedt J (Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring) held, first, that it had jurisdiction over the matter because the interpretation of s 67(1), one way or the other, would have a material effect on the constitutional rights of the Commission and the public to access the courts. This was because a finding that s 67(1) was a proper prescription provision would result in an absolute bar on the initiation of a complaint when it was made more than three years after the practice had ceased.

The CC proceeded to find that the 2010 initiation was the trigger event, and that the CAC's contrary finding that it was the 2011 initiation overlooked the Act's emphasis on the prohibited practice over of the identities of the parties implicated in it. The 2011 initiation was

merely an amendment of the 2010 initiation, which clearly stated that the investigation was 'ongoing'. Moreover, the reference to 'the main companies implicated' foreshadowed the possible addition of other firms at a later stage.

The CC further held that s 67(1) is a procedural time-bar that was capable of condonation. The CAC erred in finding that s 67(1) is a limitation or expiry period and imposed an absolute, substantive time-bar. Such an absolute time-bar would subvert the Commission's role as watchdog over transgressions of the Act and inhibit the public's right of access to the Tribunal, the CAC and the courts in general. On the other hand, an interpretation of s 67(1) as a procedural time-bar would be more in line with the Bill of Rights, constitute a lesser infringement on the right of access to the courts, and also meet the rationality test. The CC pointed out that Pickfords' contention that it would offend the principle of legality and defeat the purpose of the Act to permit the Commission 'to turn back the clock' did not, in the light of the above, bear scrutiny.

The CC accordingly upheld the appeal, setting aside the order of the CAC and replacing it with an order dismissing Pickford's exception.

See also:

- Tshepo Mashile 'Remove, withdraw or postpone? The principle of double jeopardy in competition law' 2021 (April) *DR* 24.
- Meshack Fhatuwani Netshithuthuni 'An absolute or flexible restriction: Can prohibited practices be prosecuted three years after the practice ceased?' 2021 (Jan/Feb) *DR* 37.

## Criminal law

**The presumption that the owner was the driver of a vehicle is not applicable to an owner of a trailer hired out to customer:** In *National Minister of Transport v Brackenfell Trailer Hire (Pty) Ltd and Others* 2021 (1) SACR 463 (SCA) a trailer-for-hire business (the respondents), had experienced problems with the national application of the presumption in s 73(1) of the National Road Traffic Act 93 of 1996 (the Act). As owners, they were presumed in terms of the subsection to have driven the trailers in a manner that contravened the provisions of the Act, whereas the trailers in question had in fact been driven by their customers. Their frustrations had caused them to launch an application in the WCC for an order, *inter alia*, declaring that the presumption was not applicable to trailers. This was opposed by the National Minister of Transport (the appellant). It appeared that the traffic-enforcement agencies had experienced difficulties in establishing the owners of the motor vehicles in circumstances where their

cameras were only able to pick up the registration number of the trailer, which obscured the rear registration plate of the vehicle being driven. This had led to them targeting the respondents for prosecution by virtue of being the owners of the trailers involved.

Their application was successful leading to the Minister taking the matter on appeal. The SCA, per Petse DP (Dambuza JA, Van der Merwe JA, Weiner AJA and Goosen AJA concurring), found that the word 'drive' was defined in the Act with reference to the meaning of the word 'driver' as defined, and 'driver' meant someone who drove or attempted to drive any vehicle and included someone who rode or attempted to ride a pedal cycle or lead any draught, pack or saddle animal or herd or flock of animals. Thus, the element of 'driving' in relation to a trailer in tow was lacking and it was illogical to speak of such when in fact what happened was that it was the towing vehicle that was being driven when it was propelled by manipulating its controls with the trailer in tow. A trailer, not being self-propelled, had no engine or controls to manipulate its speed and direction independently of the towing vehicle. The court further noted that it was difficult to conceive of a situation where one could truly speak of a trailer being driven on a public road and that s 73(1) could only apply to a vehicle that was itself capable of being driven. It therefore followed that s 73(1) was not applicable to a trailer. The decision of the WCC was accordingly upheld, and the appeal was dismissed with costs.

## Other criminal law cases

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

- constitutional validity of legislation;
- function of court administrative staff;
- imposition of prescribed minimum sentences; and
- malicious prosecution.

## Motor vehicle accidents

**Road Accident Fund's (RAF's) liability where accident happened in underground mine:** In *Bangiwe v Road Accident Fund* 2021 (3) SA 172 (GP) the plaintiff claimed damages from the defendant (the RAF) for injuries sustained in a motor vehicle accident, which occurred in an underground mine. (He was a passenger on the back of a bakkie, falling off when the insured driver lost control of the vehicle due to negligent driving.)

Section 17 of the Road Accident Fund Act 56 of 1996 (the Act) provides for the liability of Road Accident Fund and its agents for 'any loss or damage ... suffered as a result of any bodily injury ... caused by or arising from the driving of



a motor vehicle by any person at *any place within the Republic* (the court's italics). The RAF raised as a defence that since the collision and/or accident occurred underground in a mine, it fell outside s 17's ambit. This, it contended, was because 'any place' in s 17 did not mean 'anywhere', such as underground in a mine.

In the adjudication of this defence as a separated legal issue, Kumalo AJ held that the use of the words 'any place within the Republic' in s 17 was deliberate and meant just that. The Act was social legislation, aimed at the widest possible protection and compensation against loss and damages for the negligent driving of a motor vehicle. It would therefore be artificial to limit the RAF's liability simply on the basis that the accident happened underground in a mine when the Act stated, in no uncertain terms, that accident must have happened at 'any place within the Republic'. The GP accordingly ordered that the RAF would be liable for Mr Bangiwe's agreed or proven damages.

**Procedural fairness in appeal against rejection of claimant's serious-injury-assessment form:** In *Van Aswegen v Health Professions Council of South Africa and Others* 2021 (3) SA 238 (GP) the applicant appealed to the Road Accident Fund (RAF) Appeal Tribunal (the

Tribunal) against the RAF's rejection of her serious-injury-assessment form in her claim for general damages. The day before the hearing of the appeal, she served additional medico-legal reports on the second respondent, the Acting Registrar of the Health Professions Council of South Africa (HPCSA). That these were not forwarded to and considered by the Tribunal when it rejected her appeal, formed the basis of her complaint in her application to review the Tribunal's rejection of her appeal, for lack of procedural fairness under s 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

In opposition the respondents raised a point *in limine*, that she failed to apply for condonation for the late filing of the medico-legal reports. This, it was argued, amounted to non-compliance with the requirements of reg 3(4) of the regulations to the Act, which provides for a condonation procedure regarding a dispute as to the rejection of the serious injury assessment form by the RAF.

