

EXCLUSIVE PREVIEW

Key findings of the

LexisNexis Legal Tech Report 2021

Soon to be unpacked at the 2021 State of the Legal Industry Address, presented by LexisNexis in partnership with the Law Society of SA in October 2021

Details inside.

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ARE FUNDAMENTAL HUMAN RIGHTS BEING ERODED DURING THE COVID-19 PANDEMIC? A DISCUSSION OF THE *BRITS* APPLICATION

**A hard pill to swallow –
an evaluation of the causes of the
subsistence of pharmaceutical
counterfeiting**

**Holding shadow directors
responsible: A UK legislative
perspective**

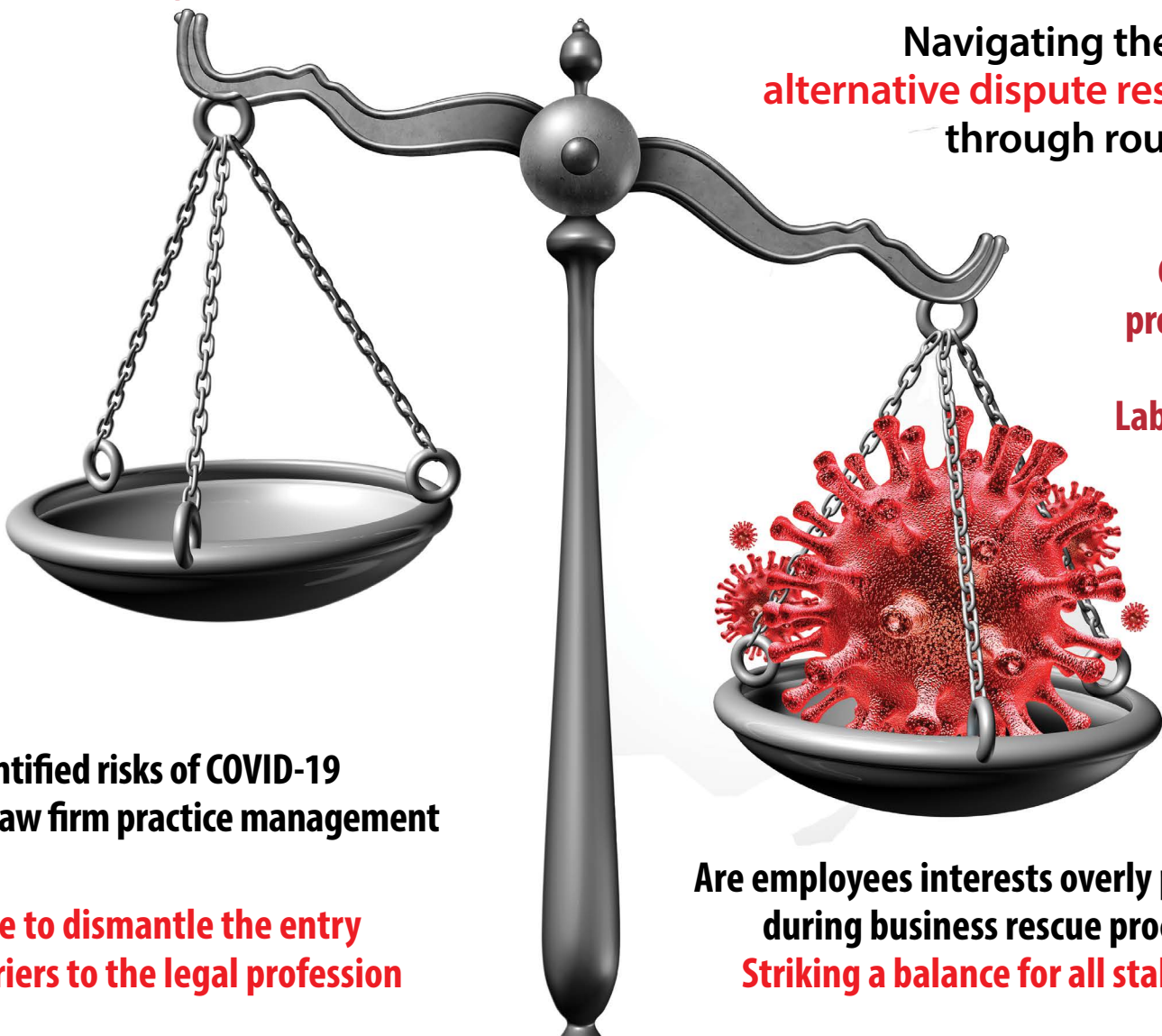
**Navigating the way of
alternative dispute resolution
through rough seas**

**Contempt
proceedings
at the
Labour Court**

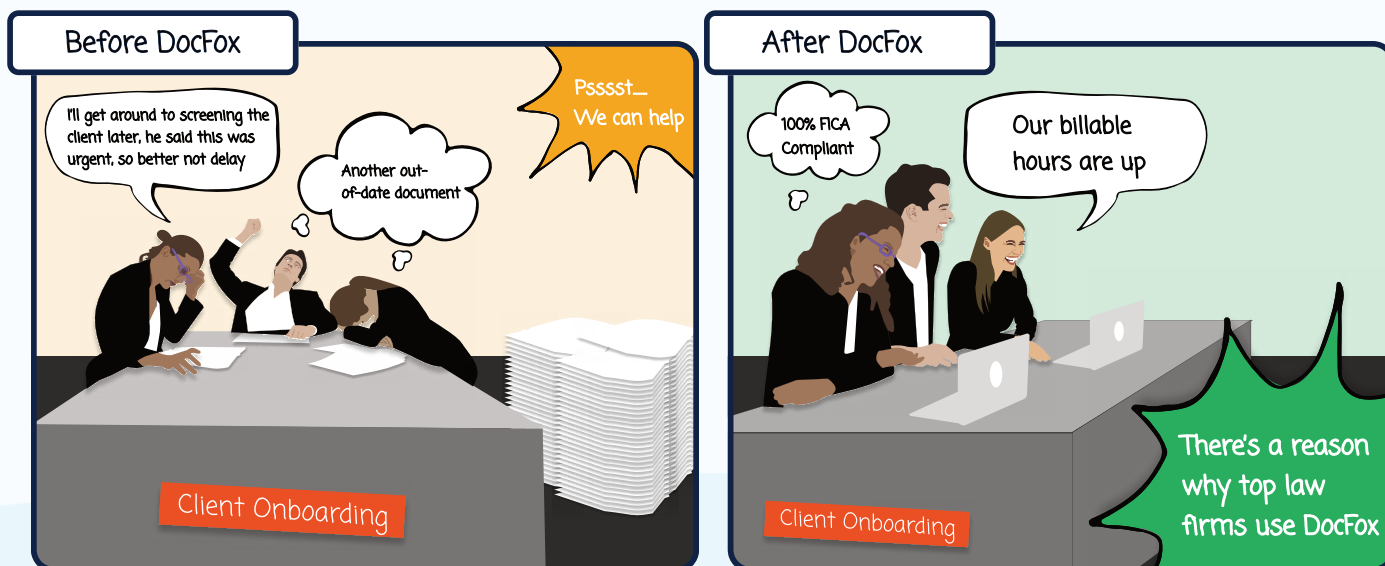
**Identified risks of COVID-19
on law firm practice management**

**Time to dismantle the entry
barriers to the legal profession**

**Are employees interests overly protected
during business rescue proceedings?
Striking a balance for all stakeholders**



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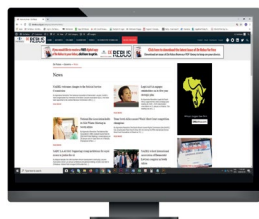
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- SADC gender-based violence model law aims to guide legislations of SADC member states in curbing gender-based violence in the SADC region
- Retired Deputy Chief Justice Moseneke donates his private collection of books to the University of Pretoria



14 Are fundamental human rights being eroded during the COVID-19 pandemic? A discussion of the *Brits* application

The Constitution enshrines the rights of all people and affirms the democratic values of human dignity, equality and freedom. As a result of the COVID-19 pandemic, many fundamental human rights were restricted. Legal practitioner and lecturer, **Dr Llewelyn Gray Curlewis**, and candidate legal practitioner, **Shandré Venter**, summarise and set out the rights allegedly infringed upon in the *Brits v The President of the Republic of South Africa and Three Others* application in which the applicants approached the court on behalf of the public regarding fundamental rights as provided for in s 33(2) of the Constitution and sought transparent reasons for the administrative decisions the respondents took during the COVID-19 lockdowns.

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FEATURES

18 A hard pill to swallow – an evaluation of the causes of the subsistence of pharmaceutical counterfeiting

LLM candidate, **Mpho Adam Titong**, writes that pharmaceutical counterfeiting is sometimes termed a perfect crime. Its easy accessibility has further been exacerbated by the Internet and has left many consumers unable to distinguish counterfeit pharmaceuticals from the genuine ones, despite efforts by international regulatory agencies. In his article, Mr Titong, writes that the lack of enforcement of relevant legislation, the inefficient and inadequate regulation and lack of commitment by relevant stakeholders has also played a significant role in the subsistence of pharmaceutical counterfeiting and that preventing the continuation and spread of counterfeit medicine may be achieved through public awareness and education.

20 Holding shadow directors responsible: A UK legislative perspective

The question of whether shadow directors owe fiduciary duties has been the subject of extensive commentary. Due to the uncertainty surrounding shadow directors, legal practitioner, **Sipho Tumelo Mdhuli**, turns to the United Kingdom's legislation to seek clarity on the subject. Specifically the Companies Act 2006, which states a 'director' comprises 'any person occupying the position of director by whatever name called', suggesting that anyone acting in the role of director is subject to the same fiduciary duties as any other director. By way of example, Mr Mdhuli examines the *Standish and Others v The Royal Bank of Scotland PLC and Another* [2019] EWHC 3116 (Ch) case where the court dealt with breach of fiduciary duties linked to specific instructions or direction given by a bank to its customer. Finally, Mr Mdhuli, asks if it is time to determine whether shadow directors are governed by the Companies Act and if the definition of 'director' should include shadow directors?



22 Navigating the way of alternative dispute resolution through rough seas

Legal practitioner, **Tshepo Mashile**, writes that in 2017, the International Court of Justice (ICJ) dealt with the issue of maritime delimitation between Somalia and Kenya. Prior to this, Kenya and Somali both signed a Memorandum of Understanding (MOU), which agreed on a method of settlement of their maritime boundary disputes other than having recourse to a court. However, in 2014, Somalia filed an application instituting proceedings against Kenya concerning a dispute in relation to the establishment of a single maritime boundary between Somalia and Kenya in the Indian Ocean delimiting the territorial sea, exclusive economic zone and continental shelf, including the continental shelf beyond 200 nautical miles. In his article, Mr Mashile, discusses the question of the ICJ's jurisdiction and whether it can be ousted by an alternative dispute resolution clause in the MOU.



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Invitation for public participation in the selection of the new Chief Justice

In a move that has not been seen in recent history, President Cyril Ramaphosa has invited nominations for the position of the next Chief Justice. In a press release issued by the Presidency, President Ramaphosa notes that the reason for this decision is to promote transparency and encourage public participation, which translates to South Africans taking part in the choice of the next Chief Justice.

Section 174(3) of the Constitution states: 'The President as head of the national executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal.' The term of the current Chief Justice, Mogoeng Mogoeng comes to an end on 11 October 2021.

The position of Chief Justice is an important one in the system of the South African judicial system. In terms of s 165(6) of the Constitution: 'The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all court' (subs (6) added by s 1 of the Constitution Seventeenth Amendment Act of 2012).

The press release by the Presidency states that: 'The Chief Justice is responsible for leading the creation of jurisprudence as he or she presides over proceeding of the Constitutional Court. He or she is also responsible for setting and overseeing the maintenance of the standards for the exercise of the judicial functions of [the South African] courts, and chairing the Judicial Services Commission'.

President Ramaphosa said: 'The Chief Justice occupies a vital position in our democratic constitutional order. It is, therefore, appropriate that all South Africans should have an opportunity to witness and participate in the selection of the next Chief Justice. We expect that this process will further deepen public confidence in the independence and integrity of the judiciary.'

South Africans are invited to nominate suitably qualified candidates for the position of Chief Justice. The process is as follows:

Nominations

Any person may nominate candidates for the position of Chief Justice. These nominations should be accompanied by the endorsement and support of at least one professional body of legal practitioners, or non-governmental organisation working in the field of human rights, or other legal areas.

Nominations should set out the reasons why the nominee is deemed suitable to be the next Chief Justice, their experience both as a legal practitioner, including any experience as a judge, and as a leader.

All nominations with all supporting documents must be sent to angeline@presidency.gov.za and cjnominations@gcis.gov.za by 1 October 2021. They must include:

- A letter of nomination, including the contact details of the nominator.
- The nominee's acceptance of the nomination and their contact details.
- Letters of support for the nomination, including contact details of persons or entities that support the nomination, including at least one letter of support from a professional body of legal practitioners, non-governmental organisation working in the field of human rights, or another legal field.
- Any additional documentation that the person nominating the candidate for Chief Justice deems relevant.

All nominations and supporting documents (save for personal information) will be made public on the Presidency website by 4 October 2021. Any objections to the nominees will need to be motivated, in writing, and sent to the above e-mail address at the latest by Friday 15 October 2021.

Panel to shortlist nominees

After receiving the nominations, a panel of eminent persons with relevant experience will shortlist between three and five candidates. The panel will decide how best to compile the shortlist openly, transparently and expeditiously.

The panel will consist of:

- Former Judge of the International Court of Justice and United Nations High Commissioner for Human Rights, Navi Pillay, as Chairperson.
- Minister of Justice and Correctional Services, Ronald Lamola.



Mapula Oliphant - Editor

- Former Minister of Justice Jeff Radebe.
 - Former Public Protector Thuli Madonsela.
 - Co-chairperson of the South African National AIDS Council, Mmapaseka Steve Letsike.
 - Professor of Law at Howard University School of Law, Professor Ziyad Motala.
- The panel will be required to report to the President by Friday, 29 October 2021.

Consultation with Judicial Service Commission (JSC) and political party leaders

The President will decide which candidates from the shortlist presented to him by the panel of eminent persons to refer to the JSC and the leaders of political parties represented in the National Assembly for consultation, as required by the Constitution, before appointing the new Chief Justice.

De Rebus welcomes article contributions in all 11 official languages, especially from legal practitioners. Practitioners and others who wish to submit feature articles, practice notes, case notes, opinion pieces and letters can e-mail their contributions to derebus@derebus.org.za.

Upcoming deadlines for article submissions: 18 October and 22 November 2021

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.

Compensation for victims

I cannot imagine any reader of your journal not welcoming the current concentration on gender-based violence and the praiseworthy attempts at terminating this scourge of society, which arrives among us from those patriarchal religious systems, which abhor granting civil rights to the 51% of our population.

A definition of democracy is: 'The greatest good for the greatest number' (Markkula Center for Applied Ethics 'Calculating consequences: The utilitarian approach to ethics' www.scu.edu, accessed 15-9-2021).

Our female counterparts outnumber those of us who are 'male and pale' and so the concentration on gender-based violence which will, hopefully, advance the position of the feminine numbers is to be welcomed.

However, the new legislation extends the 'burden of decision' to the reception desk at every one of the South African Police Service outlets. The burden of decision, leading to restorative or preventative action might sit on the shoulders of the servant manning the reception desk, either in Houghton or in Sunnyside, Tshwane but what increased burden will

it place on the shoulders of the servants manning the reception desks in Nqutu, Babanango or Nkandla?

