

SEPTEMBER 2021

THE MODERN CUSTOMARY MARRIAGE – CAN THE HANDING OVER OF A BRIDE BE WAIVED?

**Transferring independent
guarantees –
a discussion**

**A culture of
compliance:** How to
build and maintain a
compliance framework

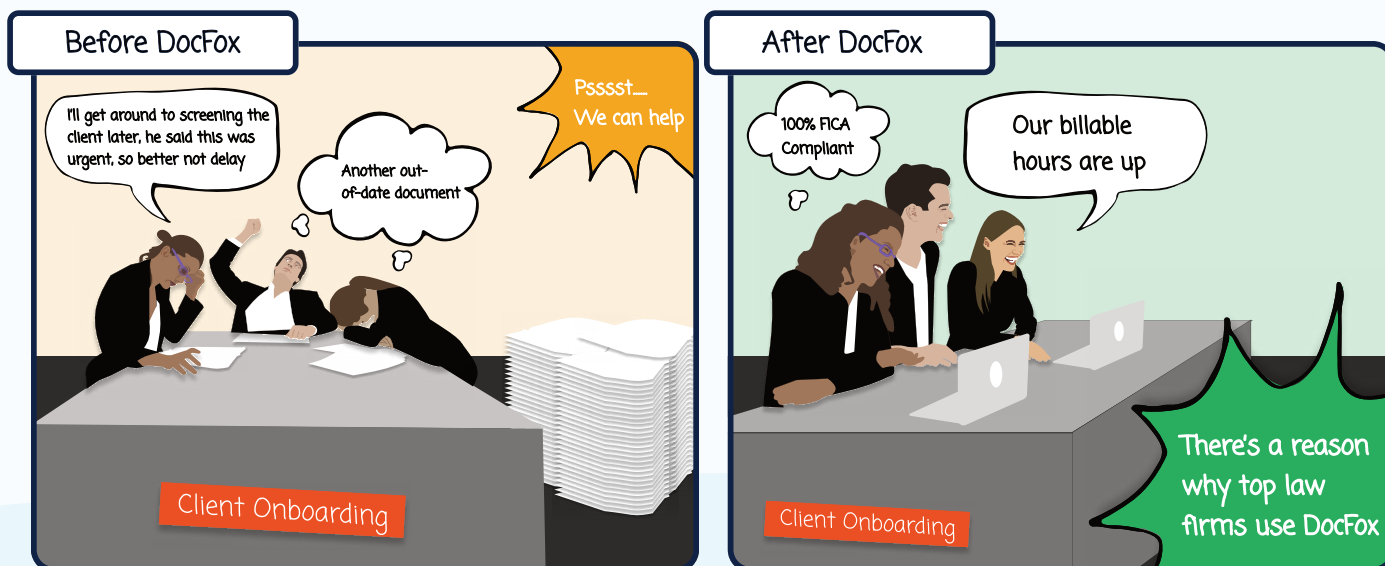
**Is a legal practitioner's
involvement in presenting
misleading evidence a
breakdown in the
justice system?**

**Can an allowance be
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programmes in terms of
s 24C of the Tax Act?**

**Proactive
communication as a risk
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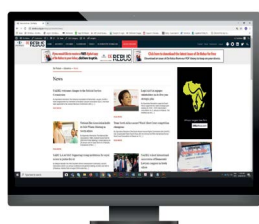




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- Jurists appointed at universities
- South African Judiciary sends condolences over the passing of Zambian Chief Justice
- Speaking of transformation and transformative leaders as theory should be avoided says Acting Solicitor-General
- Justice Minister pleased with progress on legal fees and access to justice



7 A hero, an activist, a giant and legend in the legal profession - rest in peace Lutendo Benedict Sigogo

On 31 July 2021, the legal profession was shocked to hear the announcement that legal practitioner and Acting Judge of the Mpumalanga Division, Lutendo Benedict Sigogo, had passed away in Polokwane due to COVID-19 complications. *De Rebus* news reporter, **Kgomotso Ramotsho**, compiled a report on the released statements on the passing of Mr Sigogo.



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FEATURES

14 The modern customary marriage – can the handing over of a bride be waived?

With the advent of the Constitution, customary law was said to have been given equal status with the common law. Furthermore, courts were bestowed with the power to interpret and develop customary law. In recent years, there has been substantial debate on the concept of the handing over of the bride as part of validating a customary marriage. Legal practitioner, **Koketso Masutha**, explores the answers to three pertinent questions, namely: How is the handing over of the bride determined? When is the bride deemed to have been handed over? And does the finalisation of *lobola* without handing over of the bride conclude a customary marriage?

16 Is a legal practitioner's involvement in presenting misleading evidence a breakdown in the justice system?

In the recent case of *Koni Multinational Brands (Pty) Ltd v Beiersdorf AG* (SCA) (unreported case no 553/19, 19-3-2021) (Schipper JA (Cachalia JA and Sutherland and Unterhalter AJJA concurring)), the Supreme Court of Appeal considered whether the respondent, a proprietor of the trade mark NIVEA had established whether a South African company was unlawfully passing off its product by using a similar get-up on its shower gel that would cause market confusion. Independent researcher, **Nomthandazo Mahlangu**, writes that although the decision merits an incisive analysis, her article focuses on the questionable conduct of the respondent's legal representation. Ms Mahlangu notes that during the hearing a member of the Bench inquired whether the member of the public produced by the respondent's legal team was in fact a legal practitioner for the law firm.

18 Transferring independent guarantees – a discussion

An independent or demand guarantee is an irrevocable, independent and signed undertaking that creates an obligation of payment on the presentation of a complying demand. One important principle of demand guarantees is the principle of strict compliance. An independent or demand guarantee is generally transferrable. Moreover, considering the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit and the International Chamber of Commerce's Uniform Rules of Demand Guarantees it is noted that a demand guarantee shall be transferable only if it states that it shall be transferrable. LL.M candidate, **Mpho Titong**, explores this topic and provides a critical evaluation of the practice of transferring independent guarantees.

20 A culture of compliance: How to build and maintain a compliance framework

The trust accounting environment poses unique challenges in the application of principles of corporate governance. Rule 54.14.7.1 of the Legal Practice Council Rules made under the authority of ss 95(1), 95(3) and 109(2) of the LPA, requires the legal practitioner to implement and design internal controls to provide reasonable assurance of reliable financial reporting and to ensure that they operate effectively, and are monitored regularly throughout the reporting period. Legal consultant, **Sipho Nkosi**, reflects on the application of the principles of corporate governance in the trust accounting environment, and the need and value for a compliance function.

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Build the LSSA you want

Since the enactment of the Legal Practice Act 28 of 2014 (LPA), the Law Society of South Africa (LSSA) has been positioning itself as a member interest organisation with a new mandate of serving attorneys and candidate attorneys. Since 29 October 2018, the mission of the LSSA has been to represent the attorneys' profession, safeguard the rule of law via the efficient and fair administration of justice, while the LSSA's vision has been to empower attorneys so that they can provide excellent legal services to the community in an ethical, professional, considerate, and competent manner.

The LSSA brings together the Black Lawyers Association, the National Association of Democratic Lawyers and the Provincial Attorneys' Associations, in representing the attorneys' profession (the profession) in South Africa. This includes establishing provincial associations in all nine provinces, focusing on a transformed profession that acts in the interest of both the profession and society.

Besides legal education through its more visible actions, which are Legal Education and Development and *De Rebus*, the LSSA conducts several behind the scenes activities that the profession does not see but would have felt their impact had the LSSA not intervened. The LSSA intervenes on behalf of the profession to influence legal and other issues that affect the profession. The LSSA has made numerous submissions on behalf of the profession on issues that affect the profession, justice administration, and the rule of law. Some of these are:

- Various submissions to the Minister of Justice and Correctional Services, the Minister of Transport; the Minister of Agriculture, Land Reform and Rural Development; and the Chief Justice regarding COVID-19 issues, including the functioning of the courts and the Deeds Offices.
- Various submissions to the Rules Board for Courts of Law on the Magistrates' Courts Rules, including tariff for travelling time for Sheriffs and proposed rule changes regarding summonses.
- Submissions on the proposed amendment of the tax legislation to remove the requirement of intent for the purposes of prosecution of tax related matters. The LSSA opposed the proposed amendments on the basis that it will open the door for the criminal prosecution of negligent tax-related

conduct, such as failure to update contact details.

- Various submissions to the Legal Practice Council (LPC), including on the draft criteria and procedures for the conferment of senior counsel and senior attorney status (the LSSA's position is that there should be uniformity). Proposed amendments of the Rules that intended to have principals subject to misconduct charges when they advertise specific requirements, such as driver's licences and access to vehicles for prospective candidate legal practitioners (the LSSA's position is that the LPC should not over-regulate the profession and should instead look at alternative ways to encourage transformation within the profession).
 - Submissions to the South African Law Reform Commission on, *inter alia*, a proposed new dispensation for legal practitioners' fees, according to s 35 of the LPA, a project on the review of administration orders, etcetera.
 - Several meetings were held with the Banking Association South Africa (BASA), where the issue of the banks' service level agreements were discussed, as well as the issue of electronic signatures. The LSSA is part of the BASA working group that provides input to the Department of Agriculture, Land Reform and Rural Development on the Electronic Deeds Registration System and formed part of a delegation that met with the National Economic Development and Labour Council.
- The LSSA participated in various professional interest and public interest cases, either as a party or as *amicus*, including the following:
- *Proxi Smart Services (Pty) Ltd v Law Society of South Africa and Others* (CC) (unreported case no CCT114/2019, 5-8-2019) (Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J and Theron J);
 - *Cape Bar v Minister of Justice and Others* 2020 (6) SA 165 (WCC);
 - *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2019 (3) SA 30 (CC);
 - *President, RSA and Another v Women's Legal Centre Trust and Others* 2021 (2) SA 381 (SCA);
 - *Janse van Vuuren v Roets and Others and a Similar Matter* 2019 (6) SA 506 (GJ);
 - *Rodrigues v National Director of Public Prosecutions and Others* 2019 (2) SACR 251 (GJ);
 - *University of Stellenbosch Law Clinic*



Mapula Oliphant – Editor

and Others v National Credit Regulator and Others 2020 (3) SA 307 (WCC);

- *Mabunda Inc and Others v Road Accident Fund; Diale Mogashoa Inc v Road Accident Fund* (GP) (unreported case no 15876/2020, 30-4-2020) (Davis J); and
- the *Olsen v National Director of Public Prosecutions* (CC) (unreported case no CCT 160/20, 23-10-2020) (Mogoeng CJ, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J and Tshiqi J).

Recently the LSSA has recommended a cybersecurity policy developed in collaboration with Marsh to members. This is a discretionary provider, and members can choose any other insurance provider, as competition will reduce the premiums (see www.derebus.org.za).

The LSSA has also partnered with PPS and the Reality Wellness Group to offer legal practitioners telephonic support and counselling in psycho-social matters. The wellness programme will be provided to a maximum of 5 000 legal practitioners per month, for an initial period of six months. For more information see: www.lssa.org.za.

The above items are just some of the recent interventions made by the LSSA to ensure that attorneys can provide excellent legal services to the community. In order for the LSSA to become a true member's interest organisation it needs input from legal practitioners. What else should the LSSA be doing to assist you in your practice? Send your thoughts on this issue to Mapula Oliphant at mapula@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.

Does the failure to register employees for UIF constitute unfair labour practice and if so, can the employees enforce obligations against the employer?

Section 23 of the Constitution guarantees the right to fair labour practice in the workplace. In the best interests of both employers and employees, the government has promulgated the Basic Conditions of Employment Act 75 of 1997 (BCEA) to give effect to the right to fair labour practices referred to in s 23(1) of the Constitution by establishing and making provision for the regulation of basic conditions of employment, and thereby, to comply with the obligations of South Africa (SA) as a member state of the International Labour Organisation.

This right protects employees to 'enjoy decent and safe working conditions' by requiring 'at a minimum, the regulation of working time, the appropriate payment of wages, and effective oversight of occupational safety and health' (Bureau of International Labor Affairs

'What are workers' rights?' (www.dol.gov, accessed 17-8-2021)).

One of the important duties of the employer is to register domestic workers with the Unemployment Insurance Fund (UIF). The UIF was implemented by the South African Revenue Services (Sars) from 1 April 2002. The UIF is responsible for collecting and distributing funds to unemployed workers across the country to assist with lightening the economic burden imposed on these individuals for a short time after their official unemployment' (MBS Accounting Services 'What is the purpose of the UIF and why is it important to pay it' (<https://mbservices.co.za>, accessed 17-8-2021)).

'The purpose of the UIF is to provide short-term relief to workers if they become unemployed or cannot work because of maternity, adoption leave, or illness. The UIF, which is governed by the Unemployment Insurance Act [63 of 2001 (the Act)] and the Unemployment Insurance Contributions Act [4 of 2002], also support those who are dependents of a deceased contributor. The above-mentioned Acts guide the distribution of benefits to contributors who claim from the UIF, as well as the enforcement and collection of contributions to the UIF'

(<https://mbservices.co.za>, accessed 17-8-2021).

The employer and employee have the reciprocal duty to contribute an amount equal to 1% of the employee's monthly wage, which means that the employee must pay the same amount.

However, since the global COVID-19 pandemic, which has led to the retrenchments of employees and the terminations of contracts due to operational requirements, many cases have re-surfaced indicating the omission by some of the employers who did not register their employees for UIF.

This omission by employers has as a result re-created uncertainties for the employees, as to whether they have the right to enforce obligations by the employers.

Section 17 of the Act bestowed the right on employees to have their claims investigated or processed.

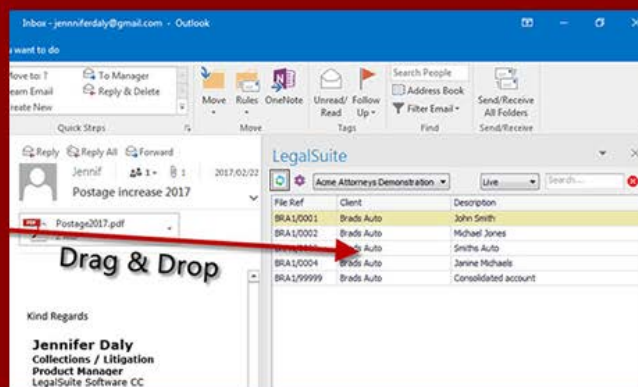
But every employee who alleges that a right or protection conferred by this Act has been infringed, must prove the facts of the conduct said to constitute such an infringement; and the employee who allegedly engaged in the conduct in question must then prove that the conduct did not infringe any provision of the Act.

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According to s 78 of the BCEA, every employee is entitled to the following legal rights, which includes the right to –

‘(e) inspect any record kept in terms of this Act ... that relates to the employment of that employee;

...
(g) request a trade union representative or a labour inspector to inspect any record kept in terms of this Act and that relates to the employment of that employee’.

By not registering and paying UIF the employer is committing an offence and the employer is not likely to put up their hand to be counted when people ask if they are committing an offence by not paying UIF.

When the employer terminates an employee’s service, the employee has the right to apply to the UIF for benefits. In *SAPU obo Louw & Others v South African*

Police Services [2005] 1 BALR 22 (SSSBC), it was held that a ‘benefit constitutes a material benefit such as pensions, medical aid, housing subsidies, insurance, social security or membership of a club or society’. This view implies that the employer is also a contributor (in whole or in part) to the pensions, provident, or medical aid funds. It was further held that there must be some monetary value for the recipient and, therefore, if the employer did not contribute in whole or in part on behalf of the employee, there would be no benefit to the employee. It was also held that a benefit is something extra, or apart from, remuneration. The concept would seem to include discretionary and performance related bonuses.

Although employees have the rights to refer the matter to the Department of Labour or if necessary to the UIF fund

itself, drastic action for unfair labour practice must be taken against employers who fail to register with the UIF or pay toward the fund. The Department of Labour needs to increase oversight over employers of domestic workers to ensure that they are complying with the requirements. If employers in SA can still get away with not registering domestic workers, they will do it. The Minister of Labour also has the duty as the arm of the state to create awareness among domestic workers to inform them of their rights.

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By
Thomas
Harban

Proactive communication as a risk management tool

Effective communication in the legal services industry – like any other professional service – goes to the heart of the maintenance of the relationship between the legal practice as the service provider, on the one hand, and the client as the consumer of such services, on the other. A breakdown in effective communication between the legal practice and its clients can include –

- the breakdown of the relationship between the parties;
- a complaint being lodged against the legal practice with the Legal Practice Council (the LPC); or
- the client bringing a professional indemnity (PI) claim against the legal practice.

A written record of the communication between the parties will go a long way towards mitigating the risks flowing from a breakdown in the relationship. This article will cover (in broad strokes) the journey from inception of the relationship with the client until the conclusion of the mandate. By so doing, I hope that the areas where a breakdown in communication, which can have negative consequences, will be highlighted.

Setting the terms of the mandate

When accepting a new mandate from a client, it is imperative that the legal practice set out in writing what the terms of the mandate are. This assists both parties to the relationship (the legal practice and the client) in understanding what the terms of the mandate are, including the respective obligations of each party.

Explaining the terms of the mandate will assist in avoiding disputes in future. Rule 35 (of the Rules made under the authority of ss 95(1), 95(3) and 109(2) of the Legal Practice Act 28 of 2014 (the LPA)) is instructive in this regard and provides as follows:

**‘35. Instructions of attorneys
(section 95(1) (zC) read with section 34(4))**

35.1 For purposes of this Rule 35 “client” means the user or intended user of legal services to be provided by an attorney.

35.2 Instructions by a client to an attorney may be in writing or may be verbal.

35.3 When written instructions are given by a client to an attorney the at-

torney 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. If the attorney is uncertain as to the scope of the mandate the attorney must seek written clarification of the intended scope of the instruction.

35.4 Where the client instructs the attorney verbally, the attorney must as soon as practically possible confirm the instructions in writing and in particular must set out the attorney’s understanding of the scope of the engagement.’

Rules 35.5 and 35.6 are not relevant for present purposes and have thus been omitted from the extract above.

In many instances the genesis of the dispute between the legal practice and the client is one regarding the scope of the mandate. The benefits of the parties discussing the full scope of the mandate, in order to ensure that they are *ad idem* therein, cannot be overemphasised. The potential uncertainty on the scope of the instruction referred to in r 35.3 will be avoided if there is a discussion ensuring that there is a meeting of the minds and a common understanding of the scope, which is then reduced to writing and

confirmed by both parties. Where applicable, it would also be prudent to record any part of a particular transaction that legal practitioner will not carry out as part of the mandate.

There have been several PI claims where the client (plaintiff) has alleged that the legal practitioner has not carried out a certain part of an alleged mandate, resulting in a loss being suffered by the party concerned. The legal practitioner may dispute this, and it is then left to the respective memories of the parties many years after the fact to determine what had been agreed in respect of the scope of the mandate, in the absence of a written record.

The defence to a complaint lodged with the LPC may also turn on the contents of the written mandate. In submitting a complaint to the LPC, one of the questions posed to the complainant is whether there was a written letter of engagement. If there was, the complainant is required to provide a copy thereof (see s 3 of the complaint form issued in terms of sch 5 (r 45.2)).

It will also be appreciated that disputes regarding fees could be mitigated by documentation of the agreement regarding fees and billing in the written mandate. The terms relating to fees and billing should also be verbally explained to the client as part of the general discussion regarding the terms of the mandate.

Regular reporting to a client

When regard is had to the particulars of the disciplinary hearings published on the LPC's website in terms of s 38(3) of the LPA, it will be noted that many of the complaints arise from failures by the legal practitioners concerned to communicate with clients or other third parties and to account (in the financial sense or account in the sense of reporting). Regular and effective communication with the parties concerned would have avoided the disciplinary sanctions and the negative publicity associated with the publication of the names on the legal practitioners on the list. It will be remembered that para 16 of the Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities provides that:

'16. Replying to communication

An attorney –

16.1 shall within a reasonable time reply to all communications which require an answer unless there is good cause for refusing to answer;

16.2 shall respond timeously and fully to requests from the Council for information and/or documentation which he or she is able to provide;

16.3 shall comply timeously with directions from the Council [LPC].'

Turning to the underlying cause of PI claims, it will be noted that the dissonance between the client and the erstwhile legal practitioner arises, in many instances, from a lack of communication by the latter and a failure to report on the progress in a matter being undertaken. The lack of regular and substantial communication from a legal practitioner on the status of a matter may be the reason a client terminates the former's mandate. A lack of communication may lead the client (justifiably in some instances) to believe that either the matter is not being attended to or that the practice does not value the client's business.

In litigious matters, where offers of settlement are made or received, this must be put to the client. The client's instructions and the recommendations by the legal practitioner in respect of such offers must similarly be confirmed in writing. This will go a long way to avoiding claims based on 'under' or 'over' settlement of matters and other allegations that the practitioner has breached the terms of the mandate or acted without a mandate.

In some instances, the legal practitioner may realise that an error has been made in a matter. In this regard, it is best to have an open and frank discussion with the affected parties and to record the discussion in writing. Caution must be applied in such instances not to make admissions of liability, offers of settlement or some other action that will be perceived by the PI insurer as compromising its position in respect of a potential claim. Legal practitioners would be well advised to simultaneously communicate the circumstances leading to a potential claim (or intimation of a claim) to their PI insurer and to seek guidance from their insurer before communicating the error to the client or a third party. The recent judgment by the Supreme Court of Appeal (SCA) in *McMillan v Bate Chubb & Dickson Incorporated* (SCA) (case no 299/2020, 15-4-2021) (Zondi JA (Mocumie and Schippers JJA and Gorven and Eksteen AJJA concurring)) is apposite in this regard. In the matter, the SCA was called on to determine whether the appellant's claim against his erstwhile attorneys had prescribed. The court had to decide when the plaintiff acquired knowledge of the facts required to institute action and thus when prescription began to run. The attorneys (the respondents in the matter) had consulted with the plaintiff on 9 May 2014 when the appellant was informed that the antenuptial contract entered into between himself and his former spouse contained 'an error and mistake which may be attributable to the drafter'. The respondent sent a letter to the appellant on 12 May 2014 confirming the discus-

sion that had been held on 9 May 2014 (see para 37 of the judgment). The SCA upheld the respondent's special plea of prescription. In my view, the open and frank communication by the respondent, in the discussion with the appellant on 9 May 2014 (a Friday) and confirming the discussion in writing on 12 May 2014 (the following Monday) went a long way to ensuring that the defence to the claim could be upheld.

