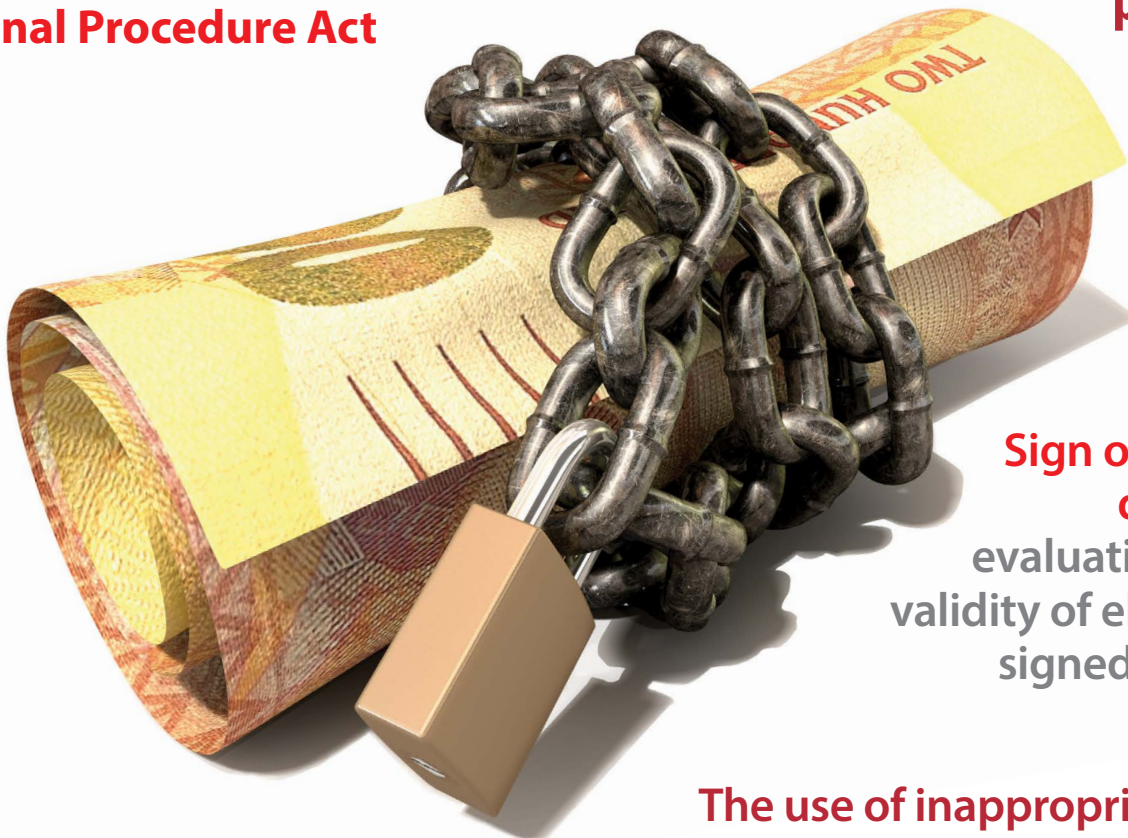


ADMINISTRATIVE MANOEUVRE: WHO CONDONES IRREGULAR EXPENDITURES IN THE PUBLIC SECTOR?

Exploring statutory requirements for private prosecution under the **Criminal Procedure Act**

Challenging the 'pay now, argue later' rule in the context of municipal property rates



Sign on the digital dotted line – evaluating the legal validity of electronically signed documents

The use of inappropriate language on workplace social media

Are companies liable for their employees' actions online?

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12 Administrative manoeuvre: Who condones irregular expenditures in the public sector?

Asset Management Director at the Northern Cape Treasury, **Gaopalelwe Walter Molelekwa**, explores the concept of 'relevant authority' to condone 'irregular expenditure' and asks who determines the relevant authority in terms of legislation. In his article, he notes any amendment to the Public Finance Management Act 1 of 1999 (PFMA) or its Treasury regulations should be tabled in Parliament for the legislature to adopt or reject the proposed amendments. Moreover, the fact that the National Treasury Instruction no 2 of 2019/20 had the effect of amending the PFMA, suggests it should have been tabled and adopted by Parliament, and by devolving the condonation function and powers to provincial treasuries, the Instruction Note could be legally flawed as not all condonation powers belong to the National Treasury as the relevant authority.

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16 Exploring statutory requirements for private prosecution under the Criminal Procedure Act

The prosecution regime envisaged by the Criminal Procedure Act 51 of 1977 (CPA) recognises three distinct forms of prosecution, namely: State, statutory and a *nolle prosequi* certificate. Furthermore, the legal framework for prosecution is established through the Constitution, the National Prosecuting Authority Act 32 of 1998 and the CPA. Legal consultant, **Sipho Nkosi**, writes that the right to prosecute for offences in respect of a trust account conducted by a legal practitioner is conferred by s 63(1)(i) of the Legal Practice Act 28 of 2014. However, the moment the Director of Public Prosecutions (DPP) takes over a private prosecution, it becomes a private prosecution and the DPP has no *locus standi* to institute a private statutory prosecution.

20 Sign on the digital dotted line – evaluating the legal validity of electronically signed documents

Digitalisation has taken over many economic activities and industries and is slowly finding its way into the legal system. From a legal perspective, several businesses are now concluding commercial transactions and contracts electronically. However, these new innovations have brought into question the legal validity of these transactions, particularly in relation to the electronic signing of documents. The COVID-19 pandemic has further prompted many companies to consider new ways of conducting business and electronic signatures have become an essential tool for concluding legal agreements. Legal practitioner, **Dr Ciresi Singh**, examines the legitimacy of electronic signatures and considers the legal validity and enforceability of e-signatures.



24 Are companies liable for their employees' actions online?

Social media has seen the intersection between workplace law and cyber law. This established relationship has gradually brought along with it risks to companies and businesses. Such as when an employee commits criminal or delictual conduct online against a party other than the employer, could place the employer in a precarious position. Candidate legal practitioner, **Luphumlo Mahlinza**, writes that delictual claims or damages arising from this kind of conduct may be attributable to the employer under the common law doctrine of vicarious liability. In order to deal with this exposure, Mr Mahlinza, provides a list of recommendations to minimise these risks.

26 Challenging the 'pay now, argue later' rule in the context of municipal property rates

If the municipality undertakes a general valuation of all the properties situated in your area, you will receive a notice from the municipality stating that your property has been valued at a set figure. In the event the valuation proposed by the municipality is far too high, you may object to the proposed valuation. If your objection fails, you could lodge an appeal. However, this process can take some time and pending the objection and appeal, the municipality will bill you based on its new proposed valuation. If you do not pay the full amount billed, your municipality will simply suspend municipal services such as electricity and water. Legal practitioner, **Francis Clerke**, asks what is the legal position in such a situation and is it possible to challenge the municipality on this?

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Amendments to note in the Recognition of Customary Marriages Act

For the past few months, the statistics from the *De Rebus* website have shown that the topic of customary marriages is one of the most read in the journal. *De Rebus* has published a myriad of articles that cover the intricacies involved with customary marriages. In this issue, on p 9, legal practitioner Terrance Maluleke writes that: 'Customary marriages contracted in terms of the RCMA [Recognition of Customary Marriages Act 120 of 1998] should enjoy equal status with valid civil marriages contracted in terms of the Marriage Act [25 of 1961] and Civil Union Act [17 of 2006].'

Mr Maluleke notes that: 'It does not make sense as to why the parties to valid monogamous customary marriages would be encouraged to transition to civil marriages, whereas the two types of marriages are of equal status and bear the same proprietary consequences. The Marriage Act and Civil Union Act do not make any provision that parties can change the marriage system to conclude a marriage in terms of the RCMA. The interpretation of s 10(1) of the RCMA seems to suggest a failure to fully recognise an equal status between customary and civil marriages. The section seems to prefer civil marriages at the expense of African customary marriages, despite the legislative recognition of the African customary marriages.'

The Recognition of Customary Marriages Amendment Act 1 of 2021, which aims to amend the RCMA to further regulate the proprietary consequences of customary marriages entered into before the commencement of the said Act commenced on 1 June 2021. The amendment states that:

Section 1 of the RCMA is amended by the substitution for the definition of 'traditional leader' of the following definition:

'traditional leader' means 'any person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position and is recognised in terms of the applicable legislation providing for such recognition'.

Section 7 of the RCMA is amended –

'(a) by the substitution for subsection (1) of the following subsection:

(1)(a) The proprietary consequences of a customary marriage in which a person is a spouse in more than one customary marriage, and which was entered into before the commencement of this Act,

[continue to be governed by customary law] are that the spouses in such a marriage have joint and equal –

(i) ownership and other rights; and
(ii) rights of management and control, over marital property.

(b) The rights contemplated in paragraph (a) must be exercised –

(i) in respect of all house property, by the husband and wife of the house concerned, jointly and in the best interests of the family unit constituted by the house concerned; and

(ii) in respect of all family property, by the husband and all the wives, jointly and in the best interests of the whole family constituted by the various houses.

(c) Each spouse retains exclusive rights over his or her personal property.

(d) For purposes of this subsection, "marital property", "house property", "family property" and "personal property" have the meaning ascribed to them in customary law; and

(b) by the substitution for subsection (2) of the following subsection:

"(2) A customary marriage [entered into after the commencement of this Act] in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage."

Transitional provisions

3(1) The provisions of section 2 of this Act do not invalidate –

(a) the winding up of a deceased estate that was finalised; or

(b) the transfer of marital property that was effected, before the commencement of this Act.

(2) The provisions of subsection (1) do not apply to the transfer of marital property where, at the time of such transfer, the person to whom the marital property was to be transferred, was aware that the marital property in question was subject to a legal challenge'.

In his keynote address on 21 March 2021 at the Inter-Ministerial Roundtable on the Draft Marriage Policy, Minister of Home Affairs, Dr Aaron Motsoaledi, noted that a Bill has been formulated to deal with the fact that currently, marriages in South Africa are regulated through three pieces of legislation. The new marriage legislation proposes the following approaches:



Mapula Oliphant – Editor

'Option 1: Is a Single Marriage Act, which has [a] unified set of requirements and consequences applying to all marriages. The difficulty in this approach is that it may have the unintended consequence of harmonising irreconcilable legal systems. In that sense it may not be suitable for the country's mixed legal system and might not pass constitutional muster.

Option 2: Is an Omnibus or Umbrella Act, which is a single Act that contains different chapters that reflect the current diverse set of legal requirements for and consequences of civil marriages, civil unions, customary marriages and other marriages that are not accommodated by the current legislation. It is a harmonisation of the existing marriage legislation which aims to remedy and eliminate conflicts between different legal systems although they are allowed their distinct recognition and continuation.

Option 3: ... Parallel Marriages Acts, which is the retention of the *status quo* that requires consideration. Although this option will generally be suitable for the country's mixed legal system, retaining the *status quo* would not be consistent with the transformative nature of the country's Constitution. This option will require enactment of more marriage legislation that must cater for marriages that are excluded by the current legislation.'

Until new legislation has been enacted, the RCMA will remain a hot topic in the journal. For more articles on the topic, legal practitioners are invited to search www.derebus.org.za



LETTERS

TO THE EDITOR

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

Candidate legal practitioners, find your balance

Starting off your legal career with articles of clerkship, or practical vocational training, is not easy. Luckily, you are not alone. The Cape Town Candidate Attorneys' Association (CTCAA) is a voluntary association committed to supporting candidate legal practitioners and making their two years a happy, healthy and successful experience.

For all candidate legal practitioners, whether at a large private firm, at Legal Aid South Africa or working with a sole practitioner, it is important to remember that there are many others with similar struggles and questions as you.

It is this community that the CTCAA was established for. The CTCAA is an organisation by candidate legal practitioners for candidate legal practitioners. It aims to bring candidate legal practitioners together and to help make those two years of hard work, as good as they can be.

With all the pressures faced by young professionals entering the legal sphere, it is important to ensure that you have a healthy routine in place. This will enable you to work sustainably throughout your busy two-year training contract. Taking some quiet time for contemplation or

making sure you squeeze in a weekly run is something, which will make the long hours more tolerable and more productive.

To help catalyse this healthy routine, the CTCAA is kick starting a brand-new wellness series with monthly events, which focuses on getting candidate legal practitioners exercising together. The first event of this series is a yoga event at Green Point Park in Cape Town.

Remember to work on getting that balance right, come join us to meet the legal minds of the future and rejuvenate after a long week.

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Savanna Kanzler is the Secretary and Head of Professional Development at the Cape Town Candidate Attorneys' Association.



Do you have an opinion or thought that you would like to share with the readers of *De Rebus* and the legal profession?

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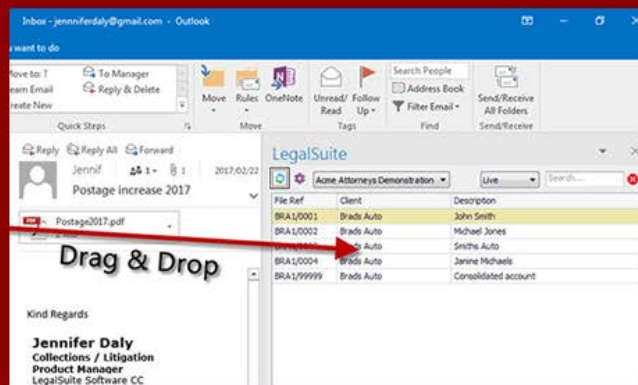
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By
Arniv
Badal

What are smart software solutions, and how do these benefit legal practitioners?

In the article titled 'The legal profession's focus on the future' 2020 (Nov) *DR* 4, I wrote about the effect that the sudden onset of the COVID-19 pandemic had on the operation and sustainability of legal practices and legal practitioners. I stated that this impact could decrease in the future should legal practitioners choose to savvy up to technology and modernise the way their legal practices are operated thereby reducing operating/overhead costs. One of the points raised was the benefit of employing smart software solutions. In this article, I take a closer look at the types of software solutions that have been created to promote efficiency and productivity specifically within the legal industry environment.

Types of legal practice software solutions available

• Productivity

These software solutions are most commonly deployed in the working world and are utilised heavily within the operation of a standard legal practice, whether it be for advice, court preparation, and preparation of conveyancing or any other similarly associated activity. Legal practitioners should take steps to facilitate the enhancement of staff productivity by deploying software solutions to assist with the ability for multiple users to work on the same documents in real-time from their separate locations. However, these solutions are not necessarily designed to be specific to the legal industry and assist with the general workflow of an organisation.

• Document management

The sheer quantity of documents required during certain legal matters can present a logistical difficulty, especially when there is more than one legal practitioner simultaneously engaged in a matter. Taking into account the approach of seeking a balance between working from home and physical office attendance, the ability for multiple people to engage seamlessly on matters is of utmost importance to establish enhanced productivity that is sustainable, as well as produce greater value for clients. A further advantage is the ability

to access the entirety of a file without any physical documents being present. Legal practitioners can employ the use of suitable and appropriate document management solutions to house large quantities of documents, files, and correspondence in a secure environment. This can be employed as a cloud-based solution, which would facilitate ease of access for multiple users, as well as eliminating the risk of file corruption due to things like power outages and interruptions. In addition to the current uses of document management systems, the implementation of the Protection of Personal Information Act 4 of 2013 places strict obligations on the management of personal information. Document management solutions will look to integrate these regulatory obligations in a manner that is compliant from the perspective of the legal practitioner.

• Password management

An aspect that is often forgotten is the importance of secure password management. In a legal practice, besides from the trust account, any variety of hardware and software solutions may require you to login using a password. If these hardware or software solutions are connected to the Internet, this poses a cyber-security risk to both the legal practitioner and to their clients. Legal practitioners who are looking to eliminate this type of risk could employ the use of a robust and tested password management software. These types of software allow a user to set highly complex passwords that would not be ordinarily used and store them within the password management software application. The user then accesses the password management software application when logging into their various accounts.

• Integrated billing and trust account management

This area is often difficult to manage on a manual system and the ability to track the amount of time spent on a matter is key to be able to bill clients correctly and efficiently for work done on relating matters, as well as to be able to maintain regulatory obligations of accurately accounting to clients. Legal practitioners have typically defaulted to a manual system of recording time, which can present inaccuracies.

In addition, the actual time spent to draw the bill increases the time spent on matters, and this 'billable time' is absorbed by the legal practice as essentially an operating cost. Legal practitioners who are faced with these types of problems could consider timekeeping/billing software solutions to be able to record time spent on tasks as they are completed and to employ a solution to cater for the specific needs of that legal practice. An additional integration of a trust account management system would ensure that amounts billed, and amounts received are automatically reconciled and displayed in a manner that is easily accessible.

• Practice management

Legal practice management solutions operate by combining aspects of technologies in a type of all-in-one solution. Legal practitioners that are considering the migration from a manual operating system (so to speak) to a digital transformation may be well served by first employing a dedicated legal practice management solution, which combine aspects of document management, accounting, and file-sharing in a sample portion of their business to ascertain the efficiencies gained by this. Once legal practitioners are comfortable with the usability and are able to see the benefit gained, it is possible to expand these systems to other areas of practice.

Conclusion

As stated previously, a failure to digitise a legal practice, or even aspects of it, could result in the loss of income, whether by having to turn away work, or due to the inability to accurately and efficiently track the quantity or amount of work conducted on a matter. Irrespective of whether legal practitioners choose to utilise a myriad of software solutions, or a single software solution, the decision to do so will be highly beneficial to the operation, sustainability, and growth of their legal practice.

Arniv Badal LLB (UKZN) is a Practitioner Support Supervisor in the Risk Management Department at the Legal Practitioners' Fidelity Fund in Centurion.



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By
Clarence
Mangena

Irrationality on consent or transfer on changing courts or jurisdiction as set out in the Magistrates' Court Act

The principle of equality does not require everyone to be treated the same, but simply that people in the same position should be treated the same. The government may, for various reasons, classify people and treat them differently. This is because it is not feasible to run the affairs of citizens without differentiation and classifications that impact on people differently (*Sithole and Another v Sithole and Another* 2021 (6) BCLR 597 (CC) at para 19). In my view, s 45(1) of the Magistrates' Courts Act 32 of 1944 (the Act), which deals with jurisdiction by consent of parties and s 50(1) of the same Act, which deals with removal of actions from court to provincial or local division, are both devoid of rationality insofar as the transfer of matters is concerned as will be shown below.

Positions of the plaintiff and the defendant

Litigants possess slightly differing rights and powers insofar as the conduct of the proceedings before court is concerned. The plaintiff is empowered to institute proceedings in any court subject to the jurisdictional limits – and the defendant may not tell the plaintiff where the latter should sue. Does this mean that a plaintiff who institutes proceedings in the magistrates' court is barred from transferring the matter to the High Court when new circumstances permit? As it stands, the plaintiff is barred from doing so unless the defendant concedes to such transfer. Section 45(1) of the Act reads:

'(1) Subject to the provisions of section 46, the parties *may consent in writing* to the jurisdiction of either the court for the district or the court for the regional division to determine any action or proceedings otherwise beyond its jurisdiction in terms of section 29(1)' (my italics).

The flaw in this section is that it requires both parties to consent – it fails to guard against the unreasonable refusal to consent by the defendant. Additionally, does it then mean if parties consent, judicial oversight is ousted? If the defendant does not agree with the plaintiff regarding the transfer, does this mean it is the end of the road for the plaintiff

because in any event, s 50(1) of the Act fails to assist? The requirement of joint consent and exclusion of on application to court by either party in s 45 creates a loophole.

Section 50(1) of the Act in the relevant parts read:

'Any action in which the amount of the claim exceeds the amount determined by the Minister from time to time by notice in the *Gazette*, exclusive of interest and costs, may, *upon application to the court by the defendant*, or if there is more than one defendant, by any defendant, be removed to the provincial or local division having jurisdiction where the court is held, subject to the following provisions –

(a) notice of intention to make such application shall be given to the plaintiff, and to other defendants (if any) before the date on which the action is set down for hearing;

(b) the notice shall state that the applicant objects to the action being tried by the court or any magistrate's court' (my italics).

From the reading of s 50, it grants the defendant(s) unfettered power of transfer to the exclusion of the plaintiff. Of course, in *Oosthuizen v Road Accident Fund* 2011 (6) SA 31 (SCA) the Supreme Court of Appeal (SCA) held '[t]here is no statutory equivalent for the plaintiff for an obvious reason. A plaintiff chooses the forum in which to litigate and must bear the consequences of doing so. A plaintiff, having instituted an action in the magistrates' court is, of course, free to change tack by abandoning the action in the lower court and commencing proceedings in a High Court with attendant costs implications' (at para 10).

The SCA further held that '[i]f there is a case in which it is necessary to fashion a constitutionally acceptable remedy because of the interests of justice, this is not it' (at para 27). It is worthy of note that the SCA in *Oosthuizen* was not called on to decide primarily, the constitutionality of s 50 of the Act, but had to determine whether, absent any statutory provision permitting transfer of an action to a High Court by a plaintiff, a court can exercise its inherent powers as set out in s 173 of the Constitution to order such transfer.

Are the sections irrational and therefore unconstitutional?

Section 45 does not adequately allow for a legal redress because it fails to allow a court to order transfer on application by either party instead it subjects such transfer to the joint consent of the parties, and this is irrational. On the other hand, the irrationality of s 50(1) lies with the fact that it provides that any action 'may, upon application to the court *by the defendant, or if there is more than one defendant, by any defendant*, be removed to the provincial or local division having jurisdiction where the court is held' (my italics). This is inconsistent with s 9 of the Constitution. The sections treat litigating parties differently absent any rational justification. A plaintiff who issues processes in the magistrates' court due to financial circumstances is debarred from transferring the same matter to the High Court, should new circumstances arise.