But why leave the question of victim compensation to the new gender-based violence legislation. The Criminal Procedure Act 51 of 1977 provides that a 'court may award compensation where [an] offence causes damage to or loss of property ... (including money) belonging to some other person, the court in question may, upon the application of the injured person or of the prosecutor acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss'.

Currently there is so much concentration on s 35(3)(h) of the Bill of Rights in the Constitution that the pendulum has swung against the interests of the property owner, and never forget that after John Locke it is accepted that the greatest property right any person has, is life. Countenancing the theft of a pocket watch is the initial step to countenancing the death of the pocket watch owner. Countenancing the rape, which in essence is the bodily integrity of a person is the first step towards depriving that raped person their most valuable property: Their life.

Let the prosecutors be more vigilant in utilising s 300 of the Criminal Procedure Act for the benefit of the victims of crime. Whereas the criminal chooses or elects on a criminal action most victims are subjected to violence, rapine and the harming of their souls by the criminals.

Lewis Errol Albert Callaghan
BAUED (Rhodes University) LLB (UKZN)
is a legal practitioner in Cape Town.

Senior status

More than a year ago, regulations were passed calling for comment on the conferment of senior status for attorneys. Nothing further has transpired.

Could the Legal Practice Council please advise members as to the progress thereof as attorneys are being prejudiced daily?

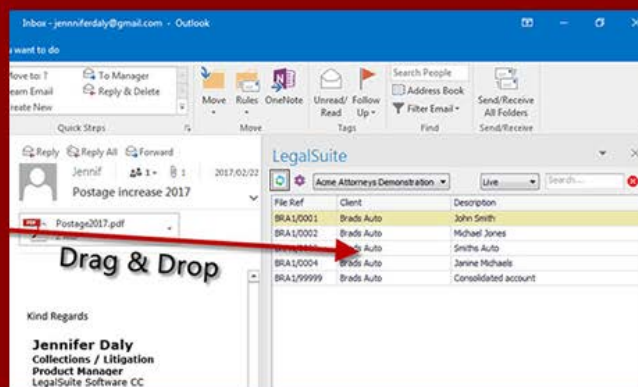
A few examples are where judges do not afford the same respect to attorneys, as opposed to their Senior Counsel counterparts in trials, and there is a huge problem on taxation when an attorney has appeared as a senior practitioner against senior and junior counsel. In such cases, the attorney is only granted fees on a much lower scale than what

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would have been awarded had the senior counsel been successful. This latter issue also impacts on the attorney's fees (and ultimately the client/public) when applying the Contingency Fees Act 66 of 1997.

Gary Austin BCom (Wits) BProc LLB (Unisa) LLM (UP) is a legal practitioner at Gary Austin Inc in Johannesburg.

Reply from the LPC

The conferment of silk status to legal practitioner's criteria is not effective yet. The Legal Practice Council (LPC) was tasked with developing the guidelines, soliciting comments from the profession and submitting them to the Minister of Justice and Constitutional Development for their inputs and guidance.

This was done last year and the LPC is waiting for the finalisation of that process and is currently not receiving any applications for the conferment of Senior Status. The LPC will make an announcement to the profession once the process has been concluded.

Legal Practice Council National Office, Midrand



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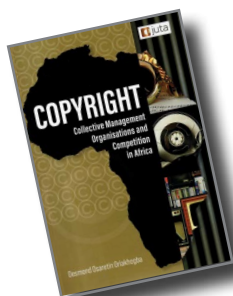
The Law Society of South Africa (LSSA) appeals to all legal practitioners who have been in practice for five-years or more to avail themselves to be instructors at the various legal education training activities offered by the Legal Education and Development (LEAD) Division, via the subvention from the Legal Practice Council (LPC).

A special appeal is made to practitioners registered as advocates.

Send your contact details by e-mail to
Moses Sikombe at
moses@LSSALEAD.org.za

The LSSA is committed to the ongoing transformation of the profession and to serve all Legal Practitioners nationally via the Provincial Associations as an independent representative voice of practitioners in support of members practice.

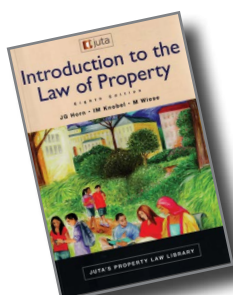
Book announcements



Copyright: Collective Management Organisations and Competition in Africa

By Desmond Osaretin Oriakhogba
Cape Town: Juta
(2021) 1st edition
Price: R 445 (including VAT)
267 pages (soft cover)

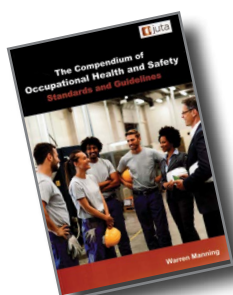
This book discusses the operation of collective management organisations (CMOs) and their regulation from the perspectives of copyright and competition law in Africa. It addresses contemporary issues relating to collective management of copyright from an African perspective. It also reflects on, and projects, the experiences of key national jurisdictions, upon which regional policy makers can rely to formulate guidelines or a regulation regime for CMOs in Africa. Importantly, the book unpacks the complexities around the nexus between copyright, CMOs and competition in Africa and presents the issues in very simple and easily comprehensible structure and language.



Introduction to the Law of Property

By JG Horn, IM Knobel and M Wiese
Cape Town: Juta
(2021) 8th edition
Price: R 578 (including VAT) (print)
465 pages (soft cover)
Available in Print, eBook and multimedia ePublication.

The purpose of this book is to provide a first introduction for an undergraduate student in property law. As with earlier editions this edition was written specifically for students in an undergraduate module on the law of property. Therefore, the contents are restricted to what the authors regard as essential for these students and extensive use is made of examples from case law. The 2021 edition contains electronic resources that will assist students to be better prepared for the legal profession with an appreciation of the constitutional values and principles underpinning the law, and an understanding that the law is a dynamic and developing discipline.



The Compendium of Occupational Health and Safety: Standards and Guidelines

By Warren Manning
Cape Town: Juta
(2021) 1st edition
Price: R 545 (including VAT)
364 pages (soft cover)

Occupational Health and Safety (OHS) is an essential service in both the public and private sectors, but its legislative framework is complex. In order to ensure compliance and gain the confidence of their clients, OHS practitioners engaged in the planning and implementation of OHS in the workplace must make recommendations that are based on solid factual foundations and codes of good practice. In the need for increased knowledge in the OHS, this book is an up-to-date reference to the technical standards and guidelines relevant to OHS and includes a selection of international codes provided as a benchmark for the design of services.





By
Jeremy
Maggs

Small increase in black legal professionals but lack of BEE credentials a worry among smaller law firms – LexisNexis SA and LSSA Legal Tech Report 2021

The COVID-19 pandemic is rapidly changing the way the legal profession is interacting and using information and there is clear evidence the sector is adopting and using technology with alacrity.

For example, when it comes to court work, more and more legal professionals source their information using a laptop, a personal computer, a tablet, a mobile phone, or an e-book. It seems the age of paper-based information is quickly receding.

This is just one of the key findings of an extensive and updated survey by leading legal technology and risk and compliance solutions provider LexisNexis done in partnership with the Law Society of South Africa (LSSA).

More broadly, South Africa's (SA's) law fraternity has also been hard hit by the pandemic but has remained strong and resilient. Sixty percent of mainly small and medium sized firms say they have been 'grossly impacted' by the lockdown with the remainder giving a more bullish assessment saying the changing work paradigm has had a minimum effect.

Operationally, COVID-19's biggest impact has been on billings for civil procedure with 34% of respondents saying there has been a negative impact. Sixteen percent of those surveyed say the lockdown has had an impact on criminal law and procedure with the same percentage saying there has been a negative impact on family law. But sadly, there has also been a tragic upside for the profession with respondents reporting an 11% increase in billings in wills, trusts and estates.

The *Legal Tech Report 2021* is an important body of research giving a moment-in-time snapshot of the challenges and concerns facing SA's law

profession. The study also comes at a time when the rule of law in SA was tested to the limit after ten days of civil unrest that inflicted damage to the economy and led to a deeply concerning loss of lives.

In that turbulent wake there were constant reminders by many in the legal fraternity that it was only through respect and strict adherence to the principles of the rule of law and the Constitution that society's centre was able to hold.

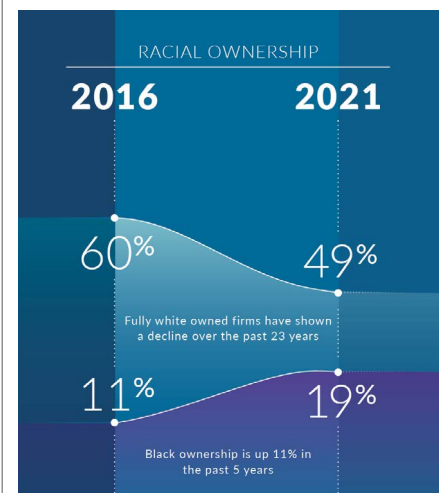
By way of background on the study, in 2016, LexisNexis and the LSSA partnered on a body of research to best understand how the legal landscape had changed since an initial study commissioned in 2008. A regular analysis of the legal profession was envisaged with the intention of developing a review of legal practice in SA and to monitor significant changes and notable trends. The last report was published in 2016. The much-needed 2021 incarnation yielded interesting and important findings.

Twenty-eight percent of respondents have been in practice for up to ten years, while 21% were veteran practitioners having been in the profession for between 31 and 40 years. According to LexisNexis's best current data there are close on 13 000 law firms in SA, with around 54 000 professionals including attorneys, advocates, conveyancers, candidate attorneys and notaries. More than three quarters are considered small firms and are made up of one to ten fee earners who are mostly engaged in litigation, debt collecting and conveyancing.

That overview provides valuable context to the survey in as much as half the sample size were sole proprietors and close on three quarters employ between one and ten staff. Most firms in the 2021 survey practice in the areas of litigation, commercial law, conveyancing, civil and family law. The majority of those polled worked in the northern provinces of

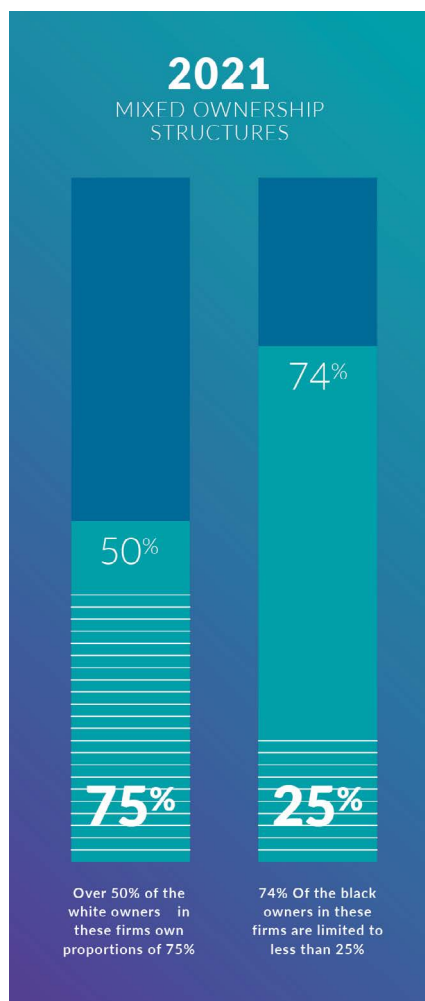
SA. Interestingly over the past five years there has been an increase in legal professionals in this region and an almost equal decrease in those living in the Cape provinces.

A significant finding in the 2021 report shows that fully white owned firms have shown a decline over the past 23 years, yet they remain the stronghold of small firms. In 2016, 60% of firms in this category were fully white owned. That percentage now stands at 49% with only 19% of firms being fully black owned. That is up from 11% five years ago. Patently there is still much work to do on the transformation front.



The latest report says in firms with a so-called mixed ownership structure there is a white majority and black minority stake. Over half of the white owners in these firms own proportions of 75%. Inversely, 74% of the black ownership in mixed ownership schemes is limited to less than 25% ownership.

Women remain in the minority in the legal profession in SA. Measuring ownership by gender, in 2016, 53% of firms were owned by men; 20% were fully female and 27% had mixed ownership. Five years on and the needle



has shown some encouraging movement with 47% of firms being male owned; 27% now being fully female owned and 26% with mixed ownership. One legal insider says: 'Transformation does move at a slow pace in this profession, but we are seeing more fully female owned businesses and that is to be welcomed.'

Extrapolating the gender dynamic further the 2021 report has found an even spread when it comes to decision making but less than 20% have a so-called strong majority of decision-making power. Essentially men still make most of the decisions.

The *Legal Tech Report 2021* also gives a useful indication of the financial performance of small and medium size firms with turnover between 2019 and 2020 remaining relatively stable with an increase at the lower end of the spectrum towards the end of 2020.

However, the survey did not measure the full fiscal impact of the pandemic on the profession. In that respect however is worth briefly referencing a study by the global con-

sultancy McKinsey & Company that said, 'globally in downturns law firms weather the situation better than the overall economy of any country' and that in order to best manage risk, 'every firm should develop a perspective on the demand outlook for the sectors, client types, and practices to which they have greatest exposure.'

It is also important to note that 63% of respondents to the survey said they were not at liberty to disclose any financial information. But just over 20% of respondents reported annual turnover of between R 100k and R 500k.

Respondents were also questioned on strategic intent and future planning. Almost a third of firms have changed their operating structure in recent times but close on 40% said it was not on their radar at this time. What is perhaps of more concern is that firms are not investing in processes or technology with the speed of previous years with close on a quarter of respondents saying they have no plan to do so in coming months. This obviously indicates diminished confidence levels – an issue that the profession will have to interrogate with vigour in coming months.

More positively though and in an increasingly competitive environment, law firms are now also seeing the real benefits of branding. Not only is it a way of reaching prospective clients, but properly done can also add credibility and gravitas to a firm. Forty-five

percent of respondents said they had either increased marketing investment or were planning to do in the next few years.

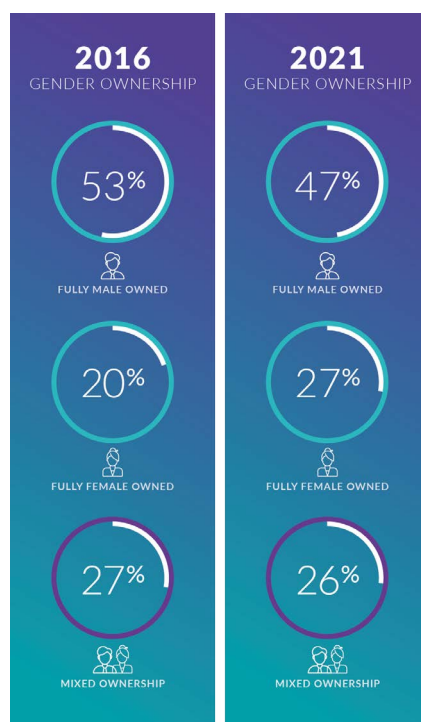
The idea of networking is evidently important to respondents with 34% having increased networking recently and 27% have plans to develop their networks in the future. However, there seems to be a gap between intent and action with just over 60% of respondents saying joining an umbrella organisation or consortium is not on their radar at the moment.