Closing the instruction

It is also good practice to communicate with the client at the end of the mandate. The communication at this stage of the engagement should go beyond a discussion of the financial, billing, and other accounting aspects (which are also important). The communication and conversation should also be used to get feedback from the client on their experience with the legal practice and to obtain their feedback on how the matter was handled. Beyond being a good client satisfaction exercise, the opportunity can also be used to glean whether there are any areas of unhappiness on the part that of the client that could potentially lead to a PI claim (some clients may consult with another legal practitioner for a second opinion on the outcome of the matter) or even a complaint to the LPC at a later stage. If there are any further steps the client may need to take after the scope of the mandate has been completed, these can also be highlighted.

Finally, a letter to the client expressing appreciation for the instruction, recording that the mandate has been carried out in full and the closing discussion will go a long way to retaining the relationship and mitigating the risk of regulatory action or a PI claim against the practice.

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



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A hero, an activist, a giant and legend in the legal profession – rest in peace Lutendo Benedict Sigogo



By
**Kgomotso
Ramotsho**

On 31 July 2021, the legal profession was shocked to hear the announcement that legal practitioner and Acting Judge of the Mpumalanga Division, Lutendo Benedict Sigogo had passed away in Polokwane, due to COVID-19 complications. Upon receiving the news of Mr Sigogo's passing, the Minister of Justice, the Judiciary and various organisations released statements on Mr Sigogo's passing.

Media statements

A statement released by the Minister of Justice and Correctional Services stated that Minister Ronald Lamola was saddened by the passing of Mr Sigogo. The statement added that Mr Sigogo was a formidable advocate for transformation in the legal profession. Minister Lamola

said: 'We have lost [a] dedicated champion of transformation. His contributions will undoubtedly form the pillars of a representative and accessible service to our people. Our thoughts and prayers are with his beloved family during this period of mourning.'

The Judicial Services Commission (JSC) – where Mr Sigogo served as a revered commissioner – said in its statement that death has robbed the people of South Africa (SA) of not just a legal practitioner but of a true leader in the legal profession. Meanwhile, the Chairperson of the Legal Practice Council (LPC), Kathleen Matolo-Dlepu, in her statement, said that the LPC has lost one of its hardest working members, who was committed and did his work with enthusiasm and diligence. Ms Matolo-Dlepu pointed out that Mr Sigogo's loss is immeasurable and has left a big

void within the legal profession and the LPC.

The Black Lawyers Association (BLA) said in its statement that Mr Sigogo joined the BLA just after his admission as a legal practitioner of the High Court of South Africa in 1998. The statement added that he occupied various leadership positions in both the BLA, as well as in the then known provincial law societies. The statement added that the transition from erstwhile law societies was made much easier by his contribution as part of the National Forum on the Legal Profession, a body established by the Legal Practice Act 28 of 2014 (LPA), to manage the transition.

The BLA said that as part of the National Forum, Mr Sigogo was always eager to lead the debate about the future of the legal profession under the new dispensation. The BLA pointed out that when the first elections of the LPC was held it was natural for legal practitioners to elect Mr Sigogo as one of their members. 'For him leadership was not an exercise in self-aggrandisement. It was a selfless commitment to the tasks at hand and ever-present preparedness to pave a way forward amidst doubt and uncertainty. His understanding of the BLA and its values was unmatched', the statement said.

The BLA added that Mr Sigogo was one of the former leaders of the organisation whose wisdom will be continued to be used for guidance and counsel. 'He was forever prepared to lend [guidance and counsel] equally. His love for humanity shone through in everything he did. He was always attentive to the other voice and forever prepared to forge unity and consensus without sacrificing the ideals of transformation of the legal profession that lie at the very foundation of the BLA. As the BLA we are proud to claim him as one of our own. We have been enriched by his leadership,' the statement said.

The National Association of Democratic Lawyers (NADEL) said Mr Sigogo was a justice activist. The statement added that it was under Mr Sigogo's leadership that saw the BLA and NADEL stand side-by-side in the first LPC election. NADEL pointed out that its members who have served with Mr Sigogo, attest to his upright character and hail him as a fighter for equality and justice.

NADEL added that Mr Sigogo, did not slow down against those opposing transformation and his work at the LPC is recorded as one of a true voice of the aspirant and previously disadvantaged. 'He was steadfast and unwavering in his commitment to wanting integrity in the legal profession. This was perfectly balanced by his compassion towards those who made mistakes as he always looked for redeeming facts to rehabilitate those who had fallen,' NADEL said.

NADEL added that Mr Sigogo was an avid reader and a fearless debater who



Lutendo Sigogo at the Black Lawyers Association's 40th Anniversary and Annual General Meeting held in Bloemfontein in 2018.

always made meaningful contributions in building a unified legal profession. A humbled and disciplined man, a great listener, and a great problem solver. 'We are sure that he enters the other side of eternity greeted by a crowd of witnesses hailing him for the work done in the legal profession. As a Pan Africanist lawyer, we are sure that amongst the crowd of witnesses are the likes of Robert Mangaliso Sobukwe who will say to him "you have done well and epitomised what we meant when we said true leadership demands complete subjugation of self, absolute honesty, integrity and uprightness of character, courage and fearlessness, and above all, a consuming love for one's people"', NADEL added.

The Law Society of South Africa (LSSA) added that it was saddened by Mr Sigogo's death who served as its council member for many years. 'The LSSA expresses its sincere and heartfelt condolences to the bereaved members of his family and prays for his soul to rest in peace in eternal glory,' the statement said.

President of the LSSA, Jan van Rensburg, added: 'The death of Mr Sigogo is a huge loss to the legal fraternity. We honour his legacy and mourn his loss alongside his family, friends, and the legal profession. Mr Sigogo was a member of the LSSA Council for many years and was at the forefront of the LSSA's transformation and the Transitional Committee that moved the LSSA and the attorney's profession into the Legal Practice Act dispensation. The legal profession has lost a person of great wisdom and foresight, and his contributions to the profession were immense. He will be dearly missed.'

Memorial service of Mr Sigogo

On 4 August 2021, at the memorial service that was held for Mr Sigogo, the

Chairperson of the Polokwane Legal Practitioners Association, Podu Mdhuli said that she was grateful that God had given her the opportunity to have lived in the time of Mr Sigogo. She pointed out that Mr Sigogo was a man of exceptional excellence, a man who worked very hard, and gave his life to the legal profession. She said that one thing about a name is that it lives beyond, even if one has been given a farewell in a physical form, his name will live on.

Ms Mdluli pointed out that Mr Sigogo was a man of integrity. She shared a story on how, years ago while it was election season at the BLA, she overheard some members saying how Mr Sigogo was just 'black and white', that there was no working around him, because he was good like that, clean and full of integrity. She added that the Polokwane Legal Practitioners Association was proud to have been associated with Mr Sigogo, that the organisation was grateful for the legacy he left behind, the legacy that young black legal practitioners would live up to.

The BLA provincial chairperson in Limpopo, Director Makhafola, added that Mr Sigogo had started with him in the BLA Limpopo Branch. He pointed out that the organisation had lost a shining star. He said Mr Sigogo was not just a leader, but also a friend. He said the Limpopo Branch was very proud of Mr Sigogo, that they knew that wherever Mr Sigogo went, he represented the branch with exception and always made sure that people knew he was a member of the BLA and belonged to the BLA's Limpopo Branch.

The President of the BLA's Student Chapter (BLA SC), Shandukani Mudau, said that Mr Sigogo's departure is and will continue to be a hard pill to swallow, as his passing was tragically premature. She pointed out that during and after his term as the president of the BLA, Mr Sigogo worked hard with the student chapter to improve their analysis and insight on how the student chapter should view the future of aspirant legal practitioners.

Ms Mudau added that the most remarkable thing about Mr Sigogo was his selflessness and good will. In one of the tributes read by Ms Mudau, the first BLA SC female president, Pearl Biyela, wrote that as the first female BLA SC president, Mr Sigogo never once made it seem as her being a female was a call for preferential treatment and this was the case with all other female executives in ad hoc structures. Ms Biyela in her letter pointed out that Mr Sigogo valued women in leadership and made sure that there was never a sense of inequality.

The BLA's National Secretary General, Mabaeng Denise Lenyai, said that it was difficult to refer to the late Mr Sigogo, as former everything, because he is still present in her mind. Ms Lenyai pointed

out when she first met Mr Sigogo, she was still the chairperson of the BLA Northwest Branch, comfortable in that position. However, Mr Sigogo took her out of her comfort zone and put her in the middle of the fire when he told her, it was time to take her rightful place in the National Executive Committee of the BLA.

Ms Lenyai said that Mr Sigogo told her that it was comfortable being in leadership, but it is not about the comfort, it is to ensure that one becomes a solution to the challenges that the organisation and the rest of the country are encountering. She added that Mr Sigogo had a drive to collect sanitary pads and one would think that Mr Sigogo would ask her to speak, however, Mr Sigogo chose to speak himself. She said Mr Sigogo told her that he was a father to girl children, that he wanted to teach girls about the journey of moving from being a young girl to a woman and that there is nothing shameful or sinful about menstruation.

Ms Lenyai pointed out Mr Sigogo never missed an opportunity to turn occasions into moments. She said that during one of the trips to Lusikisiki, as per normal when they went to donate items and give talks, the community would normally prepare some lunch. However, she said the community was one of the most destitute communities, and they had not prepared anything, but one of the pupils at the school, came and offered her and Mr Sigogo a peanut butter and jam sandwich. Ms Lenyai said Mr Sigogo accepted the sandwich and turned the lunch into a picnic.

LPC Council member, Anthony Miller, said that Mr Sigogo was a consistent person. A man who followed one course and did not deviate, or show a different face to his family, colleagues, the judiciary and in whatever capacity he acted, he was consistent in his principles and in the way he conducted himself. Mr Miller added that Mr Sigogo never held back in doing what was right. He said Mr Sigogo's life demanded notice, exemplified brilliance, inspired emulation, and burnt so bright that other paths were lit.

Mr Miller pointed out that Mr Sigogo was a strategic thinker, a visionary and he was innovative. He added that Mr Sigogo was sincere, honest, fearless, and loyal.

Judge President of the Mpumalanga Division of the High Court, Francis Legodi, in his tribute said Mr Sigogo carried warmth, kindness and love for people. He read a message that was written by a fellow JSC commissioner, which read that during Mr Sigogo's period as an acting judge, he wrote seminal judgments of great quality. Judge President Legodi said he did not know there was something like a seminal judgment.

Judge President Legodi pointed out that in a judgment written by Mr Sigogo on 21 June 2021 (*Advent Oil (Pty) Ltd v Vuletjeni*

Trading and Projects (Pty) Ltd (MM) (unreported case no 4262/2019, 21-6-2021) (Sigogo AJ)), Sigogo AJ, presented litigants and legal practitioners who would drag their matters, name of concurrent jurisdiction, between the main and local seats of the court.

Judge President Legodi said that in his judgment Sigogo AJ reported as follows:

'A period of more than [two] years has lapsed since the Minister of Justice and Constitutional Development had, on 26 April 2019, determined the areas under the jurisdiction ... of the Mpumalanga Division of the High Court. By now it should have been settled how territorial jurisdiction of this division operates. In the contrary this case is a living example that many litigants still approach territorial jurisdiction of the High Court in the manner it was under the Superior Court Act 59 of 1959 ...'

Out of habit, without giving attention to the proclaimed jurisdictional boundaries of this division the applicant issued court process falling under the Middleburg area of jurisdiction, in the main seat [which is in Nelspruit] on the wrong belief that the main seat, like the position in other divisions, exercises concurrent jurisdiction with the local seats.'

Judge President Legodi added that in para 8 of the judgment, Mr Sigogo stated that:

'Consideration of convenience and expense in these circumstances inevitably will ... be practiced in favour of the *dominus litis* much to the inconvenience and expense of the respondent/defendant. The Superior Courts Act aims to correct this situation. This is the position because it resonates well with section 34 of the Constitution of the Republic of South Africa ... The promise of the right of access to justice, as enshrined in section 34 of the Constitution is a promise that will be realised if litigants are given access to courts in their locality. Otherwise, the right of access to justice would

not [be] worth the paper it is written on if *dominus litis* will continue [to] be allowed to choose to litigate in a court far away from the respondent's/defendant's resident in the name of concurrency of the court's jurisdiction, in the process making access to justice for the respondents or defendant unattainable.'

Judge President Legodi said that in his judgment it seemed that Mr Sigogo knew that he would no longer be able to speak for the people of Mpumalanga, in the few weeks to come, as if he would no longer be able to speak for the ordinary people of society on the right to access to justice and courts and in the judgment he does so for the last time. '[As] if that is what he wanted to convey when he handed down the judgment on 21 June 2021. We just want to say as colleagues, this judgment will forever be a living document, not only for the Division and the people of Mpumalanga, but for the country as a whole,' said Judge President Legodi.

Judge President Legodi spoke of the warmth, kindness and love carried by Mr Sigogo for others. He shared a story about a letter that Mr Sigogo had written to him about one of the staff members of the Mpumalanga Division of the High Court, Welcome Mavimbela. Judge President Legodi pointed out that he received an e-mail from Mathobo, Rambau and Sigogo Attorneys (MRS Inc), and without reading the letter he asked himself what he had done. 'As I started reading the letter, tears dropped,' added Judge President Legodi.

The letter read as follows: 'This year I had an opportunity to be appointed as an Acting Judge of the High Court Mpumalanga Division in Mbombela. This was a very wonderful experience and an eye opener on what goes on behind the scenes in the administration of justice. I really appreciate the honour afforded to me to serve at this level. During this time, I worked with several secretaries who all do their best to ensure that the



Lutendo Sigogo sharing a joyous moment with retired Justice Bess Nkabinde and Black Lawyers Association's Secretary General, Mabaeng Denise Lenyai, at Justice's Nkabinde's special ceremonial session that was held on 7 December 2017 at the Constitutional Court.

judges dispense justice in as convenient manner as possible. Without comparing them, I believe it will not be fair on my part if I do not single out one of the members of the support staff, for the dedication and hard work, that he puts in his task.

I am not suggesting for a moment that he is the best, I did not work with all the people in the office. In him I saw an outstanding amount of dedication, which deserves to be mentioned. In the fourth term, I had an opportunity to work with Mr Mavimbela, as my secretary for the five weeks of my acting stint. I was impressed in the manner, Mr Mavimbela dedicated himself to his work. He is a serious person who was always punctual. For the five weeks I have worked with him, I have never reminded him of a task to be undertaken, as he kept his diary and mine ever updated.'

In his letter, Mr Sigogo told Judge President Legodi that he would like him to know about the quality staff in the Mpumalanga Division. Judge President Legodi pointed out that he was ashamed that the months he spent working with the staff, he did not recognise that there was gold among the officials in his Division. However, it took Mr Sigogo only five weeks to identify that goodness in the official mentioned.

Judge President Legodi shared another story between Mr Sigogo and Mr Mavimbela. He said that on 5 May 2021, Mr Mavimbela, underwent a serious throat operation. A lump was removed from his throat. The doctors found out that there was cancer in the lump and were worried that the cancer had spread throughout his body. Judge President Legodi added that Mr Mavimbela had to go for further tests in Pretoria. He said that Mr Sigogo and his wife Khangale Sigogo drove to see Mr Mavimbela after he was discharged from hospital and even paid for his travel and refreshment costs.

'Imagine what kind of nation we would be, if we were to do what Lutendo and his wife did,' said Judge President Legodi. Judge President Legodi added that we need to be thankful to Mr Sigogo's parents for the son they have raised.

Mr Sigogo's daughter, Tshiisaphungo Sigogo, said her father was a role model to her, her siblings and everyone around him always looked up to him. She added that he was a man of character and most importantly he handled every situation in a dignified manner. 'He never raised his voice at us and was never too quick to react. He would always take his time in assessing anything, it could be a question, a statement, or a problem. And only when he is satisfied with his response, he would respond and that would be his final say,' Ms Sigogo said.

Ms Sigogo said when her very first semester in university came to an end



Lutendo Sigogo led the Black Lawyers Association (BLA) march to the Union Buildings in July 2017 to voice the BLA's dissatisfaction on legal work distributed by government. This was during his term as President of the BLA.

and she had to go home, instead of using public transportation, her father, Mr Sigogo organised a mini family trip. 'My dad drove all the way from the Free State with all my siblings and our mother on a Friday. He had a meeting to attend the following day, which was a Saturday, so he multi-tasked and drove us home, while he had headphones on, so that he could still participate in the virtual meeting,' she added.

Ms Sigogo said her father was a hard-working man who was patient about his work as he was being a father to her and her siblings. She pointed out that the lesson she learned is that good things come to those who work hard.

Mr Sigogo's wife, Khangale Sigogo, wrote a tribute to her husband, which was read by her sister-in-law. In her tribute she said that she had never imagined that she would have to write a tribute so soon in their marriage. She said that their love was and will always be special to her. She described Mr Sigogo as a gentleman who took care of her and had big plans for their children. He was perfect in his fatherly duties and she thanked him for that. She promised to raise their children the way Mr Sigogo would have wanted.

Funeral service

The funeral service of Mr Sigogo was held on 5 August 2021. One of the Directors of the MRS Inc, Lufuno Godfrey Mathobo said he had known Mr Sigogo for 30 years and they had been working together for 22 years. He pointed out that Mr Sigogo was a good man, a man of high moral standards and integrity. He added that Mr Sigogo was an enemy of

corruption at all costs and that Mr Sigogo was born a leader. 'This is evident from all the institutions and bodies he led,' Mr Mathobo said. He added that Mr Sigogo, did not only lead outside organisations, but he also contributed to steering MRS Inc into the direction it is in today.

Mr Mathobo pointed out that Mr Sigogo always emphasised that MRS Inc should always contribute to training more legal practitioners, as well as giving candidate legal practitioners an opportunity to have vocational work in their offices. He said that the BLA and BLA SC was in Mr Sigogo's heart, and he and Tshavhungwe Lizzy Rambau noticed the passion Mr Sigogo had for the BLA and as a result the two directors took a resolution to support Mr Sigogo in all aspects. Mr Mathobo said among other things Mr Sigogo wanted to deal with disparities between black and white legal practitioners and the result of his commitment and support he made his way to being the President of the BLA and the then Law Society of the Northern Provinces.

LPC chairperson, Ms Matolo-Dlepu, said that Mr Sigogo was a younger brother to her. She pointed out that she first served with Mr Sigogo in the BLA, when she was the Deputy President of the BLA and again when they were deployed to represent the BLA in the National Forum. Ms Matolo-Dlepu said that Mr Sigogo was a calm person, a leader of note, and that his emotional intelligence surpassed many of his peers.

Ms Matolo-Dlepu added that leadership positions never excited Mr Sigogo. She said she prays that his peers who come after him emulate his maturity in

dealing with positions of power, as Mr Sigogo was a transformation agent. 'We all know that our profession is the least transformed, and one of the obligations and mandate as black legal practitioners, was to make sure transformation happens in our lifetime', Ms Matolo-Dlepu added.

Former President of the BLA, Busani Mabunda, said that Mr Sigogo's names 'Lutendo Benedict' had a serious meaning to what he was. Mr Mabunda said he found out the meaning of the two names, 'Lutendo', which meant prayer, and 'Benedict', which is a Latin name that means blessed. After this, it was difficult to craft a tribute for a hero, an activist, a moving encyclopaedia of Mr Sigogo's stature, calibre, integrity, and purpose.

Mr Mabunda said that in 2011 in the BLA conference that was held in Mafikeng, Mr Sigogo was elected Secretary General under Mr Mabunda's leadership. He added that there was an irony to Mr Sigogo succeeding him as the President of the BLA. 'We called each other, and he made an unqualified pledge to support my leadership, because as we were conversing, I told him my contest was not a question of if I will win, but when it happens,' Mr Mabunda added.

Mr Mabunda pointed out that Mr Sigogo engaged, followed, and understood the process, as well as the assignments given to him to discharge the mandate. He said that because of the unwavering confidence, which he reposed in Mr Sigogo, when he introduced him to the National Bar Association (NBA), the BLA's counterpart in the United States, he unshakingly introduced Mr Sigogo as the incoming President of the BLA, and indeed Mr Sigogo became the President of the BLA. Mr Mabunda read a message of condolence from the NBA, where they expressed sympathy with the Sigogo family, the BLA, the judiciary and the legal profession. The letter spoke about the impact Mr Sigogo brought to the organisation. That in his term as the president of the BLA, Mr Sigogo led two of the largest delegations of South African legal practitioners to the Annual Convention hosted by the NBA, one that was held in New Orleans in 2018 and the other in New York in 2019. The NBA said Mr Sigogo's commitment to it was unquestionable.

Mr Mabunda said that the legal profession is mourning the loss of an icon who with his untimely death had left the legal profession waiting for his immense contribution. Mr Sigogo went over and beyond what he was already called for and delivered on earth. He added that Mr Sigogo's contribution to the LPA was exceptional. He pointed out that Mr Sigogo made a lot of single-handed submissions, when he was given a mandate by the BLA to do so, and these were presented in Parliament, including the submission on the Road Accident Benefit Scheme Bill B17

of 2017, which the Minister of Justice is aware of.

Minister of Justice and Correctional Services, Ronald Lamola, said when he left the Cabinet meeting to drive to Mr Sigogo's funeral, President Cyril Ramaphosa, told him to convey his deepest condolences to the family of Mr Sigogo. Mr Lamola said he knows the Sigogo family has been devastated by the passing of three family members, namely Mr Sigogo's father, Edward Ntshavheni Sigogo, who passed away on 14 July 2021, Mr Sigogo who passed on 31 July 2021 and Mr Sigogo's sister, Mutondi Tshamaano Vele, who passed on 2 August 2021. He told the family that they are not mourning alone.

Mr Lamola pointed out that what people become in life and what people do in life, especially men in a patriarchal society is not only a reflection of the societal institutions, which models individuals but it is also a reflection of the type of people who brought us into the world. He comforted Mr Sigogo's widow and children and said he knows that it does not make sense when a husband and a father, a person whose warmth they will never feel again, passes away. He added that he hoped Mr Sigogo's legacy will continue to nurture his children and give warmth to the family.