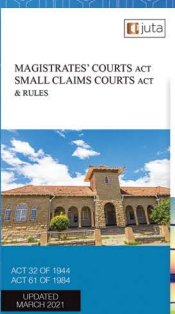
The GP, per Kubushi J, held that the purpose of reg 3(4) was to achieve the timeous lodging of a dispute regarding serious injury assessments; not to prevent, on pain of having to apply for condonation, the advancement of further submissions, medical reports, and opinions in support of the grounds on which the HPCSA's rejection was being

attacked. Also, noted the GP, there was no procedure in the regulations by which further reports, or submissions could be presented to the HPCSA. Without such a procedure in place, it could not be said that an applicant who desired to place further evidence before the Tribunal, may not do so or should be prevented from doing so. Accordingly, the HPCSA's decision not to present the additional medico-legal reports to the RAF in the absence of a condonation application, was wrong in law. It was also procedurally unfair in that the *audi alteram* rule and the provisions of s 3 of PAJA were ignored or not applied in a fair and flexible manner. The court, therefore, concluded that HPCSA's approach, on its own, was procedurally unfair and rendered the Tribunal's decision invalid and subject to be reviewed and set aside. In addition, the conduct of the Tribunal – in failing to consider the additional medico-legal reports, which the applicant had made available – was procedurally unfair. The decisions were accordingly held to be invalid and set aside.

## Practice: Summary judgment

**Whether an application for summary judgment can be granted in terms of the amended r 32 where the defendant amends the initial plea after the ap-**

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**plication for summary judgment had already commenced:** The matter cited, *Belrex 95 CC v Barday* 2021 (3) SA 178 (WCC), concerned an application for summary judgment brought under the recently amended r 32 of the Uniform Rules of Court, which now required a plaintiff to wait for a plea before applying for summary judgment. In the application, heard in the WCC before Henney J, the plaintiff had sought from the defendant, an attorney whom it had mandated to sell an immovable property, payment of what it believed was owing out of the purchase price (which following the sale of the property was paid directly into the defendant's trust account), as well as a detailed statement of account. The plaintiff applied for summary judgment on 9 July 2020, after having received the defendant's plea. Later, on 4 August 2020, the defendant filed a notice of intention to amend his plea and introduce a special plea, and then on 7 August 2020, filed his opposing affidavit, based on such amended plea and special plea. The matter was heard 13 August 2020.

The WCC found that it could not grant an order in respect of the summary judgment application, holding that the amended plea was not yet ripe for adjudication given non-compliance with r 28(2). However, the WCC went on to add that, even were the amended plea

properly before it, it would decline to deal with the matter under r 32, owing to a *lacuna* in the amended rules to adequately address the situation presented here, where the defendant had elected after the commencement of the application for summary judgment, to amend its plea and base its opposing affidavit on such amended plea. In explanation, the WCC held that, on the one hand, to proceed to summary judgment would place the plaintiff at a disadvantage since the rules confined the plaintiff to what they had presented in the founding affidavit and did not allow them to present further evidence, to explain why the defences as pleaded in the amended plea did not raise any issue for trial. On the other hand, the court could not simply ignore the amended plea and opposing affidavit: To do so would defeat the purpose of the amended rule, which required that the nature and grounds of the defence and the material facts relied on in the affidavit be in harmony with the allegations in the plea; furthermore, a defendant was entitled to amend its plea any time before judgment.

The WCC's solution was to rule that the defendant's notice of amendment should take effect in terms of r 28(2) as of the date of the judgment, for the plaintiff to exercise its rights in terms of the rule. The WCC granted the plaintiff leave to bring a fresh application on the

amended plea, should such an application for amendment be allowed.

## Other cases

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

- asset forfeiture and the freezing of third-party assets;
- contracts contrary to statute and the obligation of the court to raise the issue of legality;
- judicial case management in the Gauteng Local Division, Johannesburg;
- the constitutionality of legislation concerning the interception of telecommunications;
- the date of dissolution of a company being wound up;
- the obligation to pay interest on value-added tax; and
- the supply of electricity to a defaulting municipality.

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# Minister of Home Affairs may delegate any power conferred to them, including the power to deprive citizenship under the Citizenship Act



By  
Kgomo  
Ramotsho

*Nwafor v Minister of Home Affairs and Others* (SCA) (unreported case no 1363/2019, 12-5-2021) (Mbha JA (Zondi and Mbatha JJA, Gorven and Poyo-Dlwati AJJA concurring))

**I**n the *Nwafor* case, the applicant, Anthony Okey Nwafor, approached the Supreme Court of Appeal (SCA) to seek leave to appeal a judgment by Potterill J, that was handed down in the Gauteng Division of the High Court in Pretoria on 27 June 2019. Potterill J dismissed the applicant's application for an order to review and set aside the Minister of Home Affairs (first respondent) and the Director General of Home Affairs' (second respondent) decision to

deprive the applicant and his minor children of their South African citizenship.

This was after the Department of Home Affairs (the Department), sent a letter on 13 April 2016, addressed to the applicant and his family, advising that the Minister of Home Affairs intended to deprive him and his minor children of their South African citizenship. The minister's intended action was based on the following grounds:

- The applicant had obtained the per-

manent residence permit by means of a false representation by concealing the material fact that he was still married to Mrs Nwafor, who he married in Nigeria on 1 March 2003, when purported to marry Ms Vilankulo in South Africa on 25 April 2003, and while presenting himself as a bachelor at the time.

- That the applicant's marriage to Ms Vilankulo on 25 April 2003 took place when Ms Vilankulo was still a minor

without requisite permission from her guardian.

- That the permanent residence permit was issued to the applicant in conflict with the applicable law in that it was issued on 22 January 2004, in terms of the Aliens Control Act 96 of 1991 but subsequent to its repeal by the Immigration Act 13 of 2002 (the Immigration Act), on 12 March 2003.

In the same letter the applicant was informed that in terms of s 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), he was entitled, within ten calendar days from the date of receipt of the letter, to make representations to the minister setting out reasons why the minister should not proceed with the intended deprivation of citizenship. Importantly, the applicant could approach the High Court in terms of s 25 of the South African Citizenship Act 88 of 1995, to review the decision made by the minister.

On 3 May 2016, representation was made in a letter written on the applicant's behalf through his legal practitioners, in response to the Department's letter of 13 April 2016. The salient points made in the letter, which was addressed to the minister, and copied to the Director General of the Department, were the following:

- It was denied that the applicant obtained his permanent residence permit by means of false representation by concealing, his prior marriage to Ms Nwafor in Nigeria on 1 March 2003, and that he had presented himself as a 'bachelor' when he married Ms Vilankulo in South Africa on 25 April 2003. An explanation proffered was shortly after, 'a church blessing' between the applicant and Ms Nwafor, a serious material issue occurred, which affected the marital relationship resulting in the immediate dissolution of the said marriage.
- Regarding the allegation that Ms Vilankulo was a minor at the time of her marriage to the applicant, it was averred that Ms Vilankulo was born on 26 August 1984, she was over the age of 18 years at the time. Reliance was placed on, *inter alia*, s 24(1) of the Marriage Act 25 of 1961 (the Marriage Act) that Ms Vilankulo's mother had signed as a witness to the marriage, which constituted as parental 'consent' as is required by the Marriage Act.
- Lastly, regarding the contention that the permanent residence permit in the applicant's possession was issued contrary to the applicable law, it was contended that the applicant had followed all required procedures as expected of him, at the time of his application, for permanent residence and citizenship. Furthermore, the applicant had all the necessary documenta-

tion as proof that he had followed all the correct procedures to procure the said permanent residence permit.