Volume of work done on an annual basis was also polled by the Activate brand agency that conducted the research. The number of matters handled annually varies significantly between firms. Thirty firms indicated they handle 100 matters per year, another 26 handle only 50, 20 firms handle 200 and 12 as much as 1000 per year.

It is common cause that big corporate law firms have been upweighting their African practices in recent years and the reason is obvious as pre-COVID-19, many economies were on the boil. That bullishness does not seem to apply to smaller and medium-sized firms though who show a marked lack of appetite for any form of continental expansion.

While data always tells a cogent story, it would be unwise and injudicious to try and find one common take-out from this year's extensive report, suffice it to say the profession is going to take some time to recover from the impact of COVID-19, that transformation across multiple fronts is slow and pressure will inevitably increase to accelerate change and clearly more investment in technology to streamline operations will become more critical.

One finding that will possibly be lost in all percentages is the seeming reluctance to network more widely and tactically. It assists in identifying relevant and interesting opportunities in a country where respect and adherence to the rule of law has become a vital bulwark to the preservation of SA's democracy.



LexisNexis will be diving deeper into the results of the report at the 2021 The State of the Legal Industry Address.
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www.lexisnexis.co.za



By
Cledwin
Dzinamarira

Identified risks of COVID-19 on law firm practice management

The COVID-19 challenge is unprecedented, both for the economy and for many aspects of the South African legal system, especially law firm practice management.

Many law firms have now closed their offices due to the COVID-19 pandemic and staff are now working remotely from their homes, but this is presenting some firms with a number of significant challenges, including those that already had what they thought were robust Business Continuity Plans (BCPs) because none of the firms factored in the pandemic in their BCPs.

Most of the challenges being faced by law firms include –

- failing to access the hardcopy client records;
- cybersecurity risks;
- client confidentiality and data protection; and
- maintaining competency.

Accessing hardcopy and case management client records

With many law firm employees working from home with the introduction of nationwide movement restrictions, it appears difficult for one to access hardcopy client files from time to time, which is likely to lead to delays in dealing with client matters, and therefore, this could lead to complaints. In some instances, employees are forced to carry client files home, which have confidential information in the files. The risk of losing the file and the confidential information falling into the wrong hands is huge and it may open the firm up to litigation on the basis of negligence.

For law firms with robust information technology (IT) systems, the access of such systems remotely has also been cited as a challenge. Many systems had been built for onsite access and, as such, would require additional configuration for them to be accessible remotely. In addition, the access of such systems from home requires that security be of higher priority. Networks need to be secured to ensure that no data is lost in transit or hacked.

Users working from home also face a huge challenge in ensuring the confidentiality of the information that they are working with. The likelihood that such information can be accessed by their family members or relatives is higher as some employees do not have proper secured office space at home.

Cybersecurity risks

‘Criminals are actively taking advantage of the current crisis and are stepping up their cybercrime activities with scams to try and hack systems and steal clients’ money. Due to the lack of time, some firms have had to prepare for ... working from home, and many will have had to ask their staff to use their own IT equipment, much of which could be exposed to cyber-criminals, due to their systems not being sufficiently protected’ (Brian Rogers ‘Remote working challenges for law firms: steps to reduce home working risk’ www.theaccessgroup.com, accessed 8-9-2021).

‘Financial criminals have followed closely behind, quickly adopting and exploiting online and electronic tools to their own illicit ends’ (Brian Svoboda-Kindle *CFCS Certification Examination Study Manual – preparing for the certified financial crime specialist examination* 6 ed (Miami: 2019)). ‘Hackers, acting alone or in teams, breach the data systems of major corporations and government agencies to steal and resell customer data, from bank account access codes to credit card and tax identification numbers’ (Svoboda-Kindle (*op cit*)).

The most prevalent cybersecurity risks stem from:

- **‘Phishing** refers to the act of sending an e-mail or other electronic message falsely claiming to be a legitimate communication in order to manipulate the recipient into providing confidential information. Typically, a phishing message will direct the recipient to a [fake] website with the same look and feel as the legitimate website of a business, government agency or other organisation, and instruct the unsuspecting user to divulge sensitive information such as passwords, credit card numbers and bank account information’ (Svoboda-Kindle (*op cit*)).

According to Felix Richter ‘The most common types of cyber crime’ (www.statista.com, accessed 7-9-2021), phishing was the number one type of Internet crime in 2020.

- **Social engineering** – ‘is the act of deceiving or manipulating a target into turning over confidential information or personal data. ... Assisted by technology, social engineering schemes exploit human tendencies to trust appearances and take communications at face value, particularly those from authoritative persons or sources. Social engineering schemes can and often do occur through multiple channels. Some social engineering schemes may use phone calls impersonating a bank employee, auditor or law enforcement agent to deceive a target into turning over confidential information. Others may use social networks to contact targets, build credibility by conducting background research on targets, or create fake profiles to impersonate a target’s real friends or business associates. ... Consequently, there is no one-size-fits-all strategy for guarding against social engineering at organisations, whether banks, businesses or government agencies. One low-tech, but effective, solution is employee training’ (Svoboda-Kindle (*op cit*)). Through user awareness program organisations can equip system users with the knowledge of detecting most attacks before they have a negative impact on the business.
- **Business e-mail compromise (BEC)** – ‘is a variant of social engineering that has been lucrative for cybercriminals. In simple terms, a fraudster impersonates someone else via e-mail to deceive a target into making a wire transfer, processing a payment or otherwise taking actions that will transmit funds to the attackers. In one common example, cybercriminals send a message to a company employee in accounts payable or the finance department that appears to be sent from the CEO, CFO or other executive. The message will request immediate payment to a vendor or other party, indicating it is a very urgent matter – the payment must be completed before the close

of business. ... Attackers will either spoof the sender's e-mail address or create a new address that looks nearly identical. In other cases, attackers obtain a target's e-mail account credentials and take control of it to send messages. In a variation, messages are sent directly to a financial institution, purportedly from a business executive controlling the account, directing that funds be transferred to another party immediately' (Svoboda-Kindle *op cit*). Most business e-mail compromise attacks have targeted very senior personnel within organisations and by successfully impersonating such people, criminals are able to get away with huge amounts of money or valuable information.

- **Account takeover:** 'Account takeover is one of the more common forms of identity theft, occurring when a fraudster obtains unauthorised access to an individual or organisation's financial accounts. The nature of the takeover and the level of sophistication can vary. In the simplest form, an attacker could use malware, phishing or other techniques to obtain a person's online banking credentials, then access the account and initiate transfers. More elaborate attacks might gain account credentials and some personally identifying information (such as the victim's tax identification number or answers to online security questions) and use this to change the official mailing address or online banking credentials with that individual's financial institution. Once accomplished, the fraudster can perform unauthorised transactions using the victims account without the victim's knowledge (cash withdrawals, check orders, wire transfers, online banking transactions, etc)' (Svoboda-Kindle *op cit*).

- **Use of malware:** 'Malware is a class of malicious or intrusive computer code (or software application) that includes viruses, trojan horses and computer worms used by attackers to obtain personal/non-public user information. They can also be used to gain access to or control over private computer systems and databases or interrupt a computer's functionality and availability to its users. Malware's objective is typically to remain undetected, either by actively hiding within a computer system or by simply not making its presence on a system known to the user' (Svoboda-Kindle *op cit*). Ransomware has come out as the number one menace of the COVID-19 period. 'Ransomware is a type of malware from cryptovirology that threatens to publish the victim's personal data or perpetually block access to it unless a ransom is paid. While some simple

ransomware may lock the system so that it is not difficult for a knowledgeable person to reverse, more advanced malware uses a technique called cryptoviral extortion. It encrypts the victim's files, making them inaccessible, and demands a ransom payment to decrypt them' (<https://en.wikipedia.org>, accessed 8-9-2021). According to David Ferbrache, 'criminal groups are increasingly switching to COVID-19 themed lures for phishing exploiting your consumers' and employees' concerns over the pandemic and the safety of [their] loved ones.

There's also evidence that remote working increases the risk of a successful ransomware attack significantly. This increase is due to a combination of weaker controls on home IT and a higher likelihood of users clicking on COVID-19 themed ransomware lure e-mails given levels of anxiety' (David Ferbrache 'The rise of ransomware during COVID-19' <https://home.kpmg>, accessed 8-9-2021).

Client confidentiality and data protection

Law firms 'need to ensure ... the confidentiality of client data, which includes client information in hard (files) and soft (computer) formats.

Working from home can present a number of risks to client data, for example, family members and visitors being able to see it, or client information being overheard during telephone calls; not all people working from home have the ability to work from a dedicated office and will, therefore, be working at kitchen tables, in lounges, etc, but appropriate precautions will still have to be taken to mitigate identified risks' (Rogers *op cit*).

Maintaining competency

Law firms 'must ensure that the service [they] provide to clients is competent and delivered in a timely manner and that those providing legal services maintain their competence to carry out their roles and keep their professional knowledge and skills up to date' (Rogers *op cit*).

Key steps for law firms to consider

'The following steps should be considered to reduce the risks of working from home:

- Allocate appropriately protected business-owned IT equipment to anyone working from home on client matters and remind staff how and where they can report any potential cyber-risks.
- Communicate regularly with all staff on working from home policies, including working from home safely,

cyber and information security protection of personal data in accordance with data protection laws ... when using shared WiFi and use of company VPNs.

- Review internal policies, procedures and controls to ensure that there are no increased risks that would otherwise be mitigated or controlled in normal circumstances. Staff should still be able to get easy access to the firm's policies and procedures, including use of e-mail, Internet, social media and points of key contact should any reports need to be made.
- Provide regular updates between teams and management via conference calls to help ensure staff are both clear on their operational objectives and supported properly.
- Members of the management team should ensure that appropriate levels of supervision are maintained, and staff should be able to easily contact their supervisors and key teams (IT, accounts, etcetera) when required.
- Remind staff not to work on client matters in public places or when using free insecure WiFi connections and ensure hard copy files are stored securely when not in use and are not accessible by others when being worked on (spouse, partner, children, visitors, etc).
- Ensure breaches, complaints, claims ... are notified to the appropriate compliance officer ... ; if an online risk and compliance system is used by your firm ensure it continues to be updated as required' (Rogers *op cit*).
- Where law firms believe they are not adequately equipped to deal with cyber risks, they need to approach organisations with such skills to assist them formulate proper strategies to help them increase their ability to deal with such threats.

'Working from home is going to become the new "normal" over the next few weeks and months, so making sure your firm is able to operate effectively and compliantly during this period will be critical' (Rogers *op cit*).

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By
Moksha
Naidoo

Contempt proceedings at the Labour Court

Clause 13 of the Practice Manual of the Labour Court of South Africa (the Practice Manual) prescribes how contempt of court applications are launched and subsequently dealt with at the Labour Court (LC).

In terms of the Practice Manual, an applicant must first launch an *ex parte* application on a Friday in Motion Court, seeking an interim order that the respondent be ordered to appear before the court to show cause why they should not be held in contempt of court.

In the notice of motion, as per clause 13, the applicant should set out –

- the date and time the respondent ought to appear before court on the return day;
- that the respondent can explain their conduct by way of an affidavit to be filed on or before the date of the hearing;
- that in the absence of the respondent appearing at court or failing to establish a reasonable reason for their failure to abide by the previous order, the respondent be found guilty of contempt of court; and
- that the respondent be incarcerated for a period the court deems appropriate or be fined in an amount the court deems appropriate.

The notice of motion must be accompanied by the applicant's affidavit setting out the relevant submissions' concomitant to the contempt proceedings.

Thus, pursuant to the *ex parte* application, the court grants an interim order calling on the respondent to show cause why they should not be held in contempt of court on the return date.

The remedy of incarceration for failure to abide by an order of the LC always has and remains a remedy in contempt applications.

However, unlike the order of the Constitutional Court (CC) in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* (Helen Suzman Foundation as amicus curiae) 2021 (9) BCLR 992 (CC); which ordered

incarceration on punitive grounds; the LC would in all likelihood order incarceration for coercive reasons.

In *KPMM Road and Earthworks (Pty) Ltd v Association of Mineworkers and Construction Union and Others* (2018) 39 ILJ 609 (LC), the LC held;

'In the case of contempt of court, the applicable penalty to be imposed can be a period of imprisonment, a fine, or both. ... But even if punishment is to be dispensed, I believe that punishment must however always have a purpose. Punishment for the sake of punishment has no point.'

Similarly, in *Orthocraft (Pty) Ltd t/a Advanced Hair Studios v Musindo and Another* (2016) 37 ILJ 1192 (LC), the Labour Court held that 'the primary aim of contempt proceedings was to ensure compliance and not to punish' (see also *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA)).

This approach is likewise practical – it would serve little or no purpose to an employee who wants to be reinstated, to have their employer incarcerated for punitive reasons, without first using the threat of incarceration to force the employer to abide by the previous court order. Put differently, the order of incarceration ought to serve to compel the employer to abide by the previous court order failing which, they would be jailed.

On this score the court in the *KPMM Roads and Earthworks* case held:

'In the case where the court order requires a party to take positive action, commit a specific act, or refrain from committing a specific act, which remains unfulfilled despite the order, then the appropriate punishment would be imprisonment as a punishment of first instance. The threat of imprisonment must surely be the most effective deterrent to ensure the necessary is done. For this reason, an order of imprisonment is normally suspended on condition that immediate compliance happens, and if the transgression persists, then the transgressor must serve time' (see also *Pikitup Johannesburg (Pty) Ltd v SA Municipal Workers Union and Another* (2016) 37 ILJ 1710 (LC)).

Cost orders at the LC

Unlike the applicable principle in other courts, that being costs follow the result, s 162 of the Labour Relations Act 66 of 1995 governs the way the LC decides when to issue a cost order against a party.

The section reads:

'(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.

(2) When deciding whether or not to order the payment of costs, the Labour Court may take into account –

(a) whether the matter referred to the Court ought to have been referred to arbitration in terms of *this Act* and, if so, the extra costs incurred in referring the matter to the Court; and

(b) the conduct of the parties –

(i) in proceeding with or defending the matter before the Court; and
(ii) during the proceedings before the Court.

(3) The Labour Court may order costs against a party to the *dispute* or against any person who represented that party in those proceedings before the Court'.

On the application of s 162, the CC in *Zungu v Premier of the Province of KwaZulu-Natal and Others* (2018) 39 ILJ 523 (CC) held:

'The rule of practice that costs follow the result does not apply in Labour Court matters. In Dorkin, Zondo JP explained the reason for the departure as follows:

"The rule of practice that costs follow the result does not govern the making of orders of costs in this court. The relevant statutory provision is to the effect that orders of costs in this court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that costs orders are not made unless the requirements are met. In making decisions on costs orders this Court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers' organisations from approaching the La-

bour Court and this court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this court frivolous cases that should not be brought to court.”

In this matter, there is nothing on the record indicating why the Labour Court and Labour Appeal Court awarded costs against the applicant. Neither court

gave reasons for doing so. It seems that both courts simply followed the rule that costs follow the result. This is not correct’.

Having said that and in keeping with s 162(2)(b), I would surmise that an employer who has offered the court no plausible reasons to justify their recalcitrant behaviour, may well be met with

a cost order against them in contempt proceedings.

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By
Magate
Phala

The sanction of a disciplinary hearing must be fair and appropriate

Item 3(4) of sch 8 (Code of Good Practice: Dismissal) of the Labour Relations Act 66 of 1995 provides that ‘generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are’

-
- gross dishonesty or wilful damage to the property of the employer;
- wilful endangering of the safety of others;
- physical assault on the employer, a fellow employee, client, or customer; and
- gross insubordination.