Mr Lamola said that the country has lost a true patron, who was committed to justice. He added that the community has lost a selfless servant and a role model. He pointed out that he first met Mr Sigogo not in a physical sense, but as the legend, whom he had heard of and the role he played at the University of Venda. He said they were told about a fearless and very skilful champion in student politics,

as well as in the leadership of the law council. He pointed out that he later met Mr Sigogo in the circles of the BLA, and he (Mr Sigogo) without fail had lived up to his reputation.

'What struck me was his articulate, methodical and very thoughtful way of communication. His words had the effect of piercing through a room very sharply without him raising his voice,' Mr Lamola said. He noted that Mr Sigogo was an epitome of black excellence and a champion of transformation. Mr Lamola added that Mr Sigogo was competent and committed, that his attitude towards transformation of the judiciary was clear, he never sent mixed signals or messages. He never changed his principles or focus on the tools of transformation.

Mr Lamola pointed out that Mr Sigogo's contribution as a commissioner of the JSC was immense, even with the pen, he raised issues that could not be ignored even though the ink had dried. Mr Lamola referred to a passage in one of the articles Mr Sigogo wrote in *De Rebus* ('The BLA celebrates its 40th anniversary in October: We have come this far because we stand on the shoulders of giants' (2017 (May) DR 13)), which reads as follows: 'We owe it to the coming generations to address the challenges facing us today in a manner that they will look back and appreciate the role we would have played.' 'Indeed, we will look back and appreciate your role Mr Sigogo', Mr Lamola added.

Mr Lamola pointed out that in the last conversation he had telephonically with Mr Sigogo, Mr Sigogo had called to enquire about the progress of the Legal Sector Code and how far the process was to being gazetted. 'I am pleased to inform this gathering that we are at an advanced stage



Lutendo Sigogo photographed with businessman Sello Rasethaba, who was a guest speaker at the Black Lawyers Association's Annual General Meeting in 2017.

of finalising the Legal Sector Code, because of his contribution, the LPC, NADEL and other stakeholders in the legal profession', Mr Lamola said.

Mr Lamola added that the Legal Sector Code will play a significant role in transforming the briefing patterns and the legal profession across the board. He pointed out that Mr Sigogo was also passionate about the matter of the Silk status. He said that they are at a consultative stage, a positive development, towards having a transparent legal profession, which activists, such as Mr Sigogo had advocated for. Mr Lamola said the LPA will forever be a memory of what activists of transformation can do if they unite and organise themselves, behind the progressive imperative. 'This Act has Mr Sigogo's DNA in it,' Mr Lamola added.

Mr Sigogo's mother, Ndivhudzannyi Emelinah Sigogo, said her son loved his siblings very much. She shared a story about how after Mr Sigogo and his partners at MRS started their law firm, Mr Sigogo was invited to one of the schools in their community to give a motivational talk, to the learners there. Mrs Sigogo said that after Mr Sigogo's talk, a few days later the principal of that school came and told her there was a problem at the school as all learners wanted to take history, so that they could study law and be like Mr Sigogo. 'I thought he was just influential, I did not know he was a giant,' Mrs Sigogo added. She pointed that Mr Sigogo used to help any person who needed help, and that he loved his parents very much.

Memorial by the Mpumalanga Division

On 13 August 2021, Judge President Legodi, the judges in his division and staff held a memorial for Mr Sigogo. Judge Brian Mashile said he met Mr Sigogo while he was a member of the BLA, however, they never interacted on a personal level, but only on an official level. He added that their second encounter was when Mr Sigogo was an Acting Judge at the Mpumalanga Division. 'I was very shocked when the Judge President called me and said Lutendo had been admitted to hospital and he suspected that he had COVID-19. I jokingly said he will recover, I know he is a very strong man,' Judge Mashile said.

Judge Mashile pointed that life is a journey, which is different for everyone. He added that we all take different paths but during the journey of life, one learns and passes those experiences on to others. He pointed out that Mr Sigogo accomplished a lot in short space of time and that his spirit will live on in the judgments he handed down.

Deputy Judge President, Segopotje Sheila Mphahlele, in her tribute to Mr Sigogo, said that Mr Sigogo's celebration of life, is of a life well-lived. 'When I was



Lutendo Sigogo at the then Cape Law Society Annual General Meeting that was held in 2017.

listening to my colleagues and the support staff, I was reminded that people will remember you on how you made them feel,' she added.

Deputy Judge President Mphahlele said she would refer to Mr Sigogo as a giant in a tiny body. She took an opportunity to thank the Sigogo family for Mr Sigogo, she added that she was saying thank you to the family because charity begins at home. She described Mr Sigogo as person who had warmth, respect and was well-mannered, caring and a great leader and a true gentleman. Deputy Judge President Mphahlele, pointed out that Mr Sigogo, was always interested on matters affecting others. Interested in the transformation of the legal profession not only for him, but for those who will come after Mr Sigogo's generation.

Deputy Judge President Mphahlele pointed out that in the interactions

they had with Mr Sigogo he was an all-rounder. 'I remember when he discovered that I am Roman Catholic, he told me so much about my church. He knew so much and even recommended a book to me. And when I delayed to buy that book, he sent it to me,' Judge President Mphahlele added. She said that one day when they were seated in the judges room, Mr Sigogo gave the judges a talk on COVID-19. She added that it was unfortunate that Mr Sigogo was educating them about the disease that would be the one that took him.

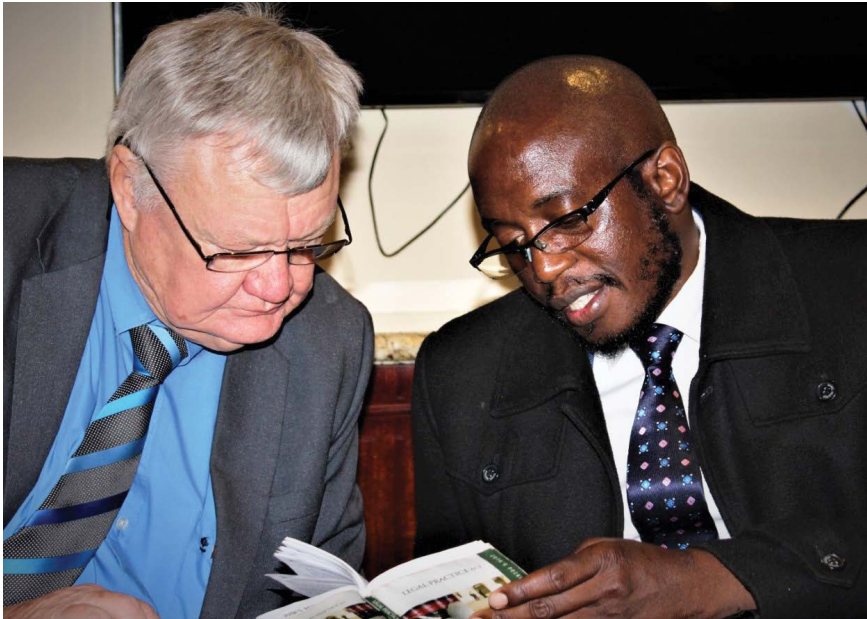
Mr Sigogo's bother, legal practitioner, Lindelani Sigogo SC, said that the Sigogo family appreciates the honour and the privilege that the Mpumalanga Division of the High Court under the leadership of Judge President Legodi has extend to his family in paying tribute to his brother. 'Words cannot sufficiently express our appreciation to you and all here present today, including the entire staff in this division,' Mr Sigogo SC said.

'It was through your leadership that my brother was called to the Bench, and we are comforted to know that Acting Judge Sigogo was a loved member of your family. He was able to contribute to the jurisprudence of this country through the opportunity given to him by this division,' Mr Sigogo SC added. He pointed out that his brother was appointed as an Acting Judge for a period accumulating just under a year and through this, he left a giant footprint as it is apparent from the judgments that he penned in his time.

Mr Sigogo SC shared some of the experiences that were shared by others since the departure of his brother, regarding his work. 'Recently I received a call from one of the senior officials from the



Lutendo Sigogo photographed with the then Chairperson of the National Council of Provinces and now Minister of Defence and Military Veterans, Thandi Modise, at a special ceremonial session for retired Justice Bess Nkabinde, that was held in 2017.



Lutendo Sigogo, with the President of the Law Society of South Africa, Jan van Rensburg.

South African Revenue Service, regarding a customs related matter that he had a privilege of presiding over. The official saw the surname Sigogo and called me thinking that I was the person who presided on the matter, mainly because it related to tax matters from a customs point of view. His comment was that the decision clarified important matters under the Customs and Excise Act 91 of 1964, specifically s 96 of the Customs and Excise Act, regarding when a litigant is approaching the court on an urgent basis.' Mr Sigogo SC pointed out that the official was grateful for the judgment. He added that he indicated to the official that it was his brother Acting Judge Lutendo Sigogo, who presided on that matter. He said the family shall forever be grateful to the High Court for the opportunity and the home they provided to Mr Sigogo. 'May excellence and justice define this division,' Mr Sigogo SC said.

Messages by the *De Rebus* Editorial Committee and staff

Chairperson of the *De Rebus* Editorial Committee and legal practitioner, Giusi Harper, said: 'Mr Lutendo Sigogo was a past member of the *De Rebus* Editorial Committee. He was an affable colleague that provided valuable legal input to the committees' deliberations. His passing is a tragic loss that has left me and those that knew him shocked and deeply saddened. My sincere condolences to his family, friends, and colleagues. May he rest in peace'.

Editorial Committee member and legal practitioner, Maboku Mangena said, '31 July 2021 will go down in history as the day Azania, our beloved country and

her people lost one of its finest sons. Mr Sigogo was the embodiment of courage and determination. He was constant and consistent in his quest to advance the interests of the legal profession. He was as dependable as he was reliable. We trusted him and had faith in him and his leadership as his name, Lutendo, demanded of us. He was a true inspiration through his exemplary leadership. We will miss his guidance and wisdom during this difficult phase of transition in the legal profession. May his spirit spur us on when the journey gets to be too long, strengthen us when we become weary and bring us into focus when forces of distraction get on our way. So long my brother ... so long.'

The Editor of *De Rebus*, Mapula Oliphant, noted that during his tenure in the Editorial Committee, Mr Sigogo made sure that he prepared for the Committee meetings by reading all the support documents connected with the articles reviewed and at times even full cases. She added: 'He never missed an opportunity to show his passion for the law and imparting legal knowledge. He would give the *De Rebus* team impromptu lessons on complex legal topics in order for us to have a better understanding of topics covered in articles. He contributed in so many ways to the profession.'

De Rebus News Reporter, Kgomo Ramotsho, said: 'Mr Sigogo's sudden departure is a sad and a premature one. His intelligence was beyond amazing. He was kind and treated everyone with respect. When he was chairing conferences during his presidency at the BLA, he made sure that *De Rebus* was there to cover the events of the day. He acknowledged the journal's presence and thanked us for the coverage of the news in the legal

profession. It has been an honour to be in the presence of this great man. May he rest in peace.'

Mr Sigogo was born on 28 December 1972 at Ngwenani ya ha Themeli village. He was the second born son of the late Edward Ntshavheni Sigogo and Ndivhudzannyi Emelinah Sigogo. He completed his secondary education in 1990 at Thohoyandou Secondary School. He obtained his BProc degree in 1994 and LLB degree in 1996. He started his career as a candidate attorney at University of Venda Law Clinic in 1995 to 1997.

He was admitted as an attorney in 1998. He continued with his studies obtaining his LLM degree at the University of Limpopo in 2001. He worked at Ace Ndou Attorneys, and later at Khathu Mulovhedzi Attorneys in 1999 for a period of six months and was forced to make a career change due to the passing on of the sole director of the firm. This led to a partnership known as Mathobo, Rambau and Sigogo Attorneys being established and practicing under the style MRS Inc. This law firm was formed under his leadership together with Ms Tshavhungwe Lizzy Rambau and Mr Lufuno Mathobo. MRS Inc is one of the longest serving black legal practice partnerships in the country spanning more than 22 years.

Mr Sigogo at various times occupied leadership positions within the legal profession including serving two terms as a treasurer and secretary of the BLA Limpopo Branch in 2006/2008 and 2008/2010 terms. He was the Chairperson of the Limpopo Law Council in 2012/2013. He was the Chairperson of the Thohoyandou Attorneys Association. In 2011 to 2012 Mr Sigogo served in the National Executive Committee of the BLA, first as the Deputy Secretary General and then as the Secretary General. In 2017, he was elected as the President of the Law Society of Northern Provinces. This coincided with his term as the President of the BLA for two consecutive terms from 2015 to 2019.

Mr Sigogo was the President of the Law Society of Northern Provinces in 2018/2019, Chairperson of the Finance and Human Resources Committee of the LPC in 2019/2020, as well as the Chairperson of the Enforcement Committee of the B-BBEE Commission. He made his contribution to the transition from the erstwhile provincial law societies to the present LPC, as part of the National Forum. He was a member of the JSC at his untimely death, and an acting judge at the Mpumalanga Division of the High Court in Mbombela.

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

The modern customary marriage – can the handing over of a bride be waived?



By
Koketso
Masutha

Customary law has – for decades – dealt with the standards in communities and each community has practiced these long established customs in each area. With the dawn of the Constitution, customary law was then recognised to have ‘equal status’ as the common law in terms of s 39(2) of the Constitution. South African courts are given wider powers to interpret and develop customary law. The courts must appreciate any developments and changes, which are put in place within a particular community, on condition that the process is in harmony with the aim of the Constitution.

In recent years, there have been big debates and legal disputes on the concept of ‘handing over the bride’, to the husband as part of validating their customary marriage. The questions, which must be dealt with are:

- How do we determine the handing over of the bride?
- When is the bride deemed to have been handed over?
- Does the finalisation of *lobola* alone – without handing over the bride – conclude a customary marriage?

The object of this article is to dichotomise the concept of ‘handing over the bride’.

Statutory requirements for customary marriages

The starting point is found in s 3(1) of the Recognition of Customary Marriages Act 120 of 1998 (the Act), which sets out the requirements to be met for validity of customary marriages.

For customary marriages that are entered into after the commencement of the Act to be valid, the following must be met:

- ‘(a) the prospective spouses –
 - (i) must both be above the age of 18 years; and
 - (ii) must both consent to be married to each other under customary law; and
- (b) the marriage must be *negotiated* and entered in to or *celebrated* in accordance with customary law’ (my italics).

Lobola is one of the all-important requisites for a customary marriage, but on its own *lobola* negotiations do not conclude a customary marriage. A *lobola* payment is followed by a celebration or any ceremonies practiced within that community/society. The payment of *lobola* can be in full or in partial payment with both families agreeing on how the remaining payments will be concluded. The objective of *lobola* is not to ‘buy’ the bride. Any alignment to this view is

mortifying as it creates an unacceptable perception held by unscrupulous individuals of different ethnic groups, that a woman is a possession or a trophy. Rather the intent of *lobola* is to show love, respect, and sacrifice. *Lobola* further shows that there is consent by the two parties to get married.

In the case of *Moropane v Southon* (SCA) (unreported case no 755/122, 24-5-2014) (Bosielo JA (Mthiyane DP, Maya and Theron JJA and Van Zyl AJA concurring)), the Supreme Court of Appeal (SCA) held that by the virtue of both parties initiating and entering *lobola* negotiations, which is an ‘integral part of a customary marriage’, the parties [have] consented to being married in terms of customary law’ (my italics) (Siyabonga Sibisi ‘Is the requirement of integration of the bride optional in customary marriages?’ (2020) 53 *De Jure* 90).

The Act does not state any style of celebration of customary marriage, nor does it specify the process of the handing over of the bride (*makoti*) to the bridegroom’s family.

In the case of *Mabuza v Mbatha* 2003 (4) SA 218 (C), Hlophe JP, when he was confronted with a contention that, SiSwati custom of *ukumekeza* namely, the handing over the bride was not done

(the formal integration of the bride into the bridegroom's family), he argued that 'African customary law has evolved and was always flexible' (para 26). Therefore, non-compliance with the strict rules pertaining to rituals and ceremonies, cannot invalidate a customary marriage that has been negotiated, agreed, or celebrated in accordance with customary law. I further submit that entering into and celebrating a customary marriage are one and the same thing, which succeeds the *lobola* negotiations.

It is a common practice that once there is consent between a man and a woman to get married, their respective families will meet and enter into *lobola* negotiations. The Act is silent when it comes to the manner in which a customary marriage should be negotiated and entered into or celebrated in accordance with customary law. 'The reason for this omission lies in under our beautiful rainbow nation and the different ethnic groups of South Africa' (Sibisi (*op cit*)). It is appreciated that different ethnic groups celebrate marital unions in their unique ways.

The Constitutional Court has cautioned 'courts must be cognisant of the fact that customary law ... regulates the lives of people. The need for flexibility and the imperative to facilitate development must be balanced against the value of legal certainty, respect for vested rights, and the protection of constitutional rights'. The courts must strive to recognise and give effect to the principle of the living law, actually observe customary law, as this constitutes a development in accordance with the 'spirit, purport and objects' of the Constitution within the community (*Shilubana and Others v Nwamitwa and Others* 2008 (9) BCLR 914 (CC) at para 47).

The court is faced with the question, whether the waiving of the integration (handing over of the bride) be excusable, considering that one of the requirements for customary marriage is that the two parties must have consented to be married in terms of customary law. Subsequently, how will the handing over be proceeded with and will this be a physical handing over where the bride is accompanied by her family to the groom's place of residence. Or will the integration take place before or after the full payment of the agreed amount of *lobola*. As the Act requires that all the requisites set out in s 3(1) must be complied with to validate a customary marriage, the question, which now needs to be unpacked is whether the customary law permits the waiving of the integration of the bride as a requirement.

How are courts approaching integration?

The belief that the integration of the bride is a dispensable requirement, which the parties may, if they decide,

'The bride must at least be handed over to the groom's family in compliance with the integration requirement.'

to waive, was discussed in the case of *Mabuza*. This case lends itself to scholars, and most court decisions that profess to follow it, do so on the argument that the integration of the bride is a flexible and a dispensable requirement.

The court accepted that according to SiSwati customary law, there were three requirements for a valid customary marriage, namely –

- the payment of *lobola*;
- *ukumekeza*; and
- the formal handing over of the bride to the bridegroom's family.

It was common cause that these requirements had been met except *ukumekeza*. The question was whether *ukumekeza* a *sine qua non*? Both the parties answered this in the affirmative. The plaintiff explained that, essentially, they regarded themselves as married. She regarded herself as the defendant's wife and the defendant regarded her as his wife. She had all the benefits of being the defendant's lawful wife. Further, the defendant had said that he was happy with the type of marriage that they had and there was no need for *ukumekeza*.

The court settled with *ukumekeza* as the integration of the bride into the groom's family and the handing over as a separate act. The finding that parties may waive compliance with *ukumekeza* inevitably led to the conclusion that parties could waive compliance with the integration of the bride into the groom's family.

The real issue in the *Mabuza* case was, whether the bride had been integrated into her in-laws and not whether the *ukumekeza* is practiced differently than what it was centuries ago. The judgment was then criticised by JC Bekker (see 'Requirement for the validity of a customary marriage: *Mabuza v Mbatha* 2003 (4) SA 218 (C)' (2004) 67 *THRHR* 146 at 149).

How should the handover be observed?

The bride must at least be handed over to the groom's family in compliance with the integration requirement. This process must take place at the residence of the groom or in-law. During this process, the bride (*makoti*) is welcomed and counselled by her in-laws. An animal is then slaughtered and enjoyed by both families. Taking into regard the flexibility of customary law and the different ways of

how this process may be done by different communities. Some families may opt to waive the physical handing over the bride, and instead welcome a 'symbolic handing over'.

In *LS v RL* 2019 (4) SA 50 (GJ), the court set a precedent of the 'symbolic' handing over of the bride. In that there was a valid marriage between applicant and the deceased, the court noted that the handing over of the bride is not an 'indispensable sacrosanct *essentialia*' for a lawful customary marriage. The applicant and the deceased, including both families waived the compliance of handing over of the bride, by allowing the parties to cohabit and opted for a 'symbolic handover'. In particular, the court held that both parties (the applicant and the deceased) complied with the requirements set out in s 3(1) of the Act. This demonstrates that their marriage was concluded on reaching an agreement in *lobola* negotiations.

Taking it further, in the case of *Mbungela and Another v Mkabi and Others* [2020] 1 All SA 42 (SCA), the parties had concluded the *lobola* negotiations and exchanged gifts, but the bride was not physically handed over to the in-laws. The court adopted the decision in the *Sengadi* case. The SCA held that a handing over ceremony is 'an important but not necessarily a key determinant of a valid customary marriage'. The 'handing over of a bride is simply a means of introducing a bride to her new family and signifies the start of the marital consortium'.

Conclusion

To conclude that a customary marriage is invalid without considering the various aspects that may lead to far reaching consequences on both sides, each customary marriage must be looked at in terms of its own facts. For the court to decide whether the customary marriage is indeed invalid, it must take the various customs practised in different societies into regard. However, it appears to have been accepted that customary marriages have a lot in common despite the diversity in ethnic groups.

One of the aims of the Act, is to determine the requirements of a valid customary marriage. The handing over of the bride is the capping stone of the customary marriage to be deemed valid but it is not a necessary feature as it is done differently within various communities. With the Act in place, parties including the in-laws may decide to waive the handing over of the bride.

Koketso Masutha LLB (UniVen) is an advocate at the Polokwane Bar. □

Is a legal practitioner's involvement in presenting misleading evidence a breakdown in the justice system?

By
Nomthandazo
Mahlangu

Picture source: Gallo Images/Getty

In the recent case of *Koni Multinational Brands (Pty) Ltd v Beiersdorf AG* (SCA) (unreported case no 553/19, 19-3-2021) (Schippers JA (Cachalia JA and Sutherland and Unterhalter AJJA concurring)), the Supreme Court of Appeal (SCA) firstly considered whether the respondent established the requisite reputation and goodwill in its 'get-up' (packaging), and secondly considered whether the appellant's use of a 'get-up' similar to that of the respondent had the likelihood to create confusion.