- The letter concluded by stating that the applicant had shown that there was no basis to warrant the deprivation of his South African citizenship in terms of s 8(1)(a) and (b) of the South African Citizenship Act.

The Supreme Court of Appeal (SCA) said the applicant's bases or grounds for the application, which are delineated as issues for determination in the applicant's heads of argument, were –

- whether the applicant should be granted leave to adduce the further evidence contained in a supplementary affidavit that was filed on 30 June 2017;
- whether the applicant should be granted leave to introduce new points of law pertaining to the following issues, namely –
  - the absence of delegation of authority granted to the decision-maker;
  - the collective deprivation of citizenship of the minor children and their mother; and
  - the abandonment issue.

The SCA added that the intended application to adduce further evidence in a supplementary affidavit was not pursued. The court said the decision was well taken considering that the court *a quo* quite rightly disregarded the supplementary affidavit on the basis that no leave to file same was sought and obtained from the court *a quo*, a fact rightly conceded by the applicant in the papers. The SCA pointed out that although the court *a quo* quite rightly disregarded the supplementary affidavit, as it was filed without leave of the court, the court still considered the point raised that the minister could not have delegated the power to deprive a citizen to the Director General and that the deprivation is thus *ultra vires* the law. The court *a quo* rightly rejected this contention as bad in law based on the provisions of s 22 of the South African Citizenship Act.

The SCA said the issue took on a new form before it, namely, that the respondents did not follow due legal process in revoking the applicant's citizenship. The SCA added that this was because the notice of deprivation was signed by the second respondent who at the time was not in possession of the delegation of authority in terms of s 7A(8) of the Public Service Act 103 of 1994 requiring, *inter alia*, that a delegation by the minister to the Director General had to be in writing. The SCA said that this point cannot succeed and must suffer the same fate as the one raised earlier before Potterill J. The SCA added that it is a completely new issue not hitherto raised before either in the paper or before the court *a quo*.

The SCA pointed out that the delegation by the minister accords full square with the clear provision of s 22 in the South African Citizenship Act. The SCA said as the first respondent may under s 22 of the South African Citizenship Act delegate any power, conferred to him or her under that Act, this includes the power to deprive citizenship in terms of s 8 of this Act. The SCA said the applicant's attempt to place reliance on the decision in *Apleni v President of the Republic of South Africa and Another* [2018] 1 All SA 728 (GP), is misconceived. That the facts in this case were clearly distinguishable as the aspect of delegation was squarely raised in the papers unlike *in casu*, where the issue only rears its head on appeal.

The SCA said the other grounds the applicant raised relates to the alleged collective deprivation of citizenship of the applicant's minor children and his wife. The SCA pointed out that it was averred that the matter was of public interest and that issues of the rights of women and children should be severed from their dependence on the citizenship of their husband and father. The SCA said that reliance was sought to be placed on s 10 of the South African Citizenship Act, which provides '[w]henver the responsible parent of a minor has in terms of the provisions of section 6 or 8 ceased to be a South African citizen, the Minister may, with due regard to the provisions of the Children's Act [38 of 2005], order that such minor, if he or she was born outside the Republic and is under the age of 18 years, shall cease to be a South African citizen'.

The SCA added that the respondents failed to put any facts to show that the minister considered certain factors in making the requisite determination, flowing from the need to protect the interests of children as required in s 7 of the Children's Act. The SCA noted that it was then averred that the children's case ought to have been dealt with separately and not as though the children were mere appendages to the applicant. The SCA pointed out that similarly, the applicant's Nigerian wife, so it was submitted, was an independent bearer of rights meaning that the department was obliged to conduct a separate investigation when revoking her citizenship. The SCA said this point regarding the collective deprivation of citizenship cannot succeed.

The SCA pointed out with regard to the submission by the applicant that in matters involving status, abandonment is generally not allowed is misplaced and cannot succeed. The SCA added that the attempt by the applicant to draw in aid the decision in *Ex parte Taljaard* 1975 (3) SA 106 (O) does not assist as the applicant in that case had sought to



abandon a final sequestration order during appeal. The SCA said that the final analysis, r 41(2) of the Uniform Rules of Court was totally irrelevant and not applicable in this matter. The SCA added that the point raised was clearly based on a wrong legal premise and must accordingly fail.

The SCA said the complaint by the applicant that the deprivation of citizenship was arbitrary and unlawful and was done without being afforded an opportunity to be heard or that he was not afforded sufficient and reasonable time to make representation, must fail. The SCA pointed out that an analysis of the

Department's letter dated 13 April 2016, addressed to the applicant and his family shows that it complies with s 3(2) of PAJA in that the applicant was given:

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

(iii) a clear statement of the administrative action;

(iv) adequate notice of any right of review or internal appeal, where applicable; and

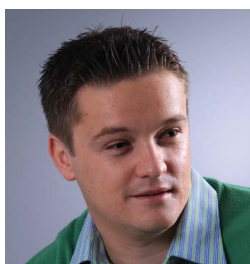
(v) adequate notice of the right to request reasons in terms of section 5.'

The SCA said that considering what it had stated above, it found that the applicant fell short of the test set out in s 17(1)(a) of the Superior Courts Act 10 of 2013. The SCA pointed out that the application must, therefore, fail.

The SCA made the following order:

'The application is dismissed with costs, such costs to include the costs of two counsel'.

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



By  
Philip  
Stoop

# New legislation

Legislation published from  
1 – 30 May 2021

## Bills

Appropriation Bill B4A of 2021.

Appropriation Bill B4B of 2021.

Preservation and Development of Agricultural Land Bill B8 of 2021.

Gas Amendment Bill B9 of 2021.

Housing Consumer Protection Bill B10 of 2021.

Land Court Bill B11 of 2021.

Criminal Procedure Amendment Bill B12 of 2021.

## Selected list of delegated legislation

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

Practice Note: Rules for discretionary collective enterprises. GN428 GG44591/18-5-2021.

### Competition Act 89 of 1998

Practice Note: Service of subpoenas and other corporate legal court documents on the Companies and Intellectual Property Commission during the COVID-19 pandemic. GN439 GG44539/21-5-2021. Memorandum of understanding between the Competition Commission and the Council for Medical Schemes. GN433 GG44593/21-5-2021.

Memorandum of understanding between the Competition Commission and the Federation of Governing Bodies of South African Schools. GN434 GG44593/21-5-2021.

Memorandum of understanding between the Competition Commission and the

Auditor-General of South Africa. GN465 GG44636/28-5-2021.

### Copyright Act 98 of 1978

Regulations on collecting societies in the music industry and renewal of the accreditation of Independent Music Performance Rights Association to act a collecting society for five years. GN473 GG44636/28-5-2021.

### Council for Medical Schemes Levies Act 58 of 2000

Imposition of levies on medical schemes. GenN251 GG44530/4-5-2021.

### Disaster Management Act 57 of 2002

#### • Education

Amendment of directions regarding measures to address, prevent and combat the spread of COVID-19 in the education sector. GN451 GG44633/28-5-2021.

#### • General regulations

Extension of National State of Disaster under the COVID-19 lockdown to 15 Jun 2021. GN R424 GG44574/14-5-2021.