Schedule 8(5) provides further that ‘when deciding whether or not to impose a penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee’s circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself’.

In the event wherein a charged employee is found guilty and/or pleads guilty to the charges of misconduct against them, the chairperson must afford both the employer and the employee an opportunity to make submissions on aggravating and mitigating factors before a final decision on an appropriate sanction can be made.

Factors, which should be considered in mitigating and aggravating circumstances, include among others –

- the employee’s personal circumstances;

- the employee’s disciplinary record and length of service;
- whether the misconduct is serious and makes a continued employment relationship intolerable;
- the employee’s attitude and remorse;
- pre-meditation and circumstances of the infringement;
- the nature and impact of the misconduct;
- the harm or potential harm caused by the employee’s conduct;
- the presence or absence of dishonesty in the employee’s conduct;
- other applicable factors.

‘In his book entitled *Dismissal* [Cape Town: Juta 2014] at page 211, Professor John Grogan remarked as follows regarding mitigating factors:

“Mitigating factors should be considered after the employee has been found guilty of the offence; whether there are mitigating (or aggravating) factors constitutes a separate inquiry. A variety of considerations may be relevant when considering a plea in mitigation. These include a clean disciplinary record, long service, remorse, the circumstances of the offence, whether the employee confessed to his misdemeanour and any other factors that might serve to reduce the moral culpability of the employee. An employer is not required to take mitigating factors into account merely because they evoke sympathy. The test is whether, taken individually or cumulatively, they serve to indicate that the employee will not repeat the offence” (Magate Phala ‘The significant value of mitigating circumstances in misconduct cases involving gross dishonesty’ www.labourguide.co.za, 9-9-2021).

The following factors as laid down

per *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) are, *inter alia*, pertinent and should be equally considered (and weighed against each other) in determining an appropriate sanction for the misconduct –

- the nature and seriousness of the charge the employee found guilty of;
- whether progressive discipline can be utilised to transform the incorrect conduct;
- the harm or potential harm caused by the employee’s conduct.
- the effect of dismissal on the employee;
- whether additional training and instruction may result in the employee not repeating the misconduct;
- the employee’s disciplinary record and length of service;
- the presence or absence of dishonesty in the employee’s conduct;
- whether the employee admitted the misconduct or disputed it and, if the employee disputed it, whether the employee behaved dishonestly or inappropriately in doing so;
- whether the misconduct is serious and makes a continued employment relationship intolerable; however,
- this list is not exhaustive.

In *Department of Labour v General Public Service Sectoral Bargaining Council and Others* (2010) 31 ILJ 1313 (LAC), the Labour Appeal Court confirmed the principle that a sanction aimed at correction or rehabilitation is of no purpose when an employee refuses to acknowledge the wrongfulness of their conduct.

In *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2000) 21

ILJ 1051 (LAC) at para 25, the court held that: 'Acknowledgement of wrongdoing is the first step towards rehabilitation. In the absence of a recommitment to the employer's workplace values, an employee cannot hope to re-establish the trust which he himself has broken'.

In *National Union of Mineworkers and Another v CCMA and Others* (LC) (unreported case no JR2016/2009, 20-3-2013) (Prinsloo AJ) the court held that 'acknowledgement of wrongdoing is the necessary first step in correcting behaviour'. By failure to acknowledge wrongdoing, the employee had rendered himself not to qualify as a candidate of a corrective discipline.

In *Miyambo v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 ILJ 2031 (LAC) at para 13, it

was held that: 'It is appropriate to pause and reflect on the role that trust plays in the employment relationship. Business risk is predominantly based on the trustworthiness of company employees. The accumulation of individual breaches of trust has significant economic repercussions. A successful business enterprise operates on the basis of trust.'

'In *Council for Scientific and Industrial Research v Fijen* [1996 (2) SA 1 (A)], the Supreme Court of Appeal confirmed trust in any employer-employee relationship to be a cardinal aspect and even though not always spelled out in a written contract, the term/element of the relationship is implied' (Tiekie Mocke 'Trust' <http://misa-link.mozello.com>, accessed 9-9-2021).

I recommended that employers should

appoint chairpersons who are well-trained to preside over disciplinary inquiries. The chairpersons should have requisite skills and experience on how to evaluate the facts of each case objectively, and have the ability to apply their minds independently and impartially. They should also have good listening and communication skills, be punctual, ethical and possess report writing skills and have ability to interpret policies.

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The legal position of a child charged with a crime who is apprehended as an adult and the impact of sentencing

By
Marvin
De Vos

The Child Justice Act 75 of 2008 [the Act] was introduced to give effect to the principles in the Constitution and to domesticate the international law relating to child offenders. The preamble of the [Act] states that the purpose of the [Act] is to establish a criminal justice system for children in conflict with the law, based on the values underpinning the Constitution. In his judgment in *S v CKM and Others* [2013 (2) SACR 303 (GNP)] at para 7, Judge Bertelsmann described the [Act's] basic tenets in the following manner:

"[The Act] represents a decisive break with the traditional criminal justice system. The traditional pillars of punishment, retribution and deterrence are replaced with [continued] emphasis on the need to gain understanding of a child caught up in behaviour transgressing the law by assessing [their] personality, determining whether the child is in need of care, and correcting errant actions as far as possible by diversion, community based programmes, the application of restorative-justice processes and reintegration of the child into the community" (Carina du Toit and Zita Hansungule 'S v SN' unreported case no 141114/14 (WCC) – Sentencing child offenders after they

turn 18' (2015) 54 SA Crime Quarterly 65).

In terms of the provisions of the Act, a separate court, the Child Justice Court was created where these cases had to be adjudicated. The Child Justice Court is defined in the Act as 'any court provided for in the Criminal Procedure Act, dealing with the bail application, plea, trial or sentencing of a child'.

The Act also defines a child as 'any person under the age of 18 years' and, and in certain circumstances it also means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in terms of s 4(2).

Section 4(2)(b) permits prosecution to be initiated in terms of the Act against an offender who is older than 18 but under the age of 21. However, this only happens in certain circumstances as set out in the National Director of Public Prosecutions Directives. These include, *inter alia*, if –

- '(a) the offence is a Schedule 1 offence ... ; or
- (b) the co-accused is a child; or
- (c) there is doubt about the accused's age; or
- (d) the accused "appears to be intellectually or developmentally challenged" (SS Terblanche 'The Child Justice Act: A

detailed consideration of section 68 as a point of departure with respect to the sentencing of young offenders' (2012) PER 58.

'This provision was included to give the prosecution more flexibility in the exercise of its powers. The provision also envisions the possibility that there could be occasions where an offender has just turned 18, is still attending school, and could benefit from diversion as set out in the Act. Lastly, the provision also takes into account that if there is more than one accused in an offence, it would be "artificial to separate the cases of one or two who are slightly older from those of their contemporaries"' (Du Toit and Hansungule (*op cit*)). While s 4(2)(iii) of the Act specifically stipulates where a child offender who commits an offence when they are under the age of 18 years and is 18 years or older at the time of their arrest, the Director of Public Prosecutions (DPP) may direct that the Act still applies.

This means that where an accused person who has committed an offence at the time when they were still a child in terms of the Act, but only apprehended or arraigned when they are an adult, can also be dealt with in terms of the Act as stated above.

The National Director of Public Prosecutions, Child Justice Act 75 of 2008: Directives in terms of section 97(4), GN R252 GG33067/31-3-2010 prescribes, in Part M points 1 and 4 of the Directives that the DPP may decide that the Act still applies in respect of a matter such as the present, where the child offender was under 18 years when they committed the offence but is now 18 years or older at the time of their arrest.

The Constitution also prescribes that 'it is established law that child offenders should be afforded special treatment and given sentences that are more lenient than those imposed on adults. The Constitutional Court [CC] has embedded child-centred sentencing principles through its judgments by applying s 28 of the Constitution to child offenders. In particular, the [CC] has emphasised the importance of applying section 28(2), which provides that the best interests of the child are paramount in every matter concerning them and section 28(1)(g), which states that children should not be imprisoned except as a measure of last

resort' (Du Toit and Hansungule (*op cit*)).

The Western Cape High Court in *S v SN* (WCC) (unreported case no 141114/14) was called 'to decide whether the above principles were applicable in the sentencing of persons who commit offences as children and become adults during child justice court procedures' (Du Toit and Hansungule (*op cit*)). The court concluded that it does find application.

Du Toit and Hansungule (*op cit*) note this was restated in the case of *Mpofu v Minister for Justice and Constitutional Development* 2013 (2) SACR 407 (CC); *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (6) SA 632 (CC). The court in *S v N and Another* (WCC) (unreported case no SHE 59/14, 9-1-2015) (Binns-Ward J) held that:

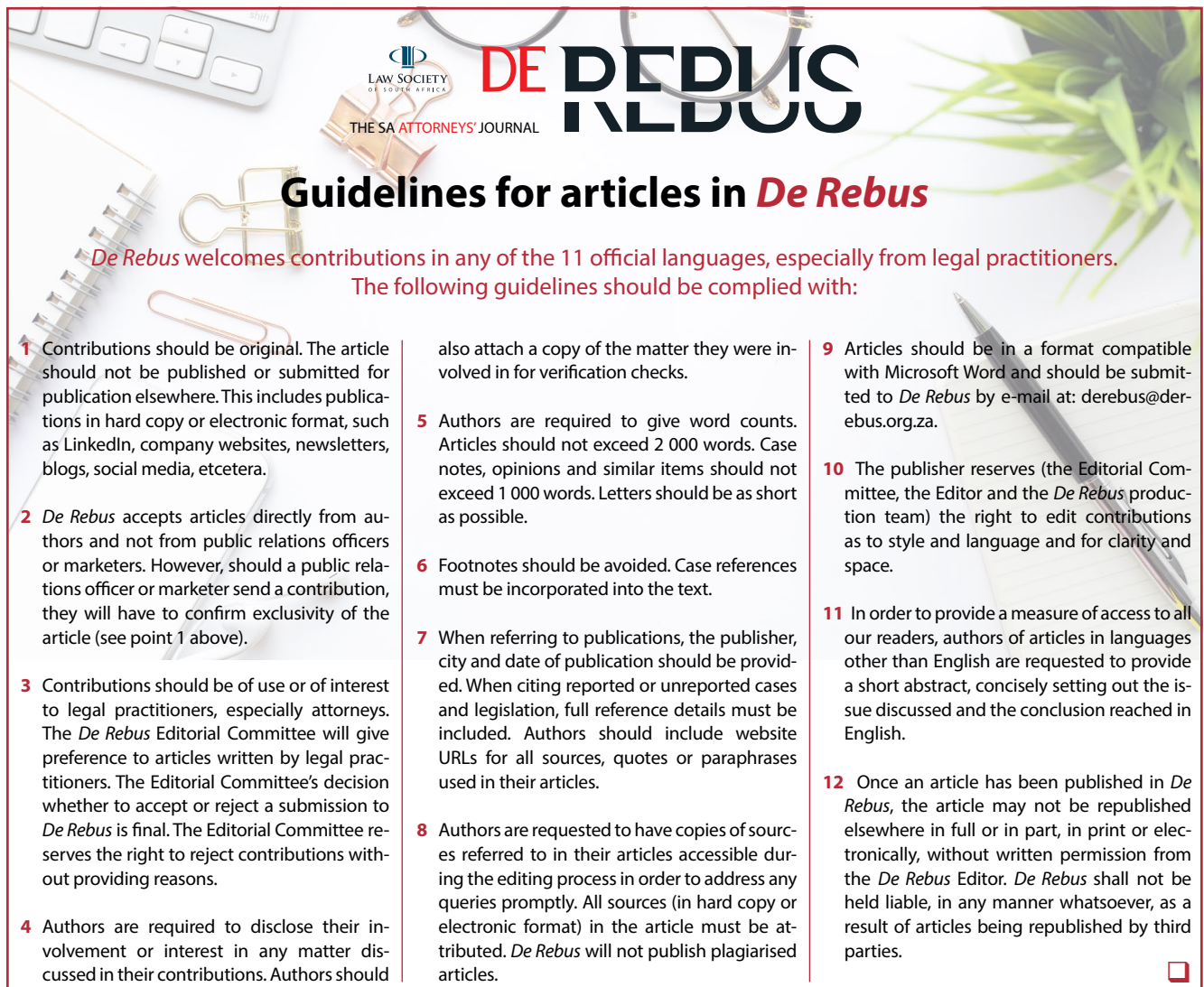
'When a person commits an offence while under the age of 18, their conduct falls to be judged in the context of these considerations. It would make no sense then to treat them as adults for sentencing purposes simply because the intervening passage of time has resulted in

their being adults when sentencing occurs. That would mean punishing them for what they had done as children as if it had been done when they were adults. That such an approach would impinge on the substance of the rights provided in terms of s 28 of the Constitution is axiomatic.'

The CC above reiterated and confirmed that the 'relevant age for sentencing' is the 'age at which the offence was committed' (Du Toit and Hansungule (*op cit*)).

In practice, legal practitioners and presiding officers who are considered as the upper guardians of all children, must be vigilant when dealing with these matters and invoke these provisions, where it finds application.

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Are fundamental human rights being eroded during the COVID-19 pandemic?

A discussion of the *Brits* application



By Dr Llewelyn Curlewis and Shandré Venter

The Constitution of South Africa's (SA's) 'Bill of Rights' is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom'. Due to the current COVID-19 pandemic, many of the fundamental rights have been restricted. In the case of *Brits*

v The President of the Republic of South Africa and Three Others, the applicant approached the court on behalf of the public with specific regard to fundamental rights, as provided for in s 33(2) of the Constitution, seeking transparent reasons for the alleged administrative decisions that the respondents took in light of the pandemic. The purpose of this article is to summarise the above-

mentioned case and to set out the rights allegedly infringed. Legislation will be discussed that regulates the event of a national disaster and whether decisions made by the respondent were justifiable.

Summary

The applicant made a formal request to the first and second respondents, namely, the President of SA and the Minister of Cooperative Governance and Traditional Affairs, for written reasons in terms of s 5(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) for the administrative decisions taken under their direct leadership due to the COVID-19 pandemic. The applicant applied in the High Court, in an urgent application in his personal - and representative capacity, on behalf of fellow South Africans. The order sought of the President and other parties cited to furnish written reasons, in terms of s 5(2) of PAJA in respect of the administrative actions and/or decisions taken by them, which had materially and adversely af-



Picture source: Gallo Images/Getty

affected the applicant's rights. The applicant requested a declaratory order in the interests of justice to be complied with within a seven-day period. According to the applicant the purpose of the application '[was] aimed at achieving constitutional transparency and accountability within the legal framework (i.e. the Disaster Management Act [57 of 2002 (the Act)]) that the South African Government elected to utilise in their response to Covid-19'. To facilitate such transparency and accountability the applicant provided detail of which rights and civil liberties had been affected or severely infringed on by the respondent.

Outline of the rights in the Constitution infringed as per Brits application

The right to equality in terms of s 9 of the Constitution by –

- disallowing certain businesses from continuing with trade and by allowing certain classes of persons to have more freedom of movement than others.