The provisions of the Act continue to treat litigating parties differently and unfairly albeit that a plaintiff may be correct in law not to institute a claim in the High Court during the initial stages of litigation. Should the plaintiff have additional evidence or information that justifies transfer the defendant may unjustifiably refuse. Circumstances of a case may change, and developments may occur to peg the jurisdiction of a High Court and the fact that the plaintiff is the 'master of its own proceedings' should not be a hill the plaintiff should die on.

Proposed remedy

All law is subject to the Constitution and must be consistent with it. What then is the appropriate proposed remedy in these circumstances? Can the current provisions of the Magistrates' Court Act be afforded a harmonious interpretation that will save them from severance? Noteworthy is that where a legislative provision is reasonably capable of a meaning that places it within constitutional bounds, it should be preserved. However, if the meaning and the preservation are not possible, one should then

resort to the remedy of reading in or notional severance (*Chisuse and Others v Director-General, Department of Home Affairs and Another* 2020 (6) SA 14 (CC) at para 55). Section 39(2) of the Constitution obliges every court, where reasonably possible, to interpret every statute in a manner that makes it consonant with the Constitution. Thus, a claimant who argues for a declaration of invalidity must not succeed if the impugned provision is reasonably capable of a meaning that is constitutionally compliant.

Here we are dealing with statutory provisions that acknowledge the differing positions of two litigants. Both sections do not pass the constitutional muster, their wording falls foul of the provisions of s 9 of the Constitution, especially the word 'everyone', which enjoins all citizens equal protection and benefit of the law. The appropriate remedy will, therefore, be to afford a reading-in to the above provisions. The other relevant parts still remain relevant, the only thing that makes the provisions inconsistent

with the Constitution is the omission of the plaintiff and/or the defendant on each transfer avenue without any rational justification. There is no justifiable limitation where one party is empowered more than the other especially if the parties are on the same footing.

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By
Terrance
Maluleke

Failure to recognise equal status between customary and civil marriages

Before South Africa (SA) became a democratic country and during the Apartheid era, marriages of indigenous African people were concluded in accordance with indigenous African customs, and were not recognised as valid marriages in SA. The then legal system of SA only recognised civil marriages as valid marriages in SA.

The Marriage Act 25 of 1961 was promulgated to regulate the requirements, solemnisation, registration, and dissolution of civil marriages. The Marriage Act was a codification of Western customary marriages.

The Recognition of Customary Marriages Act 120 of 1998 (RCMA) was promulgated and it came into effect on 15 November 2000. The RCMA has been compiled in line with the indigenous African customs. The primary purpose of the Recognition of Customary Marriages Act is to acknowledge and recognise the customary marriages of black South Africans, which marriages have been and are to be entered into in accordance with the indigenous customs of the parties to the marriage.

Through the RCMA, the marriages of indigenous Africans were recognised for the first time in SA. The Act prescribed the requirements for a valid customary marriage, the proprietary consequences, and the dissolution of the customary marriages.

The status of civil versus customary marriages (monogamous)

Both civil marriages and monogamous customary marriages are automatically in community of property and of profit and loss unless parties elect to conclude an antenuptial contract.

The Constitutional Court (CC) has ordered that the proprietary consequences of monogamous customary marriages, through retrospective application of the RCMA are automatically marriages in community of property and of profit and loss. Reference is made to the case of *Gumede v President of the Republic of South Africa and Others* 2009 (3) BCLR 243 (CC).

In the matter of *AS and Another v GS and Another* [2020] 2 All SA 65 (KZD), Madondo DJP declared the provisions of s 21(2)(a) of the Matrimonial Property Act 88 of 1984 unconstitutional and invalid to the extent that they maintain and perpetuate the discrimination created by s 22(6) of the Black Administration Act 38 of 1927, in that the marriages of black couples entered into under the Black Administration Act before 1988, are automatically out of community of property.

Both civil and customary marriages in SA currently enjoy equal status insofar as the recognition, proprietary consequences and the dissolution thereof. The

CC has cemented an equal status of the monogamous customary marriages to civil marriages.

Both marriages can only be terminated by death or by divorce in terms of the Divorce Act 70 of 1979.

African customary marriages bow to Western customary marriages

Section 10 of the RCMA reads as follows: 'Change of marriage system –

(1) A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act [25 of 1961], if neither of them is a spouse in a subsisting customary marriage with any other person.'

Section 10(1) of the RCMA provides for the change of the marriage system. It should be noted that the term 'marriage system' is not referring to the proprietary consequences of the marriage. It specifically directs that people who are parties to a valid customary marriage (monogamous marriages) may change the marriage system from customary to civil marriages in terms of the Marriage Act.

Civil marriages contracted in terms of the Marriage Act or Civil Union Act 17 of 2006 are automatically marriages in community of property and of profit and loss, unless specifically excluded by the antenuptial contract.

It must be noted that monogamous customary marriages under the RCMA are also automatically marriages in community of property and of profit and loss, unless specifically excluded by the antenuptial contract.

Therefore, there is equal status between the two types of marriages, as well as the propriety consequences created therefrom.

The practical application of s 10 of the RCMA

The legislation promotes and encourages parties in valid monogamous customary marriages to abandon their valid marriages and to conclude second marriages under Western customs. Marriages under Western customs have always been considered the only valid marriages in SA.

The practical application of s 10 is strictly an 'upgrade' from a marriage of an inferior status to the opposite. If it was not an upgrade, the Act would call for the termination of the customary

marriage in order to contract a civil marriage.

It does not make sense as to why the parties to valid monogamous customary marriages would be encouraged to transition to civil marriages, whereas the two types of marriages are of equal status and bear the same propriety consequences.

The Marriage Act and Civil Union Act do not make any provision that parties can change the marriage system to conclude a marriage in terms of the RCMA.

The interpretation of s 10(1) of the RCMA seems to suggest a failure to fully recognise an equal status between customary and civil marriages. The section seems to prefer civil marriages at the expense of African customary marriages, despite the legislative recognition of the African customary marriages.

It should be noted that parties are still at liberty to choose any type of marriage they might wish to contract, under any law that suits their liking. It is, however, an injustice and deliberately undermines

the RCMA if parties thereof can be encouraged to abandon their marriage and be allowed to conclude other marriages without firstly terminating the valid existing customary marriages.

Recommendations

Customary marriages contracted in terms of the RCMA should enjoy equal status with valid civil marriages contracted in terms of the Marriage Act and Civil Union Act.

A direct transition from customary marriage to civil marriage should be abolished forthwith.

The equal status of all marriages should be emphasised, and a campaign of public awareness be launched.

Lastly, s 10(1) of the RCMA should forthwith be repealed.

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By Kayaletu Tshiki and Lindokuhle Ndinisa

The old is gone embrace the new

The coming into effect of the Legal Practice Act 28 of 2014 (LPA) has brought along necessary changes in governing legal practitioners and harmonising the profession. However, the scope of this article is not to discuss such changes in detail, except those brought about by s 25(3) of the LPA. Prior to discussing these changes, we turn and examine the extent and scope of legal practitioner's right to appear in the superior courts.

Such a right was found in the Right of Appearance in Courts Act 62 of 1995, now repealed. Section 4(2) of the Right of Appearance in Courts Act, stipulated that: 'An application by an attorney to appear in the Supreme Court, shall be in writing, shall be signed by him or her and shall be accompanied by –

- (a) documentary proof that he or she has satisfied all the requirements for –
 - (i) the degree *baccalaureus legum* of any university in the Republic; or
 - (ii) a degree of any university in a des-

ignated country in respect of which a university in the Republic with a faculty of law has certified that the syllabus and standard of instruction are at least equal to those required for the degree *baccalaureus legum* of a university in the Republic; or

(iii) a degree which is the equivalent of the *baccalaureus legum* degree and in respect of which an exemption contemplated in section 2 of the Recognition of Foreign Legal Qualifications and Practice Act [114 of 1993], has been granted; or

(b) a certificate issued by the secretary of the law society of which the applicant is a member, to the effect that the applicant has been practicing as an attorney, or has been performing community service as an attorney at any law clinic, for a continuous period of not less than three years; and

(c) a certificate signed by the secretary of the said law society to the effect that no proceedings to strike the applicant's name off the roll of attorneys, or to sus-

pend him or her from practice as an attorney, have been instituted by that law society.

(2) If the registrar is satisfied that an application referred to in subsection (1) complies with the provisions of this Act, he or she shall issue a certificate to the effect that the applicant has the right of appearance in Supreme Court.'

Section 25(3) of the LPA, provides a similar procedure, for attorneys to enjoy the right to appear in the superior courts. However, it is important to note the new dispensation created under s 25(3) and r 20.6 of the Rules made under the authority of ss 95(1), 95(3) and 109(2) of the LPA, have extended the right to all superior courts, including the Supreme Court of Appeal, and the Constitutional Court.

Whereas s 4(2) of the Right of Appearance in Courts Act limited this right to the division in which the attorney was admitted. Section 4(2) must be read with s 20 of the repealed Attorneys Act 53 of 1979, for a proper interpretation of s 4(2) (see *ABSA Bank Ltd v Barinor New Business Venture (Pty) Ltd* 2011 (6) SA

225 (WCC) and *Liberty Group Ltd v Singh and Another* 2012 (5) SA 526 (KZD)). In our opinion the court has correctly interpreted s 4(2) by reading in s 20 of the Attorneys Act, this interpretation enables the attorney to discharge the functions of an advocate to sign pleadings and to also appear in any of the divisions of the High Court in the Republic, Supreme Court of Appeal and the Apex Court.

Interpretation of r 18(1) of the Uniform Rules of Court

Rule 18(1) clearly requires that pleadings, if not signed by a party instituting legal proceedings or defending personally, be signed by an advocate in tandem with an attorney with a right of appearance in the High Court. In order for attorneys to be able to sign pleadings, *inter alia*, a combined summons they must first be issued a certificate by the registrar qualifying them as an attorney with the right of appearance in the High Court.

In our opinion, the proper reading of r 18(1) must be read in conjunction with s 25(3) of the LPA, instead of the repealed s 4(2) of the Right of Appearance in Courts Act. The erroneous use of a repealed Act by legal practitioners when signing pleadings constitutes an irregularity and/or is an irregular step, which might attract an application in terms of

r 30 of the Uniform Rules and should such application be brought the only remedy for the defaulting litigant is to apply for condonation in terms of r 27(3) of the Uniform Rules (see *Khumalo and Others v Nedbank* (GP) (unreported case no 37984/2017, 14-12-2017) (Kubushi J)).

More often than not, defaulting litigants will rely on r 18(1), which makes reference to s 4(2) of the repealed Act in asserting the right to sign pleadings. We contend that such reliance on the section mentioned in the rule is insufficient when it is not read in tandem with s 20 of the repealed Attorneys Act. Therefore, in this new dispensation of the LPA it becomes a necessity rather than an option to assert a right to sign pleadings on s 25(3) read with r 20.6.

It is a general rule that the summons and particulars of claim issued must cite the attorney signing the pleadings that he or she has a right of appearance in the High Court, in accordance with r 18(1). The use and interpretation of this rule constitutes an irregularity as it is continuously cited as primordial law, which has no effect in the new dispensation.

Conclusion

The crux of our contention is not in the existential right of the attorneys to appear in any division and/or SCA and the Constitutional Court, but the use of the old certificate to sign pleadings by an at-

torney asserting such right from the repealed s 4(2) of the Right of Appearance in Courts Act. We contend that reference to this section renders the pleading irregular, when properly construed such a reference is based on the certificate granted in terms of the repealed Act. Further, r 18(1) gives reference specifically to s 4(2), which is not enough when not interpreted with s 20 of the repealed Attorneys Act that extends the right of appearance to sign pleadings in other divisions of the High Court.

In conclusion, if our interpretation of s 25(3) of the LPA is correct, that the use of the old certificate, with reliance on repealed legislation renders the pleadings and its summons irregular (irregular step). We propose an amendment of r 18(1) in as far as it references s 4(2) of the Right of Appearance in Courts Act and replaces it with s 25(3) of the LPA.

- See also Vuyo Mkwibiso 'Right of attorneys to appear in court: What rights have been extended?' 2012 (Sept) *DR* 18.

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Administrative manoeuvre: Who condones irregular expenditures in the public sector?

Picture source: Gallo Images/Getty



By
Gaopalelwe
Walter
Molelekwa

Central to this article is the concept of 'relevant authority' to condone 'irregular expenditure' and to determine who that relevant authority is in terms of legislation.

In terms of para 3 of the National Treasury Circular 2005 'Irregular Expenditure' (www.treasury.gov.za, accessed 10-7-2021) condonation of irregular expenditure requires an *ex post facto* approval and such approval can only be given by the State Tender Board as the relevant authority.

Legislative prescripts

Section 1 of the Public Finance Management Act 1 of 1999 (PFMA) defines 'irregular expenditure' as expenditure incurred in contravention of any applicable legislation including the PFMA and any provincial legislation providing for government procurement procedures.

Regulation 9.1.5 of the Treasury Regulations for departments, trading entities, constitutional institutions and public

entities 2005, states that amounts of irregular expenditure 'must be disclosed as a note to the annual financial statements of the institution' and be dealt with in terms of reg 12 of the Treasury Regulations. Regulation 12 among others, deals with the management of losses and claims including claims by the state against officials where the latter incurred among others irregular expenditure, as well as the condonation of that irregular expenditure if the amount is irrecoverable.

The PFMA lists the powers and functions of the National Treasury and provincial treasuries in ss 18 and 76 respectively.

Section 76(b) of the PFMA deals with 'the recovery of losses and damages', this power or function is explicitly missing under s 18 of the PFMA. Therefore, by inference the legislature never intended these powers and functions to be equally afforded to provincial treasuries in comparison to the National Treasury. For example, the National Treasury Guideline on Irregular Expenditure 2014 (www.treasury.gov.za, 10-7-2021) at para 39, issued by the Office of the Accountant-General, reflects that the sole power to condone expenditure in contravention of Treasury Regulation 16A6.1 is given to the National Treasury as the relevant authority.

Relevant authority in some government procurements will include the State Information Technology Agency (SITA), Construction Industry Development Board (CIDB) and other such like statutory bodies including, the Department of Public Service and Administration (DPSA) where human resource expenditure is concerned. Until that power of relevant authority to condone irregular expenditure is legally transferred from these institutions to the National Treasury the latter cannot usurp that power from them.

The National Treasury is established by s 5 of the PFMA as empowered by s 216 of the Constitution. The Minister of Finance is the head of the National Treasury and takes policy and other decisions of the National Treasury. In terms of s 55 of the Constitution the PFMA – as a piece of legislation – is enacted by the National Assembly therefore, any amendment to the PFMA or its Treasury regulations should be tabled in Parliament for the legislature to adopt or reject the proposed amendments. By implication, legislative amendments to the PFMA should be brought to the attention of the Minister as the head of National Treasury and be tabled by the Minister in the National Assembly for ratification.

Therefore, it is argued that the National Treasury Instruction no 2 of 2019/20 (www.treasury.gov.za, accessed 10-7-2021) devolving the condonation function and powers to provincial treasuries could be legally flawed because, as seen above, not all condonation powers belonged to the National Treasury as the relevant authority. Briefly, I submit that one cannot delegate or devolve legal powers and functions that one never had. This argument was solidified by the decision in *Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Smith* 2004 (1) SA 308 (SCA) at para 31, when the court held that an ‘administrative authority has no inherent power to condone failure to comply with a peremptory requirement. It only has such power if it has been afforded the discretion to do so.’

I submit that the delegation of powers and functions also amends ss 18 and 76 of the PFMA, which action requires processes of the National Assembly related to amending legislation and not the ‘discretion’ of an administrative authority.

We must acknowledge herein, that there is indication, as from the time of the tender boards, that some condonation powers were delegated to provincial treasuries, however, the major power to condone irregular expenditure remained with the National Treasury as envisaged by s 76(b) of the PFMA, especially where the procurement breached supply chain management legislative prescripts. How-

ever, only the irregular expenditure condonation power, which was legislatively afforded to the National Treasury by s 76(b) (ie, procurement of goods and services excluding technology equipment, and procurement through CIDB), remained with the National Treasury as the relevant authority.

The Constitution and related case law

In terms of s 2 of the Constitution, the Constitution is the supreme law of South Africa and law or conduct inconsistent with it are invalid.

Instruction Notes issued in terms of the law by the National Treasury or provincial treasuries are legislative prescripts, hence they are subject to the provisions of the Constitution. Therefore, by inference, Instruction Note no 2 of 2019/20 must be consistent with the Constitution, which holds that Parliament makes, amends and repeals enacted legislation. I submit that this Instruction Note has the effect of amending the PFMA and should have been tabled and adopted by Parliament.

Administrative action

The court in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) at para 437 held that it is impermissible to rely directly on constitutional provisions when particular legislation has been enacted to give effect to the Constitution. In this case, I submit that the Promotion of Administrative Justice Act 3 of 2000 (PAJA) is the relevant legislation enacted to address the issue of administrative action. Section 1 of PAJA defines an ‘administrative action’ as any decision taken by an organ of state, when ‘exercising a public power or performing a public function in terms of any legislation’. Therefore, the decision of the accounting officer for the National Treasury to devolve the condonation function to provincial treasuries is an administrative action.

In the article below, I will dissect s 1 of PAJA as it defines an administrative action in relation to the relevant authority to condone irregular expenditure and the devolvement of the condonation powers to provincial treasuries:

• A decision or failure to make a decision of an administrative nature

The court in *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) at paras 22 and 24 held that:

‘At the core of the definition of administrative action is the idea of action (a decision) “of an administrative nature” taken by a public body or functionary.

...

Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so. Features of administrative action ... that have emerged from the construction that has been placed on s 33 of the Constitution are that it ... [is] the conduct of the bureaucracy ... in carrying out the daily functions of the state, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.’

By implication, the decision of the accounting officer for the National Treasury to delegate the condonation function to provincial treasuries is an administrative action.

• By an organ of state or a natural or juristic person

The court in *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC) at para 40 held that ‘[o]ur Constitution ensures ... that government cannot be released from its ... rule of law obligations simply because it employs the strategy of delegating its functions to another entity.’

The National Treasury is an organ of state and a functionary because it must ‘promote the national government’s fiscal policy framework and the co-ordination of macro-economic policy’.

• Exercising a public power or performing a public function

The court in *Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another* 2010 (5) SA 457 (SCA) at para 25 to 31 defined what constitutes exercising a public power and outlined the four factors in determining such account, which ‘include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.’

The National Treasury as a publicly funded national department is centrally controlled as it reports to the Minister of Finance. There is public interest in the condonation of irregular expenditure because its reduction reflects accountability and consequence management in the public sector.

Therefore, should the devolvement of condonation of irregular expenditure be found to be erroneous and illegal as argued in this article, that would be in contravention of s 33(3)(c) of the Constitution, which provides that national legislation must promote an efficient administration. Therefore, as provided by s 3(1) of PAJA this decision will adversely affect the reasonable expectations of the departments and the public because

they will erroneously sit with the belief that the irregular expenditure is appropriately condoned by the relevant authority when the contrary is the reality, hence promoting an inefficient administration.

In the *Calibre* case at paras 54 to 60 in deciding if an administrative decision is an administrative action is just, the court will look at the –

- lawfulness of that decision;
- procedural fairness of that decision;
- reasonableness of that action; and
- reasons provided for that administrative action.

There are no reasons provided for Instruction Note no 2 of 2019/20 and the legality thereof is questionable, hence, the administrative action cannot be said to be fair or reasonable.

Findings and recommendations

It is found that Instruction Note no 2 of 2019/20 has the effect of amending the PFMA, hence I submit that it should have

been tabled and adopted by Parliament.

This Instruction Note was issued by an administrative authority, and I submit that they acted *ultra vires* because they were not afforded the discretion to amend legislation outside Parliament.

Condonations that have been and will be issued by provincial treasuries when tested may be found to be illegal and a misrepresentation to the public and the departments because they were not approved by the relevant authority.

Instruction Note no 2 of 2019/20 illegally usurped and delegated condonation powers that National Treasury never had (SITA, DPSA and CIDB etcetera), hence it is recommended that it be reviewed and retracted.

Conclusion

It is concluded that the relevant authority to condone irregular expenditure remains the National Treasury, specifically where the contravention was against statutory procurement prescripts.

The court in *Pharmaceutical Manufac-*

turers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) at para 90 held that it is a requirement of the rule of law that the exercise of public power by the executive or functionaries should not be arbitrary. Therefore, the decisions must be rational to the purpose for which the power was given.

It is thus concluded that Instruction Note no 2 of 2019/20 does not pass the constitutional scrutiny, hence, I submit that it must be reviewed and reversed, and the delegation be done in accordance with the rule of law and constitutional guidance of amending the law.