Determination of alert level: Level 2. GN R476 GG44642/30-5-2021.

Amendment of regulations issued in terms of s 27(2): Adjusted alert level 2. GN R477 GG44642/30-5-2021.

### Electronic Communications Act 36 of 2005

Amendment of the Information and Communications Technology COVID-19 National Disaster Regulations. GenN314 GG44631/28-5-2021.

### Employment Equity Act 55 of 1998

Public register in terms of s 41. GN469

GG44636/28-5-2021 (also available in isiXhosa).

### Gas Act 48 of 2001

Rules in terms of the Act. GN470 GG44636/28-5-2021.

### Genetically Modified Organisms Act 15 of 1997

Amendment of regulations (fees). GN431 GG44593/21-5-2021.

### Income Tax Act 58 of 1962

Proviso to definition of 'retirement annuity fund'. GN474 GG44640/28-5-2021.

### Independent Communications Authority of South Africa Act 13 of 2000

Second Sport Broadcasting Services Amendment Regulations, 2021. GenN469 GG44569/13-5-2021.

### Liquor Products Act 60 of 1989

Amendment of regulations (fees and appeals). GN R420 GG44572/14-5-2021 (also available in Afrikaans).

### Military Pensions Act 84 of 1976

Determination of amounts. GN R456 GG44635/28-5-2021.

### National Education Policy Act 27 of 1996

2022 school calendar for public schools. GN450 GG44632/28-5-2021.

### National Environmental Management Act 107 of 1998

Procedures to be followed when applying for or deciding on an environmental authorisation for the development or expansion of gas transmission pipeline infrastructure when occurring in a Strategic Gas Pipeline Corridors. GN411 GG44551/7-5-2021.

Regulations to domesticate the requirements of the Rotterdam Convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade. GN413 GG44558/12-5-2021.

Regulations to prohibit the production, distribution, import, export, sale and use of persistent organic pollutants that are listed by the Stockholm Convention on Persistent Organic Pollutants, 2021. GN414 GG44559/12-5-2021.

#### **National Environmental Management: Waste Act 59 of 2008**

Amendments to the regulations and notices regarding extended producer responsibility. GN400 GG44539/5-5-2021.

#### **National Nuclear Regulator Act 47 of 1999**

Nuclear authorisation fees. GN417 GG44571/14-5-2021.

#### **Nursing Act 33 of 2005**

Fees payable in terms of the regulations regarding fees and fines payable to the South African Nursing Council. BN54 GG44636/28-5-2021.

**Plant Breeders' Rights Act 15 of 1976**  
Amendment of regulations (fees). GN432 GG44593/21-5-2021.

#### **Public Audit Act 25 of 2004**

Audit Directive issued by the Auditor-General. GN394 GG44526/4-5-2021.

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

Statement of the national revenue, expenditure and borrowings as at 30 April 2021. GenN313 GG44629/28-5-2021.

#### **Remuneration of Public Office Bearers Act 20 of 1998**

Determination of the upper limit of salaries and allowances of premiers, members of the Executive Councils and members of the Provincial Legislatures of 2020/2021. Proc17 GG44570/13-5-2021.  
Determination of the salaries and allowances of members of the National Assembly and permanent delegates to the National Council of Provinces. Proc18 GG44570/13-5-2021.

Determination of salaries and allowances of the Deputy President, Ministers and Deputy Ministers of 2020/2021. Proc19 GG44570/13-5-2021.

#### **Road Accident Fund Act 56 of 1996**

Adjustment of the statutory limit in respect of claims for loss of income and loss of support (R 302 731). BN29 GG44571/14-5-2021 (also available in Afrikaans).

#### **Subdivision of Agricultural Land Act 70 of 1970 and Conservation of Agricultural Resources Act 43 of 1983**

Revised tariffs for goods and services provided by the Department of Agriculture, Land Reform and Rural Development. GenN276 GG44576/14-5-2021.

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

Persons who must submit returns for 2021 year of assessment. GN419 GG44571/14-5-2021 (also available in Afrikaans).

#### **Unemployment Insurance Contributions Act 4 of 2002**

Determination of the limit on the amount of remuneration. GN475 GG44641/28-5-2021.

### **Draft Bills**

- Draft Firearms Control Amendment Bill, 2021 for comment. GN437 GG44593/21-5-2021.
- Occupational Health and Safety Amendment Bill, 2020 for comment. GN R447 GG44610/21-5-2021.
- Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Bill, 2021 for comment. GN438 GG44593/21-5-2021 and GN463 GG44636/28-5-2021.

### **Draft delegated legislation**

- Draft Artisanal and Small-Scale Mining Policy 2021 in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 for comment. GenN258 GG44538/5-5-2021.
- Amendment of the Civil Aviation Regulations, 2011 in terms of the Civil Aviation Act 13 of 2009 for comment. GN R410 GG44546/7-5-2021.
- Amendment of the Code of Conduct of the Legal Practice Council in terms of the Legal Practice Act 28 of 2014 (change of contact details) for comment. GenN260 GG44545/7-5-2021.
- Draft Guideline on Small Merger Notification in terms of the Competition Act 89 of 1998 for comment. GN404 GG44545/7-5-2021.
- Draft regulations regarding physical protective measures for nuclear material in terms of the Nuclear Energy Act 46 of 1999 for comment. GN R407 GG44546/7-5-2021.
- Regulations for the use of water for exploration and production of onshore naturally occurring hydrocarbons that require stimulation to extract, and any activity that may impact detrimentally on the water resource in term of the National Water Act 36 of 1998 for comment. GN406 GG44545/7-5-2021.
- Draft amendments to the Cross-Border Road Transport Regulations, 2020 in terms of the Cross-Border Road Transport Act 4 of 1998 for comment. GN R423 GG44572/14-5-2021.
- Proposed farm planning regulation in terms of the Conservation of Agricultural Resources Act 43 of 1983 for comment. GN R425 GG44575/14-5-2021.
- Amendment to the regulations relating to merchant shipping (collision and distress signals) in terms of the Merchant Shipping Act 57 of 1951 for comment. GenN275 GG44571/14-5-2021.
- Proposed amendments to the requirements for the recognition and

maintenance of recognition for voluntary associations in terms of the Architectural Profession Act 44 of 2000 for comment. BN45 and BN46 GG44593/21-5-2021.

- Draft National Mine Closure Strategy, 2021 in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 for comment. GN446 GG44607/21-5-2021.
- Regulations relating to medical devices in terms of the Medicines and Related Substances Act 101 of 1965. GN435 GG44593/21-5-2021.
- Draft amendment of the regulations relating to the ordering system specification for number portability in terms of the Independent Communications Authority of South Africa Act 13 of 2000 for comment. GenN312 GG44618/27-5-2021.
- Proposed regulations on accounting standards in terms of the Public Finance Management Act 1 of 1999 for comment. GN471 GG44636/28-5-2021.