Summary of the facts

The respondent argued that the appellant was passing off its shower gel as that of, or as being associated with the respondent, using a get-up likely to cause market confusion about the source of the shower gel or its connection to the respondent. Beiersdorf argued that given the extensive and longstanding use of its get-up, the packaging has become associated with it and so too have NIVEA personal care products. Though this decision merits an incisive analysis, this article focuses merely on the questionable conduct of the respondent's legal practitioners. The first part of the judgment reads:

'The Legal Practice Council [LPC], Pretoria, to investigate the circumstances in which the respondent's attorneys, [and the customer who gave the evidence], failed to disclose [the customer's] association with the respondent's attorneys to the Gauteng Division of the High Court, Johannesburg and this court, when filing an affidavit by her as a member of the public, and to take whatever steps it deems appropriate in the light thereof'.

In the original court proceedings, the respondent's legal practitioners relied on evidence obtained from a customer believed to be a member of the public. According to the affidavit, the customer thought she was purchasing the applicant's shower gel, when she was actually purchasing the respondent's shower gel. The customer claimed that she realised the error after closely inspecting the product at home and after her husband had already used it.

During the hearing in the SCA, a member of the Bench inquired whether the customer was associated with respondent's legal practitioners of record, which the counsel confirmed. The customer's identity was then revealed. As it turned out, the customer was a legal practitioner, who at the time, worked for the law firm, Adams & Adams, the respondent's legal practitioners. This then prompted the appellant's legal practitioner to submit that the conduct of the respondent's legal practitioners had constituted a serious and material non-disclosure. Differently formulated the argument was, that the respondent's legal practitioners failed to disclose a material fact. Non-disclosure, however, is seemingly a misnomer under the circumstances, or maybe not?

The High Court in reaching its decision determined that customers were likely to be confused based on – among other considerations – the evidence presented by the purported customer. To a degree the court's decision was attributable to evidence of actual confusion. The premise encapsulated in the court's observation that the appellant's get-up exhibited 'signs of straining every nerve to evoke the respondent's product in the minds of consumers'. The irrefutable conclusion was, the evidence of actual confusion that was presented, strongly swayed the court's decision in the applicant's favour, and to determine precisely the extend of such influence is somewhat impossible.

What makes this case unique?

Central to this exposition, was the question of whether the presentation of misleading evidence was deliberately planned?

In common practice, if the trademark owner suspects that passing off is taking place, it sends agents to suppliers to make test purchases and see if they can detect cases of confusion. In addition, if confusion is present, the trademark owner will issue a cease-and-desist letter through its legal practitioners. Litigation ensues if the so-called infringer refuses to either accede to or capitulate to the demand. The remarks by court in *Beiersdorf AG v Koni Multinational Brands (Pty) Ltd* 2019 BIP 23 (GJ), per Makgoka JA, correctly bolsters this contention, namely that 'Beiersdorf knew very well that had it disclosed [the customer's] true identity, her evidence would have carried lit-

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tle, if any weight at all'. The court reasoned that 'in the absence of any explanation, an irresistible inference must be that this was a conscious effort to mislead the court'.

Implicit in this case, are the nuances to flirt with the confines of perjury, which only engenders the elements of non-disclosure. The challenge is whether the respondent's legal practitioners passive involvement in presenting misleading evidence caused the miscarriage of justice, hence, their actions were just as unethical as the act of perjury.

The aim of this article is not to persuade readers that the respondent's legal practitioners committed perjury, certainly the conduct in question does not satisfy the legal definition of perjury. However, it does not negate the respondent's legal practitioners' effort to sail as close to the wind as possible.

Another point that invites dialogue is the reason for court's referral of this matter to the LPC, which will be dealt with under the Legal Practice Council Code of Conduct for Legal Practitioners, Candidate Legal Practitioners and Juristic Entities. The LPC is conferred with the power to regulate the affairs of the legal practitioners and to hold members answerable to its norms and standards. Naturally, this is understood considering the fact of the prevailing jurisdictional constraints. However, the question is, whether or not the conduct of the respondent's legal practitioners fall within the Code of Conduct's definition of circumstances under which a legal practitioner may be found guilty of non-disclosure, or if non-disclosure is simply not expressly prohibited – then what, does it connote that conduct, which is not prohibited is permitted?

The risk is that the court is treating ethical conduct in the terms of what the rules stipulate, ignoring the fact that any experienced sophisticated legal practitioners can omit material information and likely circumvent disciplinary action. If the respondent's legal practitioners are not disciplined, what perception would that conjure up to the public and legal fraternity? By hypothesis, if the LPC effectively polices itself and decisively disciplines the legal practitioners, it will be in consonant with its rules. But if the rules inadvertently allow impugned conduct to go unpunished then the belief that courts are bound by transformative imperatives rings hollow. Borrowing from the wisdom of the court that:

'In [all organised] societies, people often rely on the courts of law to give direction in their disputes. How the court dis-

charges this task will have a bearing on how the public views the whole justice system. In colonial times and later apartheid era, courts of law did not have legitimacy in the eyes of the black majority' (Thulani Nkosi and Neo Mahlako 'Are courts going out of their way to accommodate racists? A critique of *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others*' (2020) 24 *Law, Democracy & Development* 338).

Conclusion

Legal practitioners are held to the highest standards of honesty and integrity. Presenting evidence knowing it is inadmissible, is inconsistent with the duty that legal practitioners owe to the court, and it amounts to professional misconduct. What is particularly poignant in this case, is the posture of the court and its silence or rather its reluctance to condemn the conduct of the respondent's legal practitioners. This is not to suggest that courts must usurp the power of the regulatory authority. On the contrary, the court has a meaningful role to play in litigation, which is to seek the truth. The egregious failure of the judiciary is situated in the South African legal culture of the courts, which undermines the constitutional transformative agenda, which would otherwise require the democratic values, social justice and fundamental rights to be prominently featured in the court's decision. The role of judges is not only limited to interpreting legal sources but also to transformatively shape the conduct and values of society. Presenting evidence knowingly of its inadmissible nature taints the image of courts.

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Transferring independent guarantees – a discussion



Picture source: Gallo Images/Getty



By
Mpho
Titong

In terms of art 9 of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, UN Doc A/RES/50/48 (1995) (the Convention), the right to demand payment in terms of an independent guarantee shall be transferable only if such a guarantee itself stipulates that it is transferable. Article 33 of the International Chamber of Commerce's Uniform Rules of Demand Guarantees (URDG 758) also state that a demand guarantee shall be transferable only if it states that it shall be transferrable. Unlike the URDG 758 and

the International Standby Practices (ISP 98), which do not have a force of law, the Convention becomes legally binding once adopted by member states (Grace Longwa Kayembe *The Fraud Exception in Bank Guarantee* (LLM thesis, University of Cape Town, 2008)).

Considering the context provided, this contribution will provide a critical evaluation of the practice of transferring independent guarantees.

Defining an independent guarantee

An independent or demand guarantee is an irrevocable, independent, and signed undertaking which creates an obligation of payment upon the presentation of a complying demand (Charl Hugo 'Demand Guarantees in the People's Republic of China and the Republic of South Africa' (2019) 6 *BRICS Law Journal* 4 at 8).

A 'complying demand' refers to a 'demand that meets the requirements of a complying presentation', and 'complying presentation' refers to a 'presentation that is in accordance with ... the terms and conditions of that guarantee', the rules applicable to the demand guarantee and also, it refers to a presentation, which complies with the practice standards of international demand guarantees (Hugo *op cit*) at 9).

• The principle of independence

An important principle of demand guarantees is the independence principle. In terms of this principle, the guarantee is deemed wholly independent from the underlying contract between the contracting parties (it may be a construction agreement or a contract of sale) (Hugo *op cit*) at 13-14)). This means that whatever dispute may rise between the debtor and the creditor shall have no effect on the obligation to pay in terms of the guarantee, the only exception to this general rule being where fraud by the beneficiary is an issue (Hugo *op cit*) at 15). The independence principle is consequential to the 'pay first, argue later' rule in the sense that payment ought to be made regardless of a dispute arising from an agreement other than the guarantee itself (Cayle Selwyn Lupton *A Comparative Legal Perspective on the Impact of Good or Bad Faith on the Independence of Documentary Credits and Demand Guarantees* (LLM dissertation, University of Johannesburg, 2018)).

• The principle of strict compliance

One other important principle of demand guarantees is the principle of strict compliance (Kayembe *op cit*) at 52). This principle simply entails that when

a complying demand has been made by the beneficiary of the guarantee, the guarantor has to honour the arrangement by making the payment demanded and also, such a guarantor is entitled to refuse to pay where the demand made does not strictly comply with the terms of the guarantee (TL Marange *Towards the recognition of the illegality exception under documentary credits in South Africa* (LLM dissertation, North-West University, 2019)). If the demand made is compliant at face value, the guarantor can pay the beneficiary without looking beyond the documents provided for compliance (Kayembe (*op cit*) at 53).

The practice of transferring independent guarantees

The practice of transferring independent guarantees is a concept, which was introduced by the URDG 758 (Nino Chipashvili 'The Banks Guarantee Under the Uniform Rules for Demand Guarantees' (2014) *European Scientific Journal* 69). A transferrable guarantee refers to a guarantee, which may be made available by a guarantor to a new beneficiary at the instance or request of the existing beneficiary (art 33(c) of the URDG 758 and Chipashvili (*op cit*) at 73). Transferring a guarantee typically occurs in a situation where the contractual position of the initial beneficiary in the underlying agreement has also been transferred to another person (Roeland F Bertrams *Bank Guarantees in International Trade* 4ed (Kluwer Law International 2013)).

Before the discussion on the practice of transferring independent guarantees is dealt with, it must be noted that the transfer of rights to demand payment must be distinguished from the assignment of proceeds. An assignment does not grant a right to draw or demand payment; it is basically a right to enjoy the proceeds, which result from the drawing of a guarantee by the beneficiary (James E Byrne *The Official Commentary on the International Standby Practices* (Institute of International Banking Law and Practice 1998)). On the other hand, a transfer applies to a right to demand payment and to receive such demanded payment.

A demand guarantee may be transferrable. It is, however, only transferrable if it states in itself that it is transferrable, in which case it may be transferred more than once and also, only the amount available at time of transfer will be subject to the transfer (meaning that the guarantee cannot be transferred partially) (art 33(a) of the URDG 758 and J Gloss 'Transferability of Rights Under Demand Guarantees in German Law' (<https://tradeandforfeiting.blogspot.com>, accessed 7-7-2020)). I, therefore, submit that in accordance with the governing rules, an independent guarantee can

'Even if an undertaking expressly states that it is transferrable, the guarantor is under no obligation to give effect to a request of having the guarantee transferred ...'

only be transferred if it states in itself that it shall be transferrable.

The Convention further states that where a guarantee states in itself that it is transferrable, no one (except to the extent of the consensus reached) may effect the transfer if the undertaking does not expressly authorise such a person (art 9 of the Convention (*op cit*)).

Transferring a guarantee basically means that the title of the beneficiary in terms of the guarantee is changed to whoever the rights to demand payment are being transferred to (Chipashvili (*op cit*) at 73). The initial beneficiary is consequently termed a transferor of the rights and the new beneficiary is the transferee (art 33(c) of the URDG 758). In terms of the rules of transferring a demand guarantee, the name and signature of the transferee (the new beneficiary) may be used in any other document (Chipashvili (*op cit*) at 73 and art 33(f) of the URDG 758).

Even if an undertaking expressly states that it is transferrable, the guarantor is under no obligation to give effect to a request of having the guarantee transferred, unless it is to the extent and the manner consented to by the guarantor (art 33(b) of the URDG 758). This means that a demand guarantee is transferred only on the terms and conditions stipulated and agreed to by the guarantor. For purposes of fairness, the refusal to transfer an independent guarantee by a guarantor must be based on justified grounds. Additionally, a counter-guarantee cannot be transferred (art 33(a) of the URDG 758).

The fact that a guarantee is transferred only in accordance with the terms and conditions agreed to by a guarantor indicates the fact that the URDG 758 provides protection to a guarantor in the sense that such a guarantor 'can withhold its consent to a transfer ... of a guarantee, even if the guarantee provides that it is transferable' (Sefton Fross 'Understanding the Uniform Demand Guarantee Rules No. 758' (<https://seftonfross.com/>, accessed 11-8-2021)). I, therefore, submit that the fact that a guarantee indicates that it is transferrable does not mean the guarantor is obliged to consent to the transfer.

When a demand guarantee is being transferred, the transferor must transfer the rights to demand payment and also, such transferor must notify the guarantor about the acquisition of the rights by the new beneficiary (Chipashvili (*op cit*)

at 73). All the changes pertaining to the guarantee must be included in the undertaking and must be agreed to by the guarantor and the transferor of rights (Chipashvili (*op cit*) at 73).

The ramification of transferring a demand guarantee is the fact that the transferee (who is subsequently the beneficiary) acquires the right to demand payment on its own accord and without the cooperation of the transferor; this also means that such transferee can make a request for the issuing of a second guarantee if necessary (Catherine Nommick 'A first demand guarantee is not transferrable when the beneficiary of such guarantee is split-up' (www.soulier-avocats.com, accessed 20-6-2020)). For example, if a person has acquired the right(s) to demand payment in terms of an independent guarantee, such person has the right to demand payment on their own terms and without having to seek cooperation of the previous beneficiary.

In terms of the practice of transferring demand guarantees, the transferor must notify the guarantor by furnishing same with a signed statement asserting the fact that the right(s) and obligations acquired in terms of the underlying relationship have been acquired by the transferee (who is deemed the new beneficiary) (art 33(d)(ii) of the URDG 758). The signed statement confirms the identity of the parties concerned (the initial beneficiary who is termed the transferor of rights, the transferee who is termed the subsequent beneficiary as well as the guarantor).

Conclusion

Generally, an independent or demand guarantee is transferrable. It is, however, transferrable only if it states that it is transferrable. No unauthorised person may transfer an independent guarantee or rights to demand payment in terms of an independent guarantee if it does not state that it is transferrable, except to the extent of the consensus reached. An independent guarantee is transferred only in accordance with the terms and conditions stipulated by the guarantor.

The consequence of transferring an independent guarantee is the fact that the titles of the transferor and transferee change (the initial beneficiary gets removed and a new beneficiary is inserted). The new beneficiary can transact in the capacity as a beneficiary without having to seek cooperation of the transferor (the initial beneficiary).

Mpho Titong LLB (NWU) is an LLM candidate at the North-West University in Potchefstroom. □



A culture of compliance: *How to build and maintain a compliance framework*

By
Sipho
Nkosi



Law firms are obliged to provide more than just good legal practitioners. Commercial capability and good business process are crucial to success in the legal sector. This article is a reflection on the application of the principles of corporate governance in the trust accounting environment, and the need and value for a compliance function.

Regulated environment

Law firms take the form of a sole proprietorship, partnerships, or private companies. In the regulated legal profession, an annual renewable Fidelity Fund Certificate is prescribed for trust account legal practitioners (see s 84(1) read with s 86(1) of the Legal Practice Act 28 of 2014 (LPA)). A private company used by legal practitioners to operate a practice is the only form of a commercial juristic entity that is permitted to operate a trust bank account (s 34(7) of the LPA). A private company is a 'personal liability

company' (s 8(2)(c) Companies Act 71 of 2008) and the directors/shareholders are the risk-bearers in the management of a private company. In terms of s 19(3) of the Companies Act, the directors are jointly and severally liable, together with the company. The personal liability of a legal practitioner conducting a trust account, for which indemnity is prescribed in s 74(1)(a) of the LPA, is designed for the protection of the trust funds against the risk of misappropriation.

Section 34(7)(a) of the LPA provides that a private company may conduct a practice if its shareholding is comprised exclusively of legal practitioners. In an incorporated company equity/ownership is concentrated on the inside and there are no outside shareholders. There is no separation of ownership and control, and the presence of shareholder(s) in the governing body is inevitable. The independent board requirement to check on the autonomy of managers is thus untenable in a trust accounting environ-

ment (Deloitte 'Private company governance: Independent board members can be a valuable resource for private companies' (www2.deloitte.com, accessed 10-8-2021)). The trust accounting environment thus poses a unique challenge in the application of the principles of corporate governance. The absence of outsiders in the composition of the governing body of a partnership or incorporated legal practice will thus have to be resolved through different mechanisms.

Compliance function

The creation of a compliance function to maintain sound risk management and internal control in the operations of a trust account legal practice is apposite. 'The compliance function is a crucial function within firms, responsible for identifying, assessing, monitoring and reporting on the firm's compliance risk' (European Securities and Markets Authority *Final Report: Guidelines on certain aspects of the MiFID II compliance function re-*

quirements (2020) (www.esma.europa.eu, accessed 10-8-2021)). The compliance function is required to mitigate against the danger of self-review. One of the compliance focuses is to act independently in the oversight of compliance (Ellen McCarthy 'Independence of the Compliance Function: A Critical Component of the Three Lines Model' www.corporatecomplianceinsights.com, accessed 10-8-2021)). The compliance function should not have a limited focus or be perceived as an internal police officer. The responsibility of the compliance function provides a clear mandate to manage the compliance risk of the practice (David Strachan and Rebecca Walsh 'Targeting compliance: The changing role of compliance in the Financial Services Industry' (www2.deloitte.com, accessed 10-8-2021)). The compliance function explains the consequences for not following the policy by persuasive, motivational nudging. The purpose of the compliance function is to ensure that legal practitioners act with integrity. It provides advice rooted in law. '[E]ffective risk management is not about eliminating risk taking, which is a fundamental driving force in business and entrepreneurship' (Organisation for Economic Co-operation and Development *Corporate Governance: Risk Management and Corporate Governance* (2014) (www.oecd.org, accessed 10-8-2021)). Risk management is an essential element of business governance.

Internal controls

Rule 54.14.7.1 of the Legal Practice Council Rules made under the authority of ss 95(1), 95(3) and 109(2) of the LPA, requires the legal practitioner to implement and design internal controls to provide reasonable assurance of reliable financial reporting and to ensure that they operate effectively, and are monitored regularly throughout the reporting period. '[T]he auditor's engagement on a legal practitioner's trust accounts covers only the legal practitioner's financial statements to the extent that these may affect the auditor's opinion on whether the trust accounts were maintained in compliance with the Act and the Rules' (Independent Regulatory Board of Auditors (IRBA) *Proposed Guide for Registered Auditors: Engagements on Legal Practitioners' Trust Accounts* (revised November 2019) (www.irba.co.za, accessed 10-8-2021)). The monitoring of the implementation and design of internal controls is the responsibility of the legal practitioner. The internal control systems must be ingrained into the DNA of the firm/practice and these must be followed in everyday management or actual operations (International Federation of Accountants (IFAC) *Good Practice Guidance: Evaluating and Improving Internal Control in Organisations* (2012)

(www.ifac.org, accessed 10-8-2021)). Reporting on internal control improves the quality of financial reporting and reduces governance problems (Rafat Salameh Salameh 'What Is the Impact of Internal Control System on the Quality of Banks' Financial Statements in Jordan?' (2019) 23 *Academy of Accounting and Financial Studies Journal* (www.abacademies.org, accessed 10-8-2021)).

Monitoring of the internal control mechanism is crucial for ensuring that credible rather than self-serving voluntary information is disclosed (IFAC (*op cit*) at para 4H). The accuracy and reliability of financial information reporting by legal practitioners are of critical importance in ensuring a fair, efficient, and transparent practice. The existence of a satisfactory internal control structure reduces the probability of errors and irregularities and can be another vehicle to improve corporate governance structures (David M Willis and Susan S Lightle 'Management Reports on Internal Controls: What do they say about your company?' (2000) *Journal of Accountancy* (www.journalofaccountancy.com, accessed 10-8-2021)). Low internal controls imply high risk (Ben Kwame Agyei-Mensah 'Internal control information disclosure and corporate governance: Evidence from an emerging market' (2016) 16 *Corporate Governance* (www.emerald.com, accessed 10-8-2021)).

Trust funds

The obligations of a trust account legal practitioner are set out in s 87 of the LPA. The key rules on holding trust funds re-emphasise the sanctity of the trust funds. They are:

- The practice's accounting records must 'distinguish in readily discernible form between business account transactions and trust account transactions' (r 54.8).
- 'Trust accounts not to be in debit' (r 54.14.9).
- Update and balance trust accounting records monthly (r 54.10).
- Funds in trust must be 'kept separate from other money' (r 54.11).
- '[P]ay any amount due to a client within a reasonable time' (r 54.13).
- Trust monies must be deposited promptly (r 54.14.7.2).
- Trust balances must not exceed trust monies actually held (r 54.14.8).
- 'Transfer from trust bank account to business bank account' (r 54.14.12).
- 'Withdrawals from trust banking account' (r 54.14.14).

Trust account risks are a significant risk exposure that should be on top of the agenda of the practitioners. 'A trust account trial balance that balances is not an indication that transactions have been correctly recorded' (Jannie Dan-

nhauser 'Trust account risk and risk to the practice's business' 2016 (Sept) *DR* 17). A system that allows for checking and reporting functions will assist in managing the trust account risks. Relying on the annual audit to ascertain whether the trust account books are satisfactory is inadequate. Liquidity in a trust accounting environment is a significant risk, the management of which is specifically regulated in r 54.10, r 54.14.8 – 9 and r 54.14.14. The duties in respect of compliance ultimately lie with the legal practitioner. Fidelity cover does not reduce risk and is a weak form of control (Info-Entrepreneurs 'Manage risk' (www.infoentrepreneurs.org, accessed 10-8-2021)).

Disclosure practices

One of the important ways for firms to ensure proper compliance is to normalise the disclosure of internal control information to the regulator, namely, 'disclosure-by-design', not least because the legislation or regulations demand it. One way of achieving that objective is by ensuring timely disclosure of accurate information on important firm-related matters. Information disclosure is crucial in discouraging inappropriate practices. RSO Wallace, K Naser, and A Mora suggest that organisations with greater liquidity are operating better business and are prone to disclose more information voluntarily, namely, voluntary disclosure level is related to liquidity (RSO Wallace, K Naser, and A Mora 'The relationship between the comprehensiveness of corporate annual reports and firm characteristics in Spain' (1994) 25 *Accounting and Business Research* 41 as cited in Nermeen F Shehata, Khaled Dahawy and Tariq Ismail 'The Relationship between Firm Characteristics and Mandatory Disclosure Level: When Egyptian Accounting Standards Were First Adopted' (2014) 5 *Mustang Journal of Accounting and Finance* 85 (www.researchgate.net, accessed 10-8-2021)). 'According to Ho and Wong (2001), the impact of corporate governance on information disclosure may be complementary or it may be substantive' (Yau M Damagum and Emmanuel Ib Chima 'The Impact of Corporate Governance on Voluntary Information Disclosures of Quoted Firms in Nigeria: An Empirical Analysis' (2013) 4 *Research Journal of Finance and Accounting* 166 (<https://core.ac.uk>, accessed 10-8-2021)). Reporting on internal control improves the quality of financial reporting, and '[a]ccording to Gale (2003) in Kateba (2010:27), the low quality of financial reporting greatly reduces the quality of the institution itself' (Aristanti Widyaningsih 'Internal Control System on the Quality of Financial Statement Information and Financial Accountability in Primary Schools in

Bandung, Indonesia' (2016) 7 *Research Journal of Finance and Accounting* 10).