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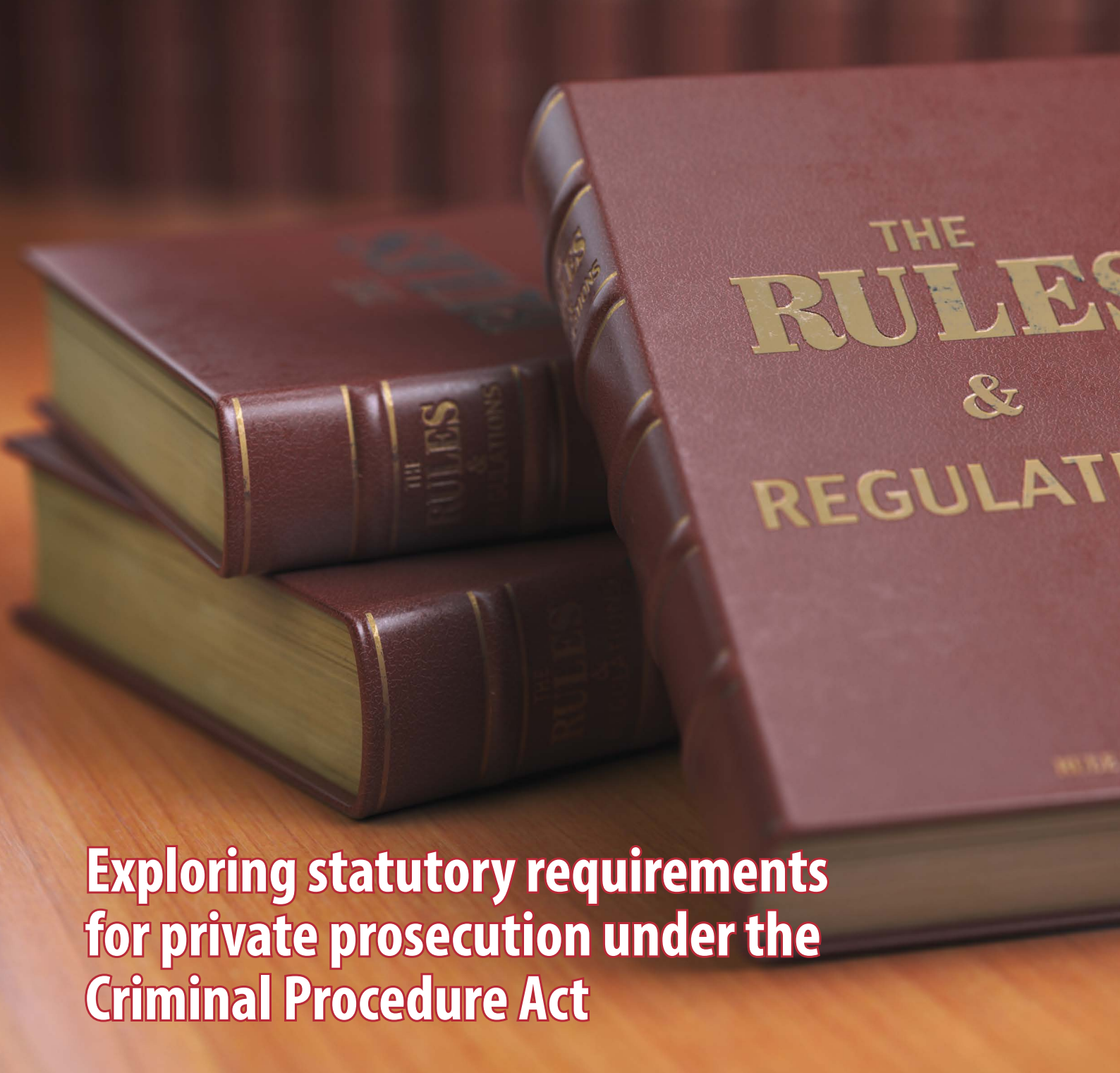
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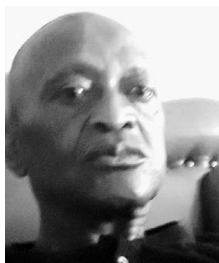
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Exploring statutory requirements for private prosecution under the Criminal Procedure Act



By
Sipho
Nkosi

The type of prosecution permissible when instituting and conducting prosecution for offences under the Legal Practice Act 28 of 2014 (LPA) or regulations made thereunder, is determined by the provisions of ss 6 and 8 of the Criminal Procedure Act 51 of 1977 (CPA) read with s 63(1)(i) of the LPA. The prosecution regime envisaged by s 6 of the CPA recognises three distinct forms of prosecution in our current legal system. They are the state, statutory, and on certificate *nolle prosequi* (*National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another (Corruption Watch as amicus curiae)* 2017 (4) BCLR 517 (CC)).

The legal framework for prosecution is established through the Constitution, the National Prosecuting Authority Act 32 of 1998 (NPA Act) and the CPA. State prosecution is governed by the Constitution and the NPA Act. Section 179 of the Constitution provides for a 'single national prosecuting authority in the Republic, structured in terms of an Act of Parliament' and empowers the prosecuting authority to 'institute criminal proceedings on behalf of the state'. Section 20 of the NPA Act gives effect to that power. The powers conferred by s 20(1) of the NPA Act relate to a prosecution instituted on behalf of the state (*National Society for the Prevention of Cruelty to Animals* at para 31).

'[I]n South African law, there are two

Picture source: Gallo Images/Getty

Private prosecution on certificate *nolle prosequi* (s 7 of the CPA)

'In any case in which a [DPP] declines to prosecute for an alleged offence –

(a) any private person who proves some substantial and peculiar interest in the issue ... arising out of some injury which he individually suffered in consequence of the commission of the said offence;

(b) a husband, if the said offence was committed in respect of his wife;

(c) the wife or child or, if there is no wife or child, any of the next of kin of any deceased person, if the death of such person is alleged to have been caused by the said offence; or

(d) the legal guardian or curator of a minor or lunatic, if the said offence was committed against his ward, may, subject to the provisions of section 9 and section 59(2) of the Child Justice Act [75 of 2008], either in person or by a legal representative, institute and conduct a prosecution in respect of such offence in any court competent to try that offence'.

In *Mullins and Meyer v Pearlman* 1917 TPD 639 at 645 the court opined that the private prosecutor must show actual damages suffered. In *Ellis v Visser* 1954 (2) SA 431 (T) at 436-438, the full court in the Transvaal Provincial Division opined that 'injury ... must be construed ... in its legal sense' to mean 'an invasion of a legal right', 'an actionable injury'. If all that the private prosecutor can say 'amounts to little more than that his feelings have been outraged and his good name injured,' it should be interpreted restrictively. If the private prosecutor has no civil remedy, if he has suffered no actionable wrong then he has no title to prosecute, even if he has suffered prejudice. Furthermore, 'interest in the issue of the trial' means a direct interest.

'The decision to institute a private prosecution under s 7 is entirely that of the private prosecutor to be properly taken only when he is able to meet the jurisdictional requirements for a private prosecution. A certificate is issued for a specific offence. It has a lifespan of three months after which it lapses. This helps to enhance certainty and prevent abuse of private prosecution. The court may interdict a private prosecution on various grounds including the private prosecutor's lack of *locus [standi]* and under the Vexatious Proceedings Act 3 of 1956. ... In exercising its discretion the prosecuting authority must have regard to the nature and seriousness of the offence, the interests of the victim and the broader community and the circumstances of the offender' (*Nundalal v Director of Public Prosecutions KZN and Other (KZP)* (unreported case no AR723/2014, 8-5-2015) (Pillay J) at para 21-23).

Private prosecution on expressly conferred right (s 8 of the CPA)

'It has been argued that a private prosecution under section 8 "is not a true 'private prosecution' even though it is identified as a 'private prosecution' in the Criminal Procedure Act" (Mujuzi (*op cit*) at 143). A body or a person who intends exercising a right of prosecution under subs (1), shall exercise such right only after consultation with the DPP concerned and after the DPP has withdrawn his right of prosecution in respect of any specified offence or any specified class or category of offences with reference to which such body or person may by law exercise such right of prosecution. In such a case, the DPP withdraws their right to prosecute and allows a statutory body or an individual to prosecute certain offences. Section 8 requires that the right to private prosecution be 'expressly conferred by law' (*National Society for the Prevention of Cruelty to Animals* at para 32).

In situations where the legislation establishing a statutory body is vague on the question whether such a body may institute private prosecutions, the Constitutional Court interpreted that legislation so as to permitting the statutory body to institute private prosecution (see *National Society for the Prevention of Cruelty to Animals*). Section 63(1)(i) of the LPA expressly confers the right, 'through any person authorised thereto in writing by the chairperson of the Board, to institute a prosecution for the misappropriation or theft of property or trust money, and the provisions of the laws relating to private prosecutions apply to such prosecution as if the Board is a public body'.

Section 179(2) of the Constitution entrenches the power to institute criminal proceedings on behalf of the State. 'Foreshadowed in subsection 3 is national legislation to detail the implementation of the exercise by the prosecuting authority of its powers and its functions. National legislation prescribes its obligations when a person seeks a private prosecution' (*Nundalal* at para 30). The statutory requirements for a private prosecution in s 8 are peremptory and must be strictly adhered to ensure a fair trial (*Nundalal* at para 32). The DPP might even intervene by way of application to stop a prosecution so that the state can commence or continue the prosecution (Mujuzi (*op cit*)).

Statutory prosecutions are conducted by public bodies or authorities, and they remain under the control of the DPP. The statutory private prosecutor under s 8 of the CPA cannot stop a prosecution without the DPP's consent (s 6(b)). Private prosecutions are a departure from

types of private prosecutions. First, private prosecution by an individual under section 7 of the [CPA] on the basis of a certificate issued by the Director of Public Prosecutions (DPP) – which is the focus of this article; and, secondly, private prosecution by statutory right under section 8 of the [CPA]. The latter type of private prosecution can be undertaken by both natural and juristic persons on the basis of specific pieces of legislation and requires no certificate from the DPP. In such a case, the DPP withdraws his right to prosecute and allows a statutory body or an individual to prosecute certain offences' (Prof Jamil Ddamulira Mujuzi 'The history and nature of the right to institute a private prosecution in South Africa' (2019) 25(1) *Fundamina* 131).

the basic law that criminal prosecutions must be conducted by a public prosecutor. '[A] decision by a [statutory body] to conduct a private prosecution has to be authorised ... ; if not, the prosecution is invalid' (Mujuzi (*op cit*) at 133).

Section 10 of the CPA provides:

'(1) A private prosecution shall be instituted and conducted and all processes in connection therewith issued in the name of the private prosecutor.

(2) The indictment, charge-sheet or summons, as the case may be, shall describe the private prosecutor with certainty and precision and shall, except in the case of a body referred to in section 8, be signed by such prosecutor or his legal representative'.

The provisions of ss 8 and 10 are mandatory and must be adhered to ensure a fair trial. 'Irrespective of whether the prosecution is public or private, for a fair trial an accused cannot be expected to mount any defence other than to stave off a conviction. Anything else would amount to shifting the goalposts in a private prosecution thus creating uncertainty about what standard an accused must meet. A standard that differs between public and private prosecution and from one private prosecution to the next will not be a foundation for a fair trial' (Nundlal at para 47). 'A criminal prosecution, private or public, has consequences potentially invasive and destructive of an accused's substantive rights to, among other things, personal freedom and security and the rights to a fair trial, of which the right to be informed of one's accuser and the nature of the accusations are paramount' (Nundlal at para 30). Consequently, the

obligation to satisfy the jurisdictional prerequisite of a statutory prosecution is fundamental to the rights of an accused to a fair trial. '[A]n accused in a private prosecution has the same rights as an accused in a public prosecution' (Mujuzi (*op cit*) at 156).

'The [CPA], by necessary implication, accepts that there may be a difference in approach towards attaining a conviction through a private prosecution and a public prosecution' (*S v Tshotshoza and Others* 2010 (2) SACR 274 (GNP) at para 7). Section 9 requires of a private prosecutor to furnish security as determined by the Minister and over and above that, in an amount determined by the court in respect of the accused's costs, which amount may be increased from time to time. Section 16 specifically provides that an accused in a private prosecution may be entitled to a favourable order in case of an unsuccessful prosecution. In the case of public prosecution, the accused is not entitled to an order for costs on his acquittal.

'In terms of section 20(1) of the [NPA] Act the power to institute criminal proceedings, to carry out the necessary functions and to conduct or discontinue them vests in the prosecuting authority' (*Tshotshoza* at para 16). In terms of s 20(5) of the NPA Act any prosecutor shall be competent to exercise any of the powers referred to in subs (1) to the extent that they have been authorised thereto by the National Director or by a person designated by him. In s 20(6) it is specifically provided that the written authorisation shall state the area of jurisdiction, the offences and the court or courts in respect of which such powers may be exercised. The powers to prosecute envisaged in ss 6 and 8 of the CPA

are distinct and non-contemporary. The powers that vest in terms of s 20 of the NPA Act do not supersede but complement the powers that vest in terms of s 8 of the CPA (*National Society for the Prevention of Cruelty to Animals* at para 32).

The institution of a public prosecution for an offence, where the right to institute criminal prosecution is expressly conferred by law, is accordingly untenable and impermissible. The right to prosecute for offences in respect of a trust account conducted by a legal practitioner is expressly conferred by s 63(1)(i) of the LPA. Mujuzi (*op cit*) argues that the moment the DPP takes over a private prosecution, it becomes a public prosecution. The DPP has no *locus standi* to institute a private statutory prosecution. '[T]he right to a fair trial in terms of section 35(3) of the Constitution includes the right to a prosecutor that acts and is perceived to act without fear, favour or prejudice' (*Bonugli v Deputy National Director of Public Prosecutions and Others* (T) (unreported case no 17709/2006, 1-2-2008) (Du Plessis JJ)). If the prosecution succeeds in disguising private prosecution as a public prosecution, the accused has all the more reason to harbour the perception that the prosecutor is biased (see the *Tshotshoza* case). Consequently, public prosecution for an offence where the right to prosecute is expressly conferred by law, is procedurally impermissible.

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Sign on the digital dotted line – *evaluating the legal validity of electronically signed documents*



By Dr
Ciresh
Singh

The advent and advancement of technology, in particular: The digitalisation of commerce and normal working methods, have created a new era of the ‘digital age’ in human history. Digitalisation has taken over many economic activities and industries and is slowly finding its way into the legal system. Internationally, many businesses are using technology to automate their processes and practices,

making it much easier, quicker and cheaper to finalise their products and services. From a legal perspective, several businesses are now concluding commercial transactions and contracts electronically. These new innovations have brought into question the legal validity of these transactions, particularly in relation to the electronic signing of documents.

The outbreak of the COVID-19 pandemic prompted many international and local companies to consider new ways of conducting business without compromising the legality and compliance aspect of operations. Electronic signatures have consequently become an essential tool for concluding legal agreements and conducting daily business practices. The move to digital signing has thus become more prevalent across all business sectors and naturally this has given rise to questions on the legitimacy of electronic signatures. It has accordingly become necessary for us to consider the legal validity and enforceability of e-signatures.

The e-signature

‘According to the South African common law, for a signature to be valid –

(1) the name or mark of the person signing must appear on the document,

(2) the person signing must have applied it themselves, and

(3) the person signing must have intended to sign the document’ (Ya-fan Wong ‘Understanding Electronic Signatures in South Africa’ (<https://dommisseattorneys.co.za>, accessed 21-7-2021)).

It naturally follows that if an electronic signature complies with the above requirements, it should be deemed valid in law. Section 1 of the Electronic Communications and Transactions Act 25 of 2002 (the ECTA) defines an ‘electronic signature’ as ‘data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature’. According to Anele Nongogo: ‘Data is defined broadly by the ECTA to include electronic repre-



Standard electronic signatures can be applied to documents that do not require special legal requirements. Standard electronic signatures include digital or scanned signatures. 'An example would be using an [electronic notepad, iPad or smartphone] to sign a document or merely printing, signing and scanning the document' (Costa Athienides 'Electronic signing of documentation' (www.linkedin.com, accessed 21-7-2021)). Wong (*op cit*) states: 'A standard electronic signature suffices where a signature is required by the parties to an agreement, and they do not specify the type of electronic signature to be used'. In this instance, the ECTA provides that the electronic signature will be deemed to be valid where:

'(a) a method is used to identify the [sender] and to indicate the [sender's] approval of the information communicated; and

(b) having regard to all the relevant circumstances at the time ... the method was as reliable as was appropriate for the purposes for which the information was communication' (see also *Spring Forest Trading CC v Wilberry (Pty) Ltd t/a Ecowash and Another* 2015 (2) SA 118 (SCA)).

'According to the ECTA, there are some instances where an electronic signature other than a standard electronic signature may be required and include circumstances where the law requires that an agreement or document must be in writing and signed. In such instances, the document can only be signed with an advanced electronic signature as defined by ECTA' (Wong (*op cit*)). Advanced electronic signatures are required for documents that require special legal formalities. An advanced electronic signature is defined as an electronic signature, which results from a process, which has been accredited by the South African Accreditation Authority. In practical terms, an advanced electronic signature is a digital signature that has been verified by a digital certificate from an accredited authority in terms of s 37 of the ECTA. To date there are only two accredited providers, the South African Post Office and LAW-trust. This is problematic given the lack of efficiency and poor service from the Post Office.

Advanced electronic signatures make use of a public key infrastructure, which uses two keys and an authorised cryptography provider to verify the authenticity of the signature. A digital certificate confirms that the security, integrity and identity of the signatory are upheld. This will usually also involve face to face verification mechanism, which may also authenticate, *inter alia*, the biometrics, such as the fingerprints or iris scan of the signatory; and/or a pin or password belonging to the signatory. I submit that thumbprint verification can be usually used in addition to an e-signature to authenticate the

identity of an individual as most electronic devices such as cell phones and notepads already have such scanning ability.

In order to be valid, an advanced electronic signature, must meet the following requirements –

- it must be uniquely linked to the signatory;
- it must be capable of identifying the signatory;
- it must be created using means that are under the signatory's sole control; and
- it must be linked to other electronic data in such a way that any alteration to the said data can be detected.

'In South Africa, an advanced electronic signature is currently required for: (1) a suretyship agreement and (2) the signing as a Commissioner of Oaths' (Wong (*op cit*)). Accordingly, I submit that an advanced electronic signature may also be used for the signing of a court affidavit and other legal documents such as loan agreements. The challenge with affidavits, however, is the requirement of commissioning in the presence of a Commissioner. Sections 1, 2 and 3 of the Regulations to the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 provide that the deponent shall sign the declaration in the presence of the commissioner of oaths. I submit that this requirement can potentially be fulfilled electronically with the use of a video conferencing system such as Skype, Microsoft Teams or Zoom. It will be interesting to see if courts will allow for the e-signing and e-commissioning of court affidavits and the processes that will need to be satisfied.

Legal recognition of the e-signature

'The use of electronic signatures has never been more relevant than at this stage in our technological development' (David Warmback and Suhail Ebrahim 'Electronic Signatures, Credit Agreements and the National Credit Act' (www.wylie.co.za, accessed 21-7-2021)). As a result of recent technological advancements, many countries have been prompted to create or develop their e-commerce laws and build new legal frameworks for this emerging digital sector. In SA, the ECTA is the primary legislation that governs digital communications. The main objectives of the Act are to promote, facilitate and regulate electronic communications and transactions. The ECTA also seeks to develop a national e-strategy, promote universal access to electronic communications and transactions and prevent the abuse of information systems. In essence, the ECTA aims to address the world of e-commerce and establish legal principles to govern digitally concluded contracts and transactions.

There are several sections in the ECTA

sentations of information in any form' ('Electronic signatures in commercial contracts' (www.withoutprejudice.co.za, accessed 21-7-2021)). Wong (*op cit*) states '[f]rom this definition [of signature], it can be seen that for a signature to be recognised as a valid electronic signature, the signature must comply with the criteria of "intention" and "relationship" – there must be a relationship between the document and the signature and the person must have intended it to be their signature. ... In many instances, an electronic signature is capable of fulfilling these requirements perhaps better than paper-based solutions, as the electronic signature process creates an electronic audit trail that clearly identifies the imprinter and recognises any tampering with the signature'.

South African law provides for two categories of electronic signatures in the ECTA, namely, 'standard electronic signature' and 'advanced electronic signature'.

that confirms the validity of the electronic signature. Section 13(2) of the ECTA specifically confirms that contracts cannot be denied enforceability merely because they are concluded electronically or through data messages. Section 13(4) further provides that where an electronic signature has been used, such signature is regarded as being a valid electronic signature and to have been applied properly, unless the contrary is proved. The ECTA specifically states that an electronic signature is not without legal force and effect merely because it is in electronic form, clearly indicating that electronic signatures are legally recognised in SA (see s 11(1) of the ECTA and *FirstRand Bank Ltd t/a Wesbank v Molamuagae* (GP) (unreported case no 24558/2016, 26-2-2018) (Senyatsi AJ)). Section 15(4) of the ECTA further provides that a data message, such as an electronic signature, produced in any legal proceedings is admissible evidence and is rebuttable proof of the facts therein.

'South Africa followed a global trend in recognising the legality of electronic signatures, rendering the status of electronic signatures as a functional equivalent to traditional "wet" [ink pen-based] signatures' (Wong *op cit*). The ECTA, like most electronic legislation in foreign countries, have followed the recommendations of the United Nations Model Law and Euro-

pean Union directives by providing legal recognition to electronic signatures and transactions (see the United States Uniform Electronic Transactions Act and the Electronic Signatures in Global and National Commerce Act, and the Canadian Uniform Electronic Commerce Act 1999, and the United Kingdom Electronic Communications Act 2000).

Importantly, the ECTA does not limit the operation of any law, nor does it compel anyone to use or submit information in an electronic form. Gereda comments that the Act does not discriminate between paper and electronic documents, nor does it create a new way of doing business (see Shumani L Gereda 'The Electronic Communications and Transactions Act' in *Telecommunications Law in South Africa* (Johannesburg: STE Publishers 2006)). The ECTA facilitates and gives legal recognition to the new ways of doing business that are emerging through the evolution of technology. In a country like SA, which has components of a developing and developed society, the emergence of digitalised economy could prove challenging to the public and private sector. Given this unique position, the ECTA has done well to facilitate the use of electronic communications.