**Philip Stoop BCom LLM (UP) LLD (Unisa)** is head of the school of law at STADIO.



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By  
Nadine  
Mather

# Employment law update

## Suspension of picketing rules

In *Clover SA (Pty) Ltd v General Industries Workers Union of South Africa and Others* [2021] 4 BLLR 419 (LC), the General Industries Workers Union of South Africa (GIWUSA) and its members embarked on a protected strike in pursuance of wage demands. As a result of unlawful conduct allegedly perpetrated by GIWUSA's members during the course of the protected strike, Clover SA (Pty) Ltd (the Company) approached the Labour Court (LC) for an interdict.

The LC ordered, among other things, that GIWUSA and its members –

- must comply with the picketing rules established between GIWUSA and the Company;
- were interdicted from interfering with road traffic and from barricading entrance points of the Company's premises; and
- were interdicted from committing any violent and unlawful conduct in pursuit of their wage demands. In this regard, GIWUSA was ordered to assist the Company with identifying those members who breach the provisions of the court order.

Thereafter, the Company again approached the LC for various orders on an urgent basis. After the court noted that these orders amounted to a duplication of the orders previously obtained by the Company, the Company persisted with one prayer only, which was for an order suspending the picketing rules for the duration of the protected strike.

The picketing rules applicable to the parties were set by the Commission for Conciliation, Mediation and Arbitration (CCMA) and were for purposes of regulating any picketing that would take place in relation to mutual interest disputes. In the event of non-compliance, the picketing rules made provision for a court to suspend the picket in accordance with s 69(12) of the Labour Relations Act 66 of 1995 (the LRA).

The court noted that the purpose

of s 69 of the LRA, read with the Code of Good Practice Relating to Picketing Rules, is to regulate protest action and demonstrations during protected strike action, and to ensure that it is lawful and peaceful. Unlawful conduct, violence, and harassment are inimical to the principle of peaceful demonstration. However, the rule of the mob during strikes has sadly become the 'new normal' in industrial relations, and often spreads to neighbouring communities. When unlawful conduct replaces peaceful demonstration and the picketing rules are ignored, s 69(12) enjoins the court to intervene and grant urgent relief either by suspending the picketing rules or by varying them.

In determining whether a suspension or variation of picketing rules is justified, the court is required to take the circumstances of each case into account. This involves a balancing act between the employees' constitutional rights to, *inter alia*, assemble and strike and the employer's rights to conduct its affairs without hindrance and in the interests of its employees and clients. Thus, an order suspending the operation of picketing rules should not be lightly granted and the onus rests on the employer to demonstrate that such is necessary.

In the present case, the Company contended that there had been non-compliance with the provisions of the interdict granted by the LC. The Company had cited various examples where its employees had been attacked while travelling to and from work or were attacked while at home. The bulk of the incidents on which the Company relied had, however, taken place some distance away from its premises and outside the demarcated picketing areas. Most of the incidents in fact took place in the communities where the employees resided and had been perpetrated by unknown persons. Although the Company's concern for the safety of its non-striking employees was warranted, the court found that this was not enough to justify suspending the employees' right to picket peacefully. On the contrary, a suspension of the picketing rules could exacerbate the situation.

The court found that in terms of the previous LC order, GIWUSA had agreed to assist with the identification of persons who contravened the picketing rules. All

that the Company was required to do was to call on GIWUSA to identify the individuals and to take action against them. The Company did not do so. The alternative option available to the Company was to approach the court by way of contempt of court proceedings. The prospects of a prison sentence or financial penalty may have been more effective than suspending the picketing rules and would have formed an adequate alternative remedy to the present application.

The court held that as picketing rules can only be applicable between an employer and its employees, what happens outside of the framework of those rules and the workplace is a matter for the criminal justice system. In the present circumstances, there was nothing to indicate that the picketing rules were inadequate. The Company had, accordingly, failed to make out a case for suspension of the picketing rules.

The application was dismissed.

## Procedure governing protest action

In *Congress of South African Trade Unions and Another v Business Unity South Africa and Another* [2021] 4 BLLR 343 (LAC), Congress of South African Trade Unions (COSATU), a trade union federation, gave notice to the National Economic Development and Labour Council (NEDLAC) of their intention to embark on protest action in accordance with s 77 of the Labour Relations Act 66 of 1995 (LRA). The protest action was in support of demands that private sector employers be prohibited from retrenching workers and be compelled to create a certain number of jobs per year.

About 15 months later, COSATU issued a further notice to NEDLAC that it intended embarking on the protest action indicated in the earlier notice and confirmed this in a further notice issued a month later. Seven months after that, COSATU issued yet another notice announcing that the protest action would take place in one month's time, which would focus mainly on the financial sector.

Thereafter, Business Unity South Africa (BUSA) approached the Labour Court (LC) for an order interdicting the planned protest action on the basis that



COSATU had failed to comply with the provisions of s 77 of the LRA. Section 77 regulates protest action and provides that every employee who is not engaged in an essential service or a maintenance service has the right to take part in protest action if –

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

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

(i) the reasons for ... ; and

(ii) the nature of the protest action;

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

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

The LC found that COSATU'S notice in terms of s 77(1)(d) had been unreasonably delayed and interdicted COSATU from proceeding with the intended protest action. COSATU took the matter on appeal.

The central issue on appeal concerned the interpretation of s 77 of the LRA. The court noted that s 77 had been scrutinised more than 20 years earlier in *Business SA v COSATU and Another* [1997] 5 BLLR 511 (LAC). In this judgment, it was held that if protest action was permitted while the parties to NEDLAC were still

considering the matter, the purpose of s 77 would be defeated.

Following this judgment, BUSA argued in the present matter that s 77 envisaged a continuum of conduct, namely that protest action may only follow upon a series of steps to be taken in sequence shortly after each other. The timing of the protest action could not be left open-ended and due regard must be had to the LRA's object of resolving disputes timeously and expeditiously.

The court held that the approach to statutory interpretation means that s 77 needs to be viewed and understood through the prism of constitutional rights which are implicated by that section. Section 77 implicates three constitutional rights, namely –

- the right of freedom of expression;
- the right to assemble, demonstrate and picket; as well as
- various labour rights protected by the LRA, particularly the right to fair labour practices and to participate in the activities of trade unions.

Section 77 must be viewed through the prism of these rights to give meaning to them.

Having regard to case law, the court found that the principle of expeditious resolution of labour disputes did not apply to strikes nor protest action as contended by BUSA. Once lawfully acquired, the right to strike does not become stale. Similarly, s 77 does not expressly set any time limits. Unlike labour disputes between parties to an employment relationship, the nature of protest action as envisaged by s 77, in this case a complaint

concerning government's economic policy, is not one that can be resolved as expeditiously as a defined labour dispute.

The court further found that the architecture of s 77 was instructive. It requires an initial notice in which the reasons for, and the nature of, the protest action is set out. Before embarking on protest action, it is incumbent for the matter to be considered by NEDLAC. Once there has been compliance with these requirements, all that s 77 requires is that at least 14 days before the commencement of the protest action, a further notice be served on NEDLAC.

The various notices issued by COSATU had informed BUSA that pressure would be applied, when it would be applied, the nature of the pressure and its duration. Once dispute resolution had failed, all COSATU was required to do was inform NEDLAC when the protest action would occur, which it had done 14 days before the planned protest action. The process would be completed only once the protest action had occurred and would have to be repeated in its entirety if COSATU sought to engage in further protest action.