The right to human dignity in terms of s 10 of the Constitution by –

- restricting certain persons from attending funerals and preventing family members from visiting ill family members, isolated, in quarantine or at frail care facilities;
- depriving breadwinners, including women, domestic workers, and gardeners from earning livelihoods;
- converting 'normal civil liberties', like leaving one's residence to exercise or going to the beach, into criminal offences, and limiting social, personal, and physical interaction with others.
- forcing testing and quarantine for COVID-19 patients at state provided facilities, 'without having a choice between medical facilities at [one's] disposal'; and
- prohibiting visitations at correctional centres, curtailing movement of citizens without a permit and the implementing of a curfew system.

The right to life, in terms of s 11 of the Constitution, by allowing members of security forces to use deadly force to ensure compliance with COVID-19 measures.

The right to freedom and security of persons in terms of s 12 of the Constitution by –

- being forced to undergo medical testing when showing symptoms of COVID-19 and then being at a quarantine facility if one tests positive;
- being forced to submit to mandatory prophylaxis treatment, isolation, or quarantine without a person's consent; and
- being deprived of the choice to use alcohol and/or tobacco products.

The right to privacy in terms of s 14 of the Constitution by –

- including personal information, positive test results and information on suspected contacts on a COVID-19 Tracing Database without a person's consent.

The right to freedom of religion, belief, or opinion in terms of s 31 of the Constitution by prohibiting and then limiting religious gatherings.

The right to freedom of expression, in terms of s 16 of the Constitution, being limited by criminalising any statement, through any media form, with the intention of deceiving any other person about COVID-19, infection status or any measure taken by government to address COVID-19, without defining deception.

A person's political rights by postponing several by-elections across SA.

The right to freedom of movement and residence in terms of s 21 of the Constitution by –

- confining citizens to their residence, and limiting movement between provinces;
- imposing a night curfew on all citizens; and
- requiring citizens to only enter public places while wearing a face mask and limiting the use of public and/or private transport.

The right to freedom of trade, occupation, and profession in terms of s 22 of the Constitution by –

- forcing the lockdown of businesses and preventing them from generating an income.
- The right to health care, food, water, and social security in terms of s 27 of the Constitution by –
- depriving people of the ability to purchase food and preventing non-governmental organisations, churches, and other community organisations from distributing food;
- failing to provide social assistance with disaster relief grants; and
- suspending certain elective surgeries.

The limitation and/or suspension of the right of children and the right to education by closing schools.

The limitation of the right to access to courts by limiting adjudication of disputes based on urgency.

From the founding affidavit in the *Brits* application, it is clear that numerous rights listed in the Bill of Rights have been affected. This leads us to compare the pandemic measures taken in China with the stringency of those taken and implemented in SA and the extent to which rights have been infringed in the South African context.

Measures taken in China

Worldwide, COVID-19 has infected more than 219 million people. One of the first

cities to go into lockdown was Wuhan in the Peoples Republic of China on 23 January 2020. No exceptions were made regarding transport in and out of the city. All shops were closed except for those selling food or medicine. Some of the areas limited people from leaving their homes 'to one family member every two days to buy necessities. Others barred residents from leaving, requiring them to order in food and other supplies from couriers' (Emma Graham-Harrison and Lily Kuo 'China's coronavirus lockdown strategy: brutal but effective' www.theguardian.com, accessed 5-9-2021). It later progressed to such an extent that officials had to go door-to-door for health checks, forcing those who were ill, into isolation (Graham-Harrison and Kuo (*op cit*)).

When comparing some of the restrictions imposed by Wuhan to that of SA, it is clear there are certain similarities in the type of restrictions, but differences in the extent to which Wuhan imposed their regulations. Unlike the position in Wuhan, persons in SA were allowed to leave their homes to buy necessities. They were not restricted to do so once or every second day.

Many of the restrictions or regulations imposed by the respondents have been lifted or decreased incrementally as SA gradually moved from one level of lockdown to the next and back again. Interprovincial travel is at some levels prohibited and almost all parts of the South African economy have reopened. The ban on the sale of alcohol and tobacco products has been lifted but restrictions remain on the sale of alcohol at some levels of lockdown. With regard to public transport, 'bus and taxi services may not carry more than 70% of the licensed capacity for long-distance travel (200 km or more). Public transport may carry 100% of the licensed capacity for any trip not regarded as long-distance travel' (Tebogo Nkabinde 'New Level 4 lockdown rule – what's permitted and what is not' www.businessstechAfrica.co.za, accessed 5-9-2021). After comparing the extent to which measures have been taken in the original dispensation it is necessary to analyse the reasons for the decisions made by the respondent and whether they were justifiable, in the public interest and specifically catered for within or in terms of the Act.

Legislation framework regulating a disaster

• The Act

The Act is managed by a Cabinet Member who is chosen by the President. A committee must then be established with the Minister, as the chairperson. The committee is responsible for making recommendations to the Cabinet on

issues relating to disaster management, as well as on the establishment of a national framework aimed at ensuring an integrated and uniform approach in SA. A National Disaster Management Centre must be established with the objectives 'to promote an integrated and co-ordinated system of disaster management, with special emphasis on prevention and mitigation' (s 9 of the Act).

The National Centre must specialise in issues concerning disasters and disaster management and monitor whether organs of state and statutory functionaries comply with the Act and the national disaster management framework. It must make recommendations regarding the funding of disaster management and initiate and facilitate efforts to make such funding available. The National Centre has the duty of making recommendations on draft legislation affecting the Act, the national disaster management framework, or any other disaster management issue. It must make recommendations on –

- the alignment of national, provincial, or municipal legislation with the Act and the national disaster management framework; or
- in the event of a national disaster, on whether a national state of disaster should be declared in terms of s 27 of the Act.

When an event occurs, which is seen as disastrous, the National Centre must determine whether the event should be regarded as a disaster in terms of the Act. If so, it must immediately assess the magnitude and severity or potential magnitude and severity of the disaster; classify the disaster as a local, provincial or national disaster and record the prescribed particulars concerning the disaster in the prescribed register. When a national disaster has been determined, the Minister may, by notice in the *Government Gazette*, declare a national state of disaster. When this has been declared the Minister may, after consulting the responsible Cabinet member, make regulations or issue directions concerning –

- (a) the release of any available resources of the national government, including stores, equipment, vehicles and facilities;
- (b) ... the rendering of emergency services;
- (c) the implementation ... of a national disaster management plan ... ;
- (d) the evacuation to temporary shelters ... from the disaster-stricken or threatened area ... for the preservation of life;
- (e) the regulation of traffic to, from or within the disaster-stricken or threatened area;
- (f) the regulation of the movement of persons and goods ... within the disaster-stricken or threatened area;

(g) the control and occupancy of premises in the disaster-stricken or threatened area;

(h) the provision, control or use of temporary emergency accommodation;

(i) the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area;

(j) the maintenance or installation of temporary lines of communication to, from or within the disaster area;

(k) the dissemination of information required for dealing with the disaster;

(l) emergency procurement procedures;

(m) the facilitation of response and post-disaster recovery and rehabilitation;

(n) other steps that may be necessary to prevent an escalation of the disaster ... ; or

(o) steps to facilitate international assistance.'

These powers, may only be exercised for the purpose of assisting, protecting, and providing relief to the public, preventing or combating disruption or dealing with the destructive and other effects of the disaster.

The Constitution

Section 36 of the Constitution determines that 'the rights in the Bill of Rights may be limited only ... to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account' the nature, purpose, extent of the limitation and less restrictive means to achieve the same purpose.

Section 37 provides that 'a state of emergency may be declared ... only when –

(a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and

(b) the declaration is necessary to restore peace and order'. Section 37 further determines that 'a declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only –

(a) prospectively; and

(b) for no more than 21 days ... , unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration of a state of emergency for no more than three months at a time. The first extension of the state of emergency must be by a resolution adopted with a supporting vote of at least 60 percent of the members of the Assembly'.

'(4) Any legislation enacted in consequences of a declaration of a state of emergency may derogate from the Bill of

Rights only to the extent that –

(a) the derogation is strictly required by the emergency; and

(b) the legislation –

(i) is consistent with the Republic's obligations under international law applicable to states of emergency;

(ii) conforms to subsection (5); and

(iii) is published in the national *Government Gazette*, as soon as reasonably possible after being enacted'. Section 37(5) holds that 'no Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise –

(a) indemnifying the state, or any person, in respect of any unlawful act;

(b) any derogation from this section; or

(c) any derogation from the section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3, of the Table' (see next page).

Here are the non-derogable rights that are considered so important that they cannot be limited or suspended under any circumstances.

There is a set legal framework that must be adhered to in the event of a national disaster. In terms of s 27(2) of the Act, the powers and duties given to the Committee and the National Centre must be executed in the public interest. The question remains whether all regulations and declarations made by the respondents were in the public interest.

Analysis and evaluation of the rights infringed

According to the applicant four of the non-derogable rights that have been allegedly infringed during the implementation of the COVID-19 Regulations in SA are the –

- right to equality;
- right to human dignity;
- right to life; and
- right to freedom and security of persons.

The right to human dignity was infringed by restricting human interaction at funerals and visitations, as well as making it a criminal offence to move outside of the boundaries of your own home.

The right to freedom and security was infringed, in that the public has been deprived of rights over their own bodies, forced to submit to mandatory medical treatment and isolation and in some instances criminalised.

The rights of children to education, physical or mental health or spiritual, moral, or social development in terms of s 28 were infringed by the closing of schools and restrictions imposed on social and sports gatherings.

1. Section Number	2. Section Title	3. Extent to which the right is protected
9	Equality	With respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language.
10	Human dignity	Entirely
11	Life	Entirely
12	Freedom and security of the person	With respect to subss (1)(d) and (e) and (2)(c).
13	Slavery, servitude and forced labour	With respect to slavery and servitude.
28	Children	With respect to: - subsection (1)(d) and (e); - the rights in subparagraphs (i) and (ii) of subs (1)(g); and - subsection 1(i) in respect of children 15 years and younger.
35	Arrested, detained and accused persons	With respect to: - subsections (1)(a), (b) and (c) and (2)(d); - the rights in paras (a) to (o) of subs (3), excluding para (d); - subsection (4); and - subsection (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair.

In terms of s 27 of the Act, the best-case scenario should reflect the least possible reasonable infringement of non-derogable rights as, by virtue of their description, they are non-derogable. The intention of the Act is to provide a guideline within which disasters should be dealt with in the public interest while keeping in mind our Constitution.

The COVID-19 legislation and its amendments have affected almost all South African citizens and were sig-

nificant in nature. Specific areas of concern were identified in the *Brits* matter and these issues will create a catalyst for legal challenges in our courts in the foreseeable future. The overall picture presents a rather pessimistic prognosis for the relationship between government and citizens as government appears to have unjustifiably infringed on several non-derogable rights, which if litigated on, will expose our legal system to unprecedented strain.

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A hard pill to swallow – an evaluation of the causes of the subsistence of pharmaceutical counterfeiting



By Mpho
Adam
Titong



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Pharmaceutical counterfeiting was deemed a global issue in 1985 by the World Health Organisation (WHO). It still is even to this day (this indicates that this crime has been succeeding for a significant number of years, when it should not have succeeded (KML Acri née Lybecker 'Pharmaceutical Counterfeiting: Endangering Public Health, Society and the Economy' (www.fraserinstitute.org, accessed 15-2-2020)).

A safe supply of medicine is essential for public health because when medication or medical product are being developed, it is meant to directly impact the health of its target (in this case the consumers or public who depend on such medication to improve their health) (A Krattiger and RT Mahoney 'Intellectual property and public health' (<https://apps.who.int>, accessed 6-6-2020)). Medicine or medical products, which are fake or substandard and do not meet the international or national standards can never be said to be as good as genuine and/or *bona fide* medication and medical products (the fake ones undersell the genuine ones), therefore, the health of the general public is inherently under threat (EA Blackstone, JP Fuhr and S Pociask 'The Health and Economic Effects of Counterfeit Drugs' (2014) 7(4) *Am Health Drug Benefits* 216).

Considering the context provided above, this article will provide a discussion on the causes of the subsistence of pharmaceutical counterfeiting within South Africa (SA).

Pharmaceutical counterfeiting as the 'perfect' crime

Distinguishing counterfeit medicine or medical products from authentic ones is a difficult task for consumers to carry out, therefore, the crime of pharmaceutical counterfeiting, becomes difficult to detect (M Nelson, M Vizurraga and

D Chang 'Counterfeit Pharmaceuticals: A Worldwide Problem' (2006) 96 *TMR* 1068). In an instance where a patient's health improves due to the use of a medicinal product, such product will not be suspected of being a counterfeit and where the health of a patient deteriorates, such deterioration will typically be attributed to some other factor (such as a patient's medical condition) instead of the medicine itself (Nelson and Chang (*op cit*) 1069). In a case where the medicinal product is suspected, it is often a legitimate manufacturer who gets persecuted and who ends up having to endure injury to their reputation and goodwill (M Nelson and D Chang (*op cit*) 1069).

Pharmaceutical counterfeiting is termed a perfect crime because the evidence (namely, the counterfeit medicine) is destroyed on ingestion and the packaging gets thrown away. Therefore, the counterfeit medicine is not always suspected at first when a patient's condition does not improve because of the inability to visually identify the counterfeit product (DJ Gibson 'Terrorism's Next Target?' www.healthplanusa.net, accessed 10-9-2020).

The fact that pharmaceutical counterfeiting is a crime that is not easy to detect makes it a noteworthy cause of the subsistence of same in any country dealing with the issue of counterfeiting of medicines and medical products.

Lack of regulatory framework and the enforcement of same

Despite efforts by international regulatory agencies, the lack of enforcement of relevant legislation, the inefficient and inadequate regulation and the lack of commitment by the relevant stakeholders has played a major role in the subsistence of

pharmaceutical counterfeiting (R Cartwright and A Baric 'The rise of counterfeit pharmaceuticals in Africa' <https://enact-africa.s3.amazonaws.com>, accessed 11-9-2021). Limited capacity, incapability, lack of proper definition of terms and corruption within regulatory bodies or authorities lead to the lack of regulation and furtherance of the crime of pharmaceutical counterfeiting (Cartwright and Baric (*op cit*) 11).

In many African countries, the enforcement of laws is rarely aimed at combating pharmaceutical counterfeiting, this is because the practice of pharmaceutical counterfeiting is not easy to detect, therefore, the responses aimed at combating it are not adequate (Cartwright and Baric (*op cit*) 12).

Pharmaceutical counterfeiters tend to find the African continent and its countries an easy target because of the lack of armour of responses needed against pharmaceutical counterfeiting, the lack of supply chain regulation, enforcement regimes, as well as the track-and-trace technology (Cartwright and Baric (*op cit*) 2). This context shows the danger related to the lack of regulation and enforcement in as far as the crime of pharmaceutical counterfeiting is concerned.

In a country where pharmaceutical counterfeiting is not adequately or effectively regulated, counterfeiters will flourish in the trade because there are no punitive measures in place against their illegal practice, unless in countries, which have robust laws in place and which enforce such laws accordingly (K Child 'Fake drugs flood SA' (www.timeslive.co.za, accessed 6-8-2020)). In SA, particularly, the large number of ports of entry make it difficult for authorities to regulate the crime of pharmaceutical counterfeiting because of the country's lack of manpower (Child (*op cit*)).