Conclusion

In today's modern society, it is difficult

to imagine the world without technology. The Internet, social media, Zoom, on-line shopping and e-mails have become a part of everyday life. Technology has created, and continues to create a new economic landscape, which has revolutionised the global economy and fundamentally changed the way we communicate. The world has embraced the rapid pace in which technology has infused into human living, and it is interesting to note that mediums such as the World Wide Web, and Google were established less than 30 years ago. The digital revolution has occurred so rapidly that its character and implications have not yet been fully understood. The age of digitalisation has changed the way we interact with one another, and from a legal perspective it has changed the way contracts and other legal and commercial transactions are concluded.

- See Peter Otzen and Aran Brouwer 'Remote commissioning of affidavits: Who can commission them and how is it done?' 2020 (June) *DR* 22.

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Best practice – business insurance cover for law firms

Legal experts running their own practices or firms face unique risks daily. For one thing, legal experts handle a considerable amount of sensitive client information that requires confidentiality and security, among other things.

Business operations face their own kind of liability exposures, which can be significantly reduced with comprehensive business insurance cover. So, it's important for legal professionals to fully understand what types of risks their business is exposed to daily.

What are some key risk management challenges that legal professionals face?

'Legal professionals face a specific set of risks as business owners, such as those related to technology, human challenges, property and operations,' says Lana Ross, Chief Operating Officer of Discovery Business Insurance. 'This is why we felt a need to design a bespoke insurance product that sufficiently addresses these risks, and provides comprehensive cover.'

- **Technology-related risks:** For many businesses today, cyber attacks are one of the main technology-related risks to keep top of mind. Hacking, social engineering, malware and ransomware are some of the most common types of cybercrimes that businesses contend with. Any business is vulnerable. The use of digital systems in practices has increased, with many using digital systems in-house in place of outsourcing freelancing cybersecurity experts. 'Legal professionals store a considerable amount of sensitive client information on digital platforms, including data networks and computers,' says Ross. 'This makes them vulnerable and a popular target for cybercriminals.'
- **Human error risks:** Related to cybersecurity risks is the human error factor. Most phishing and social engineering attacks typically occur by tricking employees into clicking on or downloading something that compromises a network or system.
- **Liability-related risks:** Sometimes accidents happen at the business premises. Risks such as bodily injury sustained

on the premises can be insured against. This is where liability cover can be very useful for legal professionals.

- **Property-related risks:** Actual property-related hazards, like a burst pipe causing water damage to the property or even valuable hard copy records and papers, can also be well covered if these unforeseen events occur.

Business insurance cover to best manage law firm risks

'Through Discovery Business Insurance, legal professionals now have access to a bespoke insurance offering with embedded cover and benefits designed to best protect their practices or firms against such risks,' says Ross.

'Importantly, cover innovations are by design, tailorable – so clients can almost "design" their cover according to their specific firm or practice needs, as well as increase their cover amount as required. This is where the professional guidance of a financial adviser can be enormously beneficial. Such guidance ensures that clients receive just the right amount of cover for their unique needs. And this then ensures absolute peace of mind for any professional running such a business,' she adds.

The Lawyers' Product from Discovery Business Insurance offers legal experts all the benefits of traditional multi-peril policy cover. It also offers cover for today's unique risks including cyber, reputational damage and social media liability exposure.

The cover and benefits offered by the product include the following:

- **Cover for cyber and reputational risks.** To protect highly sensitive and confidential client information, legal professionals automatically have access to R 100 000 cyber cover to protect against the loss or theft of sensitive data, ransomware, data recovery needs and all associated legal expenses. Following an insured cyber event, legal professionals also have access to R 50 000 business interruption cover, as well as R 50 000 crisis and reputational management cover to manage reputational damage. Lawyers also automatically receive R 100 000 crisis and reputation man-

agement cover to help them deal with a crisis. This benefit includes 24/7 access to global reputational experts who will assist clients with a response strategy following a crisis.

- **Settlement of cellphone and iPad repairs or replacements** – within one business day after a claim submission, in metropolitan areas.
- **Up to 20% off new HP, Dell or Lenovo laptop purchases.** Professionals can select from entry-level, medium-level or high-performing-level machines offered in each brand's range.
- **25% discount on Lexis Sign platform.** Legal professionals have access to an efficient service through Lexis Sign which offers efficient and secure document signing tools that enable users to sign documents instantly. This is especially handy for those professionals needing to move around often or who work remotely. The system lets the professional receive a client-signed document instantly, therefore significantly cutting down waiting time and potential losses or illegible digital scans.
- **Lawyers can also get a further 25% off selected Lexis WinDeed searches.** This platform lets lawyers easily access information from the Deeds Office, Companies and Intellectual Property Commission, leading credit bureaus and other reputable suppliers. They can then search for specific details about people (trace debtors and vet potential tenants or customers), directorship details, property ownership or registered companies.

'In addition,' says Ross, 'legal experts can also earn great rewards for managing their business well, such as up to 50% of their MTN business data spend back every month for managing their risks well, and up to 30% of their vehicle premiums back every year for driving well.'

'We've automatically embedded key cover innovations at no additional premium to help lawyers manage their firms efficiently, so that they can become better and more successful businesses. They get comprehensive cover for their business and get rewarded for managing it well,' she concludes.



Are companies liable for their employees' actions online?



By
Luphumlo
Mahlinza

Throughout the world, the Internet, information, and communication technologies (ICT) such as smartphones and computers undeniably play a significant role in the modern world of work. Within the South African context, employers and employees can conclude valid and enforceable employment contracts via e-mail, SMS or other electronic communication methods (see *Jafta v Ezemvelo*

KZN Wildlife [2008] 10 BLLR 954 (LC)), valid resignations can be made electronically (see *Sihlali v SA Broadcasting Corporation Ltd* (2010) 31 ILJ 1477 (LC); [2010] 5 BLLR 542 (LC)), and dismissals can be fairly made on grounds of derogative and/or offensive statements made by an employee on social media (see *Sedick and Another v Krisray (Pty) Ltd* [2011] 8 BALR 879 (CCMA) and *Fredricks v Jo Barkett Fashions* [2011] JOL 27923 (CCMA). For defamatory statements posted or liked on social media by an employee see *H v W* [2013] 2 All SA 218 (GSJ)).

These instances accordingly mark the intersection between workplace law and cyberspace law. This (established relationship between cyber law and workplace law), however, is rather gradually strengthening along with risks that companies or corporations may inevitably endure. For an example, an employee who commits criminal or delictual conduct(s) (such as defamation or unlawful processing of personal information) online against a party other than the employer, could put his or her employer at a very precarious position.

Moreover, delictual claims or damages arising from that specific conduct may be attributable to the employer under

the common law doctrine of vicarious liability. This developing trend is seen in English case law, which is the point of departure for this paper. Brief recommendations are made at the end of this paper in order to protect employers.

Breach of data protection: The United Kingdom's approach

- *Various Claimants v Wm Morrisons Supermarket PLC* [2017] EWHC3113 (QB)

In the United Kingdom, Andrew Skelton, a Senior IT Auditor in Morrisons' employment, was arrested and charged with an offence under the Computer Misuse Act 1990 both of fraud and under s 55 of the Data Protection Act 1998 (DPA), tried at Bradford Crown Court in July 2015, and convicted (*Wm Morrisons Supermarket* at para 8). Skelton had posted a file containing personal information of 99 998 employees of the defendant (Morrisons) on a file sharing website (*Wm Morrisons Supermarket* at para 2). Morrisons' head management was later alerted to the disclosure and within a few hours, they had taken steps to ensure that the website had been taken down (*Wm Morrisons*

Supermarket at para 4. For a take-down notice in South Africa, see s 77 of the Electronic Communications and Transactions Act 25 of 2002). Claimants, however, sought the court to hold Morrisons vicariously liable under s 4(4) of the DPA, at common law for misuse of private information and for breach of confidence (equitable claim) (at para 9).

Section 4(4) reads:

‘Subject to section 27(1), it shall be the duty of a data controller to comply with the data protection principles in relation to all personal data with respect to which he is the data controller.’

To clear any confusion, Langstaff J explicitly outlined that ‘duties under section 4, and generally within the Act, are imposed upon a data controller, even if a third party may be guilty of a criminal offence under section 55 of the Act as was Skelton here’ (at para 44). In determining who the data controller is, the court relied on paras 70-71 made by Lewison LJ in *Ittihadieh v 5-11 Cheyne Gardens RTM Company Ltd* [2017] EWCA Civ 121. The paragraphs read as follows:

‘70. A data controller is a person who makes decisions about how and why personal data are processed. It is clear from the terms of section 7(1)(a) that the data controller is responsible for persons who process data on his behalf. Thus, it follows that a person who processes data as agent for a data controller is not himself a data controller in respect of those data. Even where decisions about data are taken by natural persons, they will not themselves be data controllers if those decisions are made as agents of a company of which they are directors: *Re Southern Pacific Personal Loans Ltd* [2013] EWHC 2485 (Ch); [2014] Ch 426 at [19].

71. On the other hand, if they are processing personal data on their own behalfs they will be data controllers as regards that processing and those data. The question may then arise whether they are entitled to one or more exemptions under the DPA.’

Langstaff J continued to say that the DPA ‘imposes liability on a data controller not only for those breaches it has authorised or facilitated ... but also for those it has neither facilitated nor authorised’ (at para 49). Along the same lines he adds:

‘If a corporation (or individual) is to be liable for breaches which it is in no sense responsible for either authorising or requiring, but which are committed by employees acting in contravention of its wishes, that liability may be established vicariously – but not directly’.

In his verdict, Langstaff rejected the argument that the DPA does not hold Morrisons vicariously liable in actions for misuse of private information or breach of confidentiality (at para 197). Leave to appeal was granted and the matter was not contested.

South Africa’s (SA) approach

In 2013, SA enacted the Protection of Personal Information Act 4 of 2013 (POPIA) with the aims of protecting personal data and holding liable parties responsible for breaching data protection provisions. Section 99(1) reads as follows:

‘A data subject or, at the request of the data subject, the Regulator, may institute a civil action for damages in a court having jurisdiction against a responsible party for breach of any provision of this Act as referred to in section 73, whether or not there is intent or negligence on the part of the responsible party.’

According to Millard and Bascerano, the term ‘responsible party’ is ‘undoubtedly a synonym for “employer” in this context’ (Daleen Millard and Eugene Gustav Bascerano ‘Employers’ statutory vicarious liability in terms of the Protection of Personal Information Act’ (2016) 19 *PER* 1). This is undisputedly an accurate definition of ‘responsible party’, which rightly emulates the court’s approach in the *Morrisons* case as discussed above. From this perspective, employers remain vulnerable to lawyers who may exploit this new phenomenon to the detriment of employers’ business.

Another statutory provision that provides vicarious liability is s 60(1) of the South African Schools Act 84 of 1996. The section unambiguously reiterates that ‘[t]he state is liable for any delictual or contractual damage or loss caused as a result of any act or omission in connection with any school activity conducted by a public school’. Although the Act does not define ‘any school activity’, the term should be understood to extend to activities performed in cyberspace, whether through social media accounts or e-mails.

Accordingly, where there is no explicit statutory provision providing for vicarious liability, the common law doctrine of vicarious liability applies. Understood in the context of cyberspace, this means that where an employee posts defamatory statements or hate speech through his social media account, which may give rise to delictual claims, in the “... course and scope of employment”, the employer can be held vicariously liable’ (Susan Abigail Coetzee ‘A legal perspective on social media use and employment: Lessons for South African educators’ (2019) 22 *PER* 1 at 9).

Implications of the POPIA

Although the POPIA does not explicitly contend provisions in respect of indirect liability, the implication is that, as stated above, the terms ‘responsible party’ will in all probability be construed and interpreted to refer to an employer. Such interpretation carries with it harsh penalties in the form of a fine and/or imprisonment for a period not exceeding ten years, as

provided by s 107 of the POPIA. This denotes that while a company may be fined, its responsible employee may serve up to ten years in prison on the same set of facts. However, s 106 has the effect that a company is not liable for an unlawful conduct by its employee on cyberspace, if such employee fails to prove that they acted in the reasonable belief that they would have had the consent of the company, and if such employee has no other defence.

Recommendations

To minimise exposure to risks posed by negligent or wrongful use of cyberspace by employees, it is advisable that employers exercise the following recommendations:

- Research customs practiced by companies or corporations in protecting personal and organisational data and regulating use of electronic facilities at work.
- Incorporate the findings of your research in your Code of Conduct.
- Monitor any disruptive incoming and outgoing correspondences and behaviour by employees and respond immediately thereto, without violating the right to privacy.
- Establish a culture of cybersecurity, a strict work-related use of electronic facilities by educating employees on the value of your company’s data, and the failure to utilise electronics for employment responsibilities.
- Ensure strict adherence to provisions of POPIA and other relevant provisions providing recourse of vicarious liability.
- Limit personal and organisational data to those trusted employees who need access to that specific data in order to carry out their employment duties.
- Prepare an action plan to safeguard against any internal or external cyberattacks.

Conclusion

Overall, although the use of cyberspace undoubtedly simplifies work for both employers and employees, it however, equally poses risks to employers who unfortunately have to deal with consequences of their employees under the doctrine of vicarious liability. The conclusion reached in this advocacy, that employers can be held vicariously liable for their employees’ conduct on cyberspace, is supported above by academic literature and an international case law. Employers can minimise exposure to liability by exercising the recommendations provided in this paper.

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Challenging the 'pay now, argue later' rule in the context of municipal property rates



By
Francis
Clerke



Picture source: Gallo Images/Getty

As a property owner, it may come to your attention that your municipality is undertaking a general valuation of all the properties situated in its area. Sometime later, you receive a notice from your municipality that your property has been valued at a figure set out in the notice. You find this strange for two reasons, because:

- Like many property owners, you believe that you have a good feel for what your property is worth, and the valuation proposed by the municipality is, in your opinion, far too high.
- No one from the municipality has been to inspect your property to properly assess its value.

The notice you receive from your municipality informs you that you may object to the proposed valuation. If your objection fails, you may lodge an appeal. You are aware that these processes are laborious and can take a long time. You are also aware that, pending your objection and appeal, your municipality will bill you based on its new proposed valuation and that, if you do not pay the full amount as billed, your municipality will force you to pay by simply suspending vital municipal services, such as electricity and water supply.

This situation appears to be very unfair to property owners. What is the legal position? Would it be possible to challenge municipalities on this?

Local government: Municipal Property Rates Act

The Municipal Property Rates Act 6 of 2004 (the Rates Act) governs this situation. The relevant provisions of the Rates Act are the following:

Section 50(6): 'The lodging of an objection does not defer liability for payment of rates beyond the date determined for payment'.

Section 54(4): 'An appeal lodged in terms of this section does not defer a

person's liability for payment of rates beyond the date determined for payment'.

These sections are hereinafter referred to as the 'impugned sections'. They are commonly interpreted to mean that, when a property owner lodges either an objection or an appeal, they must, as from the date of implementation of the valuation roll, pay rates based on the disputed municipal valuation pending the outcome of any such objection or appeal. This means that the provisions are what is referred to as a 'pay now, argue later' provisions. This interpretation obviously favours municipalities.

It is argued, by proponents of this interpretation, that these provisions are constitutional because the 'pay now, argue later' provisions are also found in tax legislation and such a provision was found to be constitutional by the Constitutional Court (CC) in the well-known *Metcash Trading Limited v Commissioner for the South African Revenue Service and Another* 2001 (1) BCLR 1 (CC). Is that a valid argument?

The purpose of this article is to take a preliminary look at the constitutionality of the impugned sections and to ascertain whether they align with three of the fundamental rights contained in the Constitution, namely –

- s 34 – access to courts;
- s 25 – arbitrary deprivation of property; and
- s 33 – just administrative action.

Section 34 of the Constitution – access to courts

In the *Metcash* case, certain provisions of the Value-Added Tax Act 89 of 1991 (VAT Act) provided that South African Revenue Service (Sars) was entitled to bypass adjudication by the courts and to have the Registrar issue a writ of ex-

ecution against a taxpayer who did not pay the assessed amount of tax, even though the tax was disputed and was the subject of an objection or appeal. Thus, the case focused on whether the provisions infringed s 34 of the Constitution by denying taxpayers access to the courts.

One of the main findings of the CC was that s 36(1) of the VAT Act provided that the obligation to pay tax was not suspended 'unless the Commissioner so directs'. It accordingly held that there would be circumstances in which it would be just for the Commissioner to suspend the obligation to make payment of the tax pending the outcome of the dispute. The Commissioner would need to make a rational decision, which would be reviewable by the courts (see para 62 of the *Metcash* case). Thus, it was held that access to the courts was not prevented. It is important to note that the Rates Act does not contain such a provision. It, therefore, does not follow that the same conclusion can be reached.

For these and other reasons it would appear that the *Metcash* case does not constitute a valid basis on which the 'pay now, argue later' interpretation of the impugned sections can be considered to be constitutional.

Section 25 of the Constitution – arbitrary deprivation of property

It is significant that the Davis Tax Committee is of the opinion that the pay now, argue later rule is 'an infringement

to the right to property as enshrined in the Constitution' (see *Davis Tax Committee: Tax Administration Report* (September 2017) at para 20.5). The Davis Tax Committee was made up of eminent tax specialists headed by the well-known and respected Judge of the High Court. Its views cannot be ignored.

In the *Metcash* case, the CC did not consider s 25. It is possible that the reason for this is that money might not, at that time, have been considered to constitute 'property'. It has subsequently been held by the CC that a law, which permits arbitrary deprivation of money, can be unconstitutional (*Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport and Others* 2015 (10) BCLR 1158 (CC)).

It is apparent that the impugned sections of the Rates Act, when accorded the 'pay now, argue later' interpretation, permit the arbitrary deprivation of property in the form of money. Thus, the sections appear, at face value, to infringe s 25 of the Constitution.

The CC has held that a deprivation of property is arbitrary, if the law in issue either fails to provide 'sufficient reason' for the deprivation or is procedurally unfair (*Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) at para 34). Regarding the aspect of procedural fairness, many of the aspects dealt with in the paragraphs below dealing with procedural fairness could also be dealt with under s 25.

Section 33 of the Constitution – just administrative action

The CC has ruled that the imposition of the rates and levies constitutes legislative action and not administrative action (*Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC)). However, the High Court has subsequently found that '[t]he necessarily interrelated process of valuation of properties and the compilation of a valuation roll' constitutes administrative action (*Gillyfrost 54 (Pty) Ltd v Nelson Mandela Bay Metropolitan Municipality* [2015] 4 All SA 58 (ECP) at para 67). Thus, the question is whether that process is lawful, reasonable and procedurally fair. For several reasons, too voluminous to cover in this article, I submit that the process is not fair and reasonable.

Section 36 – limitation of rights in Bill of Rights

As it appears from the above that the

impugned sections may transgress certain of the basic rights contained in the Bill of Rights, it is necessary to consider them against s 36, which provides that it is necessary to determine whether they are nevertheless 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. For a number of reasons, it can be argued that the impugned sections do not pass this test. These reasons are too voluminous to set out in detail in this article. Only certain of these reasons will therefore be touched on.

The impugned sections are not in favour of a single fiscus such as Sars, which has the capacity to properly implement tax legislation. They are in favour of some 257 municipalities in South Africa (SA). It is widely known that many of these municipalities are in a state of disarray.

In many other comparable democracies, services such as water and electricity are not provided by municipalities but rather by utility companies. Such municipalities are not able to withhold such services to force payment of rates or property taxes that they regard as being in arrears. They would need to follow due process to collect arrears resulting in the matter coming before a court.

To comply with their obligations in terms of the Rates Act, municipalities need to employ sufficient professional valuers to attend to valuations and objections and to fund Valuation Appeal Boards to hear appeals. It is generally known that municipalities are failing in this regard and that unreasonable delays are experienced before objections and appeals are decided. For example, it has been ascertained that, in relation to the municipality of the City of Johannesburg, there are many appeals and s 52 reviews still outstanding from the 2013 General Valuation Roll. In addition, there are more than 50 outstanding objection decisions in the first Supplementary Valuation Roll of 2018 (information obtained as at January 2021). It is furthermore understood that there are some local municipalities that simply do not deal with objections and appeals. They do not have money to pay the service providers and/or the knowledge/capacity to deal with valuation matters.

The Rates Act requires the municipal valuer to determine the precise market value of a property. However, it is generally accepted in the valuation profession that valuations are subject to a margin of error of between 10 to 15% of actual market value (Martin Skitmore, Janine Irons and Lynne Armitage 'Valuation Accuracy and Variation: A Meta Analysis' (www.researchgate.net, accessed 21-7-2021)). Thus, the reality is that, even when proper valuation methods are utilised, it is difficult to calculate the precise market value of a property. In some

countries (such as the United Kingdom), a system of valuation bands is utilised to get around this problem. In such systems, it is not necessary to determine the precise value of a property, but only to determine into which valuation band the property falls. The result is that the number of valuation disputes is significantly reduced. That is not the position in SA, even though valuation banding has been recommended for countries in Africa and South America (WJ McCluskey, FAS Plimmer and OP Connellan 'Property tax banding: A solution for developing countries' (2002) 9 *Assessment* 37).

In addition to determining the value, the municipal valuer is also required to determine into what category the property falls. Rates on properties in business/commercial categories are levied at a much higher rate than those in the residential categories. For example, in the Mangaung Metropolitan Municipality, rates on commercial properties are charged at 4.1 times higher than residential properties ('Annual Levy, Rates & Tax Increases for 2020/2021: Water Charges, Property Rates, Sewer & Refuse Removal Costs' (www.mangaung.co.za, accessed 21-7-2021)). Thus, if an error is made, and errors in this regard are made, the consequences for the property owner can be devastating. Yet, in terms of the 'pay now, argue later' interpretation the owner must simply pay the higher rates and will get to put his case at a later stage, in many cases at a much later stage.