In the circumstances, there was no justification for the LC's finding that the notice in terms of s 77(1)(d) had to be issued by COSATU within a reasonable time.

The appeal was upheld with costs.

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



By  
Moksha  
Naidoo

## Dismissed for violating COVID-19 protocols

*Esport Ltd v Mogotsi and Others* (LC) (unreported case no JR1644/20, 28-3-2021) (Tlhotlhamajje J)

In a response to the COVID-19 pandemic, the applicant employer, operating as a butchery, introduced COVID-19

policies and protocols at its workplace. These policies and protocols informed employees what symptoms to watch out for and to immediately self-isolate themselves should an employee display any one of the listed symptoms. Included in the policy was an obligation on the employee to inform the employer that they underwent a COVID-19 test.

The respondent employee travelled to work with his colleague, Mr Mchunu, in a private vehicle. On 1 July 2020, Mchunu fell ill and was later hospitalised, after which he was diagnosed with COVID-19 on 20 July 2020.

Around the same time Mchunu took ill, the employee himself experienced headaches, chest pains and coughs. The employee was booked off from work by a traditional healer from 6 to 7 and 9 to 10 July 2020. Despite his manager instructing the employee to stay at home, the employee returned to work on 10 July 2020 and remained at work even when he found out that Mchunu had tested positive for COVID-19.

On 5 August 2020, the employee took

a COVID-19 test and on 9 August was informed that he had tested positive.

While awaiting his results, the employee continued to come to work on 7 and 9 August and returned on 10 August 2020 to personally hand in his results to his manager.

On the same day, the employee was observed walking around the store without a mask and hugging another colleague who suffered from comorbidities.

On his return to work on 28 August 2020, the employee was charged and dismissed for gross misconduct and gross negligence.

The misconduct charge related to the employee's failure to inform his employer that he had on 5 August 2020 taken a COVID-19 test. The charge of gross negligence was in respect of the employee's failure to follow the COVID-19 policies in that he –

- did not wear his mask on one occasion;
- failed to keep a social distance when hugging a fellow employee; and furthermore,

- failed to self-isolate himself and instead continued to come to work on 7, 9 and 10 August 2020, which placed his fellow employees at undue risk.

The employee challenged the fairness of his dismissal at the Commission for Conciliation, Mediation and Arbitration (CCMA). He argued that the employer victimised him by questioning the medical certificate he produced and changed his job description by giving him new duties. This according to the employee was the true reason for his dismissal.

The arbitrator rejected the employee's defence and found that on the evidence, the employee was indeed guilty of both charges preferred against him. However, the arbitrator found that dismissal was not an appropriate sanction; the employer's own disciplinary code called for a final written warning and thus the employer deviated from its own code. This fact, together with the arbitrator's reading of the CCMA Guidelines on Misconduct Arbitration, led him to find that the employee's dismissal was substantively unfair. The arbitrator awarded the employee reinstatement without back pay and further held that he be issued with a final written warning.

In setting aside the award on review, the court held:

'Despite having stated that he had regard to all the provisions he had cited, it had clearly escaped the Commissioner's reasoning that a disciplinary code and procedure, is not prescriptive as correctly pointed out on behalf of the applicant,

and that it is merely a guideline, insofar as issues of sanctions are concerned.

Ultimately, irrespective of what the disciplinary code and procedure stipulates, in determining the appropriateness of a sanction of dismissal, the Commissioner is obliged to make an assessment of the nature of the misconduct in question, determine if whether, combined with other factors and the evidence led, the misconduct in question can be said to be of gross nature. Once that assessment is made, and the invariable conclusion to be reached is that the misconduct in question is of such gross nature as to negatively impact on a sustainable employment relationship, then the sanction of dismissal will be appropriate.'

On the common cause facts, the court found that the employee's actions were reckless and that he endangered the lives of his colleagues, customers and their own families. He displayed blatant disregard for the employer's COVID-19 policies and for no reasonable explanation continued with a care-free attitude. For these reasons, the court was satisfied that the sanction of dismissal was appropriate and substituted the award with a finding that the dismissal was substantively fair.

In closing the court did not spare the employer as well and raised the following questions:

'The questions that need to be posed despite the applicant having all of these fancy COVID- 19 policies, procedures and protocols in place, is whether more

than merely dismissing employees for failing to adhere to the basic health and safety protocols is sufficient in curbing the spread of the pandemic? How can it be, that in the midst of the deadly pandemic, the applicant still allows mask-less "huggers" walking around on the shop floor? Of further importance is notwithstanding all of these protocols and awareness campaigns about this pandemic, why would any employee in the workplace, especially one with comorbidities, hug or reciprocate hugging in the middle of a pandemic? Does a basic principle such as social distancing mean anything to anyone at the workplace? Furthermore, what is the responsibility of the applicant and its employees when other employees or even customers, are seen roaming the workplace or shop floor mask-less? Of even critical importance is what steps were taken in ensuring the health and safety of all the employees and customers, where at least from 20 July 2020, Mchunu's test results were known? All of these questions need to be addressed in the light of Mogotsi's version that after Mchunu's test results were made known, business at the store had continued as usual, hence he had continued reporting for duty.'

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By  
Kathleen  
Kriel

# Recent articles and research

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Abbreviation	Title	Publisher	Volume/issue
<i>AJCL</i>	Africa Journal of Comparative Constitutional Law	Juta	(2019)
<i>DJ</i>	De Jure	University of Pretoria	(2021) 54
<i>LitNet</i>	LitNet Akademies (Regte)	Trust vir Afrikaanse Onderwys	(2021) 18(2)
<i>Obiter</i>	Obiter	Nelson Mandela University	(2021) 42.1
<i>SAJBL</i>	South African Journal of Bioethics and Law	South African Medical Association NPC	(2020) 14.1
<i>SALJ</i>	South African Law Journal	Juta	(2021) 138.2
<i>TSAR</i>	Tydskrif vir die Suid-Afrikaanse Reg	Juta	(2020) 1

## Banking and finance law

**Broeckx, K and De Groote, B** 'The European Account Preservation Order (EAPO): A solution for cross-border seizure of bank accounts in the European Union' (2021) 1 *TSAR* 75.

## Children's Act

**Strode, A and Badul, C** 'Forms to capture child consent to surgical procedures: Time to focus on function rather than form' (2021) 14.1 *SAJBL* 20.

**Toohey, JD and Strode, A** 'A critical review of the South African legal framework on adolescent access to HIV prevention interventions' (2021) 14.1 *SAJBL* 16.

## Civil forfeiture

**Rhimes, M** 'Forfeiting proceeds: Civil forfeiture, the right to property and the Constitution' (2020) 138.2 *SALJ* 323.

## Civil law

**Njoko, TB** 'The admissibility of criminal findings in civil matters: Re-evaluating the *Hollington* judgment' (2021) 54 *DJ* 160.

## Competition law

**Munyai, PS** 'Suitability of the remedy of divestiture in non-merger cases: A South African perspective' (2021) 42.1 *Obiter* 84.

## Constitutional law

**Maseko, TW** 'The feasibility of the victims of corruption's claim for constitutional damages against corrupt public officials in South Africa' (2021) 54 *DJ* 127.