One other important issue attached to the regulation and enforcement of laws against pharmaceutical counterfeiting is the punishment of offenders for infringing intellectual property rights, *in lieu* of punishing such offenders for the death of the victims of counterfeit medicines and medical products. This motivates offenders because they will not be afraid of punishment since it is merely the intellectual property that has been infringed and they are not effectively punished for the murders they commit by counterfeiting medicines and medical products (C Koffi 'Fake medicine is real business in Africa' <https://mg.co.za>, accessed 13-9-2020).

Owing to the large number of illegal pharmacy websites, SA is struggling to deal with the rise of online marketing of counterfeit drugs (this is by virtue of the failure of relevant authorities to carry out routine checks and effectively regulate illegal and unregistered medical networks within the borders of the country) (N Aminu and MS Gwarzo 'The Imminent Threats of Counterfeit Drugs to Quality Health Care Delivery in Africa: Updates on Consequences and Way Forward' (2017) 10 *AJPCR* 63).

An important cause of the subsistence of pharmaceutical counterfeiting which deserves mentioning is the confusion around the term 'counterfeit'. Typically, counterfeit is defined to refer only to the trademark infringement of a pharmaceutical product (such as the definition contained in the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, *in lieu* of making reference to the quality and/or manufacturing of such product, this is an issue because combating pharmaceutical counterfeiting becomes even more difficult since it may not be easy to answer the question of whether or not a pharmaceutical product has been counterfeited (L Menghaney "Counterfeit" confusion diverts action from drug quality' (<https://msfaccess.org>, accessed 10-9-2021). With SA having ratified the TRIPS Agreement, combating pharmaceutical counterfeiting is bound to be a mammoth task by virtue of the confusion around the term 'counterfeit'.

Lack of public awareness and education

In April 2018, an online survey in five countries within the African continent (SA, Egypt, Kenya, Nigeria and Cote d'Ivoire) was conducted to provide an understanding about patient perceptions relating to pharmaceutical counterfeiting (SANOFI 'Fighting falsified medicine in Africa' (www.sanofi.com, accessed 10-9-2020). A total of 2 519 people participated in the online survey.

Among other things, the survey indicated that 97 % of the total number of participants believed they did not know enough to be able to protect themselves against

counterfeit medicines, despite most people being aware of their existence and 44% having actually come across them (SANOFI (*op cit*)). These indications prove the fact that there are South Africans who are still not educated enough about the existence of counterfeit medicines in the market, this causes the subsistence of pharmaceutical counterfeiting because such counterfeit products are bound to be purchased without knowing they are counterfeit.

'If you know the enemy and you know yourself, you need not fear the result of a hundred battles' (A Parmar '10 Quotes From "The Art of War" That Will Transform Your Life' <https://medium.com>, accessed 15-9-2020). This quote indicates the fact that knowing what you are up against serves as an important factor when preparing for combat, this equally applies to the general South African public, which is in combat with the scourge of pharmaceutical counterfeiting. Not being educated enough about the existence of counterfeit medicine in the market is the cause of the subsistence of pharmaceutical counterfeiting because such counterfeit medicine will be bought, and the counterfeiters will generate profit and be motivated to continue with their crime since it is proving to be successful and profitable (SANOFI (*op cit*)).

The Internet and pharmaceutical counterfeiting

Using the Internet, counterfeiters are able to sell their illegal goods in large scales, directly to customers and in secured channels (IRACM 'Fake Drugs on the Web'). The reasons for patients using the Internet so frequently are diverse and unlimited, some use the Internet because of the low prices when compared to prices in pharmacies, some use the Internet to preserve their anonymity when purchasing medicine which treat so-called shameful infections and/or diseases and also, some purchase medicine from the Internet because of their intention to abuse such medicine and feed their addiction (IRACM (*op cit*)). All these reasons are what counterfeiters exploit in carrying out their crime because they provide exactly what is demanded by patients and the crime is therefore able to subsist.

Since it is relatively difficult to identify anonymous Internet websites and track and trace counterfeit products, the Internet is deemed to be a provider of vast and optimum opportunities for counterfeiters to flourish in their speciality (Nelson and Chang (*op cit*) 1071). This premise is based on the fact that if a customer or patient's health deteriorates by virtue of a counterfeit medicine bought online, such patient has little to no recourse since the physical location or operator of the website where the purchase was made may

be unknown, the seller may be out of the patient's reach and also, the Internet has no border controls (Nelson and Chang (*op cit*) 1071). This is a cause of the subsistence because this manner of sale is beneficial to counterfeiters since they can escape penalties and also, it is a cause of the subsistence, which affects any country that is combating the scourge of pharmaceutical counterfeiting, not a cause that only SA is faced with (Nelson and Chang (*op cit*) 1085).

Summative remarks on the causes of subsistence of pharmaceutical counterfeiting

Pharmaceutical counterfeiting is dubbed the 'perfect crime' because of the difficulty attached to detecting it. Customers tend to find out late (if not ever) that they have ingested a counterfeit medicine (Nelson and Chang (*op cit*) 1069 – 1070). This difficulty referred to serves as the cause of the subsistence of pharmaceutical counterfeiting because if counterfeiters realise that their crime is undetected, they will flourish and continue to commit their crime.

One other cause of the subsistence of pharmaceutical counterfeiting is the lack of regulation and law enforcement (this serves as a cause of the subsistence because counterfeiters are bound to flourish when they realise that the chances of them being punished for their crime are slim if not close to nought) (SANOFI (*op cit*)).

One other major cause of the subsistence of pharmaceutical counterfeiting is the lack of public awareness and education, this is deemed a cause because if the public is not aware of the existence of counterfeit medicine around them then they cannot know when they have purchased such counterfeit products, even if they are aware that counterfeit medicines exist, they still need to know how to spot such counterfeit products (SANOFI (*op cit*)).

Another major cause of the subsistence of pharmaceutical counterfeiting is the Internet. The Internet is deemed a cause of the subsistence of pharmaceutical counterfeiting because, *inter alia*, it is difficult to identify anonymous Internet websites and, patients who are victims of counterfeit medicine have little to no recourse against counterfeiters (IRACM (*op cit*)).

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Holding shadow directors responsible: A UK legislative perspective



By Sipho
Tumelo
Mdhuli

The definition of a 'shadow director' as well as its constituent elements and its application within factual scenarios has been the subject of extensive commentary and the number of high-profile cases in South Africa (SA) has increased. The question of whether shadow directors owe fiduciary duties has troubled academics and the courts for some time.

Section 250 of the United Kingdom (UK) Companies Act 2006 states that a "director" includes any person occupying the position of director, by whatever name called'. If someone acts in the role of a director and performs the functions usually performed by a director, they will be subject to the same fiduciary duties as any other director.

These duties include –

- acting in good faith;
- acting for a proper purpose; and
- acting in the company's best interests.

If a director fails to comply with these duties, they will have to account for the losses suffered by the company.

'Whether someone is identified as a shadow director depends on the type of decisions they make and how often they are involved in the management of the company. Also relevant is the extent to which their instructions are automatically followed by the Board of the company and the scope of their influence' (Prof Rehana Cassim 'South African law is failing to make sure that "shadow directors" are held accountable' www.unisa.ac.za, accessed 9-9-2021).

'The law imposes duties on those who exercise power or control, which affects third parties. Shadow directors, however, have proved something of an anomaly. Until relatively recently a shadow direc-

tor could exercise power and control over the affairs of a company, without having the same duties and responsibilities as *de jure* or *de facto* directors' (Alison Ozanne and Gregory Tee 'Shadow directors – power and influence bring responsibility' <http://aohall.com>, accessed 9-9-2021).

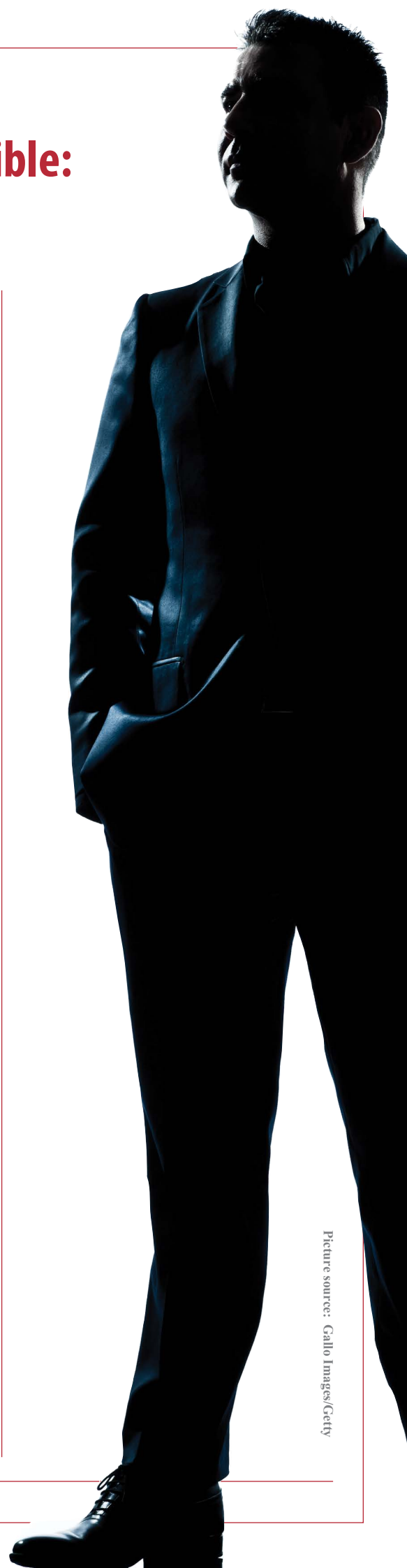
'Section 217 of the Constitution enjoins organs of state in the national, provincial, or local sphere of government to contract for goods or services in accordance with a system that is fair, equitable, transparent, competitive, and cost effective. This requires the state to take positive steps to ensure transparency of all public procurement processes, including through the investigation of allegations of corruption or improper conduct in procurement processes' (Corruption Watch 'Corruption and the law in South Africa – A Quick Reference Guide' www.corruptionwatch.org.za, accessed 9-9-2021).

It is undeniable that 'South Africa [SA] has become notorious for corruption in many of its state-owned entities' (Prof Cassim *op cit*). A shadow director cannot carry out these acts themselves as they have to act behind the scenes as there is a reason that they cannot be appointed formally. For example, a body corporate will not usually be regarded as a shadow director because of its subsidiaries but a 'dominant individual' at the parent company could be. Advice given in a professional capacity (for example by legal practitioners or accountants) is not sufficient to make a person a shadow director, but banks seeking to protect loans made to a company or a 'company doctor' working on a corporate recovery plan could potentially be shadow directors.

A claim of misfeasance or breach of duty cannot be brought against a shadow director (but it can be brought against a *de facto* director) under s 212 of the Companies Act but a claim of wrongful trading can be brought against shadow directors, as well as *de facto* directors (UK Insolvency Act 1986). A shadow director can also be disqualified under the UK Company Directors Disqualification Act 1986.

The UK Small Business, Enterprise and Employment Act 2015 will ensure that shadow directors have legal duties (as set out in ss 170 to 177 of the Companies Act) on the same basis as individual directors.

Shadow directors are not 'properly identified as directors, which means that they are able to escape legal responsibility for their influence and control. Due to conflicting authorities and no clear court



Picture source: Gallo Images/Getty

ruling on this issue, it's unclear whether shadow directors are governed by the Companies Act.

Holding shadow directors accountable for influencing and controlling directors of a board would deter bad behaviour and improve corporate governance. It would go some way to addressing the issue of corruption and the abuse of state-owned entities for personal gain' (Prof Cassim (*op cit*)).

'An intriguing aspect about how decisions [are] made revolves around the role of their [respective] boards, and in particular what influence "shadow directors" [have] over decisions. It may be arguable that some of those responsible for state capture are shadow directors' (Prof Cassim (*op cit*)).

Academics and writers argue that 'one potential upshot of holding shadow directors liable for the same duties as ordinary directors is that they would have to account for the losses suffered by a company due to a breach of their duties.

For example, if a shadow director influenced a state-owned entity to award certain contracts to companies associated with them, they could be held responsible for losses suffered by the company due to their breach of the duties to act in good faith, for a proper purpose and in the company's best interests.

Another upshot is that shadow directors could be held accountable for losses suffered by the company as a result of being a part of fraud committed by the company when the shadow director knew that the act was fraudulent. Where fraud is committed by the company, under the Companies Act a criminal action can be brought against those responsible, resulting in a fine or imprisonment of up to [ten] years' (Prof Cassim (*op cit*)).

In *Standish and Others v The Royal Bank of Scotland PLC and Another* [2019] EWHC 3116 (Ch) the High Court held that a bank that has been a shadow director of its customer will not be liable for breach of fiduciary duty unless the breach is linked to a specific instruction or direction given by the bank.

The claimants were shareholders in a company named Bowlplex Ltd (the Company), which owned and operated sixteen bowling sites across the UK. The Royal Bank of Scotland PLC (the Bank) provided the Company with banking facilities.

'The Company was referred in June 2010 to the Bank's Global Restructuring Group ... , following the Company's breach of its [banking] covenants. As a result, the Company was introduced to West Register Number 2 Ltd (West Regis-

ter), an indirect wholly owned subsidiary of the Bank, and West Register's employee, Mr Sondhi. Mr Sondhi indicated ... that West Register was interested in acquiring 80% of the equity of the Company in exchange for securing the continued support of the Bank.

The Company was subsequently restructured on two occasions. Under the first restructuring, West Register acquired 35% of the Company and the Bank agreed to a restructuring of certain of the Company's indebtedness. It was a condition of the first restructure that West Register would be permitted to appoint an observer to attend the Company's board meeting and a non-executive chairman.

West Register subsequently appointed a chairman with a background as a turnaround consultant. The Company then implemented a company voluntary arrangement under which the Bank wrote off £ 4,5 million of indebtedness and West Register increased its equity holding to 60%. Shortly thereafter, the chairman sacked the Company's managing director and former majority shareholder.

Ultimately, the Company was sold, and West Register was paid £ 13,6 million in respect of its shares' (Herbert Smith Freehills 'High Court upholds strike out of claim based on allegation a financial institution breached fiduciary duties as a shadow director of its customer' <https://hsfnotes.com>, accessed 10-9-2021).

The claimants alleged that the Bank and West Register conspired to obtain the claimants' equity in the Company using unlawful means. The unlawful means said to be at the root of this claim were put in various ways. In particular, that West Register and/or Mr Sondhi breached the fiduciary duties to the Company that they had assumed as shadow directors. In effect that they were acting in their own best interests and not in the interest of the Company, contrary to ss 172(1) and 175(1) Companies Act 2006.

It was not suggested that the Bank or Mr Sondhi were *de facto* directors. 'A *de facto* director is a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director' (Sean Tan Yang Wei 'The De Facto Director' www.thomasphilip.com, accessed 10-9-2021).

These claims had failed before Chief Master Marsh at first instance. He held that the claim had no prospect of success, and the proceedings were struck out. The main difficulty for the claimants was that the decisions taken by the directors were taken of their own free will. The directors were not instructed to take specific steps as claimed, by West Register or Mr Sondhi.

The appeal

The claimants sought to further amend

their particulars of claim to argue that as shadow directors, West Register and Mr Sondhi assumed all the duties of a *de jure* director. The basis of this claim was s 170(5) of the Companies Act, which reads: 'The general duties apply to shadow directors where, and to the extent that, the corresponding common law rules or equitable principles so apply'.

That would include the duty to act in the best interests of the Company. For the purposes of the appeal, the court was prepared to assume that West Register and Mr Sondhi were shadow directors.