In view of the above, I submit that it may be argued that the 'pay now, argue later' interpretation of ss 50(6) and 54(4) of the Rates Act is not 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom' and is, therefore, unconstitutional.

Conclusion

As mentioned above, the purpose of this article has been to take a preliminary look at the constitutionality of ss 50(6) and 54(4) of the Rates Act. The conclusion is that these sections could well be unconstitutional and that there would be merit in conducting a more thorough investigation into the matter. In addition, it should be explored whether there are possible alternative interpretations of the impugned sections that may align with the 'the spirit, purport and objects of the Bill of Rights' (s 39(2) of Constitution). It is proposed to cover this in a future article.

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THE LAW REPORTS

June [2021] 2 All South African Law Reports
(pp 645 – 926); June 2021 (5) Butterworths
Constitutional Law Reports (pp 575 – 681)

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:

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

Banking and finance

Legal duties of bank: In *FirstRand Bank Limited v Spar Group Limited* [2021] 2 All SA 680 (SCA) the respondent (Spar) fell into a dispute with one of its franchisees (Umtshingo). Umtshingo kept bank accounts with the appellant (FNB) for each of its outlets. Spar held a notarial bond over Umtshingo's assets. When Umtshingo defaulted on its obligations under the franchise agreement, Spar obtained a provisional order perfecting its security. The terms of the notarial bond permitted Spar to take over the Umtshingo businesses and run them for its own account. Umtshingo's controlling mind (Mr Paolo) agreed to that arrangement but refused to de-link the speed point credit card devices of the stores from Umtshingo's bank accounts. Spar ran the outlets and credited the stock on hand to Umtshingo and brought in new stock. Cash receipts were deposited into a Spar account. However, the speed point credit card devices in use, which facilitated electronic deposits of revenue directly into Umtshingo's designated accounts, remained in use. That allowed Mr Paolo to retain control over the accounts, and he effected substantial disbursements out of two of the accounts. The debit balances (in respect of Umtshingo's overdraft liability, its debts to FNB in respect of a loan and a guarantee paid by FNB to Spar) in two of the accounts were purportedly extinguished by FNB applying set off against the credits derived from revenue generated by Spar and deposited into the accounts.

Spar contended that FNB ought not to have allowed disbursements to be made at Mr Paolo's behest because Umtshingo had no rightful claim to the funds, and that FNB was not entitled to set off Umt-

shingo's debts in respect of which Spar had a quasi-vindictory claim. It sued FNB and Mr Paolo to recover the relevant amounts. The dismissal of the claims led to the present appeal.

In respect of the set-off issue, when the customer of a bank deposits money into their account, the money becomes the property of the bank, which enjoys a real right of ownership. The deposit usually gives rise to a credit balance in the customer's account and a personal obligation owed by the bank to its customer to pay the credit balance. The personal obligation of the bank to pay the balance standing to the credit of the customer may be discharged by payment to the customer, payment to persons designated by the customer, or set off. Set off comes about when two parties are mutually indebted to one another, and both debts are liquidated, due and payable. Set off extinguishes a debt but does so reciprocally – one debt extinguishes another. Umtshingo had no entitlement to the funds paid into the accounts held with FNB. Those funds were the proceeds of the business conducted by Spar for its own benefit. FNB was aware of that. Umtshingo thus enjoyed no personal right against FNB to the funds credited to its accounts that derived from Spar's deposits. Consequently, FNB could not contend that Umtshingo's indebtedness to it was set off against FNB's indebtedness to Umtshingo because FNB owed no such debt to Umtshingo. FNB's defence of set off failed.

FNB was also found to have allowed Mr Paolo to wrongly withdraw money from the accounts, knowing that such funds did not belong to Umtshingo. That amounted to breach of a legal duty by the bank. The court held that the bank was a joint wrongdoer owing a legal duty to Spar. The appeal was thus dismissed.

Civil procedure

Role of amicus curiae: The first respondent (Mr McBride) in *Helen Suzman Foundation v McBride and Others* [2021] 2 All

SA 727 (SCA) was the executive director of the Independent Police Investigative Directorate (IPID), appointed to that position on 1 March 2014, in terms of s 6 of the Independent Police Investigative Directorate Act 1 of 2011 (the Act). Section 6 provides for the appointment of the executive director of IPID, and for the renewal of the incumbent's tenure after the expiry of the first five years in office. Shortly before Mr McBride's five-year term of office ended, he engaged the minister about its renewal and was informed that his contract would not be renewed. He challenged the minister's right to unilaterally make such a decision and demanded that the matter be referred to the Parliamentary Committee on Policing (the PCP) for its decision.

After discussions appeared to be futile, Mr McBride approached the High Court for relief. In his founding affidavit, he accepted that he had no right to be re-appointed but wished to ensure that the proper process in relation to his possible re-appointment or rejection thereof, be followed. Before the matter was heard, the appellant, the Helen Suzman Foundation (the HSF) successfully applied to the court below to be admitted as an *amicus*. It stated that its aim was to show that neither of the parties' interpretation of s 6(3)(b) of the Act was correct. It sought to advance an alternative interpretation to the effect that the appointment of the Executive Director of IPID was renewable at his instance and not at the instance of either of the respondents.

After the admission of the *amici*, the main parties settled the matter, and the settlement agreement was made an order of court. The HSF obtained leave to appeal from the present court.

The court, per Navsa ADP and Plasket JA (Dambuza, Schippers JJA and Goosen AJA concurring), held that the central issue in the appeal was whether s 6(3) of the Act could be construed in the way that the HSF contended.

The interpretation eventually agreed

on by Mr McBride, the PCP and the Minister was that the power to extend the incumbent's tenure for a second term was vested in the PCP. However, the HSF contended that the incumbent had an unfettered option to continue in office for a second term. The foundation of the HSF's interpretation of s 6(3) was that because the PCP had the power to renew undermined IPID's independence, it was necessary to interpret the section in a different way that was purportedly constitutionally compatible. The court referred to a series of cases, which served to refute that premise. It held that there was no need for the HSF's type of interpretation in order to save s 6(3) from constitutional invalidity because the PCP's powers were not in conflict with IPID's independence. In any event, the said interpretation was untenable and could lead to absurd results.

Commenting on the role of an *amicus*, the court highlighted the importance of *amici* playing their rightful role while their participation is kept within appropriate bounds. In this case, the HSF departed from the basis on which it had sought to be admitted and attempted to broaden the scope of the challenge to include the lack of guidelines in the processes of the PCP. That was impermissible.

The appeal was dismissed.

Special defence of *res judicata*: In the case *Democratic Alliance v Brummer* [2021] 2 All SA 818 (WCC) the respondent (Brummer) joined the appellant political party, the Democratic Alliance (the DA) in 2000. He subsequently served as a councillor for more than a decade. On 13 August 2012, the DA confirmed termination of Brummer's membership of the party, alleging that he had failed to pay his dues to the party. The termination of membership was based on a clause in the DA's Federal Constitution, which provided for membership to cease when a member was in default with the payment of any compulsory public representative contribution for a period of two months after having been notified in writing that he is in arrears, and still fails to make good on the arrears.

Upon Brummer's position becoming vacant, the Independent Electoral Commission (the IEC) was statutorily required to advertise that vacancy. Following such advertisement, Brummer applied to interdict the IEC from filling the post and to procure the reinstatement of his membership. By the time the matter came before court, the vacancy had already been filled by the IEC. Brummer attempted to challenge the constitutionality of the relevant clause in the DA constitution, but the court refused to entertain the belatedly raised point. The application was dismissed in September 2012.

In 2014, Brummer commenced action proceedings against the DA for damages

founded in contract, alternatively delict and in the further alternative, for constitutional damages. The basis of Brummer's claims in the action was that the DA had unlawfully terminated his membership.

A week before the trial was due to commence, the DA sought to introduce for the first time a special plea of issue estoppel and then insisted upon that issue being determined separately and *in limine* at the trial. The dismissal of the special plea led to the present appeal.

Defence of issue estoppel has taken root in our law as a subsidiary of the principle of *res judicata*. The plea of *res judicata* – that the matter has already been decided – was available where the dispute was between the same parties, for the same relief or on the same cause. The requirements have been relaxed over the years and where there is not an absolute identity of the relief and the cause of action, the attenuated defence has become known as issue estoppel.

A party seeking to rely on the defence of *res judicata* must allege and prove all the elements underlying the defence. The DA relied on the September 2012 judgment as constituting *res judicata* in respect of the claims for damages subsequently launched by Brummer. The court stated that the factual issue, which arose in this matter, was the termination of Brummer's membership through the application by the DA of the clause in its constitution. That termination afforded Brummer various causes of action. However, he was denied the opportunity to place his case before the court. His having been prevented from litigating his cause of action in relation to damages to finality meant that it would be unjust and inequitable to uphold the special plea of issue estoppel. The majority of the court dismissed the appeal.

Constitutional and administrative law

Vote of no confidence against the President: The applicant in *African Transformation Movement v Speaker of the National Assembly and Others* [2021] 2 All SA 757 (WCC) sought to review and set aside a decision of the first respondent, the Speaker of the National Assembly, in declining the applicant's request to hold voting by secret ballot in a motion of no confidence against the South African President.

Raising a preliminary point, the Speaker contended that the present court lacked jurisdiction to hear the application. It was argued that the Speaker's mandate is constitutional, and that the decision not to hold a vote by secret ballot involved a constitutional obligation to allow members of Parliament to vote in a certain way. The contention, therefore, was that it was the CC, which had exclusive jurisdiction in the matter in terms of s 167(4)(e) of the Constitution.

Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. The pleadings contain the legal basis under which the applicant has chosen to invoke the court's competence. A determination of whether the present court had jurisdiction to consider the matter lay in a proper interpretation of ss 102(2) and 167(4)(e) of the Constitution. Section 102 deals with a vote of no confidence in the President by the National Assembly.

It is incumbent upon a party invoking the jurisdictional exclusivity in terms of s 167(4)(e) to establish that there was a failure by parliament to fulfil a constitutional obligation. The applicant's cause of complaint related to the procedural path to the vote and did not involve the President's constitutional obligations.

Similarly, s 102(2) does not clothe a member of Parliament with a constitutional obligation envisaged in s 167(4)(e) to perform a specific act or function that would trigger the CC's exclusive jurisdiction. Instead, it confers power on the assembly to pass a motion of no confidence in the president if the majority of members support the motion. It was concluded that the present court had jurisdiction to grant orders in terms of s 102(2).

The court then turned to consider whether the Speaker's decision was unlawful and fell to be reviewed and set aside. The decision whether to vote by open or secret ballot lay with the Speaker. The courts can only interfere if the Speaker did not apply her mind to her decision. The court found the Speaker's decision to have been based on sound reasons. Finding the decision to have been unimpeachable, the court dismissed the application for review.

Criminal law and procedure – rape

Evidence and the role of indictments: The accused in *S v Makayi* [2021] 2 All SA 907 (ECB) was charged with having raped a 6-year-old girl and pleaded not guilty. The indictment referred to his having intentionally committed an act of sexual penetration with the complainant by inserting his penis into her vagina and anus without her consent.

The complainant's testimony did not include an allegation of penetration or sexual intercourse. The accused flatly denied the allegations against him. After their evidence had been adduced, the court invited argument on the question of intent. The prosecution pressed for a conviction on the main count, contending that the complainant's honest and reliable description of the manner in which the accused had placed her on top of him and the manner in which he had moved, was sufficient to prove that the accused had the requisite intent to rape, and the

evidence was sufficient for a conviction of rape on the basis of *dolus eventualis*.

It was held, by Stretch J, that s 144(3) (a) of the Criminal Procedure Act 51 of 1977 states that an indictment shall be accompanied by a summary of the substantial facts of the case that, in the opinion of the Director of Public Prosecutions (the DPP), are necessary to inform the accused of the allegations against him. The purpose of the summary is to fill out the picture presented by the indictment. While the prosecution is not bound by the summary of substantial facts, where the evidence, which the state intends to lead is so vastly different from that reflected in the summary of substantial facts, it is expected from the prosecution to either supplement the summary, and/or present an opening address. Prosecutors should decide on and draw up charges based on available evidence which will, *inter alia*, adequately reflect the nature, extent and seriousness of the criminal conduct and which can reasonably be expected to result in a conviction, provide the court with an appropriate basis for the sentence requested, and enable the case to be presented in a clear and simple way. The Prosecution Policy of the National Director of Public Prosecutions, in Item 7, states that prosecutors should fairly present the facts of a case to a court, disclosing information favourable to the defence even though it may be averse to the prosecution case. The summary of substantial facts in this case was misleading in its particularity. An opening outline by the prosecutor, indicating that the state's case would be that the accused made movements up against the complainant's body while the two of them remained fully clothed, would have solved that problem.

The court also rejected the prosecutor's attempt to rely on intention to rape in the form of *dolus eventualis*.

The final issue was that of the competent verdict of sexual assault. The testimony of the complainant, who was a single witness, was less than satisfactory. The medical evidence also did not corroborate her version.

Finding that the prosecution had failed to prove its case beyond a reasonable doubt, the court acquitted the accused.

Family law – marriage

Proprietary rights in black marriages: In *Sithole and Another v Sithole and Another* 2021 (6) BCLR 597 (CC), the High Court made an order declaring s 21(2)(a) of the Matrimonial Property Act 88 of 1984 unconstitutional and invalid to the extent that its provisions maintain and perpetuate the discrimination brought about by s 22(6) of the Black Administration Act 38 of 1927, which provided that marriages of black couples concluded under the Black Administration Act before 1988, would

automatically be out of community of property. The High Court declared that all marriages of black persons concluded out of community of property under s 22(6) before 1988 were marriages in community of property. A spouse in a marriage so declared to be a marriage in community of property was, however, given leave to apply to the High Court for an order that the marriage would remain one out of community of property, notwithstanding the High Court's order. The High Court referred its order to the CC for confirmation.

The first applicant, a black woman married to the first respondent since 1972, had brought the application in the High Court, together with the second applicant, the Commission for Gender Equality. The first applicant had contributed financially throughout the years of the marriage. She and her husband bought an immovable property, which became the family home. When the marriage relationship between them deteriorated, the first applicant was faced with the possibility of losing the value of her share of an estate, which she had helped to build up. For religious reasons she was unwilling to have the marriage dissolved by divorce and, therefore, would not be able to utilise the remedy provided by s 7(3) to (5) of the Divorce Act 70 of 1979 to secure an equitable distribution of the couple's assets.

The second respondent was the Minister of Justice and Correctional Services, cited in his capacity as the cabinet member responsible for the administration of the Matrimonial Property Act, and as the representative of the government.

The CC in a unanimous judgment confirmed the High Court's declaration of invalidity.

The judgment observed that s 22(6) of the Black Administration Act created the default position that black couples were married out of community of property. They were permitted to marry in community of property if, in the month prior to their marriage, they jointly declared to a magistrate, commissioner or marriage officer that they intended their marriage to be a marriage in community of property and of profit and loss. Section 22(6) applied only to marriages of Black people and not to marriages of other races.

Section 22(6) of the Black Administration Act was repealed by the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. The Amendment Act deleted s 22(6) of the Black Administration Act and inserted ss 21(2)(a) and 25(3) into the Matrimonial Property Act. The effect of the repeal for Black couples was that those who were married out of community of property under s 22(6) of the Black Administration Act had the opportunity to change their matrimonial regimes within two years from 2 December 1988. Couples were required to do so by executing and registering a notarial contract to that effect. Section 21(2)(a) of the Matrimonial

Property Act permitted couples to make the accrual system provided for in Chapter I of the Matrimonial Property Act applicable to their marriages. It provided, *inter alia*, that 'spouses to a marriage out of community of property entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988, in terms of s 22(6) of the Black Administration Act ... may cause the provisions of Chapter I of this Act to apply in respect of their marriage by the execution and registration ... of a notarial contract to that effect.'

Applicants contended that although various amendments made to the Matrimonial Property Act had ameliorated the discriminatory legacy of s 22(6), they did not remedy or reverse the negative impact of s 22(6) on black spouses. The default position of those marriages continued to be that they were out of community of property unless the couples had taken steps to alter their matrimonial property regime.

The court found that the impugned provisions perpetuated the existence of a special matrimonial regime for black couples who concluded their marriages before 1988. Marriages of black people were treated differently from those of other races. There was no justification for this differential treatment. The discrimination complained of was on one of the grounds listed in s 9(3) of the Constitution. In terms of s 9(5) of the Constitution, discrimination on one or more of the grounds listed in s 9(3) is presumed to be unfair unless proven otherwise. It was open to respondents to attempt to show that the discrimination was fair. They had not done so. It was in any event clear that they would not have been able to do so.

The provisions of s 21(2)(a) of the Matrimonial Property Act were inconsistent with the Constitution. The High Court order, therefore, had to be confirmed. Henceforth, the default position would be that all marriages which in terms of the Black Administration Act were automatically out of community of property were now marriages in community of property. Affected couples would have the option, like married couples of other races, to opt out and change their matrimonial regime to be one out of community of property, if they wished.

The court's order would not affect the legal consequences of any act or omission existing in relation to a marriage before the court's order was made. Nor would the order be permitted to undo completed transactions in terms of which ownership of property belonging to any of the affected spouses had since passed to third parties. A saving provision or generic order should be made in favour of a person claiming specific prejudice arising from the retrospective change of the matrimonial regime, to approach a competent court for appropriate relief.

Pharmaceutical and health – medical schemes

Administrative appeals: The third respondent (Discovery) and fourth respondent (Medshield) in *Cotty and Others v Registrar of the Council for Medical Schemes and Others* [2021] 2 All SA 793 (GP) refused to approve applications by the relevant applicants for the funding of treatment of certain conditions. Complaints to the first respondent (the Registrar) were dismissed, and the applicants appealed against such dismissals to the Appeal Committee of the Council for Medical Schemes (the Council) in terms of s 48 of the Medical Schemes Act 131 of 1998. The Appeal Committee's finding in favour of the applicants, led to Discovery and Medshield invoking s 50 of the Act and appealing against such rulings to the Appeal Board of the Council. The schemes then contended that the decisions of the Appeal Committee had been suspended by their appeals and they accordingly did not comply with the rulings made by the Appeal Committee.

In the present application, the question raised was whether the lodging of an appeal in terms of s 50(3) of the Act suspends the decision, which is the subject of that appeal, pending a decision by the Appeals Board.

The dispute turned on the correct inter-

pretation, effect and application of s 50 of the Act. The court referred to case law setting out the correct approach to statutory interpretation.

In terms of the Act, where a member is not entitled to payment in terms of its rules, the medical scheme is precluded from effecting payment to that member. That remains so notwithstanding a decision by the Council in terms of s 48(8). It is only following an order by the Appeal Board in terms of s 50(16)(b) that the decision be implemented, that the medical scheme may give effect to such decision. Section 50 establishes and sets out the powers of the Appeal Board. In terms of s 50(3), any person aggrieved by a decision of either the Registrar acting with the concurrence of the Council or by a decision of the Council may within 60 days of such decision and on payment of a prescribed fee, appeal against such decision to the Appeal Board.

Section 50 does not expressly state whether the lodging of an appeal in terms of s 50(3) does, or does not, suspend the decision, which is the subject of the appeal. In the case of court orders, the effect at common law of noting an appeal is to suspend the operation of the decision appealed against. The issue in this case was whether the common law principle applies to administrative decisions. The court concluded that there was nothing

in the Act that displaced the common law principle that the administrative appeal (timeously taken) suspends the decision which is the subject of the appeal. The ordinary common law principle was thus applicable and an appeal in terms of s 50(3) suspends a decision by the Council in terms of s 48(8).

The application was dismissed.

Other cases

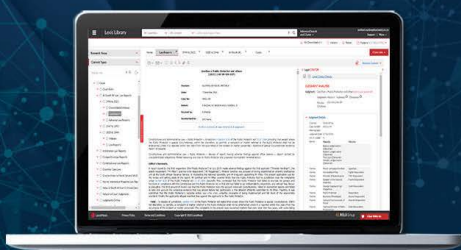
Apart from the cases and material dealt with above, the material under review also contained cases dealing with –

- disciplinary procedures of medical practitioners;
- duty of Parliament and provincial legislatures to facilitate public involvement in legislative processes;
- gender equality and male primogeniture;
- insolvency – trustee challenging validity or extent of creditor's claim; and
- orders of court incorporating settlement agreements.

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



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By
Lebogang
Mabitsela

The use of inappropriate language on workplace social media

Nkuna v Outsurance Insurance Company Limited
[2021] 4 BALR 408 (CCMA)

In the case of *Nkuna*, Ms Nkuna (the applicant) was an employee of Outsurance Insurance Company Ltd for a total period of five years where she served as an Inbound Sales Advisor at their head offices. The applicant was a member of a WhatsApp group, which comprised of mainly her team members and on one occasion the applicant sent a text to the group, which read: 'The MF was a racist piece of sh*t' out of frustration following an unsuccessful sale's pitch with a potential client who expressed an interest in signing with a company that serviced mainly Afrikaans people (see para 17). The applicant perceived the sending of such a text as nothing more than blowing off steam (see para 42), which was common among the members of the group, however, certain members received her text as one full of racist undertones, which ultimately led to her dismissal on 5 June 2020 following a disciplinary hearing (see para 6).