## Contract law

**Adams, F** 'Choice of Islamic law in the context of the wider *lex mercatoria*: An express choice of non-state law in contract' (2021) 1 *TSAR* 59.

**Obiri-Korang, P** 'Party autonomy: Promoting legal certainty and predictability in international commercial contracts through choice of law (justification)' (2021) 1 *TSAR* 43.

## COVID-19 - human rights

**Ibitoye, TR and Ajagunna, F** 'Sexual autonomy and violence against women in Nigeria: Assessing the impact of COVID-19 pandemic' (2021) 54 *DJ* 141.

## COVID-19

**Dhai, A** 'Access to COVID-19 vaccines as a global public good: A coordinated global response based on equality, justice and solidarity is key' (2021) 14.1 *SAJBL* 2.

**Staunton, C** 'ACT-Accelerator data governance framework: Balancing individual rights with the public interest in responding to COVID-19' (2021) 14.1 *SAJBL* 4.

## Criminal law and procedure

**Hector, S** 'Voluntary withdrawal in the context of attempt - a defence?' (2021) 42.1 *Obiter* 148.

**Neethling, J** 'Liability of police for investigation of rape' (2021) 1 *TSAR* 171.

## Customary marriages

**Bapela, MP and Monyamane, PL** 'The "revolving door" of requirements for validity of customary marriages in action - *Mbungela v Mkabi* [2019] ZASCA 134' (2021) 42.1 *Obiter* 186.

**Manthwa, TA** 'Towards a new form of



customary marriage and ignorance of precedence' (2021) 1 *TSAR* 199.  
**Sibisi, S** 'The juristic nature of *ilobolo* agreements in modern South Africa' (2021) 42.1 *Obiter* 57.

## Deceased estates

**Sonnekus, JC** 'Einde van gemeenskaplike boedel van 'n egpaar getroud in gemeenskap van goed en aanvang van uitwisende verjaring van tersake vordering val saam' (2021) 1 *TSAR* 184.

## Delictual law

**Zitzke, E** 'Transforming age-related capacity for fault in delict' (2020) 138.2 *SALJ* 367.

## Education law

**Arendse, I** 'Falling through the cracks: The plight of "over-aged" children in the public education system' (2021) 54 *DJ* 105.

## Environmental law

**Lemine, BJ** 'The efficacy of section 2(4)(l) of the National Environmental Management Act in the context of cooperative environmental governance' (2021) 42.1 *Obiter* 162.

## Fourth industrial revolution

**Njontini, MN** 'Disruptive technologies and the future of regulations - ICT regulatory structure(s) determined' (2021) 54 *DJ* 174.

## Germline editing

**Soni, S** 'The Brave New World: Should we tread down the path to human germline editing?' (2021) 14.1 *SAJBL* 24.

## Insurance law

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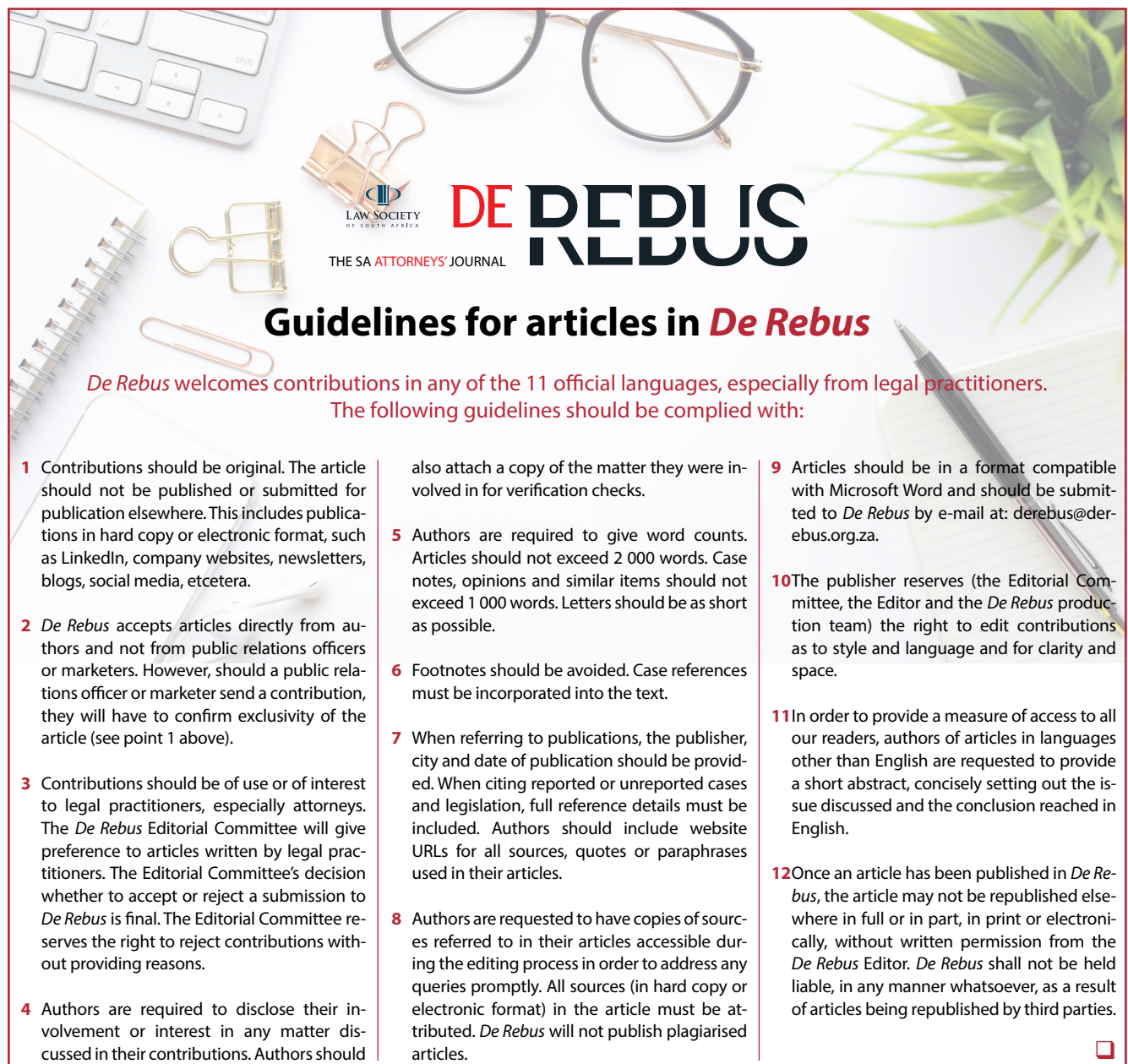
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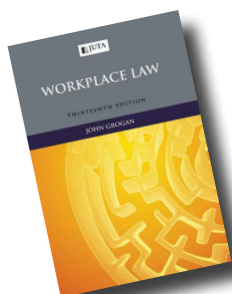
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# Book announcements



***Workplace Law***  
By John Grogan  
Cape Town: Juta  
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Price R 895 (including VAT)  
508 pages (soft cover)  
Also available as an e-Book.