Mr Justice Trower referred to the decision of David Richards J in *McKillen v Misland (Cyprus) Investments Limited* [2012] EWHC 521 (Ch). That decision noted that the duties owed by shadow directors are limited in extent. This was further illustrated by the fact that the status of shadow directorship can be acquired or imposed where the relevant instructions do not extend over all (or even most) of the company's activities or affairs.

This approach was well established in the insolvency context before the enactment of the Companies Act. Reference was made to Morritt LJ's judgment in *Secretary of State for Trade and Industry v Deverell* [2001] Ch 340 where it was said that it is not necessary for the shadow director's influence to be exercised over the whole field of its corporate activities.

That being so, 'section 170 of the 2006 Act cannot be read as imposing the full range of fiduciary duties owed by a *de jure* director on somebody merely because they have acquired the status of a shadow director. Put another way, because the status of shadow directorship can be acquired through the giving of instructions that are limited to only some part of a company's activities or affairs, there can be commensurable limitations on the nature and extent of the duties that they will thereby owe' (*Standish* at para 55). As a result the appeal was dismissed.

Conclusion

I for one agree with fellow colleagues that South Africa 'needs to take urgent action to end the uncertainty about whether or not shadow directors are governed by the Companies Act. This will require amending the definition of a "director" in the Companies Act so that it unambiguously recognises shadow directors' (Prof Cassim (*op cit*)).

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Navigating the way of alternative dispute resolution through rough seas

Picture source: Gallo Images/Getty



By
Tshepo
Mashile



In its essence, the law of the sea divides the sea into zones and specifies the rights and duties of countries in the use and conservation of the ocean environment and its natural resources. Every coastal country has jurisdiction over maritime space by international conventions. The 'maritime zones of two States frequently meet and overlap, and the line of separation has to be drawn to distinguish the rights and obligations between the States, which is what maritime delimitation is about' (Nugzar Dundua 'Delimitation of the Maritime Delimitation of the Maritime Boundaries between the adjacent Boundaries between the adjacent States' www.un.org, accessed 8-9-2021). After the establishment of the United Nations and the International Law Commission under its auspices, the third United Nations Convention on the Law of the Sea (UN-

CLOS) led to the adoption of the most comprehensive conventions on the law of the sea.

In 2009, the International Court of Justice (ICJ) had occasion to set out a proper interpretation of the law regarding maritime delimitation programmatically and with long-term effect in the 2009 Black Sea case of *Romania v Ukraine (Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009*, p. 61 (www.icj-cij.org, accessed 6-9-2021). This article, however, is based on a 2017 judgment (on preliminary objections) of the ICJ in the Indian Ocean case of *Somalia v Kenya (Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017*, p. 3 www.icj-cij.org, accessed 6-9-2021)). A 'public hearing sitting' on the merits of the dispute was scheduled to be held from 15 March

2021 to 24 March 2021. Oral arguments were presented by Somalia on 15 and 16 March 2021. Kenya did not participate in the hearings and deliberations by the court are underway.

Somalia and Kenya are adjacent countries on the coast of East Africa. Both countries signed the UNCLOS on 10 December 1982 and ratified UNCLOS on 2 March and 24 July 1989, respectively, and the Convention entered into force for the parties on 16 November 1994. 'Under Article 76, paragraph 8, of UNCLOS, a State party to the Convention intending to establish the outer limits of its continental shelf beyond 200 nautical miles shall submit information on such limits to the Commission on the Limits of the Continental Shelf (... CLCS ...). The role of the [CLCS] is to make recommendations to coastal States on matters related to the establishment of the outer

Kenya and Somalia were among those States to which this time-limit applied.

In June 2008, at the eighteenth Meeting of States Parties to UNCLOS, it was decided that the ten-year time-limit could be satisfied by the submission to the Secretary-General of the United Nations [SG] of preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles ...

On 7 April 2009, the Kenyan Minister for Foreign Affairs and the Somali Minister for National Planning and International Cooperation signed a “Memorandum of Understanding [MOU] ... to grant to each other no-objection in respect of submissions on the outer limits of the continental shelf beyond 200 nautical miles to the Commission on the Limits of the Continental Shelf” ... On 14 April 2009, Somalia submitted ... preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles, enclosing a copy of the MOU. On 6 May 2009, Kenya deposited with the CLCS its submission with respect to the continental shelf beyond 200 nautical miles. On 3 September 2009, ... Kenya made an oral presentation of its submission’ (*Somalia v Kenya (op cit)*).

The MOU was registered by the Secretariat of the United Nations on 11 June 2009 at Kenya’s request. However, by a letter dated 2 March 2010 Somalia informed the SG that the MOU had been rejected and requested that it be treated ‘as non-actionable’. The parties to the agreement subsequently engaged in negotiations on the various questions of the delimitation.

On 21 July 2014, Somalia deposited with the CLCS its submission with respect to the outer limits of the continental shelf beyond 200 nautical miles. On 28 August 2014, Somalia filed in the Registry of the Court, an application instituting proceedings against Kenya concerning, *inter alia*, a dispute in relation to the establishment of a single maritime boundary between Somalia and Kenya in the Indian Ocean delimiting the territorial sea, exclusive economic zone, and continental shelf, including the continental shelf beyond 200 nautical miles.

In the ICJ, Somalia invoked, as the basis for the jurisdiction of the court, the declarations which Somalia and Kenya have made under art 36, para 2, of the Statute of the Court. In the view of Somalia, no condition or reservation to either declaration applies. Kenya, however, raised two preliminary objections. One concerns the jurisdiction of the court. This article is based on this preliminary objection.

The preliminary objection by Kenya on jurisdiction

In this preliminary objection, Kenya as-

serted that one of the reservations in its declaration accepting the compulsory jurisdiction of the court applies in this case for two reasons. ‘First, Kenya contended ... in the MOU the parties agreed on a method of settlement of their maritime boundary dispute other than having recourse to the court Secondly, Kenya argued that Part XV of the [UNCLOS] makes provision for methods of settlement of disputes concerning the interpretation or application of UNCLOS As neither party has made a declaration regarding the choice of one or more means of dispute settlement pursuant to article 287, paragraph 1, of UNCLOS, Kenya submitted that the parties were deemed, under paragraph 3 ... , to have accepted arbitration in accordance with Annex VII to UNCLOS for the settlement of disputes concerning the interpretation or application of the Convention. According to Kenya, the relevant provisions of UNCLOS on dispute settlement, therefore, amount to an agreement “to have recourse to some other method or methods of settlement” ...’ (Ousa Okello ‘An Analysis of the Decision of the International Court of Justice in the Maritime Delimitation case between Somalia and Kenya with Regard to Preliminary Objections Raised by Kenya’ www.academia.edu, accessed 8-9-2021).

‘For its part, Somalia [argued] that the MOU does not establish a method for resolving the delimitation dispute between the parties and that, consequently, Kenya’s reservation did not apply Moreover, it disagreed with Kenya’s assertion that Part XV of UNCLOS falls within the scope of Kenya’s reservation. In Somalia’s view, the agreement of the parties to the jurisdiction of the court – expressed through declarations under article 36 ... – takes priority ... over the procedures provided for in section 2 of Part XV’ (*Somalia v Kenya (op cit)*).

The MOU

The MOU caused some domestic controversy in Somalia in the months after it was signed. It was debated and rejected on 1 August 2009. Several years later, in a letter to the SG dated 4 February 2014, Somalia maintained that ‘no [MOU] is in force’, highlighting that ratification thereof had been rejected by the Parliament of Somalia.

In this case, Somalia did not expressly invoke the alleged invalidity of the MOU as a reason for rejecting the preliminary objection raised by Kenya. It took the view that it is unnecessary to determine the legal validity *vel non* of the MOU on the basis that even if it were effective (*quod non*), it does not constitute an agreement on a method for settling the parties’ maritime boundary dispute, let alone one that could preclude this ICJ from resolving it.

limits of their continental shelf beyond 200 nautical miles ... Pursuant to Article 4 of Annexure II to UNCLOS, a State party intending to establish such limits shall submit the required information to the [CLCS] “as soon as possible but in any case within [ten] years of the entry into force of [the] Convention for that State”.

In May 2001, bearing in mind the difficulties encountered by some developing States in meeting the requirements of Article 4 ... , the eleventh Meeting of States Parties to UNCLOS decided that the ten-year period ... would be deemed to have commenced on 13 May 1999 for those States parties to the Convention for which UNCLOS had entered into force before 13 May 1999 Consequently, the ten-year time-limit for such States to make their respective submissions to the CLCS was due to expire on 13 May 2009.

For its part, Kenya [argued] that the MOU is an international treaty, duly registered pursuant to article 102 of the Charter of the United Nations, which is legally binding on the parties. In respect of Somalia's earlier contentions regarding ... ratification, Kenya [emphasised] that the MOU did not refer to a need for ratification, but instead provided "in categorical terms" for its entry into force "upon its signature". In addition, it contended that there was "nothing in the exchanges leading to adoption of the MOU suggesting that the parties ever considered a requirement of ratification" and that there is no evidence that its representatives were ever told of such a requirement.

Kenya [argued] that the validity of the MOU was confirmed in Somalia's April 2009 submission of preliminary information to the CLCS' and 'that any inconsistency with the internal law of Somalia did not affect the validity of the MOU under international law' (*Somalia v Kenya (op cit)*).

Determination of the validity of the MOU

The court considered that in order to determine whether the MOU has any effect with respect to its jurisdiction, it was appropriate first to address the issue whether the MOU constituted a treaty in force between the parties.

'Under the customary international law of treaties, which is applicable in this case since neither Somalia nor Kenya is a party to the Vienna Convention, an international agreement concluded between States in written form and governed by international law constitutes a treaty (see *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 429, para. 264 ...). The MOU is a written

document, in which Somalia and Kenya recorded their agreement on certain points governed by international law. The inclusion of a provision addressing the entry into force of the MOU is indicative of the instrument's binding character. Kenya considered the MOU to be a treaty, having requested its registration ... and Somalia did not protest that registration until almost five years thereafter ...

In respect of Somalia's contentions regarding the ratification requirement under Somali law, the court recalled that, under the law of treaties, both signature and ratification are recognised means by which a State may consent to be bound by a treaty. As the court has previously outlined: "While in international practice a two-step procedure consisting of signature and ratification is frequently provided for in provisions regarding entry into force of a treaty, there are also cases where a treaty enters into force immediately upon signature. Both customary international law and the Vienna Convention on the Law of Treaties leave it completely up to States which procedure they want to follow" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 429, para. 264).

The court [noted] that the MOU provides, in its final paragraph, that "[t]his Memorandum of Understanding shall enter into force upon its signature" and that it does not contain a ratification requirement. Under customary international law as codified in article 12, paragraph 1(a), of the Vienna Convention, a State's consent to be bound is expressed by signature where the treaty so provides' (*Somalia v Kenya (op cit)*). Considering the express provision of the MOU that it shall enter into force upon signature, the court concluded that this

signature expressed Somalia's consent to be bound by the MOU under international law. The court concluded that the MOU is a valid treaty that entered into force upon signature and is binding on the Parties under international law.

Court's finding on the preliminary objection jurisdiction

Kenya's 'acceptance of the court's jurisdiction [in the declaration] extends to "all disputes" ... except those for which the parties have agreed to resort to a method of settlement other than recourse to the court. ... Part XV of UNCLOS does not provide for such other method of dispute settlement Accordingly, this dispute does not, by virtue of Part XV of UNCLOS, fall outside the scope of Kenya's optional clause declaration.

A finding that the court has jurisdiction gives effect to the intent reflected in Kenya's declaration, by ensuring that the dispute is subject to a method of dispute settlement. By contrast, because an agreed procedure within the scope of article 282 takes precedence over the procedures set out in section 2 of Part XV, there is no certainty that this intention would be fulfilled were this court to decline jurisdiction ... ' (*Somalia v Kenya (op cit)*). Considering all these considerations, the court concluded that 'the force of the arguments militating in favour of jurisdiction is preponderant', and that this case does not, by virtue of Part XV, fall outside the scope of the parties' consent to the court's jurisdiction.

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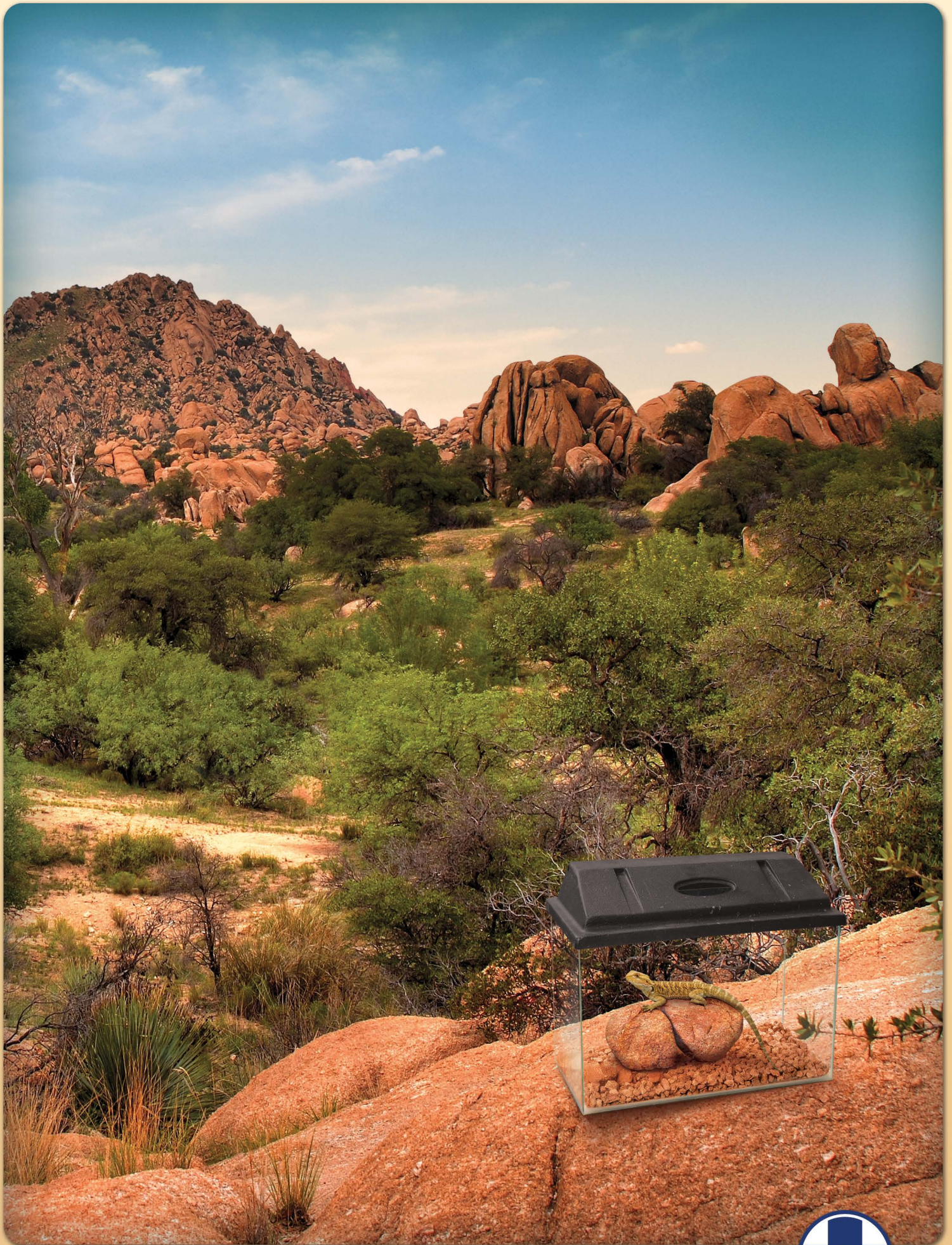
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By
Merilyn
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THE LAW REPORTS

August [2021] 3 All South African Law Reports
(pp 299 – 645) August 2021 (8) Butterworths
Constitutional Law Reports (pp 807 – 928)

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

Abbreviations:

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

Arbitration

Initiation of arbitration proceedings: In *Samancor Holdings (Pty) Ltd and Others v Samancor Chrome Holdings (Pty) Ltd and Another* [2021] 3 All SA 342 (SCA), the terms of a sale of shares agreement the first respondent, Samancor Chrome Holdings (Pty) Ltd (SCH) acquired a chrome business from the second respondent, Samancor Chrome Ltd (Samancor Chrome) by buying the shares in Samancor Chrome from the first appellant, Samancor Holdings (Pty) Ltd (Samancor Holdings). The second and third appellants BHP Biliton SA Ltd (BHP) and Anglo South Africa Capital (Pty) Ltd (ASAC) were Samancor Holdings' shareholders.