The matter was escalated to the Commission for Conciliation, Mediation and Arbitration. The basis of the applicant challenging the dismissal was that there was inconsistent application of discipline by the employer where racist complaints are concerned (see para 48). Previously, a Team Leader only received a final written warning for using language such as 'b*tch n*ga' and creating a WhatsApp group titled 'blacks only,' however, the applicant was dismissed without any form of warning (see para 14). An arbitration, therefore, took place and the issue to be determined was whether the applicant was procedurally and substantively unfairly dismissed taking into consideration the inconsistent application of discipline by the employer.

In the case of *Rustenburg Platinum Mine v South African Equity Workers Association obo Bester and Others* [2018] 8 BLLR 735 (CC), the court held that there are a number of factors that a Commissioner ought to consider when deciding on the fairness of a dismissal. Though not considered to be a closed list, however, the factors are as follows:

(i) the importance of the rule that was breached; (ii) the reason the employer im-

posed the sanction of dismissal; (iii) the basis of the employee's challenge to the dismissal; (iv) the harm caused by the employee's conduct; (v) whether additional training and instruction may result in the employee not repeating the misconduct; (vi) the effect of dismissal on the employee; and (vii) the long-service record of the employee'.

To evaluate the substantive fairness of the applicant's dismissal, the context and circumstances of the misconduct were, therefore, considered.

The rule against racism in the workplace is and was an important rule, however, it did not warrant the automatic dismissal of the applicant without considering all the circumstances of the case (see para 69). The reason given for the dismissal of the applicant was that she was in fact guilty of the charges she faced, namely, introducing a racial narrative on a social platform used as a business tool within the working environment, showing poor team relations as her conduct resulted in team members feeling racially offended and/or singled out, potentially bringing the name of the company in disrepute, and creating an environment of racial segregation, which goes against the values of the company (see para 6).

However, this finding was proven to be incorrect as the applicant successfully showed that the racial narrative was introduced a year before by the Team Leader who used foul language such as 'b*tch n*ga' among other racist acts, therefore when the applicant sent the text, such narrative had already been introduced.

The applicant's grievance was majorly fuelled by the fact that the said Team Leader only received a final warning for her racist conduct whereas the applicant was automatically dismissed for her similar conduct. There was no evidence that could suggest that the applicant is a racist person or that she was incapable of learning from her mistakes (see para 73), which therefore begs the question of why she was disciplined in a harsh manner which would leave devastating consequences for her career and her financial income (see para 73).

Taking into consideration all the above-

mentioned factors a conclusion was reached to the effect that the dismissal was procedurally fair, however, it was substantively unfair. It was shown that the decision of the employer was overly punitive and there was a general view that progressive discipline would have been effective especially since the employer did not suffer any loss from the conduct of the applicant (see para 73). In essence, the same standard of punishment that was imposed on the Team Leader should have been applied to the applicant as well.

The case of *Nkuna* gives a perspective that indicates that rules against racism in the workplace were and still are important, however, such rules should not lead to an automatic dismissal of an employee – every case should always be dealt with based on its own merits and account, taking into consideration all the relevant circumstances of the particular case. This was conveyed in the case of *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* [2017] 1 BLLR 8 (CC) where it was argued that courts have the duty to ensure that 'racism or racial abuse is eliminated. And that they must fulfil that duty fairly, fully and firmly. The notion that the use of the word k*ffir in the workplace will be visited with a dismissal regardless of the circumstances of a particular case, is irreconcilable with fairness. It is conceivable that exceptional circumstances might well demonstrate that the relationship is tolerable.'

It thus becomes clear that the violation of the applicant was in fact a serious one and rightly so ought to be sternly corrected in order to ensure a racist free working environment. However, employers should always strive to maintain consistent application of discipline in the workplace – because as shown in the case of *Nkuna*, inconsistency can render such discipline and dismissal by employers unfair.

Lebogang Mabitsela LLB (Wits) is a candidate legal practitioner at Snail Attorneys @ Law in Pretoria. □



By
Michelle
van der
Merwe

Sars' draconian powers: How long may Sars detain imported consignments?

Commissioner, South African Revenue Service v Trend Finance (Pty) Ltd and Another 2007 (6) SA 117 (SCA)

Section 88(1)(a) of the Customs and Excise Act 91 of 1964 (the Act) provides that any officer may detain any goods at any place 'for the purpose of establishing' whether the goods are liable to forfeiture. The question, which remains unanswered to a certain extent is, how long is the South African Revenue Service (Sars) entitled to detain imported consignments to establish whether it falls to be seized or forfeited?

Section 93 of the Act allows for the release of the consignments detained in terms of s 88 on provisional payment equating to the face value of the goods plus any unpaid duty. Although the consignments are allowed to be released on provisional payments, this section does not constitute a right to the importer or owner of the detained goods and SARS may still subsequently refuse to accept provisional payments.

An unreasonable period of detention to make a determination can expose a taxpayer to arbitrary deprivation of its right to property in terms of s 25 of the Constitution, as well as devastating economic consequences – given for example that apparel might only be suitable for a certain season based on current fashion trends.

It should be kept in mind that where Sars detains consignments in order to establish any liability to forfeiture, Sars has an obligation to conduct an investigation to make a determination to either seize or release the consignment. Detention is held to be the preliminary step in the process to reach a determination in this regard.

A first attempt to clear the air on what a reasonable period would be to detain goods in terms of s 88 is found in the case of *Trend Finance*.

In the *Trend Finance* case *a quo* the applicants imported three consignments of shoes into South Africa (SA) for Pep Stores and Foschini, respectively. All three consignments were detained shortly after or on arrival in SA during

1999 for purposes of investigating potential underpayment of duty. The consignments were, thereafter, released on agreements of provisional payments with the Controller of Customs.

On 29 March 2001, two years after the detention of the first consignment, Sars issued its decision to render the consignment liable to forfeiture in respect of the first consignment to the applicants. No determination at that stage had been made in respect of the other two consignments.

The applicants brought an application in the High Court to set aside the determination made in respect of the first consignment, to review the administrative action and to refund the provisional payments in respect of the remaining containers given that a 'reasonable period' has elapsed since the payments were made in 1999. At the time of the lodging of the application, a hefty five years after the detentions were made, the Commissioner was yet to make a determination pertaining to the second and third consignments.

The court *a quo* ruled in favour of the applicants on this aspect, in that, the Commissioner cannot detain the provisional payments indefinitely and that a limitation had to be read into ss 88 and 93 of the Act in this regard.

A revolutionary decision for taxpayers occurred in the consequent ruling of the Supreme Court of Appeal (SCA) where the decision of the court *a quo* was confirmed.

The court confirmed that a limitation should be read into s 88(1)(a) in terms of which the goods were detained to the effect that the right to detain goods only endures for a period of time reasonable for the investigation, which the section contemplates to be made, but no longer.

The SCA went on to state that there is no sufficient reason for the continued deprivation of the property once the purpose of the deprivation (to investigate whether the property is liable to forfeiture under the Act) is no longer justified,

and the continued deprivation would accordingly be arbitrary as meant by s 25 of the Constitution (para 29).

The provisional payments made in terms of s 93(1)(c) were held to be subject to the same limitation (para 29).

The court held that after a reasonable time has lapsed, any determination by the Commissioner would be incompetent given that the time within it could have reached a determination has expired (para 30). In view of this conclusion, the SCA confirmed the order of the court *a quo* in directing the Commissioner to refund the provisional payments in respect of the second and third consignments including interest thereon.

Although the *Trend Finance* case dealt with the unreasonable period of retention of the provisional payments, it is similarly applicable to detention in terms of s 88 of the Act.

While the decision of the SCA is lauded, it is unfortunate that no definite guideline has been provided as to what constitutes a 'reasonable period'. It is, however, a good way to reassure taxpayers that the customs officials might now detain goods with more consideration than before, conduct their investigations more speedily and that their provisional payments will have to be refunded after a reasonable time.

In conclusion, the decision in *Trend Finance* reassured taxpayers that Sars does not have the power to indefinitely detain imported goods and that an unreasonable period of detention will render its decision an arbitrary deprivation of property in terms of s 25 of the Constitution. Regard must, however, be had to the merits and circumstances of each case to determine reasonableness.

Michelle van der Merwe LLB (UP) is a candidate legal practitioner at Richard Meaden and Associates in Johannesburg.





By
Kgomo
Ramotsho

Biowatch principle does not apply to a matter that is not of a constitutional nature

Mkhatshwa and Others v Mkhatshwa and Others (CC)
(unreported case no CCT 220/20, 18-6-2021)
(Khampepe J (Mogoeng CJ, Jafta J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaetsi AJ and Tshiqi J concurring))

The Constitutional Court (CC) refused leave to appeal in the *Mkhatshwa* case. The matter was on appeal from the Supreme Court of Appeal (SCA) dismissing an appeal from the Mpumalanga Division of the High Court in Mbombela. The applicants submitted to the CC that the orders granted by the High Court were sought for illicit purposes and were improperly and unlawfully granted. The applicants argued that certain provisions of the Communal Property Associations Act 28 of 1996, as well as s 25(1) of the Constitution, are implicated by the allegedly unlawful orders, which were granted as a result of a material misdirection by the High Court.

The application arose from the orders and judgment of the Mpumalanga Division of the High Court, that was granted in March 2020 in terms of an Anton Pillar order and a temporary interdict in favour of the first respondent Evah Simangele Mkhatshwa, the mother of Khulile Nomvula Mkhatshwa, the Chieftainess of the Mawewe Tribe and the second respondent, the Mawewe Tribal Authority, recognised in terms of the Traditional Leadership and Governance Framework Act 41 of 2003. The relief was sought from and granted by the High Court on the basis of an application predicated on allegations of corruption, theft and fraud in the Mawewe Communal Property Association (MCPA), as well as the failure of the Executive Committee of the MCPA to register and restore certain farms to the Mawewe Tribe. The purpose of the application before the High Court was to vindicate the integrity of the MCPA by wresting control away from its alleged hijackers.

In February 2020, the respondents approached the High Court on an urgent basis, seeking an Anton Pillar order and an interim interdict. The purpose of the double-pronged relief was to –

- reserve evidence pertaining to the operations of the MCPA; and
- limit the management and running of the MCPA to certain appointees.

The applications were heard *in camera* as directed by the Judge President, and the orders were granted. Consequently, the committee was temporarily dissolved, and three persons were appointed to take control of investigating the affairs of the MCPA, and to report back to the High Court as to the allegations in question.

In response to the orders granted against them, the applicants filed a reconsideration application, which ended up being heard on the return day of the *rule nisi*. Aggrieved, the applicants sought leave to appeal against the decision of the High Court. The applicants approached the SCA, which dismissed the application for leave to appeal on the basis that it bore no reasonable prospects of success. The CC considered the merits of the application for leave to appeal on the papers alone, and it was satisfied that it must be dismissed on the basis that it bears no reasonable prospect of success. The CC added that ordinarily, the matter would end there, and an order would be issued to that effect. However, the CC said in pursuit of their cause, the applicants repeatedly made certain troubling submissions, which led to this judgment.

The CC pointed out that a recurring theme through the applicants' submissions is that the presiding officer in the High Court, Roelofse AJ, conducted himself in an improper and biased manner. In particular, the applicants have repeatedly taken issue with the fact that, as expressed by Roelofse AJ in his judgment, the matter was heard '*in camera* in accordance with the Judge President's directive'. The CC added that the applicants have effectively accused Roelofse AJ, together with the Judge President, of

serious and grave misconduct. By way of example, the following submission appeared in the applicants' founding affidavit:

'There is evidently no doubt that the interim interdict was heard *in camera* as a result of the directive of the Judge President. We submit ... that this was inappropriate. We submit that Roelofse AJ has failed to act independently and impartially.'

The CC said that it was troubling that the applicants had made these submissions, not as mere passing remarks, but as a basis of their appeal. The CC added that the applicants submit that the impugned orders were granted as a 'result of this improper influence' and are accordingly a nullity and stand to be set aside on appeal. The respondents reacted to the accusations by submitting that they are 'unacceptable, scurrilous and vexatious' and 'constitute a basis for ordering costs on a punitive scale in respect of this application'.

The applicants submitted to the CC that their costs should follow the result, but the *Biowatch* principle (see *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC)) ought to apply if the application failed. The applicant's argument was made on the basis that the applicants seek to assert their constitutional rights as contemplated by ss 25 and 34 of the Constitution, because the matter involves land restitution and s 13 of the Communal Property Associations Act.

The respondent, on the other hand, argued that the *Biowatch* principle does not apply to this matter because the application has no impact on the public interest and is clearly not of a constitutional nature, in line with the previous cases wherein this principle has applied. The respondent also emphasised that the *Biowatch* principle does not ordinarily apply between private parties, and that

the applicants' reprehensible conduct towards the Judge President and Roelofse AJ vitiates any mercy towards them in relation to costs. On the matter of punitive costs, the respondents submit that such an order is appropriate as a result of the 'deplorable and unacceptable attitude of the applicants towards the courts.'

The CC said although the interpretation of s 13 of the Communal Property Associations Act may invoke constitutional issues, the genesis of the application is a dispute about the validity of an Anton Piller order. The CC pointed out that it was inclined to agree with the respondents' submission that this 'constitutes an attempt to bring the matter under a broad blanket of constitutional rights, so as to enable the applicants to

then rely on the *Biowatch* principle.' The CC said, it is trite that the principle does not apply to frivolous and vexatious litigation, which is plainly what has spurred the application. The CC pointed out that the ease in which the applicants approached the court, callously defaming other members of the judiciary to justify their cause was troublesome.

The CC said that courts and their members are by no means immune to public criticism and accountability to those they serve. However, that does not mean that it is open to a litigant to level unfounded and scurrilous attacks against judicial officers to further their own end. The CC pointed out that it enjoys a sacrosanct power and privilege to uphold the law in furtherance of the

constitutional project. The CC added that litigants who resort to the kind of tactics displayed in this matter must be aware that they are unlikely to enjoy the CC's sympathies or be shown mercy in relation to costs.

The following order was made:

'1. Leave to appeal is refused.

2. The applicants must pay the costs of the first and second respondents in [the CC] on an attorney and client scale.'

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



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By
Philip
Stoop

New legislation

Legislation published from
1 – 30 June 2021

Bills

Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill B16A of 2020.

Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill B16B of 2020.

Domestic Violence Amendment Bill B20B of 2020.

Commencement of Acts

Protection of Personal Information Act 4 of 2013, s 58(2). *Commencement:* 1 February 2022. GN560 GG44761/25-6-2021 and GenN395 GG44782/30-6-2021.

Promulgation of Acts

Appropriation Act 10 of 2021. *Commencement:* 28 June 2021. GN390 GG44774/28-6-2021 (also available in Sepedi).

Correctional Services Amendment Act 7 of 2021. *Commencement:* To be proclaimed. GN323 GG44650/1-6-2021 (also available in Afrikaans).

Customary Initiation Act 2 of 2021. *Commencement:* To be proclaimed. GN333 GG44668/4-6-2021 (also available in Siswati).

Cybercrimes Act 19 of 2020. *Commencement:* To be proclaimed. GN324 GG44651/1-6-2021 (also available in Afrikaans).

Division of Revenue Act 9 of 2021. *Commencement:* 28 June 2021. GN389 GG44773/28-6-2021 (also available in isiXhosa).

Electoral Laws Amendment Act 4 of 2021. *Commencement:* To be proclaimed. GN321 GG44648/1-6-2021 (also available in Afrikaans).

Local Government: Municipal Structures Amendment Act 3 of 2021. *Commencement:* To be proclaimed. GN320 GG44647/1-6-2021 (also available in Afrikaans).

Recognition of Customary Marriages Amendment Act 1 of 2021. *Commencement:* 1 June 2021. GN319 GG44646/1-6-2021 (also available in Afrikaans).

Special Appropriation Act of 11 of 2021. *Commencement:* 28 June 2021. GN391 GG44775/28-6-2021 (also available in Setswana).

Upgrading of Land Tenure Rights Amendment Act 6 of 2021. *Commencement:* To be proclaimed. GN322

GG44649/1-6-2021 (also available in Afrikaans).

Selected list of delegated legislation

Animal Diseases Act 35 of 1984

Control measures relating to foot and mouth disease in certain areas. GN R569 GG44783/30-6-2021.

Auditing Profession Act 26 of 2005

Fees payable from 1 April 2021. BN67 GG44788/30-6-2021.

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Domestic workers minimum assessment. GenN360 GG44702/15-6-2021 and GenN361 GG44722/17-6-2021.

Constitution

Transfer of administration, powers and functions entrusted by legislation to certain cabinet members: Chapters 5 and 6 of the Children's Act 38 of 2005 from the Minister of Social Development to the Minister of Basic Education. Proc21 GG44787/30-6-2021.

Customs and Excise Act 91 of 1964

Amendment of Rules. GN R525 GG44705/14-6-2021.

Deeds Registries Act 47 of 1937

Amendment of Regulations. GN R498 GG44700/11-6-2021 (also available in Afrikaans).

Disaster Management Act 57 of 2002 (COVID-19)

• Education

Amendment of directions regarding measures to address, prevent and combat spread of COVID-19 in the National Department of Basic Education: Re-opening of schools. GenN393 GG44779/29-6-2021.

• General regulations

Extension of National State of Disaster under the COVID-19 lockdown to 15 July 2021. GN R493 GG44692/11-6-2021.

Determination of alert level: Adjusted Alert Level 3 from 16 June 2021. GN R529 GG44715/15-6-2021.

Amendment to the regulations issued in terms of s 27(2): Adjusted Alert Level 3. GN R532 GG44721/17-6-2021.

Determination of alert level: Adjusted Alert Level 3 from 28 June 2021. GN R564 GG44772/27-6-2021.

Amendment to the regulations issued in terms of s 27(2): Adjusted Alert Level 4.

GN R565 GG44772/27-6-2021 and GN R567 GG44778/29-6-2021.

• Home Affairs

Amendment of directions regarding measures to prevent and combat the spread of COVID-19 in Home Affairs. GN398 GG44786/30-6-2021.

• Labour

Consolidated direction on occupational health and safety measures in certain workplaces. GN R499 GG44700/11-6-2021.

• Sports, arts and culture

Amendment of directions regarding measures to address, prevent and combat the spread of COVID-19 in sports, arts and culture. GN496 GG44699/11-6-2021.

Interpretation Act 33 of 1957

Dictionary of terms and concepts for post-school education and training. GenN335 GG44674/4-6-2021 and GenN363 GG44724/18-6-2021.

National Environmental Management Act 107 of 1998

Amendment of the Financial Provisioning Regulations, 2015. GN495 GG44698/11-6-2021.

Amendment to the Environmental Impact Assessment Regulations, Listing Notice 1, Listing Notice 2 and Listing Notice 3. GN517 GG44701/11-6-2021.

National Environmental Management: Air Quality Act 39 of 2004

Repeal of regulations regarding fuel burning appliances in dwelling houses. GN537 GG44724/18-6-2021.

Repeal of regulations relating to inspection of premises in a dust control area. GN536 GG44724/18-6-2021.

Repeal of regulations relating to smoke control. GN538 GG44724/18-6-2021.

National Environmental Management: Integrated Coastal Management Act 24 of 2008

The National Estuarine Management Protocol. GN533 GG44724/18-6-2021.

National Environmental Management: Waste Act 59 of 2008

National norms and standards for organic waste composting. GN561 GG44762/25-6-2021.

National Nuclear Regulator Act 47 of 1999

Long term Operation of Nuclear Installations Regulations (Afrikaans version of the regulations). GN R501 GG44700/11-6-2021.

National Payment System Act 78 of 1998
Designation of Efficacy Payments (Pty) Ltd as a clearing system participant by the Governor of the South African Reserve Bank. GN519 GG44701/11-6-2021.

Occupational Health and Safety Act 85 of 1993

Notice that first aid level 1, 2 and 3 conducted by first aid training organisations approved by the Chief Inspector ceased to exist from 1 April 2021 and that a person or organisation who wants to provide first aid training approved by the Chief Inspector must have a valid accreditation document issued by the Quality Assurance Body that has been delegated the quality assurance responsibilities for First Aid Unit Standards by the Quality Council for Trades and Occupations. GN R328 GG44663/4-6-2021.

Promotion of Access to Information Act 2 of 2000

Exemption of certain private bodies from compiling the manual contemplated in s 51(1). GN397 GG44785/30-6-2021.

Public Finance Management Act 1 of 1999

Statement of national revenue, expenditure and borrowings as at 31 May 2021. GenN394 GG44781/30-6-2021.

Road Accident Fund Act 56 of 1996

Stipulation of terms and conditions on which claims for the compensation shall be administered. BN58 GG44674/4-6-2021.

Traditional Leadership and Governance Framework Act 41 of 2003

Recognition of the AmaRharhabe Kingship. GN521 GG44701/11-6-2021.

Draft Bills

- Draft Electoral Commission Amend-

ment Bill, 2021 for comment. GenN374 GG44741/21-6-2021.

- Draft National Nuclear Regulator Amendment Bill, 2021 for comment. GN545 GG44749/22-6-2021.

Draft delegated legislation

- Draft Policy for the General Education Certificate in terms of the National Education Policy Act 27 of 1996 and the South African Schools Act 84 of 1996 for comment. GN489 GG44674/4-6-2021.
- Exposure drafts 188 to 191 issued by the International Public Sector Accounting Standards Board for comment. BN55 GG44674/4-6-2021 and BN60 GG44701/11-6-2021.
- Code of Conduct of the Banking Association South Africa in terms of the Protection of Personal Information Act 4 of 2013 for comment. GN492 GG44690/11-6-2021.
- Regulations relating to the certificate of need for health establishments and health agencies in terms of the National Health Act 61 of 2003 for comment. GN528 GG44714/15-6-2021.
- Draft regulations regarding agricultural remedy in terms of the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947 for comment. GN R541 GG44726/18-6-2021.
- Proposed regulations regarding fees for the provision of aviation meteorological services in terms of the South African Weather Service Act 8 of 2001 for comment. GN544 GG44743/22-6-2021.
- Draft terms and conditions on which

claims for compensation shall be administered in terms of the Road Accident Fund Act 56 of 1996 for comment. BN66 GG44747/22-6-2021.