The holding of trust funds demands financial accountability regarding financial integrity disclosure and compliance with the legislation. 'The impact of accountability and transparency in financial reporting on the governance of an organisation is usually related in the level of quality of financial reporting (Sanni, 2011)' (Widyaningsih (*op cit*)). The disclosure of internal control information in law firms needs to be encouraged. It is expected that ownership concentration will influence the disclosure of internal control information (Agyei-Mensah (*op cit*)).

Culture of compliance

Active monitoring to evaluate all efforts, regular training on compliance obligations, is essential in building a culture of compliance into operations of the organisation, from C-suite to the post-room (Deloitte *Building world-class ethics and compliance programs: Making a good program great* (2015) (www2.deloitte.com, accessed 10-8-2021)). Each practice – sole proprietor/partnership/incorporated company – should design, develop, implement and maintain a compliance framework that will be appropriate to the practice (Carwyn Evans 'Establishing Effective Compliance Structures' (2016) (www.cclcompliance.com, accessed 10-8-2021)). This will include a compliance policy, charter, manual and organisational structure that supports a compliance culture. 'The charter is a formal document approved by the governing body' and improves the organisation's operations (The Institute of Internal Auditors *The Internal Audit Charter: A Blueprint to Assurance Success* (2019) (<https://na.theiia.org>, accessed 10-8-2021)). It is an outward statement that seeks to determine compliance with the spirit of the law. It goes beyond a policy, is functional, defining operations – anything operational is included in the charter (Deloitte *Audit Committee Resource Guide* (www2.deloitte.com, accessed 10-8-2021)). 'The organisation's control framework/procedures should have the necessary compliance requirements embedded therein' (Compliance Institute of Southern Africa (CISA) King III Practice Note: The Compliance Universe (2007) (www.associatedcompliance.co.za, 10-8-2021)).

It is prudent to develop a compliance checklist (Institute of Directors in Southern Africa (IoDSA) Practice note: King III Chapter 6 Compliance Guidance (2009) (<https://cdn.ymaws.com>, accessed 10-8-2021)). This should be underpinned by the development, approval and implementation of a compliance policy, charter, and manual, which will serve as a platform to institutionalise a compliance process (CISA (*op cit*)). The purpose of a compliance program is prevention, detection

'Active monitoring to evaluate all efforts, regular training on compliance obligations, is essential in building a culture of compliance ...'

and correction to ensure that an organisation complies with any laws or regulations that apply to it (Matt Kelly 'Corporate Compliance Programs: Everything You Need to Know' (www.ganintegrity.com, accessed 10-8-2021)). The identification and assessment of compliance risks can take some time to complete and should be undertaken with a view to enabling the organisation to manage its business in compliance with applicable laws, regulations, codes and standards (IoDSA (*op cit*)).

The legal practitioner is responsible for supervising the practice concerning the design and efficacy of the internal risk management and control systems, risks inherent in the practice's activities and compliance with laws, regulations and internal rules from the compliance management plan perspective. The control environment is the 'tone' of the organisation and is the foundation for all other controls. 'One of the largest factors influencing the control environment in an organisation is the "tone at the top". This is a term that is used to define management's leadership and commitment towards openness, honesty, integrity, and ethical behaviour' (Boise State University 'Basics of Internal Controls: Understanding internal Controls' www.boisestate.edu, accessed 10-8-2021).

Regulatory efforts

In matters involving the legal practice of Garlicke and Bousfield, the law firm was sued by a client. It was alleged that one Cowan, who was admittedly at the time an executive consultant of the legal practice, was authorised to represent the law firm, and did represent the law firm in an investment scheme contract. In the *ratio decidendi* the court remarked that had the practitioner 'demanded a licence to operate' an investment scheme, 'he would have nipped the operations in the bud...'. The failure to ensure that the conditions for the operation of the investment scheme are satisfied is characteristic of risk management failure and exposed the law firm to a risk of pure economic loss (*Jaffit v Garlicke and Bousfield Inc (PFK (Durban) Incorporated and Others as Third Parties) and other cases* [2012] 2 All SA 95 (KZP)).

'Internal controls are the processes designed, implemented and maintained by a legal practitioner to provide reasonable assurance about the ... reliable financial

reporting and compliance with the [LPA] and the Rules; while compliance is to ascertain whether or not the legal practitioner complied specifically with the requirements of the [LPA] and the Rules' (IRBA *Guide for Registered Auditors: Engagements on Legal Practitioners' Trust Accounts* (revised March 2020) (www.lssa.org.za, accessed 10-8-2021)). The corporate law of compliance extends beyond fiduciary duties and includes substantive regulatory statutes, criminal laws, guidance from administrative agencies, codes of best practices, internal corporate rules, and other governing norms (Deloitte *Duties of Directors* (2017) (www2.deloitte.com, 10-8-2021)). The effective external enforcement of the regulations needs to be improved and the ability to enforce the regulations, as well as active devices for their effective enforcement will ensure good corporate governance in the legal sector.

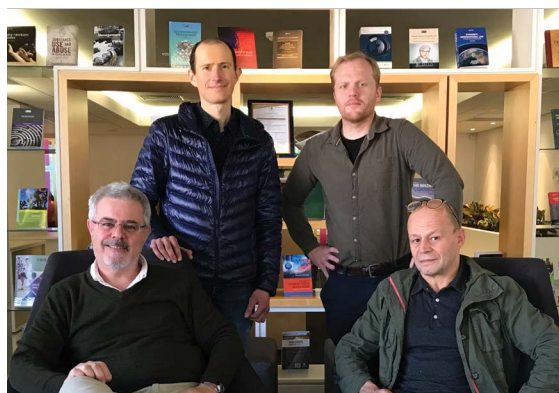
Law firms in South Africa are also accountable institutions for the Financial Intelligence Centre Act 38 of 2001 and the Protection of Personal Information Act 4 of 2013 and have extensive reporting and monitoring duties. 'A good governance system will ensure that:

- comprehensive risk management occurs as a normal course of events; and
- there is transparent disclosure to shareholders and regulators of the nature, extent, and management of the risks' (Ben Kwame Agyei-Mensah 'Does the corruption perception level of a country affect listed firms' IFRS 7 risk disclosure compliance?' (2017) 17 *Corporate Governance International Journal of Business in Society* 727).

It is advisable to make use of a phased approach in the implementation of a compliance framework and process, since the development of a fully effective compliance function, however structured, can take some time before the value thereof is realised (CISA (*op cit*)). Smaller firms can engage part-time resources dedicated to compliance (Strategic Management Services, LLC 'When is Having a Part-Time Compliance Officer a Viable Option?' www.compliance.com, accessed 10-8-2021). The implementation of the principles of good governance needs to be encouraged and its external enforcement mechanism strengthened. The Law Society of South Africa *Legal Services Sector Charter* (2007) (<https://justice.gov.za>, accessed 10-8-2021) enjoins the regulator to develop and implement an effective mechanism to ensure compliance with the charter and to adopt a good governance policy.

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THE LAW REPORTS



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

July 2021 (4) South African Law Reports
(pp 1-322); July 2021 (2) South African
Criminal Law Reports (pp 1-114)

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

KZD: KwaZulu-Natal Local Division, Durban

KZP: KwaZulu-Natal Division, Pietermaritzburg

SCA: Supreme Court of Appeal

WCC: Western Cape Division, Cape Town

Abuse of process

Strategic litigation against public participation (SLAPP) defence recognised for first time in South Africa: The SLAPP defence, was raised in the WCC in *Mineral Sands Resources (Pty) Ltd and Another v Redell and Others and Two Related Cases* 2021 (4) SA 268 (WCC). It was raised in the form of a special plea by three environmental attorneys and three community activists (the defendant) against Australian mining company Mineral Sands Resources and its local subsidiary, Mineral Commodities (collectively, the Com-

panies), after the companies had sued the defendants for defamation. The companies were involved in the exploration and development of major mineral-sands projects in South Africa: The Tormin Mineral Sands Project on the West Coast and a proposed operation on the Wild Coast region of the Eastern Cape.

The Companies' case against the defendants was that public statements made by them in which they criticised the environmental impact of the Companies' operations were false and defamatory. They sued the defendants for damages in an amount of R14,25 million or, alternatively, the publication of apologies.

In a SLAPP defence, raised in the form of a special plea, the defendants argued that the suit was an abuse of process and violated the constitutional right to freedom of expression. They alleged that they were brought for the ulterior purposes of –

- discouraging, censoring, intimidating, and silencing the defendants; and

- intimidating and silencing members of civil society, the public and the media in relation to public criticism of the Companies.

The term SLAPP, coined by academics in the United States (US), referred to typically meritless or exaggerated lawsuits brought by powerful companies to intimidate civil society advocates, human rights activists, journalists, academics, and the like, acting in the public interest. The aim was to litigate them into silence and to drain their resources. In the US anti-SLAPP statutes were enacted to provide a quick, effective, and inexpensive mechanism to discourage such suits.

The Companies argued that the defendants were impermissibly relying on the Companies' motives and not the merits of their claims. They claimed that the SLAPP defence amounted to a request that the court shut its doors to them without investigating the merits of their defamation suit against the defendants.

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The WCC, per Goliath DJP, emphasised that South African courts have often referred to the purpose or motive of the litigation as being relevant to the question of abuse of process. The Companies were claiming exorbitant amounts that they knew the defendants could ill afford to intimidate them. The litigation was oppressive and *mala fide*.

Goliath DJP pointed out that, in the absence of specific legislative mechanisms to deal with SLAPP suits, the courts had limited powers to cure the symptoms of SLAPP suits. Goliath DJP, therefore, dismissed the Companies' exception to the defendants' pleas, reiterating that the interests of justice should not be compromised due to a *lacuna* in South African legislation.

Births and deaths

Burial consequences of still birth: The case of *Voice of the Unborn Baby NPC and Another v Minister of Home Affairs and Another* 2021 (4) SA 307 (GP) concerned a challenge to the constitutional validity of provisions of Births and Deaths Registration Act 51 of 1992 (BADRA) relating to the burial consequences of a 'still birth'. 'Still birth' is defined in BADRA as 'at least 26 weeks of intra-uterine existence but show[ing] no sign of life after complete birth'. The effect of these provisions is that the foetal remains of a pregnancy loss due to natural causes, which occurs before 26 weeks of gestation, or the foetal remains of a voluntary induced termination under the Choice of Termination of Pregnancy Act 92 of 1996 (CTOPA) were excluded from burial. Section 20(1) provides that no burial may take place in the absence of a burial order, and ss 18(1) to 18(3) and reg 1 issued under it provide for the issuance of a burial order only in the event of a still-birth certificate or declaration. These were treated as pathological or anatomical waste and disposed of through incineration with other medical waste, denying the prospective parent(s) the opportunity of burial. The applicants sought a declaratory order that these provisions were inconsistent with the constitutional rights to dignity, privacy, religion and equality of such prospective parents.

The GP (per Mngqibisa-Thusi J) held that no rational reason existed why there should be a differentiation in the burial consequences of a still-birth and those of a pregnancy loss other than a still-birth. It was about the emotional loss and the pain felt by the expectant parent(s), as well as the intensity of the pain felt by both types of parent who have suffered a loss must be the same; in both instances no child was born alive. The impugned provisions should be adapted to cater for a loss of pregnancy other than a still-birth for those who wish to perform the

last rites for the prospective baby and conduct a burial. Allowing them to bury the foetal remains would ameliorate the pain caused by the loss and assist in the process of healing and the dignity of the parents who have suffered loss would be restored. The GP accordingly declared the impugned provisions were inconsistent with the Constitution and invalid to the extent that they excluded the issuance of a still-birth notice in the case of a pregnancy loss other than a still-birth. The GP, however, limited the declaration of invalidity so as not to apply in the case of a pregnancy loss due to an inducement, given concerns raised on the effect of such relief on the rights of pregnant women who chose to terminate their pregnancies in terms of the provisions of CTOPA.

Criminal law

Fresh applications for firearm licences permitted where terminated by the operation of law: *Fidelity Security Services (Pty) Ltd v Minister of Police and Others* 2021 (2) SACR 1 (SCA) concerns the efforts by the appellant, a company providing security services, to restore certain expired firearm licences. Given the nature of its core business, lawful possession of these firearms was indispensable for it to operate effectively.

The appellant was the owner of approximately 8 500 firearms and had a dedicated employee responsible for maintaining the licences. Their problem arose when that employee left the appellant's service, and it was discovered that the licences of some 700 firearms had not been renewed timeously. These licences had consequently terminated by the operation of law, as contemplated by s 28 of the Firearms Control Act 60 of 2000 (the Act). The appellant belatedly attempted to renew the licences, but the designated firearms officer at the local police station refused to accept these applications in compliance with a directive issued by the Commissioner of the South African Police Service. The appellant had then instructed its attorneys to write to the Minister of Police and the Commissioner, the respondents, explaining why they were late in applying for the renewal of the firearm licences and offering to submit application forms for new licences. After failing to receive a response to these communications, the appellant launched an application in the High Court for an order, *inter alia*, directing the Commissioner as Registrar of Firearms to accept late renewal applications, alternatively, that it may apply for new firearm licences in respect of those firearms the licences of which had terminated.

After the application was dismissed, the appellants filed the present appeal to the SCA seeking an order declaring

that it be entitled to obtain new licences for those licences that had terminated by operation of law – attempts at renewal were abandoned. The respondents opposed the appeal. Their primary main contention was that a party whose licence had terminated by the operation of law was simply precluded from applying under the Act for a new licence to possess a firearm.

The SCA (in a unanimous judgment), per Petse AP, accepted that there was nothing in the Act nor the regulations that even remotely suggested that someone whose licence had terminated by the operation of law was, as a result, forever precluded from applying for a new licence. Indeed, such an interpretation, in terms of which such firearm owners were prevented from applying for a new licence and were required to buy new firearms only for the same application to be considered, was considered neither sensible nor business like (in such cases the firearm, in respect of which the licence had expired, would also have to be destroyed in terms of s 149 of the Act – in this case some 700 firearms). Thus, first-time applicants and repeat applicants alike were eligible to apply for a firearm licence.

The appeal was accordingly upheld, and the appellant declared entitled to apply afresh for new licences for the firearms in question.

Other criminal law cases

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

- admissibility of hearsay evidence;
- prevention of crime – forfeiture order;
- prisoner rights;
- trial record; and
- traffic offences.

Delict

The defence of *volenti non fit injuria*:

The case of *Jackson v Road Accident Fund* 2021 (4) SA 244 (GP) concerned a stuntwoman, Ms Jackson, who while filming 'Resident Evil 6' was required to drive a motorbike, bareheaded, at an on-coming vehicle with a camera attached to it which extended from a boom arm. For the scene the boom arm would hold the camera at a level close to the road surface and then, just before Jackson reached it, it would be raised, and she would be filmed passing under it. On 5 September 2016 the day in question the boom was lifted too late, and the camera struck Jackson on the head and shoulder, severely injuring her.

Ms Jackson sued the South African film company, the stunt coordinator, her employer, the driver of the boom vehicle (the driver) and the camera boom operator. She also instituted a separate action against the Road Accident Fund (RAF).

The two actions were then consolidated. The GP found in a judgment on a special plea that the vehicle with the camera boom was a motor vehicle for the purposes of the Road Accident Fund Act 56 of 1996. When the matter came before the GP again (before Davis J), the RAF denied that the driver was negligent, and that even if he was, Ms Jackson, as a stunt driver, had consented to risk of damage – that is, it raised the defence of *volenti non fit injuria*.

Each party called an expert, who in joint minutes agreed that the ‘boom up’ call during the incident happened at least three seconds past the location where it was given at the trial run and that the incident would have been avoided if the incident run had been aborted in time. The boom operator testified that he was under the driver’s instructions when it came to lifting the boom, and that when the driver said, ‘boom up’, it was too late. Both the driver and the operator tried to blame Ms Jackson for the incident, claiming that she was going too fast and did not keep a proper lookout.

Davis J concluded from the experts’ opinion that the driver was negligent. The director had given an instruction that ‘boom up’ had to come one second later than the incident run to get a more exciting shot, and the driver miscalculated the margin for error on the command. Ms Jackson had no opportunity, either time- or distance wise, to take evasive action, and there was no room for a finding of contributory negligence on her part.

Davis J then dealt with the *volenti* issue. Ms Jackson explained in her evidence, which was uncontroverted, that everyone on the movie set had a specific job to do and that hers had been to ride the motorcycle in a straight line at a constant speed. The insured driver had the job to drive the freedom arm vehicle similarly in a straight line at a (lesser) constant speed and to lift the boom with the camera over the plaintiff at a given point or at least at a safe and opportune moment. She did not consent to any other risk, and she was unaware

that the director had given the insured driver instructions to decrease the safety margins from the rehearsal run to the incident run. She was never given the opportunity to consider this or to consent thereto.

Davis J found that it could not be said on this evidence that Ms Jackson had consented to a specific risk. She accepted the mishaps that might happen in the normal course if everyone did their job, but not to a driver not doing his job, not starting from where he should have started, not making any proper calculations, and decreasing the safety margin without telling her. Even if she had voluntarily assumed the risk of harm of riding a motorcycle as a stunt rider, she did not assume the risk of a diminishing of the safety margin without her knowledge. The RAF, therefore, failed to prove the *volenti* defence.

Insolvency

The petitioning creditor’s liability for costs: In *FirstRand Bank Ltd v Master of the High Court Pretoria and Others* 2021 (4) 115 (SCA) the second respondent, a body corporate, was the petitioning creditor (for arrear levies) in the sequestration of the owner of a sectional unit within the scheme it administered. No concurrent creditors proved any claims. The free residue in the estate having been insufficient to cover the estate’s administration costs, the third and fourth respondents, trustees of the insolvent estate, levied a contribution for the shortfall against two secured creditors who relied solely on the proceeds of the property, which constituted its security. One of these were the appellant bank (FirstRand Bank), the other the fifth respondent, Nedbank. The body corporate did not prove a claim. Instead, to collect the arrear levies, it relied on the statutory obligation to settle arrear levies as prerequisite for the registration of transfer when the properties constituting FirstRand Bank and Nedbank’s security were sold in execution. When the first respondent, the Master, would not en-

ertain FirstRand Bank’s objection to the contribution raised, it took the Master’s decision to include such contribution in the estate accounts on review in the GP.

The present case concerned FirstRand Bank’s appeal to the SCA against the GP’s order, which had held FirstRand Bank (and Nedbank) *pro rata* liable for the contribution together with the petitioning creditor. There the correct interpretation of following sections of the Insolvency Act 24 of 1936 (the Act) were at issue –

- section 89(2) of the Act, that where creditors rely for the satisfaction of their claim solely on the proceeds of the property, which constitutes their security, they shall not be liable for any costs of sequestration other than the costs specified in s 89(1), and other than costs for which they may be liable under paras (a) and (b) of the proviso to s 106;
- section 106(a) that if all the creditors who have proved claims against the estate are secured creditors, who would not have ranked on the surplus of the free residue if there were any, they shall be liable to make good the whole of the deficiency, each in proportion to the amount of his claim; and
- section 14(3), that ‘in the event of a contribution by creditors under [s 106], the petitioning creditor, whether or not he has proved a claim against the estate ... shall be liable to contribute not less than he would have had to contribute if he had proved the claim stated in his petition.’

In a unanimous decision, the SCA, per Mabindla-Boqwana, held that the proviso in s 106(a) meant that only if all creditors relied solely on their security – namely, there were no concurrent portions to their claims – would they be liable for the whole deficiency, each in proportion to their claims. Section 14(3) sought to avoid a situation where a creditor would petition for the sequestration of the estate and not prove a claim, only for other creditors ‘to pick up the costs’. In terms of s 14(3) that petitioning creditor would

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always have to contribute (the section contained no exceptions). The petitioning creditor was placed in the same position as it would have been in had it proved its claim. Section 106, while not deeming the petitioning creditor to have proved a claim, read together with ss 14(3) and 89(2), meant that the provisions of s 106 applied to the petitioning creditor 'whether or not [it] has proved a claim'. It should be treated in the same manner as a creditor who had proved its claim. So, it concluded, when there was no free residue or it was insufficient, the first port of call would be to look to the petitioning creditor to contribute along with concurrent creditors who have proved their claims, and secured creditors who would have ranked upon the surplus of the free residue; only if there were no other proved and concurrent creditors (including the petitioning creditor) able to contribute, would the secured creditors who relied solely on their security be called upon to pay (s 106(a) read with s 89(2)).

In this case the other two creditors (FirstRand Bank and Nedbank) were secured creditors who relied solely on their security and, therefore, the body corporate, as the petitioning creditor, was solely liable to pay the costs of sequestration. The appeal accordingly succeeded.

Labour law

Is a 'picket' a 'gathering'? In *NUMSA and*

Others v Dunlop Mixing and Technical Services (Pty) Ltd and Others 2021 (4) SA 144 (SCA), the National Union of Metalworkers of South Africa (NUMSA) had, pursuant to the Labour Relations Act 66 of 1995 (LRA), organised a protected strike during which, its members conducted a picket outside their employers' (Dunlop's) premises. The picket became violent and resulted in damage to Dunlop's property. Dunlop claimed compensation, asserting that the damage was 'riot damage' and that NUMSA was deemed liable for it under the Regulation of Gatherings Act 205 of 1993 (the Gatherings Act). The Gatherings Act defined 'riot damage' as the injury or death of any person, or damage to property 'caused directly or indirectly by, and immediately before, during or after, the holding of gathering'. NUMSA met this claim with the contention that the LRA, which in s 69 allowed picketing (which was not defined), governed the matter to the exclusion of the Gatherings Act. Determinative of this was whether a picket under the LRA was a 'gathering' under the Gatherings Act. The KZP (per Van Zyl J) ruled that it was.