This book provides a complete overview of issues that have arisen and are likely to arise on the shop floor, in court and in arbitration proceedings – from unfair labour practices, through employment equity, dismissal and collective bargaining, to strikes. Students, human resource and industrial relations practitioners, legal practitioners, employers, employees, and trade union officials will find this updated, comprehensive and reliable work a convenient and indispensable guide to a complex and fascinating area of law.



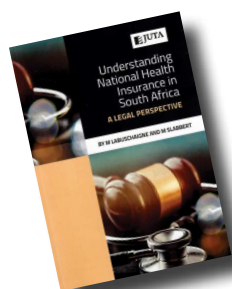
***Meetings – Laws, Rules, Procedures and Suggestions***  
By Pat Mahony  
Cape Town: Juta  
(2020) 1st edition  
Price R 225 (including VAT)  
102 pages (soft cover)

This book sets out the rules and procedures that apply to meetings so that the requirements are taken into account when planning meetings. Drawing on his extensive experience and personal professional conduct, the author provides suggestions to help facilitate the planning of meetings. All these suggestions are integrated with the legal requirements relating to meetings, so that compliance and smooth flowing conduct will be the result.



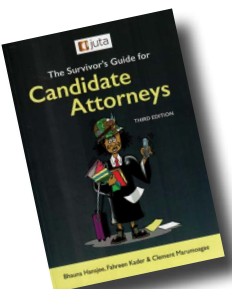
***Understanding the Conduct of Financial Institutions Bill***  
By Professor Daleen Millard  
Cape Town: Juta  
(2020) 1st edition  
Price R 299 (including VAT)  
232 pages (soft cover)

The Conduct of Financial Institutions Bill (COFI Bill) aims to regulate market conduct in the financial sector. The commentary in this book provides some background on the objectives of the COFI Bill and the way in which these objectives will be realised. In addition, it provides information on how the COFI Bill builds onto the Financial Advisory and Intermediary Services Act 37 of 2002 and evaluates new aspects of market conduct and the possible impact of the COFI Bill on the financial services industry.



***Understanding National Health Insurance in South Africa – A Legal Perspective***  
By M Labuschaigne and M Slabbert  
Cape Town: Juta  
(2020) 1st edition  
Price R 235 (including VAT)  
161 pages (soft cover)

National Health Insurance (NHI) aims to ensure that all South Africans have access to appropriate, efficient and quality health services. The right to health, as an economic, social and cultural right to a universal minimum standard of health to which all individuals are entitled, requires government action and that the state provides welfare to the individual. This book serves to inform stakeholders and communities of the key elements of the National Health Insurance, its structure, processes and plans for implementation.



***The Survivor's Guide for Candidate Attorneys***  
By Bhauna Hansjee, Fahreen Kader and Clement Marumoagae  
Cape Town: Juta  
(2021) 3rd edition  
Price R 575 (including VAT)  
304 pages (soft cover)

This book provides candidate attorneys with the practical information that they need when starting articles. The information in this guide bridges the gap between the university environment, where the emphasis is on theoretical knowledge, and the candidate attorney's new working environment, where the emphasis is on the practical, hands-on application of this knowledge and learning fast. It covers the candidate attorney's relationship with their principal, with counsel and clients, registering and ceding articles, issuing, serving and filing, the courts, how to prepare for applications and actions, being admitted as an attorney, ethics and etiquette.





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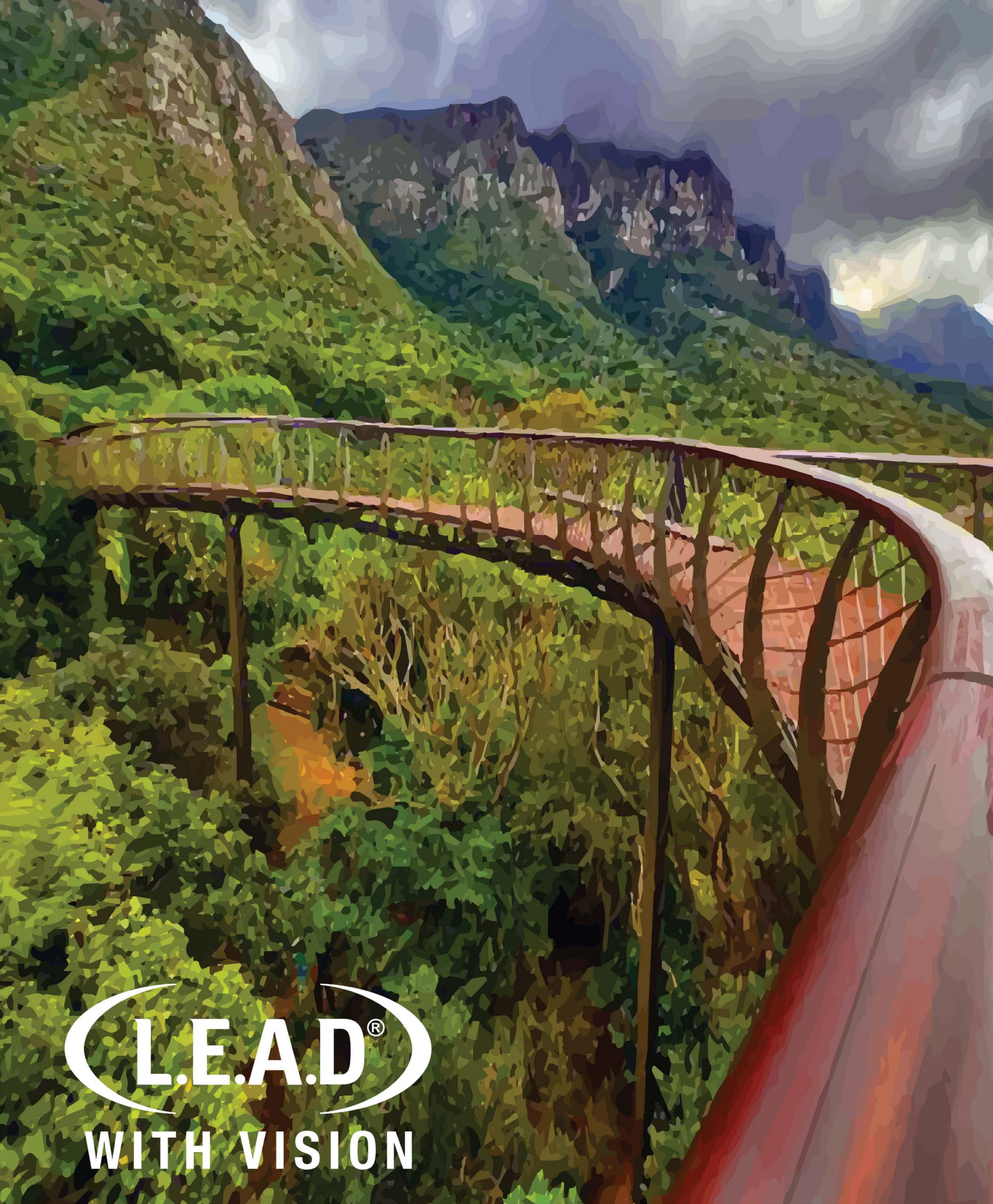
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