- Draft Maritime Occupational Health and Safety Amendment Regulations, 2021 in terms of the Merchant Shipping Act 57 of 1951 for comment. GenN388 GG44761/25-6-2021.
- Proposed amendments to the list of waste management activities that have, or are likely to have, a detrimental effect on the environment in terms of the National Environmental Management: Waste Act 59 of 2008 for comment. GN562 GG44763/25-6-2021.
- Draft national guideline for consideration of climate change implications in applications for environmental authorisations, atmospheric emission licences and waste management licences in terms of the National Environmental Management Act 107 of 1998 for comment. GN559 GG44761/25-6-2021.
- Draft policy on the conservation and ecologically sustainable use of elephant, lion, leopard and rhinoceros in terms of the National Environmental Management Act 107 of 1998 for comment. GN566 GG44776/28-6-2021.
- Draft amended format and procedure for the nomination of world heritage sites in South Africa in terms of the World Heritage Convention Act 49 of 1999 for comment. GenN392 GG44777/29-6-2021.

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

People and practices

Compiled by Shireen Mahomed

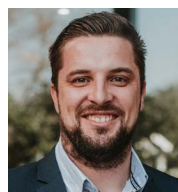
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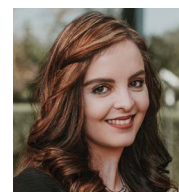
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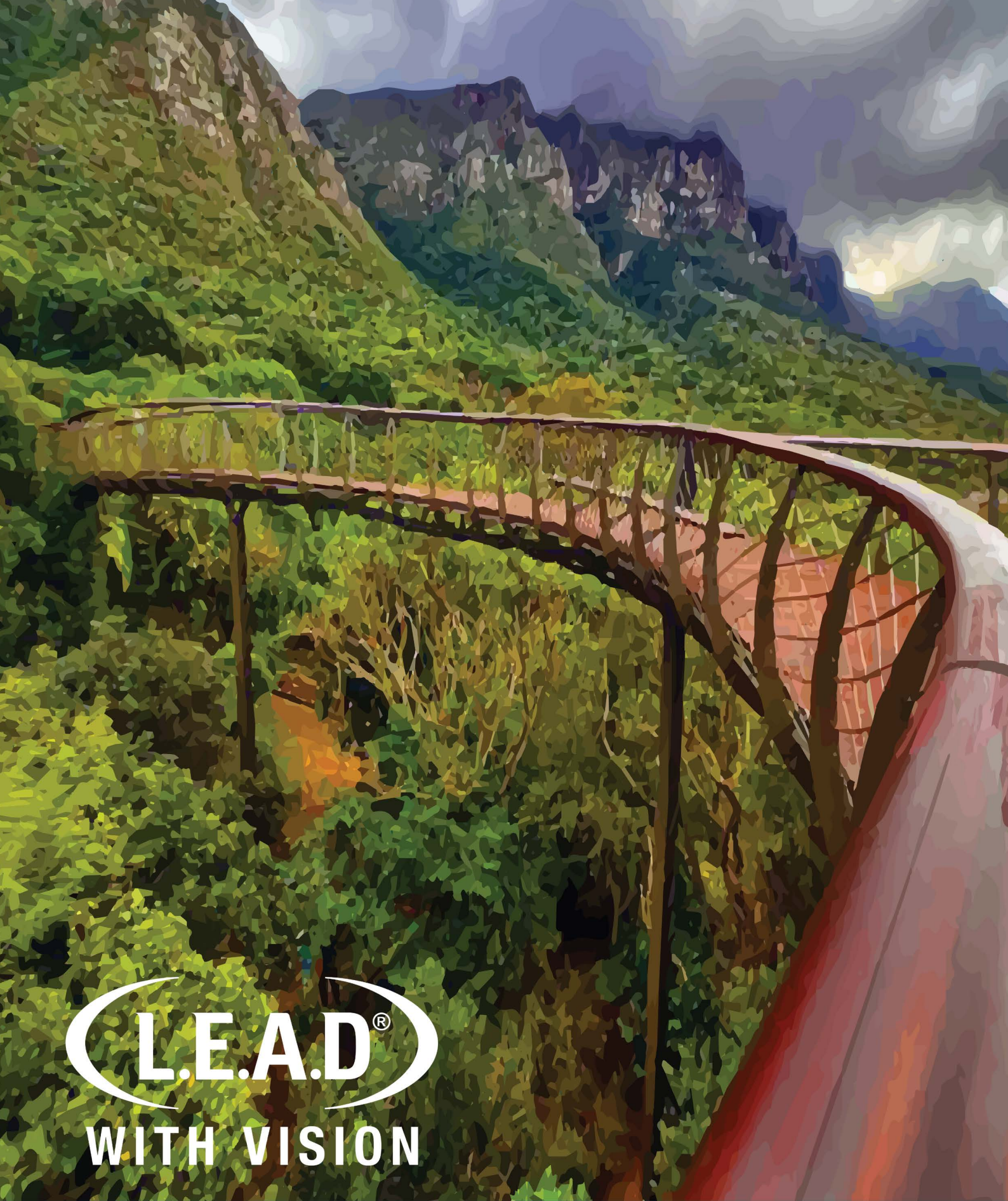


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The Kirstenbosch Centenary Tree Canopy Walkway, also known as *The Boomslang*, takes visitors on a 130 metre-long walkway, snaking its way through the canopy of the National Botanical Garden's Arboretum. The walkway is crescent-shaped and takes advantage of the sloping ground, touching the forest floor in two places and raising visitors to 12 m above ground in the highest parts. Kirstenbosch National Botanical Garden was established in 1913 to promote, conserve and display the extraordinarily rich and diverse flora of southern Africa. It was also the first botanical garden in the world to be devoted to a country's indigenous flora.


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LEGAL EDUCATION & DEVELOPMENT

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1954-2017.



By
Monique
Jefferson

Employment law update

Unfair discrimination for failure to appoint an employee to a position

In *Ethekweni Municipality v Nadesan and Others* [2021] 6 BLLR 598 (LC) the Labour Court (LC) had to determine whether an Indian male employee was unfairly discriminated against when he was not appointed to the position of Senior Storekeeper, Fire and Emergency Services. This position had been vacant for a year and the filling of this position had become urgent as it was impacting on the functionality of the department. It was a critical and highly specialised role that required a lot of experience to develop in-depth knowledge of specialised fire-fighting equipment and uniforms. There were accordingly very few candidates with that experience. The employee had 15 years of experience and he scored the best among other shortlisted candidates in the written examination and interview questions. There was, however, overrepresentation of Indian males in the Emergency Services Cluster whereas there was under-representation of white males, white females, and African females. The selection panel was, therefore, aware that ideally an African female should be appointed to the position to address this inequity. There were, however, no suitable African female candidates so the selection panel recommended the appointment of the employee on the basis that African females could be appointed to other vacancies within the cluster to address the inequity. The recommendation from the selection panel was rejected and the position was re-advertised with the hope that a suitable African female candidate would come forward in the next round.

The employee alleged that this constituted unfair discrimination based on race and referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The employer municipality alleged that the employee was not appointed because Indian male employees were already overrepresented in

the occupational level in which the position fell. The CCMA found that the employee had been unfairly discriminated against. The municipality then referred the dispute to the LC alleging that the commissioner erred in finding that the employee was unfairly discriminated against as there had been no attack on the employment equity plan.

The LC was required to consider whether the affirmative action measure not to appoint the employee was fair and rational in the circumstances. The LC referred to the decision in *Solidarity and Others v Department of Correctional Services and Others (Police and Prisons Civil Rights Union and Another as amici curiae)* [2016] 10 BLLR 959 (CC) to determine which test to apply to determine the lawfulness of an affirmative action measure. In this case, there were two views regarding the rationality of an affirmative action measure. The one view is that a measure should not be interfered with if it is rationally connected to addressing identified demographic imbalances. The second view is that rationality is not the only ground, and the court is required to consider the effect of the employment equity plan. Therefore, it may still constitute unfair discrimination even if the measure may rationally advance demographic representivity in general, but it infringes on the dignity, right to equality and other legitimate interests of the non-appointed candidate. Whitcher J preferred the latter test in this case.

The LC per Whitcher J found that the 'fairness' approach requires one to first consider whether the affirmative action measure is rational and then one needs to consider whether it is fair by considering the facts of the matter. A test was suggested in terms of which a measure would be regarded as irrational if the following factors are present –

- the measure will not address the demographic inequity;
- there is no employment equity plan; the plan imposes quotas;
- the objectives of the plan have already been met;
- the wrong demographic statistics have been taken into account; and
- the affected employee is a member of more than one previously disadvantaged group.

If, after considering these factors, it is

determined that the measure is rational then it needs to be determined on the facts of the case whether the benefit for the advantaged person outweighs the harm to the external parties. Therefore, although a measure that is rational is presumed to be fair it may still be regarded as unfair depending on the facts. Factors to consider assessing fairness are –

- the prospects of finding a suitable candidate from the under-represented group;
- the number of times a rejected candidate has been assessed;
- the extent to which groups are under-represented;
- the difference in scores between the successful candidate and the other applicants;
- the time that the overlooked candidate has spent in an acting capacity in that role;
- the impact on being overlooked on self-worth and dignity;
- the need to fill the post with the best qualified person; and
- the needs of the business as a whole.

It was emphasised that a candidate's disappointment cannot lightly trump the need to achieve transformation in the workplace. Therefore, the facts of the case always need to be considered. For example, an employer may be able to demonstrate that it was fair in the circumstances to negatively impact an employee's dignity because there is an operational requirement to attain certain demographics for Broad-based Black Economic Empowerment purposes in order to preserve business.

In this case, the abovementioned factors were considered, and it was found that the decision not to appoint the employee was irrational in the circumstances notwithstanding that there was no evidence led on the critical nature of the role or the impairment to the employee's dignity. It was, however, irrational to re-advertise a role when there had been no suitable African female candidates available and there had been no consideration given to appointing African females into other roles in the cluster to address the inequities in that cluster. It also appeared that incorrect statistics were used as a basis for the decision.

In regard to the allegation by the em-

ployer municipality that the employee was required to attack the municipality's employment equity plan, it was held that that was an incorrect interpretation of the *South African Police Service v Solidarity obo Barnard (Police and Prisons Civil Rights Union as amicus curiae)* [2014] 11 BLLR 1025 (CC) case as to require an employee to challenge the plan would have the effect of depriving employees of the right to allege unfair discrimination if the decision was taken in accordance with a valid and acceptable employment equity plan.

The appeal was accordingly dismissed.

Delictual claim for damages against employer

In *Churchill v Premier of Mpumalanga and Another* [2021] 6 BLLR 539 (SCA), an employee instituted a delictual claim against the employer for R 7,5 million for medical treatment, general damages and loss of income. The claim arose as a result of the employee suffering physical injuries and post traumatic disorder, which eventually led to her resignation as a result of being assaulted in the workplace by strikers. The employee had

been working in the employer's building during a labour-related protest when a member of a trade union mistakenly thought that she swore at him. She then locked herself in her colleague's office. The strikers broke down the door and carried her down the stairs, threw her shoes at her and racially abused her. She sued the Premier of Mpumalanga on the basis that reasonable steps had not been taken to protect her.

The employer alleged that the High Court did not have jurisdiction to determine the matter as s 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) precludes an employee from claiming from the employer for an occupational injury. Furthermore, negligence was denied.

The court held that to constitute an occupational injury there must be a causal connection between the accident and the person's employment and, therefore, the facts of each matter need to be determined. In this case the employee suffered her injuries during the course of her employment as she was at her place of work at the time. The court then had to consider whether the injuries arose out of her employment. It is

more likely for the injury to have arisen out of employment if there is a close link between the injury and the performance of the employee's ordinary duties. After considering the facts it was held that the injury was not sufficiently closely connected to her employment to have arisen from her employment. The incident had not occurred because of her employment or because of the position she held or anything she had done when performing her duties but because she had run into these protesters and one of the protesters mistakenly thought that she had sworn at him. Furthermore, the assault had racial and gender undertones. It was held that attacks on dignity are not part of the job. It was, therefore, held that the injury did not arise out of employment, and she accordingly was not precluded by COIDA from claiming damages from the employer. The matter was remitted to the High Court to determine the damages that she was entitled to.

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By
Moksha
Naidoo

A crucial distinction between ss 197(2)(c) and 197(5)(a) of the LRA

Fulton and Others v Vita Nova Selection Plant (Pty) Ltd and Others (LC) (unreported case no J3042/18, 11-6-2021) (Nkutha-Nkontwana J).

The facts in this matter brought into focus the following two sections of s 197 of the Labour Relations Act 66 of 1995 (LRA).

Section 197(2)(c) states: 'If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) -

...

(c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour

practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer' (my italics).

Section 197(5)(a) states: 'For the purposes of this subsection, the collective agreements and arbitration awards referred to in paragraph (b) are agreements and awards that bound the old employer in respect of the employees to be transferred, *immediately before the date of transfer*' (my italics). The three applicants were dismissed by the first respondent, Vita Nova on 24 October 2016. In terms of an arbitration award delivered sometime in August 2017, the employees' dismissals were found to be substantively and procedurally unfair following which they were collectively awarded compensation of R 774 400.

Vita Nova did not honour the award, nor did it seek to have the award set aside. This prompted the employees to obtain a writ of execution. In an interpleader, brought by the second to fourth respondents in their capacity as trustees of Mooipan Trust, it was argued that the assets which the Sheriff had attached, were assets bought by Mooipan Trust from Vita Nova.

In response, the applicants approached the Labour Court (LC) for an order declaring that the sale of assets from Vita Nova to Mooipan Trust constituted a transfer contemplated in s 197 of the LRA and that both Vita Nova and Mooipan Trust were jointly and severally liable to comply with the award.

Neither respondent opposed the first

order sought but denied Mooipan Trust was liable to pay the applicants the compensation awarded. Mooipan Trust argued that the sale of the business occurred in May 2017 whereas the arbitration award was delivered in August 2017. This, according to the respondents meant that the award was not an award envisaged in s 197(5)(a) as it was not an award, which was binding on the old employer prior to the transfer. In addition, Mooipan argued that it was not a party to the arbitration provisions.

Having considered the purpose of s 197 in general, as well as what s 197(5) sought to achieve in particular, the court made two critical findings.

The first was that the general scheme of s 197(5), focussed to ensure the continuation and enforcement of collective bargaining, in the form of either collective agreements or arbitration awards pertaining to collective agreements or organisational rights; when a business was sold as a going concern.

On this point the court held:

'It is absolutely clear from the above memoranda that the purpose of section 197(5) of the LRA is to facilitate the continuity of collective bargaining by providing that the old employer's obligations in respect of trade union organisational rights in terms of the arbitration awards or collective agreements, that bound the old employer immediately before the transfer of [a] business as a going concern, shall automatically transfer to the new employer.'

The second point was that arbitration

awards in respect of an unfair dismissal, unfair labour practices and/or unfair discrimination; are awards, which ought to be addressed within the context of s 197(2)(c) and not s 197(5).

The court held:

'In my view, section 197(5) of the LRA does not apply to arbitration awards that are issued consequent to employees successfully challenging the conduct of the old employer in relation to dismissal, unfair labour practice or discrimination. The outcome of those processes would be binding on the new employer in terms of section 197(2)(c) of the LRA irrespective of the date on which they were issued.'

Following this distinction, the court found that s 197(5) was not relevant to the application before it. The arbitration award was in respect of an unfair dismissal dispute and was enforceable against Mooipan Trust as per the provisions of s 197(2)(c), irrespective of the fact that the award was delivered after the date of transfer.

In criticising the argument further, the court noted that the Mooipan Trust's construction of s 197(5)(a) meant that a new employer would escape liability under circumstances where the old employer dismissed the employee whereafter the latter claimed an automatically unfair dismissal, which has to be adjudicated at the LC. If judgment was delivered in favour of the employee but after the date of the sale of the business, then on the respondent's argument, the new employer would not be liable for an order of reinstatement or compensation. This, according to the court was not only irrational but would run contrary to the spirit and purpose of s 197.

Dismissing the argument that Mooipan Trust was not a party to the arbitration proceedings, the court noted that the second respondent, acting as a trustee of Mooipan in the declaratory proceedings, also represented Vita Nova as its director in the arbitration proceeding. During the same time, he was also

a trustee of Mooipan Trust. It was common cause that at no time before the award was delivered, did he inform the arbitrator or the applicants that the business had been sold hence the applicants could not have joined Mooipan Trust to the dispute.

The court ordered that the sale of the business from Vita Nova to Mooipan Trust was a transaction hit by the provisions of s 197 and that both entities were jointly and severally liable to pay the applicants compensation as set out in the award together with interest running from the date of the award. No order as to costs were made.

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By
Kathleen
Kriel

Recent articles and research

Please note that the below abbreviations are to be found in italics at the end of the title of articles and are there to give reference to the title of the journal the article is published in. To access the article, please contact the publisher directly. Where articles are available on an open access platform, articles will be hyperlinked on the *De Rebus* website at www.derebus.org.za

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Abbreviation	Title	Publisher	Volume/issue
<i>EL</i>	Employment Law Journal	LexisNexis	(2021) 37.2
<i>ITJ</i>	Insurance and Tax Journal	LexisNexis	(2021) 36.1
<i>PLD</i>	Property Law Digest	LexisNexis	(2021) 25.1
<i>TCR</i>	The Corporate Report	Juta	(2020) 1
<i>TSAR</i>	Tydskrif vir die Suid-Afrikaanse Reg	Juta	(2021) 2 (2021) 3

Constitutional law – religion

Henrico, R 'Administrative law and voluntary religious associations in South

Africa: Some reflections' (2021) 3 *TSAR* 521.

Constitutional law

Laubscher, R 'Overview of constitutional

court judgments on the Bill of Rights – 2020' (2021) 2 *TSAR* 311.

Rautenbach, IM 'Constitution and contract: Indirect and direct application of the Bill of Rights on the same day and

the meaning of “in terms of law” (2021) 2 TSAR 379.

Consumer law

Eiselen, S ‘Digitisation and consumer law in South Africa and Africa’ (2021) 3 TSAR 436.

Contracts – novation

Sonnekus, JC and Schlemmer, EC ‘Nova-sie en delegasie van skuld – hoe raak dit die versekering van die tersake skuld?’ (2021) 2 TSAR 356.

Contracts

Reinecke, MFB and Lubbe, GF ‘Contracts of insurance and the objective approach to interpretation of contracts’ (2021) 2 TSAR 346.

COVID-19 – constitutional law

Brickhill, J ‘Constitutional implications of COVID-19’ (2020) 1 TCR 33.

COVID-19 – corporate entities

Foster, R ‘Critical insights into COVID-19’s impact on organisations through the lens of the King IV Report’ (2020) 1 TCR 7.

Hooper, P ‘Non-governmental organisations and corporate social investment in a time of crisis’ (2020) 1 TCR 39.

King, M ‘Corononomics’ (2020) 1 TCR 1.

Natesan, P ‘COVID-19: Key actions for boards’ (2020) 1 TCR 21.

Singh, H ‘Pandemonics: The impact of the pandemic on business and society’ (2020) 1 TCR 47.

COVID-19 – insolvency

Timoney, K and Veldhuizen, PJ ‘Insolvency and restructuring in the post-pandemic world: The role of liquidation and business rescue’ (2020) 1 TCR 25.

COVID-19 – legal profession

Van Eck, M ‘Ethical and professional duties of legal practitioners: Another casualty of COVID-19?’ (2021) 2 TSAR 396.

Criminal procedure

Watney, M ‘Concern about the (seemingly) unlimited discretion to discharge an accused after close of the state’s case’ (2021) 3 TSAR 611.

Customary marriages

Sonnekus, JC ‘Huweliksluiting en aan-neming van kinders kragtens kulturele gebruike in stryd met die reg behoort kragteloos te wees – *sed, ex Africa semper aliquid novi*’ (2021) 2 TSAR 211.

Delict

Sonnekus, JC ‘Verlowingsbreuk of trou-breuk is geen egbreuk nie maar slegs nog

in sommige moderne sosiale gemeenskappe as onregmatige daad erken?’ (2021) 2 TSAR 327.

Disaster management

Botes, M ‘The use of geospatial surveillance data for public-health emergency and disaster management in South Africa: A review with legal recommendations’ (2021) 3 TSAR 474.

Extradition

Du Toit, JJ and Svicevic, M ‘The unconstitutionality of section 5(1)(a) of the Extradition Act 67 of 1962 – implications for ongoing and future extradition proceedings in light of a decision of the Constitutional Court’ (2021) 3 TSAR 538.

Fair use

Karjiker, S ‘Should South Africa adopt fair use? Cutting through the rhetoric’ (2021) 2 TSAR 240.

Insolvency

O’Brien, P and Calitz, J ‘Setting aside the (result of a) vote to reject a business rescue plan: Mind the gaps when biting at the cherry!’ (2021) 3 TSAR 409.

Labour law

Coetzee, SA ‘Promoting fair individual labour dispute resolution for South African educators accused of sexual misconduct (part 2)’ (2021) 2 TSAR 279.

Grogan, J ‘Back pay puzzles: Enforcing retrospective reinstatement orders’ (2021) 37.3 EL.