In an appeal the SCA (in a unanimous decision) per Goosen JA examined the governing provisions of the LRA (ss 68 and 69) and the Gatherings Act (s 11). Goosen JA pointed out that the Gatherings Act gave expression to the consti-

tutional right to assemble and gather by providing a procedure for the convening of gatherings and demonstrations. Pickets were conduct to which employees could legitimately resort to further the objects of strike action but, in accordance with s 69 of the LRA, they had to be peacefully conducted in the furtherance of a protected strike.

Goosen JA pointed out that the obstacle to Dunlop's construction was that it required a finding that a picket as a particular type of gathering or demonstration, while not otherwise regulated by the Gatherings Act, nevertheless fell within the ambit of s 11 of the Gatherings Act for purposes of liability for 'riot damage'. To so hold, said Goosen JA, would require that the SCA ignore both the detailed regulation of gatherings in terms of the GA and the comprehensive regulation of conduct in furtherance of strike action by the LRA. There was no basis for such a strained interpretation of the Acts, and the appeal should be upheld.

Vexatious proceedings

The common law and the Vexatious Proceedings Act 3 of 1956: In *MEC, Department of Co-Operative Governance and Traditional Affairs v Maphanga* 2021 (4) SA 131 (SCA) the MEC applied for an order that Mr Maphanga be prohibited from instituting proceedings against her, her department or any past or present mem-



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ber of the public service, except with the leave of the court. The MEC argued that s 2(1)(b) of the Vexatious Proceedings Act, alternatively the common law, entitled her to the relief claimed. Section 2(1)(b) allows courts to prohibit vexatious litigants from proceeding if certain prerequisites are met.

The objects of the MEC's ire were a series of suits filed by Mr Maphanga against the MEC. They included –

- a review and appeal proceedings launched in the Labour Court;
- a delictual action in the High Court for damages relating to the sale in execution of his property (in which he alleged the MEC's department was involved); and
- a complaint in the General Public Service Sectoral Bargaining Council concerning severance pay.

The KZD ruled that the MEC had failed to establish vexatious conduct on the part of Mr Maphanga, either under the Act or the common law.

In an appeal to the SCA the MEC argued that the KZD had overlooked the fact that Mr Maphanga had filed five suits against her and had misconstrued the common-law powers of the courts to address abuses of their process.

The SCA, per Maya P, dismissed the appeal. She pointed out, in respect of s 2(1)(b), that the Labour Court proceedings had multiplied merely because Mr Maphanga had incorrectly identified the correct forum in which to vindicate his claim. The proceedings in the KZD, on the other hand, were based on an entirely different cause of action. Since it could, in addition, not be said that the Labour Court or KZD proceedings were instituted without reasonable grounds, the MEC had failed to establish a right to relief under s 2(1)(b).

Maya P also dismissed the MEC's attack under the common law. She emphasised that courts would exercise their inherent power to stop frivolous or vexatious proceedings only if it could be shown that the litigant in question had habitually and persistently instituted vexatious legal proceedings without reasonable grounds.

Proceedings were vexatious and an abuse of process if they were obviously unsustainable as a certainty and not merely on a preponderance of probability, and this requirement applied to all litigation that amounted to an abuse of process. This had not been the case with Mr Maphanga, against whom no case had been made out under the common law either.

Maya P concluded that the declaratory relief was correctly refused by the KZD and dismissed the appeal.

Wills

Discriminatory provisions of fideicommissum declared void: The case of *King and Others NNO v De Jager and Others 2021 (4) SA 1 (CC)* concerns a will executed in 1902 by certain testators. The will included a fideicommissum under which immovable property would devolve to the testators' children, thereafter only to their male grandchildren, and thereafter from the male grandchildren only to male great grandchildren. In an instance where a child did not produce a male grandchild, the property would pass to the other male grandchildren.

A grandson (Mr Kalvyn de Jager) had died. He had only granddaughters (second to sixth applicants), and in his will he bequeathed the property concerned to his daughters. Kalvyn, however, had a brother, Mr John de Jager, who had produced great-grandsons (first to third respondents).

The executor of Kalvyn's estate (first applicant, Mr King) received three claims on the property: In the first instance by Kalvyn's daughters under Kalvyn's will; in the second by John's sons under the fideicommissum in the testators' will; and in the third, by the daughters' sons (the testators' great-great grandsons, fourth to eighth respondents).

Confronted with these claims, Mr King applied to the WCC for a declarator of the appropriate heirs. His view was that the clause of the testators' will creating the fideicommissum (clause 7) was unfairly discriminatory, and on public policy grounds should not be enforced. He was joined in this view by the daughters,

who added that the clause violated their right to equality and should be altered in inclusive terms.

Neither contention was accepted, the WCC finding no clash with public policy and that the discrimination concerned was reasonable and justifiable. A subsequent appeal to the SCA was unsuccessful.

In an application for leave to appeal to the CC, the court (per Jafta J for the majority), held the discrimination in the fideicommissum to be contrary to public policy, unconstitutional and contrary to the prohibition of unfair discrimination based on gender in s 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). Nor, was the fideicommissum saved by s 36 of the Constitution. The fact that the will was executed in 1902 was immaterial: The Constitution and PEPUDA applied by virtue of the attempt to enforce the offending condition now. Hence it would be regarded as never having been written, and the property bequeathed unconditionally to the applicants' father. Like all his assets, it became the subject of his will when he died in 2015.

Other cases

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

- constitutional law (duties of state);
- curators (power to ratify contract);
- delict (slip and fall);
- leave to appeal (costs);
- legal practitioners (enrolment of attorney as advocate);
- medicine (confidential information);
- mortgage (judicial execution); and
- revenue (customs and excise).

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By
Kgomo tso
Ramotsho

Estranged wife fails to establish a clear right to bury husband

Mabulana v Mabulana and Others
(LP) (unreported case no 5040/2021,
26-7-2021) (Kganyago J)

In a case of *Mabulana*, the Limpopo Division of the High Court in Polokwane dismissed Moyahabo Eugly Mabulana's (the applicant) application with costs, after she had approached the court seeking an *ex-parte* urgent application that Gledies Mabulana (the first respondent) and Sophy Mabulana (the second respondent) be interdicted from burying Nakampe Wilard Mabulana (the deceased). The applicant wanted to be allowed to bury the deceased and she also wanted the first and second respondents or any other person be interdicted from misusing or taking the deceased assets pending the final determination of the matter.

According to the applicant, she and the deceased were married in 1996 in terms of civil rites, and from the said marriage they had three children who were all over the age of majority. The applicant averred that during 2018 the marriage between her and the deceased faced some challenges and difficulties, which led to the deceased moving out of their common matrimonial home. However, the applicant said during their separation they had continued to communicate with each other concerning their children and matrimonial home.

The respondents in their answering affidavit submitted that the deceased and the applicant were married to each other on 3 July 1996. On 9 January 2018 the applicant instituted divorce proceedings against the deceased, and in the papers she stated that she had lost her love and affection towards the deceased. In the particulars of claim in the divorce action, the applicant stated that there were no children born between her and the deceased. That the deceased had vigorously contested the divorce, but on 30 June 2021 the parties at court agreed that the applicant should obtain the decree of divorce on an unopposed basis, and that their joint estate be equally divided.

On that date, the matter was postponed to 28 July 2021 to enable the applicant to obtain the assistance of an interpreter. Had it not been for the postponement, the divorce would have been finalised on 30 June 2021. The respondents also submitted that the applicant had withdrawn her divorce action immediately after hearing that the deceased had passed away. The respondents fur-

ther submitted that the applicant and her children were not prohibited from attending the deceased's funeral. The court added that it was the respondent's contention that the third respondent derived entitlement and the right to bury the deceased by virtue of the fact that they were named as one of the beneficiaries in the deceased's will.

The applicant in her replying affidavit submitted that she had a clear right to bury the deceased as she was married to the deceased, and the will was silent on the issue of the person who had to prepare and arrange the deceased's funeral. It was the applicant's contention that the marriage relationship between her and the deceased was terminated by the death of the deceased and that the deceased's death certificate stated that he was still married at the time of his death. The court held that family feuds in relation to who had the right to bury a deceased person had the potential for permanently dividing the family. The court pointed out that the dispute was sensitive, which is best suited to be mediated and resolved by the family's elders rather than bringing the dispute to court.

The court added that during the period of a death of a loved one, it is a time when the family should be united more than ever, by preparing to give the loved one a dignified burial, rather than hang their dirty linen in court. The court pointed out that in applications of this nature, it is the duty of all parties to make a full disclosure of all the relevant and vital facts relating to the matter in dispute, which will enable the court to make a just and fair decision. The court said that the applicant was aware that at the time of the deceased's death, she had instituted divorce proceedings against the deceased; that they had already agreed that she would obtain the decree of divorce on an uncontested basis; and they had agreed on how their estate would be divided and had already secured a date on which the divorce would be finalised, which was a few days before the deceased's death.

The court added that all the facts above were vital and necessary information, which would assist the court in arriving at a just and fair decision, but the applicant – without justification –

failed to disclose that, and even in her replying affidavit she admitted the contents of the paragraphs without giving an explanation as to why she had failed to disclose information in her founding affidavit. The court pointed out that the applicant had for a long period of time disassociated herself with the deceased and she had lost love, affection, and respect towards the deceased. She did not want to be with him anymore.

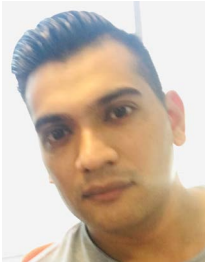
The court said all these facts had been expressly stated by the applicant in her divorce papers, and the applicant had failed to explain how the death of the deceased had restored the lost love, affection, and respect towards the deceased when she was on the eve of obtaining permanent termination of the relationship, which she had with the deceased. The court referred to the matter of *W and Others v S and Others* (WCC) (unreported case no 360/16, 4-5-2016) (Mantame J), where Mantame J said:

'[T]he deceased, by her actions disassociated herself from [the] first respondent whilst she was still alive. It is unheard of that a person who was severing ties with her husband would now [claim] to be the husband's ancestor when she is no more. ... [N]othing was left from his civil union with the deceased, as they were two (2) days away from divorce when the deceased met her death.'

The court said that the case at hand is not distinguishable from the *W and Others* case above, as the applicant was a few days away from obtaining a decree of divorce when the deceased passed away. The parties had separated from each other since 2018 and had already agreed on a divorce. The court added that what was still joining them together was a marriage certificate of which the actual marriage existed only on paper. The court pointed out that the deceased, in his will, did not give directions as to who would be responsible for arranging his funeral and he did not specify where he should be buried.

The applicant's application was dismissed with costs on party and party scale.

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By
Dr Ciresh
Singh

Eeny, meeny, miny, moe, to which court will foreclosures go? (Part 2): The SCA has spoken

Standard Bank of SA Ltd and Others v Thobejane and Others; Standard Bank of SA Ltd v Gqirana NO and Another (SCA) (unreported case no 38/2019; 47/2019; 999/2019, 25-6-2021) (Sutherland AJA (Maya P, and Petse, Dambuza and Plasket JJA concurring))

Some may recall a recent article ‘Eeny, meeny, miny, moe, to which court will foreclosures go? A brief analysis of recent foreclosure proceedings and a consideration of the need for specialised foreclosure courts in SA’ 2019 (Oct) *DR* 31, which dealt with the issue of the jurisdiction of foreclosure matters in the magistrate’s court and High Court. The crux of the article dealt with the cases of *In re: Nedbank Limited v Thobejane and related matters* [2018] 4 All SA 694 (GP) and *Nedbank Limited v Gqirana NO and Another and related matters* [2019] 4 All SA 211 (ECG), and the burning issue of which court held jurisdiction over foreclosure proceedings.

Summaries of High Court decisions

In *Thobejane*, the Full Bench of the Gauteng Division of the High Court held that all the matters falling within the jurisdiction of the magistrates’ court must be heard before the magistrate court and not the High Court. The Full Bench found that the advent of the Constitution introduced access to justice as a primary consideration during court proceedings and this approach required the High Court to regulate their own processes regarding this right. The court held that it would be an abuse of process and contrary to the principles of access to justice to allow a matter, which could be decided in the magistrates’ court, which was geographically closer and financially viable for a consumer, to be heard in the provisional division simply because it had concurrent jurisdiction.

In *Gqirana*, the Full Bench of the Eastern Cape Division of the High Court in Grahamstown found that the right to access to justice in s 34 of the Constitution, and the principles of the National Credit Act 34 of 2005 (NCA) affords equality and access to justice to financially and previ-

ously disadvantaged persons. Accordingly, the NCA, properly interpreted through the prism of the Constitution, provided that the magistrates’ court be the court of first adjudication of all NCA matters (including foreclosures) to the exclusion of the High Court. In other words, the High Court found that the principle of access to justice required all NCA matters to be brought before the magistrates’ court, save only if there are exceptional circumstances justifying otherwise.

The Supreme Court of Appeal (SCA) decision

The effect of the *Thobejane* and *Gqirana* judgments dictated that all foreclosure proceedings had to be brought before the magistrates’ court. This ruling sparked controversy among the mortgage debt enforcement industry and forged a movement to appeal these rulings. These judgments were accordingly taken on appeal by several financial institutions in 2019. Due to the COVID-19 pandemic there was a prolonged delay with delivery of the judgment, however, on 25 June 2021, the SCA handed down judgment in *Standard Bank of SA Ltd and Others v Thobejane and Others; Standard Bank of SA Ltd v Gqirana NO and Another*. The SCA confirmed that the High Court has no power to refuse to hear a matter falling within its jurisdiction on the ground that another court has concurrent jurisdiction (see also s 169 of the Constitution). The court further confirmed that it was not an abuse of process for a plaintiff to choose which court to litigate from as they are entitled to this right and there is no obligation in law on financial institutions to consider the cost implications and access to justice of financially distressed people when a particular court of competent jurisdiction is chosen in which to institute proceedings. The court held that the provisions of the NCA affirmed that the High Court has concurrent jurisdiction with

the magistrates’ court and there was no cogent reason to oust the jurisdiction of the High Courts. Accordingly, the High Court was obliged to entertain all matters falling within the jurisdiction of the magistrates’ court. The SCA further held that as drastic an event such as the repossession of a person’s home ought, as a matter of policy, to enjoy the scrutiny of the High Court rather than the magistrates’ court.

Conclusion

It has now been accepted that foreclosure proceedings can be brought before the High Court as it has concurrent jurisdiction with the magistrates’ court, however, the controversy of the above judgments have brought the need for certainty and specialisation during foreclosure proceedings to light. The foreclosure against a home involves a complex analysis of legal, financial and factual circumstances coupled with the interaction of competing constitutional rights of homeowners and creditors. Accordingly, such complex issues justify these cases being heard before specialised courts and judges. I submit that the need may have arisen for the establishment of specialised foreclosure courts, within the High Court, and a Foreclosure Act to govern the execution process against a home (see C Singh *A critical analysis of the home mortgage foreclosure requirements and procedure in South Africa and proposals for legislative reform* (published PhD thesis, UKZN, 2018) and C Singh ‘To foreclose or not to foreclose: Revealing the “cracks” within the residential foreclosure process in South Africa’ (2019) 31(1) *South African Mercantile Law Journal* 145).

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By
Pierre van
Ryneveld

Can an allowance be claimed for loyalty programmes in terms of s 24C of the Tax Act?

Clicks Retailers (Pty) Ltd v Commissioner for the South African Revenue Service (CC) (unreported case no CCT 07/20, 21-5-2021)
(Theron J (Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, and Victor AJ concurring))

In the recent matter of *Clicks*, before the Constitutional Court (CC), the issue at hand concerned the treatment of the loyalty and rewards programme of Clicks in terms of the provision in s 24C of the Income Tax Act 58 of 1962 (the Act) (as it read at the relevant time). The section was amended in 2016, but the amendment did not affect the principle of the provision.

Section 24C read at the relevant time:

'24C Allowance in respect of future expenditure on contracts –

(1) For the purposes of this section, "future expenditure" in relation to any year of assessment means an amount of expenditure which the Commissioner is satisfied will be incurred after the end of such year –

(a) in such manner that such amount will be allowed as a deduction from income in a subsequent year of assessment; or

(b) in respect of the acquisition of any asset in respect of which any deduction will be admissible under the provisions of this Act.

(2) If the *income of any taxpayer* in any year of assessment includes or consists of an amount *received by or accrued to them in terms of any contract* and the Commissioner is satisfied that such amount will be utilised in whole or in part to finance future expenditure which *will be incurred by the taxpayer in the performance of their obligations under such contract*, there shall be deducted in the determination of the taxpayer's taxable income for such year such allowance (not exceeding the said amount) as the Commissioner may determine, in respect of so much of such expenditure as in their opinion relates to the said amount.

(3) The amount of any allowance deducted under subsection (2) in any year of assessment shall be deemed to be income received by or accrued to the taxpayer in the following year of assessment' (my italics).

The allowance provided for in s 24C creates an exception to the general provision in s 11(a) of the Act that provides that only expenditure actually incurred in the production of income in the current year of assessment will be deductible from the income of the taxpayer in that year.

At the time, Clicks invited the public to: 'Join ClubCard'. The invitation goes on to read: 'Swipe your ClubCard when you shop in store or enter it when you shop online. You earn points on all your Clicks shopping ...'

It further reads that: 'For every R 5 spent at Clicks, ... you earn 1 point [equals 10c]', and 'ClubCard members ... who earn at least 50 points by the qualification date will receive cashback loaded onto their ClubCard', and '[c]ashback can be used for purchases in a Clicks, Claire's or The Body Shop stores'.

The benefit are earned when shopping at Clicks stores or making online purchases, and at other stores referred to as 'rewards partners' or 'affinity partners'. If goods are purchased by a ClubCard member from a rewards partner, the rewards partner pays Clicks a commission. The source of the income that accrues to Clicks is another party, other than the Clicks ClubCard member. The income is received in terms of a contract between Clicks and the rewards partner, and as such, is disqualified for purposes of the s 24C deduction. It is not clear to what extent, if any, Clicks claimed deduction under s 24C based on income received from rewards partners. The CC judgment appears to only deal with income derived from purchases from Clicks stores (para 9).

The decision was whether Clicks was entitled to the deduction it claimed in terms of s 24C in the relevant tax year came down to one matter, and the question whether the expense to be incurred by Clicks arose from an obligation in terms of the same contract as the con-

tract in terms whereof the income was earned, as is prescribed in s 24C(2), or if it arose from two contracts, whether the two contracts are so inextricably linked that they may satisfy the requirement of sameness. It clearly arose from two contracts (or actually three contracts, namely, the ClubCard contract, the first purchase when points are earned, and a further purchase when the purchaser receives the actual financial benefit).

In an earlier judgment, in the matter between *Commissioner, South African Revenue Service v Big G Restaurants (Pty) Ltd* 2019 (3) SA 90 (SCA) the CC held that two contracts may be 'so inextricably linked that they may satisfy this requirement of "sameness"'. The court did not in that case consider what would constitute such a link.

In the *Clicks* judgment, Theron J, found that the obligation of Clicks to incur expenses, as alleged by Clicks, in order to reward its ClubCard members arises from what is referred to as the ClubCard contract, while the income referred to in s 24C arises from the contract when the customer purchases goods.

On behalf of Clicks it was argued that 'the conclusion of the ClubCard contract does not itself generate any real obligations and that the obligation to award points, while governed by the terms of the ClubCard contract, is only triggered and given content when a qualifying purchase is made'.

On behalf of the South African Revenue Service (Sars) it was argued that: 'Because a loyalty programme member can buy products at Clicks without presenting [their] ClubCard (and thus without earning loyalty points), and a person can become a loyalty programme member without making any qualifying purchases (again, without earning any loyalty points), each of the two contracts can stand on its own' and are thus not inextricably linked.

With reference to Clicks' obliga-

tion to finance future expenditure, the court found that 'the actual obligation is sourced in the ClubCard contract and does not depend on the existence of a sale contract', and it finds that 'the sale contract does not owe its existence to the ClubCard contract', and also that 'the sale contract does not accrue to Clicks necessarily because it has undertaken an obligation to honour the redemption of loyalty points'. The court further found that 'the terms of each sale contract are the same regardless of whether the purchaser is a loyalty programme member and regardless of whether a ClubCard is presented.'

The court does not analyse the content of the ClubCard contract in any detail. One may argue that the ClubCard contract is constituted by an offer from Clicks to a potential client that if you become a ClubCard member, you potentially become entitled to the stated rewards. To become entitled to the rewards, the ClubCard member has the obligation to make two purchases from Clicks and at those purchases present their ClubCard (I exclude purchases from the rewards partners).

Are the two purchases, one receives the points offered and one receives the actual reward, not simply the contractual obligations of the ClubCard member in terms of the ClubCard contract? Does the fact that an obligation in terms of a contract (which entitles the contracting party to the benefit contracted for) is that a contracting party enters into one or more further contracts changes the fact that entering into those further contracts is simply the performance of an obligation in terms of the first contract? If the ClubCard member performs their obligations in terms of the ClubCard contract they become entitled to the benefits undertaken by Clicks in terms of the ClubCard contract. How linked must two or more contracts then be to satisfy the requirement of sameness?

One may furthermore argue that it is probable that when a client makes a purchase and presents their ClubCard, they do so exactly because Clicks has offered them rewards should they present their ClubCard, and that the sale when the ClubCard is presented is not the same as a sale when a ClubCard is not presented.

But in fact, the purchase contracts are

not obligations of the ClubCard member in terms of the ClubCard contract. Clicks cannot enforce purchase contracts in terms of the ClubCard contract. The ClubCard contract is rather of the nature of an option. The ClubCard member has the right to exercise the 'option' by making a purchase (or two), without being compelled to do so, and if the ClubCard member does so, Clicks is then bound in terms of the ClubCard contract to perform its obligation to reward the ClubCard member. The purchase contracts are the agreed manner of exercising the 'option'. This relationship and process appears to define the link between the ClubCard contract and the purchase contracts.

The court, however, found that while the two contracts 'in that sense are inextricably linked or connected', the link is not sufficient to render the contracts the same for the purpose of s 24C.

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By Sifiso Ngcobo and Ntombifikile Zulu

To compensate or not?

McGregor v Public Health and Social Development Sectoral Bargaining Council and Others (CC) (unreported case no CCT270/20, 17-6-2021)
(Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J)

In this case the Constitutional Court (CC) was called on to make a determination of whether an award of six months' compensation awarded to Dr McGregor, a senior medical practitioner, dismissed on the basis of sexual harassment in the workplace was appropriate and if not, what compensation, if any, should have been awarded under the circumstances.