Grogan, J ‘Cause and effect – does the “Afrox test” still apply?’ (2021) 37.3 EL.

Law of succession

De Waal, MJ and Mills, L ‘What it means to be a parent: Implications for family law and the law of intestate succession’ (2021) 3 TSAR 562.

Faber, J ‘A conceptual view of the act of testation to elucidate a testator’s intention in the South African law of succession: A proposed “act-based model” as opposed to the traditional “requirements model” (part 1)’ (2021) 3 TSAR 504.

Legal practice

Van Eck, M ‘The third branch of the legal profession’ (2021) 2 TSAR 256.

Matrimonial law

Neethling, J ‘The availability of the *actio legis aquiliae* and the *actio iniuriarum* between spouses’ (2021) 3 TSAR 602.

Pension fund law

De la Harpe, L ‘Withdrawing retirement funds upon emigration’ (2021) 36.2 ITJ.

Mhango, M ‘A strange thing happened on the way to the Post Office: *Post Office Retirement Fund v S.A. Post Office SOC Ltd and Others*’ (2021) 36.2 ITJ.

Mhango, M ‘Deductions from pension

benefits under the Lesotho Pension Funds Act: A comparative analysis’ (2021) 36.2 ITJ.

Nevondwe, L ‘Retirement reforms: The practical implications of annuitisation’ (2021) 36.2 ITJ.

Oosthuizen, WM ‘Critical analysis of the SCA decision in *Montanari v Montanari* in respect of living annuities on divorce’ (2021) 36.2 ITJ.

POPIA

Botha, M ‘POPIA and electronic direct marketing: A storm (in a teacup)’ (2021) 25.2 PLD.

Property law

Bhuqa, W ‘Speculation on the validity of removals of title deed restrictions effected in terms of the Repealed Act 84 of 1967 after 1 July 2015’ (2021) 25.2 PLD.

Botha, M ‘Body corporates’ liability for costs contributions when using sequestration to collect arrear levies’ (2021) 25.2 PLD.

Malatji, M ‘The importance of property *force majeure* clause in a lease for commercial lease agreement’ (2021) 25.2 PLD.

Sonnekus, JC ‘Géén teenprestasie vir ’n serwituut van parkering oor eiendom van ’n aandeelblokskema – bedenklik – ook wat kompetensie betref’ (2021) 3 TSAR 571.

Van der Merwe, CG ‘Is a scheme rule prohibiting the keeping of animals in a sectional title scheme invalid? Lessons from the landmark decision of the New South Wales Court of Appeal’ (2021) 3 TSAR 546.

Tax law

Moosa, F ‘Analysis of legal professional privilege in the Tax Administration Act’ (2021) 2 TSAR 294.

Trusts

Van Tonder, W ‘Total return investing and trusts’ (2021) 36.2 ITJ.

Kathleen Kriel *BTech (Journ)* is the Production Editor at *De Rebus*. □



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Book announcements



Essential Evidence

By DT Zefferdt, AP Paizes and
JS Grant
Durban: LexisNexis
(2020) 2nd edition
Price R 598 (including VAT)
385 pages (soft cover)
Also available as an e-Book.

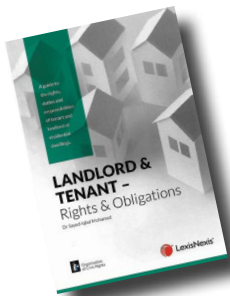
The law of evidence is vital and forms part of the curriculum of every South African law qualification. Law of evidence is not considered an easy subject, especially not for persons who have never been inside a court of law and this condensed version of the detailed *The South African Law of Evidence* (Durban: LexisNexis 2009) is ideal for students and, candidate attorneys and pupil advocates for practitioners requiring a quick reference.



Handbook of the South African Law of Maintenance

By Lesbury van Zyl and revised by
Dr Brigitte Clark
Durban: LexisNexis
(2016) 4th edition
Price R 583,78 (including VAT)
277 pages (soft cover)
Also available as an e-Book.

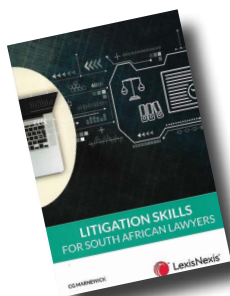
This book is a concise exposition of the common law and statutory provisions relating to the law of maintenance. This handbook is suitable for practitioners and justice officials as a ready reference to every aspect of maintenance law.



Landlord and Tenant - Rights and Obligations

By Dr Sayed-Iqbal Mohamed
Durban: LexisNexis
(2019) 1st edition
Price R 241,50 (including VAT)
289 pages (soft cover)
Also available as an e-Book.

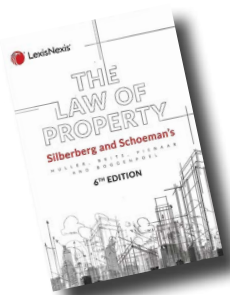
This book focuses on residential tenancies and the Rental Housing Act 50 of 1999 in private and public rental housing. It includes practical guidelines for tenants, landowners, estate agents, Rental Housing Tribunals, legal practitioners, and students, regarding the rights, duties and responsibilities of tenants and landowners of residential dwellings. The book is based on the Rental Housing Act as amended and offers an in-depth analysis of each provision of the Rental Housing Act, as well as other relevant legislation and case law.



Litigation Skills for South African Lawyers

By CG Marnewick
Durban: LexisNexis
(2019) 4th edition
Price R 1 301,80 (including VAT)
534 pages (soft cover)
Also available as an e-Book.

This book includes not only the skills and techniques required for civil litigation, including the new court-based mediation, but also the skills and techniques required of a prosecutor and defence counsel in criminal litigation. This publication is essential reading for both civil and criminal litigators.



Silberberg and Schoeman's the Law of Property

By Gustav Muller, Reghard Brits, Juanita M Pienaar, Zsa-Zsa Boggenpoel
Durban: LexisNexis
(2019) 6th edition
Price R 961,17 (including VAT)
915 pages (soft cover)
Also available as an e-Book

Apart from the introductory chapters looking at the legal concept of property, its classifications and property rights, the book also looks at the different types of ownership of property, including co-ownership, as well as the protection and loss thereof. This product and its title have a long-standing reputation among practitioners, as well as students. It consolidates various aspects of property law, making it a one stop publication for students and practitioners.



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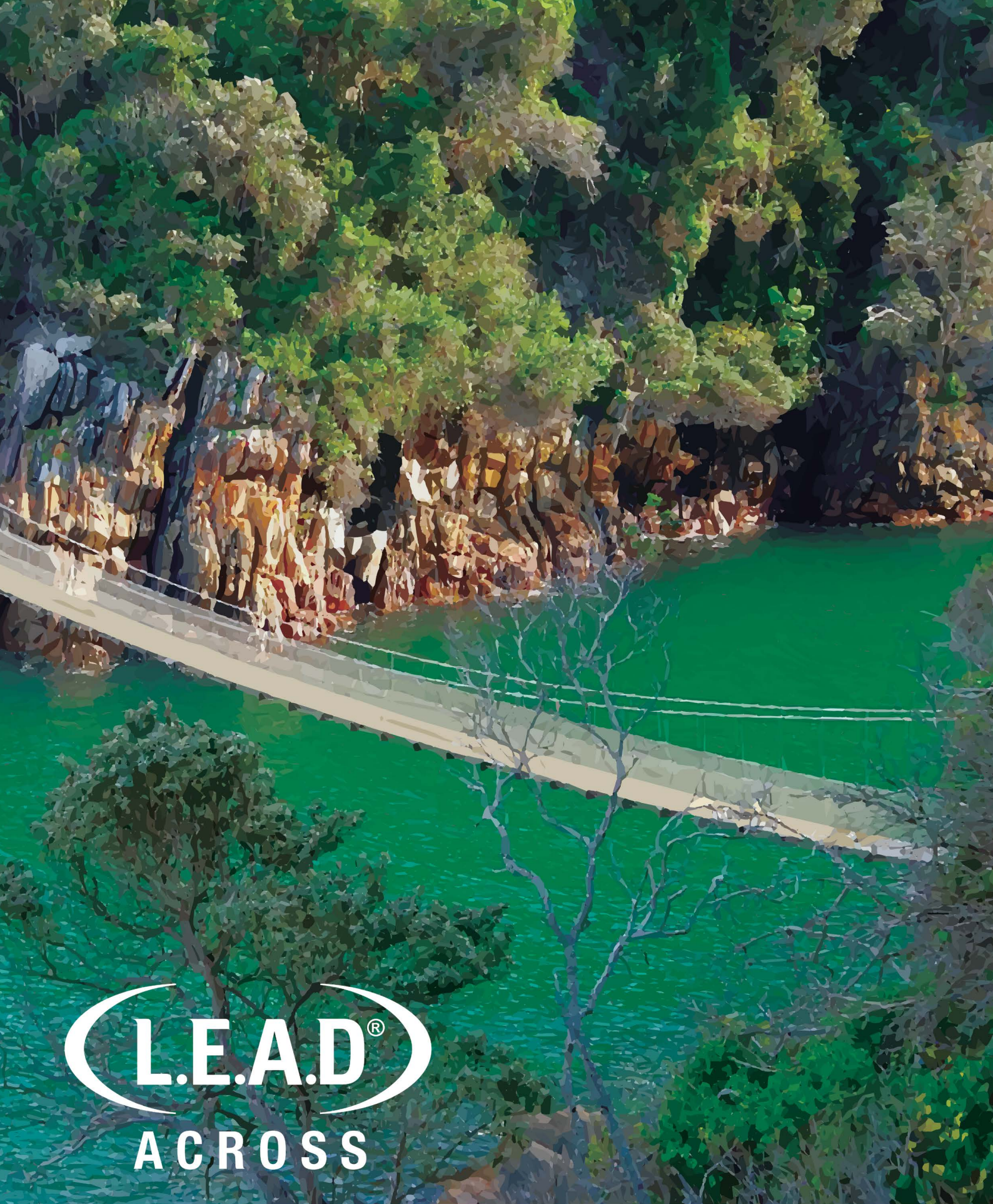
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The southern coast of South Africa is home to the Garden Route National Park and its jewel is the Tsitsikamma Section (proclaimed in 1964) – one of the world's most spectacular biodiverse protected areas. It comprises of indigenous rain forests that harbour 116 types of trees such as the giant Outeniqua yellowwood (some estimated to between 600 and 800 years old) and fynbos (which covers around 30% of the park). Tsitsikamma is also the country's largest marine reserve and the oldest in Africa. One of the highlights is the 77 metre-long suspension bridge which spans the width of the Storms River Mouth. The bridge hangs just seven metres above the churning waters of the river as it enters the sea. SANParks, established in terms of the National Environmental Management: Protected Areas Act, 2003, has the primary mandate to oversee the conservation of this sensitive and valuable biodiversity, landscape and associated heritage asset.

RISKALERT

AUGUST 2021 NO 3/2021

IN THIS EDITION

RISK MANAGEMENT COLUMN

- Written records of instructions: Meeting the regulatory requirements 1

RISK MANAGEMENT COLUMN

WRITTEN RECORDS OF INSTRUCTIONS: MEETING THE REGULATORY REQUIREMENTS

The importance of a legal practice having a written record of the terms of the mandate undertaken by it has long been emphasised as an essential risk management tool. A letter of engagement is one example of the various types of documents used to record the terms of the engagement between the legal practice and its clients. It has been gleaned from the engagements with legal practitioners that letters of engagement are, generally, gaining wider use in the profession. This is a positive development.

There are, however, still many legal practices that do not make use of any form of documented record of the mandates they receive, who they are acting for, the ambit of the instruction and other terms of the mandate or even the fee and billing arrangements. Some firms use a generally worded power of attorney or other forms of outdated precedents as the record of the instruction. These fail to succinctly capture the essence of the instructions and the obligations of the parties. We have received several requests for general guidance on how to draft a letter of engagement. The resources listed at the end of this Bulletin will assist practitioners in this regard. Generally, the letter of engagement



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should cover the following -

1. the identity of the client (and the requirements of the Financial Intelligence Centre Act 38 of 2001 (FICA)). The client's contact details (and alternate contact persons, if necessary) and banking details will mitigate the risk of cybercrime as well);
2. a detailed scope of the instruction;
3. the servicing team in the firm;

RISK MANAGEMENT COLUMN continued...

4. the use of counsel, correspondent attorneys or other expert outside of the firm;
5. fees, expenses and billing;
6. instructions to invest client money as part of the mandate, if applicable (section 86(4) of the Legal Practice Act 28 of 2014 (the Act));
7. the terms of the contingency fee agreement (if applicable);
8. breach, dispute resolution and termination;
9. confidentiality, data protection and the relevant provisions of the Protection of Personal Information Act 4 of 2013;
10. any other applicable provisions (including those required by regulation); and
11. the signatures of the parties.

Changes to the mandate or the terms of the engagement must, similarly, be

recorded, explained to the client and signed by the parties. Other professions (most notably the auditing profession) often include a provision limiting liability to double the professional fee, but it is uncertain whether or not such a clause will be upheld in the case of a legal practice.

Firms can also develop checklists applicable to their individual circumstances and areas of practice. Such a checklist will assist the firm in auditing and reviewing its compliance with the regulatory requirements.

We have prepared an example of a statutory checklist below. It must be noted that this example is not an exhaustive list of the statutory requirements. The list is not prescriptive and not all the provisions highlighted will apply to every legal practice, instruction or area of practice. For purposes of illustration,

the checklist below covers some of the essential topics addressed in the Act, the Rules issued in terms of the Act and the Code of Conduct. It will be noted that the topics covered range from documenting the ambit of the instruction, to the recordal of complaints to the Legal Practice Council (the Council) and the investment Rules. We have, as far as possible, used the exact wording of the regulatory requirements or paraphrased where necessary- this approach has been followed to avoid losing the essential elements of the regulatory prescripts. These can be summarised by legal practices in the development of their own statutory compliance checklists. Regulatory compliance is one the main risks facing legal practitioners and it is hoped that the checklist below will assist firms in developing measures to ensure and monitor compliance with the regulatory requirements.

A SAMPLE OF THE PROVISIONS PRESCRIBING WRITTEN RECORDS

Number	Subject	Applicable provision in the statute, rules, Code of Conduct or other subordinate legislation	Description	Is the requirement applicable to the matter the legal practice is dealing with? (Yes/ No)	Is compliance therewith (where applicable) documented in the file? (Yes? No)	Date of review and name of the partner/ director/ responsible person who has conducted the review
1	Acceptance of the instruction and documenting the scope thereof					
1.1	Receipt of instructions	Section 34 (1)	Does the legal practice have a confirmed instruction to act on behalf of the client/s in the matter at hand? (Section 34 of the Act provides that '[an] attorney may render legal services in expectation of any fee, commission, gain or reward as contemplated in the Act or any other applicable law, upon receipt of a request from the public for that service.")			

RISK MANAGEMENT COLUMN continued...

1.2	Setting out the instruction to the attorney in writing: Rule 35 (see also section 95(1) (zC) read with section 34 (4) of the Act)	Rule 35.3	On receipt of written instructions from a client, an attorney must ensure that they set out the intended scope of the engagement with sufficient clarity to enable the attorney to understand the full extent of the mandate. In the event of uncertainty regarding the scope of the mandate, the attorney must seek written clarification of the intended scope of the instruction			
		Rule 35.4	If verbal instructions have been received from the client, such instructions must be confirmed in writing as soon as possible by the attorney, setting out the latter's understanding of the scope thereof			
1.3	Investment mandates	Rule 56.2.2	Investment instructions must be written, detailing the manner and form of the investment (Rule 56.1). The investment instruction may be incorporated into the written contract in terms of which the person concerned has given instructions to the firm - (see also 3.6 below)			
1.4	Complaints against legal practitioners	Schedule 5 [Rule 45.2] Form of laying a complaint of misconduct against a legal practitioner	Section 3 of the complaint form enquires from the complainant: "Was there a written letter of engagement? If so, please provide a copy"			

RISK MANAGEMENT COLUMN continued...

2 Fees and billing						
2.1	Acting on a contingency basis	Contingency Fees Act 66 of 1997	If the firm is acting on a contingency basis, there must be a written contingency fee agreement that complies with all the provisions of the Contingency Fees Act. Regard should be had to the various judgements delivered by the courts on contingency fee agreements for guidance on the requirements for validity of such agreements			
2.2	Written fee agreements	Section 35: Fees in respect of legal services (Note: though section 35 of the Act is yet to come into operation, legal practitioners are advised to develop measures that meet the requirements of section 35, in anticipation of its implementation)	Section 35(3)- Does the fee agreement comply with the prescribed tariff? If it does not, is the deviation from the tariff recorded in a written agreement?			
			Section 35 (7)- Has a written cost estimate notice been given to the client when instructions were initially received (or as soon as practically possible thereafter)?			
			Does the written cost estimate specify all the particulars of the legal services, including the following:			
			(a) the likely financial implications including fees, charges, disbursements and other costs;			
			(b) the hourly fee rate and an explanation to the client of their right to negotiate the fee payable;			

RISK MANAGEMENT COLUMN continued...

			(c) an outline of all the work to be done in each stage of the litigation process, where applicable;			
			(d) the likelihood of engaging an advocate and the different fees that can be charged by different advocates, depending on factors such as seniority or expertise, and			
			(e) in litigious matters, the legal and financial consequences of the client's withdrawal and the costs recover regime.			
			Has the written fee estimate been explained to the client? (Section 35(8))			
			Is there a written record of the client agreeing to the envisaged legal services and the incurring of the anticipated legal costs? (Section 35(9))			
2.3	Fee agreements with counsel	Provisions of the Code of Conduct relating to agreements about fees (paragraphs 26.1, 26.7 and 48.5 of the Code)	Has a brief marked with a fee been offered to counsel and has counsel agreed in writing to the initial marked fee?			
			Does the written agreement with counsel provide for any of the following:			
			(a) that the fees will be paid prior to the performance of any obligation in terms of the brief?			
			(b) a shorter payment period than the standard period?			
			(c) a special collapse fee in the event that the matter does not proceed as envisaged?			

RISK MANAGEMENT COLUMN continued...

3 Trust account investments in terms of section 86(4) of the Act						
3.1	Investment mandates	Section 86(4) read with Rule 54.17	Is there a written mandate to open a separate trust account or other interest-bearing account for the purpose of investing any money of a particular person?			
		Section 86(6)	Where trust funds are deposited into an account, other than with a bank that the Fidelity Fund has made arrangements with in terms of section 63(1)(g), has the written consent of the Fidelity Fund been obtained?			
		Rule 54.18	Where the firm will receive any commission, fee or other reward from a bank with which the trust investment has been made, has the receipt of such income from the bank concerned been disclosed in writing to the person giving the mandate to invest?			
3.2	Reports to clients in relation to investments	Rule 55.5	If the firm is carrying on an investment practice, has it provided at least one written report annually to the client on income earned, capital movements, commission earned or other changes made by the firm in carrying out the mandate in that year?			
3.3	Transfers from investment accounts	Rule 54.14.7	Written authorisation for the payment of any guarantees issued by the bank on the strength of trust guarantees, that any amount withdrawn from the trust investment account is promptly deposited into the trust banking account.			

RISK MANAGEMENT COLUMN continued...

3.4	Restrictions on certain investments	Rule 55.11	Prior specific written instructions from the client in respect of each investment in shares or debentures in a company not listed on a licenced securities exchange in South Africa (if that company is not a subsidiary of a listed company) or unsecured loans.			
3.5	Compliance with the Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS Act)	Rule 55.12	If the firm conducts an investment practice, it must comply with the requirements of the FAIS Act.			
3.6	Investment of funds by firms on behalf of persons otherwise than in terms of investment practice Rule 55	Rule 56.1	The firm can only invest funds on behalf of any person if there is an existing written instruction from that person detailing the manner and form of the investment.			
		Rule 56.2.1	If the mandate to invest was not obtained beforehand, or in cases of emergency, the firm must obtain the written instructions to invest and details of the manner and form of investment as soon as possible.			
		Rule 56.3	If the firm does not receive the written investment instructions within a month after it has, in writing, requested such instructions, it must notify the Legal Practice Council in writing and, simultaneously, furnish the Council with copies of all its letters of request and any responses thereto.			

RISK MANAGEMENT COLUMN continued...

4	Consider applicable requirements arising from other legislation					
4.1	Depending on the circumstances of the individual mandate and matter being undertaken by the firm, there may be additional requirements for the written record of the mandate. An example is the PFA Guidance Note.	PFA Guidance Note 6 of 2018 (dated 19 October 2018) issued in terms of the Pension Funds Act 24 of 1956	Where recovery of arrear pension fund contributions is outsourced by a board of management of a pension fund to a firm of attorneys, the agreement between the pension fund and the firm of attorneys must, at least, include a provision that (i) any amount recovered by an attorney in respect of arrear contributions must be transmitted into the fund's bank account within 7 (seven) business days of receipt, and (ii) the defaulting employer must provide the relevant contribution statement as required in terms of section 13A(2)(a) and regulation 33(1) of the Pension Funds Act together with the outstanding contribution.			

OTHER RESOURCES

Regard can be had to the following publications for more information on documenting the instructions:

- “The importance of the inhouse compliance function in a law firm”, De Rebus, September 2019
- “Letters of engagement- documenting the ambit of the instruction given to the attorney”, De Rebus, October 2016
- Risk Alert Bulletin, November 2011
- The engagement management section of the document on risk management tips for legal practices available on the LPIIF website (accessible at <https://lpiif.co.za/wp-content/uploads/2017/10/Risk-Management-Tips.pdf>)

Classified advertisements and professional notices

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