Dr McGregor was employed as Head of

Anaesthesiology and was dismissed after the disciplinary hearing in which he was found guilty of four charges of misconduct that amounted to sexual harassment. Not satisfied with the outcome Dr McGregor referred the dispute to the Public Health and Social Development Sectoral Bargaining Council challenging both the substantive and procedural fairness of the dismissal. The arbitrator found him guilty of three of the four charges of misconduct and found that

dismissal was procedurally unfair and subsequently ordered compensation in the sum of R 924 679,92 equivalent to six months' remuneration.

Labour Court (LC)

Dr McGregor was not happy with the outcome and referred the matter to the LC to have the arbitration award reviewed on the basis that his conduct did not constitute sexual harassment and did

not warrant dismissal. The Department also brought a counter-review challenging the award on the basis that –

- Dr McGregor did not commit misconduct in relation to the third allegation;
- the conclusion that the dismissal was procedurally and substantively unfair; and
- the award of compensation.

The LC found that the arbitrator's finding in respect of the three charges were reasonable and, therefore, not reviewable. It found that notwithstanding the unfairness of the procedure followed the dismissal was substantively fair. The LC dismissed the Department's cross-review and did not interfere with the compensation awarded.

Labour Appeal Court (LAC)

Dr McGregor filed a petition with the LAC, requesting that his dismissal be declared substantively unfair and that he be reinstated. The Department filed a new cross-appeal, claiming that the LC erred in not reconsidering the compensation after determining that the dismissal was substantively fair. Like the LC, the LAC found that dismissal was procedurally unfair and substantively fair. Similar to the LC, the LAC, albeit erroneously as it seems, did not revisit the compensation award.

The CC's decision

Dr McGregor approached the CC to overturn the LAC's judgment. The CC refused to grant leave to appeal against the dismissal as this only constituted a factual dispute. The CC thereafter discussed the cross-appeal brought by the department and addressed the question of compensation. The CC revisited s 193(1)(c) of the Labour Relations Act 66 of 1995 (LRA), which authorises the arbitrator or the LC to award compensation of unfair dismissal, however, this section must be

read with s 194(1) of the LRA, which sets the limit of compensation that may not be exceeded. Although every employee has the right under s 185(a) of the LRA not to be unfairly dismissed the infringement of this right does not automatically confer a right to a remedy. The operative term 'may' in s 193(1)(c) of the LRA implies that the award of compensation is never guaranteed. Compensation is determined by the conclusions of the quality and character of a dismissal, and in the end, a wide range of variables must be considered to determine if compensation must be given and, if so, for how many months.

The CC referred to the judgment in *Dr D.C Kemp t/a Centralmed v Rawlins* [2009] 11 BLLR 1027 (LAC) and drew a distinction between the discretion exercised in terms of ss 193(1)(c) and 194(1). It held that a compensation award in terms of s 193(1)(c) is reviewable, and the test is whether a reasonable decision maker would have arrived at that conclusion. On the other hand, a compensation award in terms of s 194(1) constitute a narrow exercise of discretion and the court can only interfere if the grounds for interference exists. The CC found that both the LC and LAC erred in that they failed to consider whether the grounds for a review of the amount of compensation, as laid down in *Dr D.C Kemp*, had been met. As a result, no court had adequately applied itself to the appropriateness of the compensation amount because the dismissal was substantively fair. The CC confirmed the principle in *HM Liebowitz (Pty) Ltd t/a Auto Industrial Centre Group of Companies v Fernandes* (LAC) (unreported case no DA3/01, 1-2-2002) (Zondo JP) that there is a distinction between compensation payable to an employee who deserved to be dismissed (substantive unfairness) and an employee who did not, but was subjected to unfair procedure, and the compensation award must reflect this distinction. The CC stated that although compensation for unfair dismissal serves a vital purpose, its appropriateness must be considered in the context of the dismissal. This means that if sexual harassment was the reason for the dismissal, it must be considered. This is because the Constitution guarantees not only the right to fair labour practices, but also that our constitutional democracy is built on the explicit values of human dignity, integrity, and the achievement of equality in a non-racial and non-sexist society under the rule of law. Sexual harassment, on the other hand, undermines a person's dignity and is the opposite of genuine workplace equality. Consequently, the CC reduced the compensation to an equivalent of two months' remuneration.

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Conclusion

Noteworthy from this decision is the reviewability of the exercise of discretion by a decision maker when they decide whether to award compensation at all, and if so, by how much?

The decision also reaffirms the weight of substantive unfairness over procedural fairness on the question of how much compensation to award as enunciated in *Dr D.C Kemp*.

Lastly, the decision notes the CC's intolerance to sexual harassment in the workplace on one hand and cushions an employee's right to fair procedure on the other hand.

Sifiso Ngcobo LLB (Hons) (University of Zululand) is a legal practitioner at Zuma & Co Inc in Verulam and **Ntombikile Zulu LLB LLM (Business Law) (UKZN)** is a legal practitioner in Durban. Ms Zulu writes in her personal capacity. □

People and practices

Compiled by Shireen Mahomed

Tomlinson Mnguni James Inc has three new appointments.



Vishay Soni has been appointed as an Associate in the Employment and Labour Law Department in Pietermaritzburg.



Leanda Osborne has been appointed as a Senior Associate in the Conveyancing Department in Pietermaritzburg.



Danielle Stevens has been appointed as an Associate in the Corporate and Commercial Litigation Department in Durban.

All People and practices submissions are converted to the *De Rebus* house style. Please note, in future issues, five or more people featured from one firm, in the same area, will have to submit a group photo. □



By
Philip
Stoop

New legislation

Legislation published from
2 – 30 July 2021

Bills

Upstream Petroleum Resources Development Bill B13 of 2021.

Plant Health (Phytosanitary) Bill B14 of 2021.

Commencement of Acts

Border Management Authority Act 2 of 2020. *Commencement:* 15 July 2021. Proc22 GG44823/9-7-2021 (also available in Sepedi).

Promulgation of Acts

Appropriation Act 10 of 2021. *Commencement:* 9 July 2021. GN415 GG44835/9-7-2021 (also available in Sepedi).

Selected list of delegated legislation

Carbon Tax Act 15 of 2019

Amendment of regulations. GN595 GG44818/8-7-2021.

Civil Aviation Act 13 of 2009

Amendment of the Civil Aviation Regulations, 2011. GN R599 GG44820/9-7-2021.

Competition Act 89 of 1998

Memorandum of agreement entered into between the Competition Commission of South Africa and the National Consumer Commission. GN580 GG44799/2-7-2021. Memorandum of agreement entered into between the Competition Commission of South Africa and the South African Council for the Architectural Profession. GN581 GG44799/2-7-2021.

Memorandum of agreement entered into between the Competition Commission of South Africa and the National Energy Regulator of South Africa. GN582 GG44799/2-7-2021.

Regulations on the Block Exemptions for the Security of Supply of Essential Goods, 2021. GN616 GG44854/15-7-2021.

Guidelines on collaboration in the implementation of the South African Value Chain Sugarcane Master Plan to 2030. GN622 GG44866/16-7-2021.

Memorandum of understanding entered into by and between the Competition Commission of South Africa and the Governing Body Foundation. GN640 GG44881/23-7-2021.

Memorandum of understanding entered

into between the Competition Commission of South Africa and the Council for Medical Schemes. GN667 GG44908/30-7-2021.

Memorandum of understanding entered into between the Competition Commission of South Africa and the South African National Association for Specialised Education. GN668 GG44908/30-7-2021.

Commissions Act 8 of 1947

Amendments to the terms of reference of the Commission of Inquiry into allegations of state capture, corruption and fraud in the public sector including organs of state. Proc31 GG44860/16-7-2021 (also available in Afrikaans).

Disaster Management Act 57 of 2002

• Correctional services

Measures to address, prevent and combat the spread of COVID-19 in all correctional centres and remand detention facilities in the Republic of South Africa. GN647 GG44883/21-7-2021.

• 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. GenN422 GG44858/15-7-2021.

• Forestry, fisheries and environment

Directions regarding measures to address, prevent and combat the spread of COVID-19 in the biodiversity sector. GN591 GG44807/5-7-2021 and GN619 GG44862/16-7-2021.

• General regulations

Extension of National State of Disaster under the COVID-19 lockdown to 15 August 2021. GN R611 GG44839/12-7-2021. Amendment to the regulations issued in terms of s 27(2). GN R610 GG44838/11-7-2021 and GN R612 GG44844/14-7-2021. Amendment to the regulations issued in terms of s 27(2): Adjusted alert level 4. GN R614 GG44850/14-7-2021.

Amendment to the regulations issued in terms of s 27(2): Adjusted alert level 3. GN R651 GG44895/25-7-2021 and GN669 GG44911/30-7-2021.

Determination of alert level: Adjusted alert level 3 from 26 July 2021. GN R650 GG44895/25-7-2021.

• Justice

Directions to address, prevent and combat the spread of COVID-19 in all courts,

court houses and justice service points in the Republic of South Africa. GN R632 GG44868/16-7-2021.

• Labour

COVID-19 Temporary Employee/Employer Relief Scheme (C19 TERS) Direction, 2021. GN R637 GG44874/20-7-2021.

• Social development

Directions on measures to address, prevent and combat the spread of COVID-19 in community nutrition and development centres and older persons' residential facilities (during adjusted alert level 4). GN608 GG44824/9-7-2021.

• Small business development

Directives providing direction on the operation of businesses whose licences and trade permits have lapsed and are due for renewal and due to the prevailing lockdown regulations. GN615 GG44853/15-7-2021.

• Sports, arts and culture

Amendment of directions regarding measures to address, prevent and combat the spread of COVID-19 in sports, arts and culture. GN576 GG44811/6-7-2021 and GN635 GG44872/19-7-2021.

• Telecommunications and postal services

Amendment of directions on the risk-adjusted strategy for the communications and digital technologies sector. GN594 GG44814/7-7-2021.

Disaster Management Act 57 of 2002

Classification of a national disaster: Droughts in parts of the Northern Cape, Western Cape, Eastern Cape and some pockets within other provinces. GN638 GG44876/20-7-2021.

Firearms Control Act 60 of 2000

Firearms Control Fees Amendment Regulations, 2020. GN589 GG44804/5-7-2021.

Health Professions Act 56 of 1974

Repeal of the rules for the registration of speech and hearing correctionists. BN76 GG44857/15-7-2021 and BN77 GG44866/16-7-2021.

Regulations relating to the Constitution of the Professional Board for Emergency Care Practitioners. GN642 GG44881/23-7-2021.

Judges' Remuneration and Conditions of Employment Act 47 of 2001

Determination of the remuneration of Constitutional Court judges and judges. Proc25 GG44856/15-7-2021.

Magistrates Act 90 of 1993

Determination of salaries and allowances of Magistrates. Proc30 GG44856/15-7-2021.

Petroleum Products Act 120 of 1977

Regulations prohibiting the sale and dispensing of petrol and diesel into containers. GN R618 GG44861/16-7-2021.

Pharmacy Act 53 of 1974

Rules relating to the services for which a pharmacist may levy a fee and guidelines for levying such a fee of fees. BN69 GG44822/9-7-2021.

Fees payable. BN83 GG44908/30-7-2021.

Public Finance Management Act 1 of 1999

Borrowing powers of Water Boards listed under sch 3, Part B of the Act. GN628 GG44866/16-7-2021.

Public Protector Act 23 of 1994

Determination of the salaries and allowances of the Public Protector and Deputy Public Protector. Proc29 GG44856/15-7-2021.

Remuneration of Public Office Bearers Act 20 of 1998

Determination of salaries and allowances of traditional leaders, members of the National House and Provincial Houses of Traditional Leaders. Proc32 GG44875/20-7-2021.

South African Human Rights Commission Act 40 of 2013

Determination of the remuneration of the Commissioners of the South African Human Rights Commission. Proc27 GG44856/15-7-2021.

Superior Courts Act 10 of 2013

Amendment notice for the Western Cape Division of the High Court of South Africa. GenN412 GG44822/9-7-2021.

Draft delegated legislation

- South African Atmospheric Emission Licence and Inventory Portal (SAAELIP) Data Management Policy in terms of the National Environmental Management Act: Air Quality Act 39 of 2004 for comment. GN583 GG44799/2-7-2021 and GN623 GG44866/16-7-2021.
- Regulations relating to the names that may not be used in relation to the profession of physiotherapy in terms of the Health Professions Act 56 of 1974 for comment. GN584 GG44799/2-7-2021.
- Proposed amendment to the National Policing Standard for Municipal Police Services on Ranks, Badges, Buttons, Gorget Patches and Cap Peaks in terms of the South African Police Service

Act 68 of 1995 for comment. GN590 GG44805/5-7-2021.

- Competency standards for pharmacy support personnel in South Africa in terms of the Pharmacy Act 53 of 1974 for comment. BN74 GG44822/9-7-2021.
- Draft Pressure Equipment Regulations, 2021 in terms of the Occupational Health and Safety Act 85 of 1993 for comment. GN606 GG44822/9-7-2021.
- Qualification Standard for the Bachelor of Pharmacy Degree in terms of the Pharmacy Act 53 of 1974 for comment. BN72 GG44822/9-7-2021.
- Rules relating to good pharmacy practice in terms of the Pharmacy Act 53 of 1974 for comment. BN70 and BN71 GG44822/9-7-2021.
- Regulations relating to qualifications for registration of dispensing opticians in terms of the Health Professions Act 56 of 1974 for comment. GN664 GG44908/30-7-2021.

Philip Stoop BCom LL.M (UP) LL.D (Unisa) is head of the school of law at STADIO.



By
Nadine
Mather

Wielding dangerous weapons during strike action

In *Pailpac (Pty) Ltd v De Beer NO and Others* [2021] 6 BLLR 570 (LAC), members of National Union of Metalworkers of South Africa, employed by Pailpac (the Company), participated in a national strike. As a result of carrying sticks, PVC rods, *sjamboks* and golf clubs, certain of the employees were charged with 'brandishing and wielding weapons during a strike'. The employees were found guilty and subsequently dismissed.

The dismissed employees referred an unfair dismissal dispute to the bargaining council. The arbitrator held that the

dismissals were substantively unfair on the basis that the employees were not aware of the rule against wielding weapons while on strike, which rule had not effectively been communicated to the employees. The Company's attempt to have the award reviewed and set aside was dismissed by the Labour Court (LC). The LC held that the arbitrator's decision that the employees could not reasonably have been expected to know of the rule fell within a band of reasonable conclusions. The Company took the LC's judgment on appeal.

The primary issue on appeal was whether the employees knew or could reasonably have been expected to be aware of the rule against brandishing and wielding weapons during a strike. In this regard, the Company relied on two sets of rules, namely -

- a revised Breaches of Discipline (BOD) document, which prohibits the 'brandishing or wielding of dangerous weapons'; and
- a picketing policy, which provides that 'no weapons of ANY kind are to be carried or wielded by the picketers'. The revised BOD rules were placed on a no-

tice board at the entrance of the factory and the picketing policy was affixed to walls adjacent to the access gates for the employees during the strike.

The Company accordingly argued that the employees had knowledge of these rules but that the arbitrator ignored this evidence. Further, the arbitrator had ignored material contradictions in the version of the employees regarding knowledge of the rules and the area where the rules were published, yet the LC simply rubberstamped the arbitrator's findings. The employees argued, to the contrary, that there was no evidence that any of them had actual knowledge of the rule prohibiting the carrying of weapons and the sanction for contravening it.

Considering the facts relating to the BOD rule, the Labour Appeal Court (LAC) found that -

- the rules were placed on a prominent notice board;
- the employees regularly read notices posted on that particular notice board; and
- the employees were fully aware of their obligation to read the notices posted on the board.

In the circumstances, it was probable that the employees were aware of the rule or could reasonably have been expected to be aware of the rule.

Having regard to the picketing policy, the LAC found that both the LC and the arbitrator had ignored inconsistencies in the employees' evidence. The employees testified that security guards prevented them from approaching the walls where the picketing policy was displayed. However, they also testified that what was posted on the walls was a copy of an SMSs calling on them to return to work. If the employees were able to read the SMS, as a matter of probability, they would have been able to read the picketing policy. Thus, the employees would have been aware of the rule or could reasonably have been expected to be aware of the rule.

Insofar as the arbitrator had held that there was no positive duty on the employees to approach the wall, that is not the test. The correct test is whether, on the evidence, the employees were aware of the rule or could reasonably have been expected to be aware of the rule. The LC not only erred in endorsing the application of the wrong test, but also failed to consider the contradictory versions put forward by the employees.

Turning to the question of whether the employees were in breach of the rule, it was not in dispute that the employees had carried sticks, PVC rods, golf clubs and *sjamboks*. The words 'wielding or brandishing' included the carrying of weapons in a manner that is threatening. The visible carrying of prohibited weapons was aimed at creating a hostile and

intimidating atmosphere. An employee who attempted to go to work was in fact beaten with sticks. Any reasonable employee would know that bringing a dangerous weapon to work would not be tolerated.

In the circumstances, the employees knew or could reasonably have been expected to know that the breach of the rule could result in their dismissal. The court accordingly held that the dismissals were fair and appropriate.

The appeal the review proceedings were upheld with costs.

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



By
Kathleen
Kriel

Recent articles and research

Abbreviation	Title	Publisher	Volume/issue
<i>Acta Juridica</i>	Acta Juridica	Juta	(2021) 1
<i>AJCL</i>	African Journal of Comparative Constitutional Law	Juta	(2020)
<i>ANULJ</i>	Africa Nazarene University Law Journal	Juta	(2020) 8.1
<i>JCLA</i>	Journal of Comparative Law in Africa	Juta	(2021) 8.1
<i>SAJCJ</i>	South African Journal of Criminal Justice	Juta	(2021) 34.1
<i>SLR</i>	Stellenbosch Law Review	Juta	(2021) 32.1

Administrative law

Mujuzi, JD 'Companies convicted of economic crimes and their participation in government tender processes in South Africa: A comment on *Namasthetu Electrical (Pty) Ltd v City of Cape Town and Another* (201/19) [2020] ZASCA 74 (29 June 2020)' (2021) 8.1 *JCLA* 102.

Agency law

Glover, G 'Agency in South Africa: Mapping its defining characteristics' (2021) *Acta Juridica* 243.

Citizenship

Moosa, F 'Citizenship by naturalisation: Are regulations 3(2)(b) and (c) to the South African Citizenship Act 88 of 1985 invalid?' (2021) 32.1 *SLR* 71.

Commercial law

Hutchison, A 'Recontextualising the teaching of commercial transactions law for an African university' (2021) *Acta Juridica* 275.

Contract law

Barnard-Naudé, J 'Bona fides and ubuntu - a response to Dale Hutchison' (2021) *Acta Juridica* 85.

Bhana, D 'The future of the doctrine of economic duress in South African contract law: The influence of Roman-Dutch law, English law and the Constitution of the Republic' (2021) *Acta Juridica* 107.

Brand, F 'Equity and certainty in contract law' (2021) *Acta Juridica* 141.

Brownsword, R 'The future of contract law: Three conversations at the Cape' (2021) *Acta Juridica* 3.

Clive, E 'Breach of contract' (2021) *Acta Juridica* 37.

Du Plessis, J 'Some thoughts on the consequences of illegal contracts' (2021) *Acta Juridica* 177.

MacQueen, H 'Contract law reform: Legislators or judges - or both?' (2021) *Acta Juridica* 57.

Price, A 'Contractual fairness: Conflict resolved?' (2021) *Acta Juridica* 321.

Criminal law and procedure

Carney, TR 'Understanding one's rights when arrested and detained: An assessment of language barriers that affect comprehension' (2021) 34.1 *SAJCJ* 1.

Naudé, BC 'Comment: Telephonic entrapment' (2021) 34.1 *SAJCJ* 118.

Okpaluba, C 'Comment: Wrongful arrest and detention' (2021) 34.1 *SAJCJ* 103.
Olaborede, A and Meintjes-van der Walt, L 'Demeanour, credibility and remorse in the criminal trial' (2021) 34.1 *SAJCJ* 55.
Reddi, M 'Recent case: Criminal Procedure' (2021) 34.1 *SAJCJ* 137.
Schwikkard, PJ 'Rape: An unreasonable belief in consent should not be a defence' (2021) 34.1 *SAJCJ* 76.
Tshehla, B 'Comment: Distinguishing between *dolus directus* and *dolus eventualis*: *Ngobeni v The State* (1041/2017) ZASCA 127 (27 September 2018)' (2021) 34.1 *SAJCJ* 128.
Whitear-Nel, N 'Recent case: Law of evidence' (2021) 34.1 *SAJCJ* 153.

Customer due diligence

Chitimira, H and Munedzi, S 'Selected challenges associated with the reliance on customer due diligence measures to curb money laundering in South African banks and related financial institutions' (2021) 8.1 *JCLA* 42.

Delictual law

Fagan, A 'The contract-delict interface and harm-causing omissions' (2021) *Acta Juridica* 203.

Estoppel

Pretorius, CJ 'Authority by representation – a rule lacking a theory: A reappraisal of *Makate v Vodacom (Pty) Ltd* 2016 (4) 121 (CC)' (2021) *Acta Juridica* 297.

Execution of immovable property

Brits, R 'Execution against residential immovable property in terms of High Court rule 46A' (2021) 32.1 *SLR* 47.

Human rights law

Dugard, J and Sánchez, AM 'Bringing gender and class into the frame: An intersectional analysis of the decoloniality-as-race critique of the use of law for social change' (2021) 32.1 *SLR* 24.

International constitutional law

Abdulrauf, LA 'States of emergency and the rule of law under contemporary African constitutions: A comparative analysis' (2021) 8.1 *JCLA* 67.
Abuza, AE 'A reflection on issues involved in the exercise of the power of the Attorney-General to enter a *nolle prosequi* under the 1999 Constitution of Nigeria' (2020) *AJCCCL* 79.
Kibet, E 'The economy in the Constitution: An appraisal of Kenya's 2010 Constitution as an economic charter' (2020) *AJCCCL* 1.

Moyo, A and Makwaiba, BS 'The role of founding values and principles in constitutional and statutory interpretation: Lessons for Zimbabwe' (2020) *AJCCCL* 31.

International criminal law

Gravett, W 'Sentenced by an algorithm – bias and lack of accuracy in risk-assessment software in the United States criminal justice system' (2021) 34.1 *SAJCJ* 31.

International dispute resolution

Sergon, J and Mumma, A 'The efficacy of traditional dispute resolution mechanisms (TDRMS) in achieving access to justice for marginalised: A focus on the Kipsigis Community in Kenya' (2020) 8.1 *ANULJ* 149.

International electoral law

Atupare, AP 'A fundamental law of reason and the constitutional law of elections in Africa' (2021) 8.1 *JCLA* 1.

International gender equality

Baraza, N and Koech, K 'Gains and losses: The impact of the Beijing Declaration and Platform for Action on the Legal Status of Kenyan Women' (2020) 8.1 *ANULJ* 86.

International gender-based violence

Bradley, MM and de Beer, A 'The collective responsibility of organised armed groups for sexual and gender-based violence during a non-international armed conflict' (2021) 32.1 *SLR* 129.
Maphosa, R 'The unreported war: Tackling denialism and social stigma towards victims of armed conflict-related sexual and gender-based violence' (2021) 32.1 *SLR* 155.
Nwotite, A 'An evaluation of the legal framework for redressing sexual violence in the Boko Haram insurgency in Nigeria: Challenges and the way forward' (2021) 32.1 *SLR* 169.
Oloo, JA 'Sexual violence against women during times of conflict: Promise of the vulnerability theory' (2020) 8.1 *ANULJ* 65.

International jurisprudence

Alloh, B 'An evaluation of the enforcement of fundamental rights and the controversy of jurisdiction of the Federal and State High Courts in Nigeria' (2020) *AJCCCL* 59.

International labour law

Eyongndi, DTA 'An appraisal of HIV and Aids (Anti-Discrimination) Act, 2014 and the tide of employment discrimination

in Nigeria' (2020) 8.1 *ANULJ* 111.

International law

Chakanyuka, TL 'Reforming the UNSC by the African Union proposal to address inequality: The limitations' (2020) 8.1 *ANULJ* 128.
Nyuguto, M 'Insecurity and economic marginalisation in Marsabit County' (2020) 8.1 *ANULJ* 199.
Ombella, JS 'Promoting water infrastructure investment to accelerate access to water in Tanzania: A legal analysis' (2020) 8.1 *ANULJ* 172.

Internet law

Kakungulu-Mayambala, R; Solomon, R; Makmot, VP and Rutabingwa, D 'The case for a law against the online distribution of non-consensual intimate images in Uganda' (2021) 32.1 *SLR* 93.

Islamic inheritance law

Jadeed, M; Waris, A and Musembi, CN 'The application of Islamic inheritance law in independent and contemporary Kenya: A Muslim's right to equality and freedom from discrimination' (2020) 8.1 *ANULJ* 30.

Persons and family law

Bonthuys, E 'Public policy in family contracts, part II: Antenuptial contracts' (2021) 32.1 *SLR* 3.

Refugee law

Khamala, CA 'When rescuers become refoulers: Closing Kenya's refugee camps amid terrorism threats' and leaving vulnerable groups out in the cold' (2020) 8.1 *ANULJ* 1.

Unjustified enrichment

Scott, H 'Interference without ownership: The theft of incorporeal money in the South African law of unjustified enrichment' (2021) *Acta Juridica* 343.

Please note that the abbreviations on p 35 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

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

Public violence: Its roots and results in 1990 and 2021



By Haroon Aziz and Shireen Mahomed

Public violence results in the breakdown of the rule of law. It needs immediate treatment in the criminal justice system. The treatment should focus on the historical, sociological, anthropological, and social psychological in the mid- to long-term period.

Related to 1990, the Truth and Reconciliation Commission Report, volume 3 concluded, 'Arson was by far the most common type of severe ill treatment, with nearly 4 000 cases reported, followed by shooting, beating and stabbing. Material losses, destruction of property and burning also feature in the top eight types of ill treatment. All these reflect the nature of the violence in this area, in which whole communities were targeted.' It also recorded 47 types of human rights violations, which surpassed the 20 types of torture identified by the Istanbul Protocol.

The ten days wherein the recent looting and violence took place in KwaZulu-Natal and Gauteng resulted in 337 deaths, 161 attacks on malls and shopping centres, 3 000 shops being looted, including 11 warehouses, 161 liquor stores, 90 pharmacies, 50 000 informal traders; 300 bank branches and post offices were vandalised; 1 300 bank branches were shut down; 1 400 ATMs were damaged; 32 schools were damaged; and 3 407 people arrested.

In the 118 incidents of public violence, an unknown number of vehicles were damaged, trucks were hijacked and burned, and roads damaged. Before and during the violence 353 000 tonnes of sugarcane were lost to arson. What is impossible to quantify is the psychological damages done to the national state of the mind.

The loss in economic output was R 50

billion and 150 000 jobs were at risk. The fall in rand/dollar exchange rate was 2%.

The breakdown in the rule of law in both 1990 and 2021 manifested themselves in peculiar ways. In proportion to local demographics there were undertones or overtones of racism, ethnicism, tribalism, clanism, male chauvinism, xenophobia, and vigilantism.

On 25 February 1990, 'two weeks after being released from prison, [former President, Mr Nelson Mandela] was in a 100 000-packed Kings Park stadium in Durban' (Yonela Diko 'The menace of the years found him unafraid' (www.news24.com, accessed 19-8-2021)) and said: 'My message to those of you involved in this battle of brother against brother is this: take your guns, your knives, and your pangas, and throw them into the sea. Close down the death factories. End this war.'

Departing from his prepared text he said that he could not understand why Africans killed Africans. Then he had neither legal nor political powers but only moral and ethical authority.

On 5 August 2021, President Cyril Ramaphosa removed the stand-alone State Security Agency and incorporated it directly in his Presidency. He corrected a serious error of history. Before and during the violence there was no coordination of the strategic ministries of intelligence, police, and army, which internally imperilled the rule of law and resulted in public violence as a 'failed insurrection'.

Another error of history that still must be seen to be corrected is the failure of democracy to gather political intelligence within and outside the African National Congress. This failure provided fertile ground for the breeding of factions as antagonistic fractions of the ruling elite.

One fraction of it misappropriated for itself the delusory power to break the rule of law with impunity.

On 16 July 2021, President Ramaphosa said, 'It is clear now that the events of the past week were nothing less than a deliberate, coordinated and well-planned attack on our democracy.'

The breakdown in the rule of law in 1990 (under Apartheid) and in 2021 (under democracy) has manifested itself in peculiar ways. In proportion to local demographics there were undertones or overtones of misanthropic expressions like racism and tribalism. The commonality to them was that they had their origins in feudalism with a regional approach.

Feudalism had well-established societies along tribal/clan/ethnic/patriarchal lines in the pre-nation state. How will SA re-establish societies from pre- to post-nation state? How will SA value labour and the use of communal land, water and private cattle from pre- to post-nation state? How will SA use land/water for food production on an industrial scale?

The earlier sociological transformation from feudalism had demanded masculine labour and made history look so masculine that the unpaid labour of women and girl-children became invisible, which is now visible and vocal.

Feudalism and patriarchal authoritarian rule are dying and need to be pushed into their common grave. Gender-based violence (GBV) – as features of indigenous/capitalist patriarchies – such as, child labour, child trafficking, child prostitution, *ukuthwala*, child marriages, child abuse, child pornography, women/men abuse, and male/female rape should be made into the rotting bones of a dying feudalism.

The modern urbanised capitalist system demands high levels of literacy, numeracy, education, training, expertise, and skills as a condition for individual and collective survival. Those with knowledge find it easy to adapt to a capitalist society and press for speedier advance to industrialisation (the cry for jobs).

As associational life grows in dynamism, labour grows in strength as a distinct and powerful constituency that accelerates historical development from feudalism to capitalism to socialism.

South Africa is challenged with how to deal with rural and urban morphologies (forms of things), cultural/spiritual substance, social psychology, ethnography,

livestock rearing, science and technology, and feudal/capitalist patriarchies.

The fratricidal crime to which Mr Mandela had referred cannot be explained by textbook-style sociological causes of crime. It symptomises the deeper cultural and spiritual malaise of an interruption in the generational transmission of the humane indigenous value-system (*Ubuntu*). The interruption miscreated urban space for a show of public disdain for centres of compassion, such as hospitals, dialysis centres, x-ray facilities, ambulances, blood services, pharmacies, COVID-19 vaccination sites, and the delivery of food and medicine to health facilities.

The criminal justice system can only provide symptomatic relief to a histori-

cally traumatised society, which is still in transition from Apartheid to democracy. It will take the whole of society to eradicate incrementally the causes of the systematic traumas.

It requires of political leadership to transcend political, economic, social, and psychological fractions and out-dated binaries. Among the many historical needs are:

- The inclusion of the deracialisation of the human mind in the curriculums of public education.
- An anti-racist strategy that simultaneously prevents misanthropic behaviour.
- The House of Traditional Leaders to help shift from reliance on the oral tradition of *Ubuntu* to one that is a writ-

ten code, as the constant for humane behaviour.

The legal community needs to play a role beyond legal justice. Although the primary purpose of history is to explain the past truthfully, history should also function as a guide to liberate human minds and emotions from misanthropism.

Haroon Aziz is a retired physicist, author, and researcher and is part of the leadership collective of the Apartheid Victims' Families Group (AVFG) and Shireen Mahomed is the Editorial Secretary at *De Rebus*. □



By
Sujata
Balam

Rooibos: Revealing the road to traditional knowledge protection

Recently *Rooibos* tea, a traditional knowledge product of South Africa (SA), became the first in Africa to get protection designation from the European Commission, which approved the registration of *Rooibos* and *Red Bush* in its register of protected designations of origin and protected geographical indications. This recognition will allow the *Rooibos* industry to use the European Union (EU) logo on products thus indicating its uniqueness and authenticity to consumers in Europe. This status signifies quality, reliability, and sustainability – all factors relating to geographical indications.

According to many authors, geographical indications can act as a traditional knowledge protection instrument. '[U]nlike other intellectual property systems, which cannot accommodate the defining attributes of traditional knowledge without being extensively changed, geographical indications provide a "discernable structural and functional compatibility" with traditional knowledge which caters for its unique attributes' (S Balam 'Enhancing South Africa's traditional knowledge trade through the extension of geographical indications under the TRIPS Agreement' (LLM thesis, University of KwaZulu-Natal, 2018)). Furthermore, geographical indications pro-

vide market differentiation and valuable competitive advantage, which is difficult to erode. The recent geographical indication success with *Rooibos* can pave the way forward for more traditional knowledge products to be protected through bilateral and multilateral agreements. The Economic Partnership Agreement between the EU and the Southern African Development Council allowed for *Rooibos* tea's successful protection thereby illustrating the importance of this SA and EU preferential trade relation, especially since it can ensure the supply of affordable and suitable food products and jobs along the food value chain. Despite this achievement, more needs to be done to ensure a global protection, and not just one situated in the EU. The World Trade Organisation's Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement, to which many countries – including SA – are a party to, is the way forward with regard to this global protection endeavour, however, a few hindrances prevent this realisation.

The first lies with art 23 of the TRIPS agreement, which speaks to the enhanced geographical indication protection for wines and spirits only. Here, traditional knowledge is not mentioned as a category thereby proving such clause to be discriminatory with no legal reasoning. Therefore, a call for an extension of

this clause needs to be met. The set-back to realise this, however, lies with the fact that developed countries do not seem to have much interest in this extension and developing countries are not so united to press on discussions around this (see Balam (*op cit*) at ch 3.4 for an in-depth discussion on the hindrances).

The solution to this is two-fold. Firstly, compromise needs to be sought by developed countries, so that all the diverging interests are considered and balanced in order to acquire fairness and fulfilment of a developing country's needs (ie, the preservation and protection of traditional knowledge). Further, it can be noted that traditional knowledge owners and producers require assistance in obtaining access to information related to the markets and the facilitation of fair and equitable business partnerships. Such assistance can be provided by developed countries to developing and least developed countries.

Secondly, developing countries need to unite in the common goal to extend art 23 of TRIPS. The first step would be to develop a national protection system for traditional knowledge products since research has shown that an array of products that have unique qualities and reputation (such as traditional knowledge products) are not registered as geographical indications or even pro-

tected. Developing countries should help each other with this undertaking through the sharing of knowledge and opinion, which is essential to develop dialogue about globalisation, the preservation of cultural diversity and trade. Once this is established, then developing countries can take to the international platform and motivate for the global protection of its traditional knowledge (see Balaram (*op cit*) at ch 5.3 and 5.4 for an in-depth discussion on the solutions).

With the current protection afforded to *Rooibos*, its presence in the local and

European market is secure and protected against misuse. Sustenance of the *Rooibos* industry is also reaped thereby contributing to the preservation of traditional knowledge, heritage, community traditions, and the upliftment of farmers in indigenous communities producing *Rooibos*. South Africa has a rich biodiversity linked to traditional knowledge so products such as Honeybush tea can also eventually gain the EU logo status like *Rooibos* tea. South Africa can, therefore, make progress with protecting more traditional knowledge products in the EU

but a lot of work still has to be done in order to get enhanced geographical indication protection under TRIPS. Working with other African countries and learning from other countries with established traditional knowledge protection laws, can promulgate the way forward with the World Trade Organisation.

Sujata Balaram LLM (UKZN) is an Editor in the Commentaries Department at LexisNexis in Durban.



By
Sthembelo
Ralph
Mhlanga

Jacob Zuma's 15 months jail sentence: Should employers be worried?

I find it extremely intriguing that the meaning of a 'trial' is debatable among jurists, and the topic of much debate in the Constitutional Court (CC), which is perplexing, is the question: What constitutes a 'trial' (be it a civil or a criminal trial)? I had taken it for granted that this topic was settled. I could not have been more wrong!

Be that as it may, the focus of this article is not on what constitutes a 'trial' but rather on the effects of the hybrid contempt of court proceedings as developed in the *Secretary of the Judicial Commission of Inquiry into the State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* (CC) (unreported case no CCT 52/21, 29-6-2021) (Khampepe ADCJ (Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Tlaletsi AJ and Tshiqi J concurring)) judgment of the CC within the context of labour law.

The CC has repeatedly held that court orders must be obeyed for the sake of protecting the rule of law, dignity and authority of the courts and the judiciary. This was the court's view in *Pheko and Others v Ekurhuleni Metropolitan Municipality (Socio-Economic Rights Institute of South Africa as amicus curiae)* (No 2) 2015 (6) BCLR 711 (CC); *Department of Transport v Tasima (Pty) Ltd* 2017 (1) BCLR 1 (CC) and in the *Zuma* case at paras 26 to 27 and 59 to 62. In any event, s 165 of the Constitution says so in as many words. Therefore, I can safely take

it that it is settled law that court orders from all courts must be obeyed.

There is no doubt that the *Zuma* judgment created a law that binds all lower courts from the small claims courts to the Supreme Court of Appeals. In labour law jurisprudence, contempt of court proceedings are a regular occurrence wherein an employer is ordered by court to reinstate an unfairly dismissed employee. The employer, despite knowing the order, openly, wilfully and with disdain disobeys the court order. Often, after obtaining an arbitration award ordering the reinstatement of an employee, and after converting that award into a court order in terms of s 143 of the Labour Relations Act 66 of 1995 (LRA) or using s 158(1)(c) of the LRA, the dismissed employee will serve the order through the Sheriff and tender their services to the employer and the employer simply does not reinstate that employee for no reason. The remedy open to that employee is to institute contempt of court proceedings, which are inherently civil contempt proceedings with some sort of civil law remedy in the form of coercive rather than punitive orders despite the papers clearly demonstrating wilful disobedience beyond a reasonable doubt. Contempt of court proceeding papers are also served by the Sheriff to the employer. The employer again often ignores those proceedings, thus rendering the coercive order inappropriate as the CC found in *Zuma*.

What the CC has done in the *Zuma*

judgment is to enable that employee in those civil contempt of court proceedings to ask for a criminal remedy, such as committal of that recalcitrant employer to prison for 15 months, for instance. It was not possible in the past to seek direct imprisonment without some other option being available to the employer. Relying on *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA), the Labour Court (LC) would refuse to imprison an employer without a trial in contempt of court proceedings for want of compliance with s 158 of the Criminal Procedure Act 51 of 1977. The LC insisted that the accused employer be brought to court to stand trial (see *Premier, North West Provincial Government and Another; In re: Bogacwe and Others v Premier, North West Provincial Government and Others* [2018] 10 BLLR 1029 (LC)). Committal to prison comes about with the hybrid contempt of court proceedings introduced into South African law by the *Zuma* judgment.

Whereas the CC invited former President Jacob Zuma to make representations on the appropriate sanction, it seems to me that in addition to asking for the employer to be held in contempt of court, an employee can simultaneously invite that employer to make submissions on the appropriate sanction in their founding papers. There is nothing that suggests that this invitation must only come from the court. It would be easy to convince the court that an invitation was extended to the employer and

was ignored, therefore, the court can proceed to sanction that employer instead of repeating what has already been done. It seems to me that this will suffice to comply with s 35 of the Constitution and bring the proceedings within the ambit of a 'trial' contemplated in s 12(1)(b) of the Constitution.

The LC is always slow to issue costs orders against a losing party, more so if

that party did not oppose such proceedings. The *Zuma* judgment says the opposite. An employee can now persuade the LC to issue a punitive costs order against an employer if they can show that but for the employer's conduct of disobeying a court order they would not have been required to approach the court.

The 15 months jail term for Mr Zuma should be worrying to employers who

wilfully disobey reinstatement orders issued by the LC. They can now be jailed and ordered to pay punitive costs. That is if the *Zuma* judgment is not rescinded.

Sthembelo Ralph Mhlanga LLM (Maritime Law) (UKZN) is a legal practitioner at Mhlanga Incorporated in Durban. □



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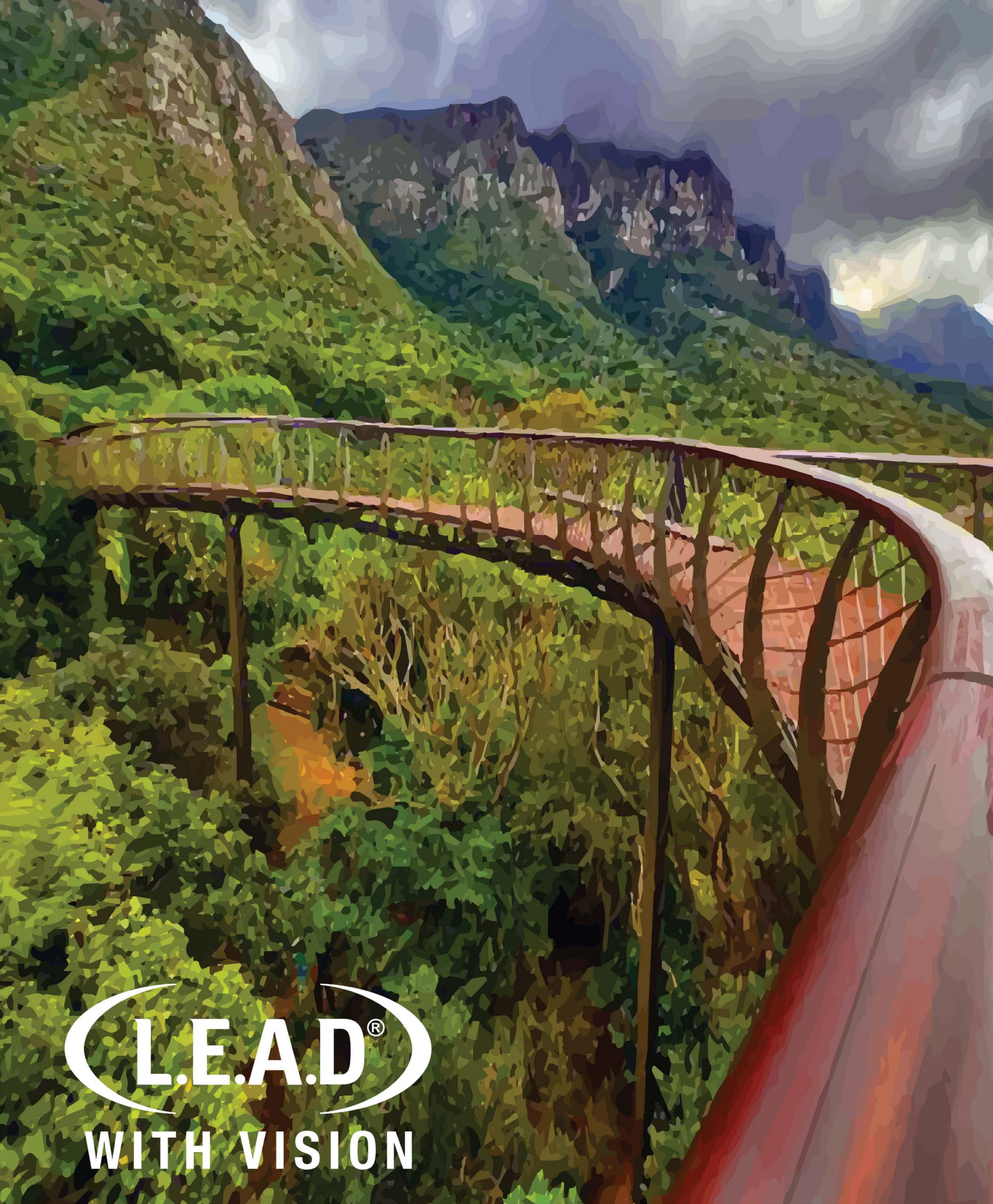
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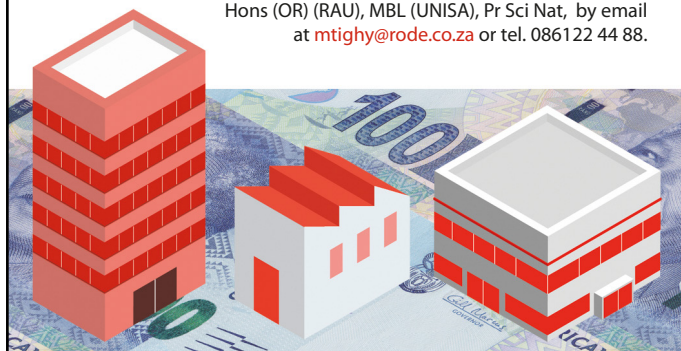
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