The defined effective date of the agreement was 1 June 2005. In terms of the agreement, that was the date on which the parties implemented their agreement economically. It was not possible, however, for the restructuring and transfer of shares to SCH to be completed by that date. The agreement contained an indemnity clause in respect of Samancor Chrome's income tax up to a stipulated date. In terms of a time-bar clause, proceedings in respect of the income tax indemnity had to be issued before the sixth anniversary of the effective date of 1 June 2005. The six-year time-bar expired on 1 June 2011. On 16 August 2011, the South African Revenue Service began an investigation into Samancor Chrome's tax affairs, including its 2005 tax year. That resulted in an additional assessment, which increased the original assessment of taxable income. SCH and Samancor Chrome (the claimants) initiated arbitration proceedings against Samancor Holdings, to recover the amount paid as additional tax.

The effect of the arbitration ruling (on appeal) was that the claimants were required to have the period for initiating the arbitration proceedings extended in terms of s 8 of the Arbitration Act 42 of 1965. The claimants' application to the High Court for such extension was granted, leading to the present appeal.

The court, per Rogers AJA (Mbatha, Navsa, Saldulker JJA and Ledwaba AJA concurring) held that s 8 allows for the extension sought by the claimants where a court is of the opinion that in the circumstances of the case, undue hardship would otherwise be caused. The hardship, which the section contemplates, is hardship to the claimant because its claim is time-barred. To be regarded as undue, the hardship must be unwarranted or inappropriate because it is excessive or disproportionate.

It could not be found that the High Court was guilty of any legal or factual misdirection in assessing the claimants' delay in launching their s 8 application. In exercising its discretion, that court considered factors, which had a material bearing on the question of the claimants' delay. The appeal was dismissed with costs.

Civil procedure

Application for decision on lawfulness of arrest and confiscation of property pending criminal proceedings: The applicant in *Gigaba (born Mngoma) v Minister of Police and Others* [2021] 3 All SA 495 (GP) was married to a former national Minister (Mr Malusi Gigaba). In July 2020, the fourth and fifth respondents, being police officials and members of the Hawks, arrived at the Gigaba home to investigate two alleged offences. The first was malicious damage to property in respect of a Mercedes Benz G-Wagon, and the second related to *crimen injuria* in respect of a WhatsApp message, which had been sent from the applicant's cellular phone to an associate of Mr Gigaba. Two days after the first visit, the police officers returned and demanded all the

applicant's electronic communication devices in connection with the *crimen injuria* complaint. A week later, they arrested the applicant.

In the present application, the applicant challenged the lawfulness and constitutionality of her arrest and prosecution, and of the confiscation of the electronic communications equipment.

The respondents raised two points *in limine* regarding urgency and the court's jurisdiction to grant the relief sought and opposed the application on the merits.

Rule 6(12) of the Uniform Rules of Court sets out the principles for establishing urgency. One of the requirements is an explanation for the applicant's belief that substantive redress in due course was unattainable. Based on the respondents' conduct, the court was satisfied that the applicant would not obtain redress in due course as she would be subjected to continuous violations to her dignity, restrictions of movement, invasion of privacy and abuse of power.

Regarding jurisdiction, the respondents argued that the criminal court in which the applicant was to be tried was the correct forum to deliberate on the constitutionality of the arrest and admissibility of evidence. The court considered the applicant's interest in the matter, and whether the alleged illegality directly affected her rights. The complaint of confiscation of the applicant's property without a warrant and the refusal of the right to legal representation established such interest. The court, therefore, did have jurisdiction in the matter. The application of the principle of natural justice involves striking a balance between public and private interest.

The court found compelling reasons why the issues raised by the applicant should be addressed by it. There were serious allegations of breach of the applicant's privacy and abuse of power by the applicant's politically affiliated husband who directed a domestic dispute to the Directorate for Priority Crime Investiga-

tion under the guise of a conspiracy to commit murder against him. The court was satisfied that it should intervene before the criminal proceedings properly commenced.

In considering the lawfulness of the arrest, the court could not find that the magistrate who issued the warrant acted *mala fides*. The next question was whether the police officers' decision to arrest the applicant was lawful and whether they were responsible for the malicious prosecution of the applicant. Where a warrant of arrest is requested under the pretext that it is acquired for a legitimate purpose while in fact the intention is not to use it for that purpose, but for another unauthorised purpose such person acts *mala fide* and *in fraudem legis*. The court confirmed that the arresting officers abused their powers, presumably to avenge a complaint made by Mr Gigaba and not for any lawful purpose. The arrest was accordingly *in fraudem legis*. Based thereon; the confiscation of the applicant's possessions was unlawful. As the items seized had already been returned, the respondents were directed to restore all information unlawfully removed from the applicant's electronic equipment.

Corporate and commercial

Business rescue – effect of termination on surety's obligations: As a prerequisite for its supplying a company Blue Chip Mining and Drilling (Pty) Ltd (BCM) with petroleum products on credit, the respondent, Auto Commodities (Pty) Ltd (Auto Commodities) required the appellant Mr Van Zyl to bind himself as surety for BCM's resulting liabilities, which he did in July 2014. In December 2014, BCM was placed under business rescue. After adoption of a business rescue plan, Auto Commodities received two dividends. The business rescue terminated on 31 January 2017 because of its substantial implementation. On 21 July 2017, Auto Commodities issued summons against Mr Van Zyl for an amount in excess of R 6 million, representing the shortfall regarding BCM's original indebtedness. Its claim, based on the deed of suretyship, was upheld in the High Court.

In *Van Zyl v Auto Commodities (Pty) Ltd* [2021] 3 All SA 395 (SCA) on appeal, the only issue between the parties was whether Mr Van Zyl was liable under the deed of suretyship to pay the amount claimed by Auto Commodities. His contention was that, when BCM's business rescue was terminated, s 154(2) of the Companies Act 71 of 2008 (the Act) released BCM from any further indebtedness to Auto Commodities. He submitted that that in turn released him from liability because suretyship is an accessory obligation.

The business rescue plan contemplated a compromise between the debtor and one or more of its creditors, in which case there would be an unpaid balance for which the surety would remain liable. A liquidation would be one instance of such circumstances. Even if BCM as principal debtor was released from its obligations, Auto Commodities' rights under the suretyship were unaffected and, whether or not it supported the business rescue plan, it did not operate as an abandonment of its claim against Mr Van Zyl.

The court addressed Mr Van Zyl's legal point as leave to appeal had been granted based on that point. The starting point for Mr Van Zyl's argument was s 154 of the Act, which is directed at the consequences of approval and implementation of the business rescue plan for the enforcement by creditors of any debt that existed prior to the business rescue process. It provides that the creditor will not be able to enforce the debt except to the extent provided for in the business rescue plan. The section did not support Mr Van Zyl's arguments that Auto Commodities could no longer enforce any debt, which was owing to the creditor by BCM prior to the business rescue; that as a result of the implementation of the business rescue plan, BCM did not owe anything to the creditor; and that the accessory suretyship obligation was discharged. An inability to enforce a debt is not necessarily an indication that the debt has been discharged. If the whole or a part of the debts of a company become unenforceable as a result of the adoption and implementation of a business rescue plan, the fact that some creditors may pursue the balance of their claims against sureties, who will have a right of recourse against the company, does not negate the purpose of business rescue. Section 154(2) does no more than preclude creditors from pursuing claims against the company after the business rescue plan has been implemented. It does not affect or extinguish the liability of a surety for the debt. The appeal was dismissed with costs.

Corporate and commercial

Extension of powers of liquidators: The applicant in *Massyn v De Villiers NO and Others* [2021] 3 All SA 578 (WCC) was one of two directors in a company, which was finally liquidated on 9 November 2020. The company had conducted business as a fund manager trading in foreign currencies. Three investors/creditors, who had invested more than R 20m, had sought the company's liquidation when it was unable to honour their withdrawal request – made after investigations revealed that the company's business activities were fraudulent and in contravention of financial services legislation.

As provisional liquidators of the company, the second and third respondents had obtained an order extending their powers to include establishing an inquiry into the affairs of the company in terms of s 417 of the Companies Act 61 of 1973, appointing the first respondent (Mr de Villiers) as commissioner and authorising him to summon persons to be examined at the inquiry. The inquiry was adjourned pending the outcome of the present application for rescission of the order, which established the inquiry and extended the powers of the respondents. In the alternative, the removal of Mr de Villiers as commissioner and setting aside of the subpoenas issued by him, was sought.

In support of the application, it was contended that the liquidators had failed to establish a jurisdictional requirement, namely, that the company was unable to pay its debts in the course of being wound up. A related argument was that no s 417 inquiry could be established before the company had been placed in final liquidation, it being common cause that the impugned order was made while the company was in provisional liquidation.

The court, per Bozalek J, held that to claim that the jurisdictional fact of the company's inability to pay its debts had not been established, the applicant had to go further and at the very least assert that the company was able to pay its debts at the material time. However, at no stage prior to the granting of either the provisional or the final liquidation order was it ever asserted on behalf of the company that it was able to pay its debts. The order could, therefore, not be set aside on that basis. The applicant also averred that the liquidators had sought and been given powers without making out a case therefor. Section 386 of the Companies Act deals with the powers of liquidators and provides for a court, if it deems fit, to grant leave to a liquidator to do anything, which the court may consider necessary for winding-up the affairs of the company and distributing its assets. The court found that the provisional liquidators had established a case that all the powers they sought were necessary for them in their role as provisional liquidators, save for the power to sell movable assets and to agree to any reasonable offer of composition.

Turning to the alternative relief, the court considered the allegations of bias levelled against Mr de Villiers. It concluded that the conduct referred to could never justify a reasonable apprehension of bias on the part of the commissioner by the applicant or someone in his position.

Apart from the two minor amendments to the impugned order, the application was dismissed with costs.

Lease

Cession of rights under long-term lease:

Applicant, the University of Johannesburg (UJ) and first respondent, Auckland Park Theological Seminary (ATS) in *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (3) BCLR 807 (CC) concluded a co-operation agreement in 1993, which provided, *inter alia*, that students who registered for theological degrees, would be taught some courses by UJ and others by ATS. In December 1996, UJ and ATS also concluded a written long-term lease agreement whereby UJ leased some immovable property belonging to it to ATS on which ATS intended to establish a theological college. The lease was registered against the title deed of the property. It was to endure for a period of 30 years, renewable with six months' written notice by ATS prior to the expiry of the period. ATS paid UJ a once-off rental of R 700 000. This all occurred with the approval of the Minister of Education. ATS did not ultimately establish a theological college on the leased premises. Instead, it ceded its rights under the lease agreement to second respondent (Wamjay) by means of a written cession. Wamjay paid ATS R 6 500 000 for the rights under the lease agreement. Wamjay's intention was to establish a religious-based school for primary and high school education on the leased premises. This occurred without UJ, or the Minister being notified beforehand. When UJ learnt of the cession, it took the view that the rights in the lease agreement were personal to ATS and that ATS had, therefore, repudiated the lease agreement by purporting to cede to Wamjay rights that were incapable of cession. UJ thus purported to accept ATS's repudiation and cancelled the lease agreement. ATS and Wamjay disputed UJ's right to cancel the lease agreement. UJ applied to the High Court for orders evicting ATS and Wamjay from the leased premises and cancelling the registration of the notarial lease against the title deed.

The High Court found in favour of UJ, holding that the lease was *delectus personae*. An appeal to the Full Court by ATS and Wamjay failed. ATS and Wamjay appealed the finding of the Full Court to the SCA, which upheld their appeal and replaced the order of the High Court with an order dismissing UJ's claim. The SCA, held that all contractual rights can be transmitted unless their nature involves a *delectus personae* or the contract shows that the rights were not intended to be ceded. The restriction on cession imposed by the *delectus personae* concept was simply a manifestation of the general principle that a cession should not disadvantage the debtor. In a long lease the lessor does not expect that the obligations of the lease will be carried

out personally by the lessee throughout the whole term and that there is, therefore, no *delectus personae*. A lessee could therefore cede its rights under a lease without the consent of a landlord, unless the terms of the lease forbade it from doing so. It held that in this case there was nothing in the lease itself that indicated that ATS's rights were not intended to be ceded. UJ had sought to meet that difficulty by adducing oral evidence, but such evidence was plainly inadmissible on the basis of the parole evidence rule. UJ's introduction of that evidence, the SCA found, was done under the guise that it was adduced in respect of the context in which the lease had been concluded. However, properly construed, such evidence was introduced in order to add to, vary or contradict the general words of the lease. The parole evidence rule applied. The evidence should not have been allowed by the High Court. The SCA held that as the basis of UJ's claim could not be supported, the High Court's judgment could not be sustained.

UJ approached the CC seeking leave to appeal against the judgment of the SCA.

The CC in a unanimous judgment per Khampepe J (Mogoeng CJ, Jafa, Madlanga, Mhlantla, Theron Tshiqi JJ and Mathopo AJ concurring) granted leave to appeal and upheld the appeal.

The court considered the principles surrounding the concept of *delectus personae*, together with the general principles of contractual interpretation. The court confirmed that a court interpreting a contract has to, from the outset, consider the contract's factual matrix, its purpose, the circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract. Although this does not mean that extrinsic evidence is always admissible, there will be times where contextual evidence will be necessary for interpretive purposes. To the extent that the SCA purported to revert to a position where contextual evidence may be adduced only when a contract or its terms are ambiguous, it erred. Context must be considered when interpreting any contractual provision and it must be considered from the outset as part of the unitary exercise of interpretation. The position is no different when the interpretive exercise involves a *delectus personae* inquiry. Contextual evidence ought to have been admitted in this case to determine whether the rights in question were personal to ATS. Contextual evidence in that sense is not precluded by the parole evidence rule because it does not seek to add to, vary, modify or contradict the terms of the agreement. Rather, that evidence gave context and background to the lease agreement, which could be used by a court in its interpretation of that agree-

ment. It assisted in seeking to ascertain whether the circumstances gave rise to an intention of the parties (at the time of the conclusion of the agreement) that the rights were personal to ATS.

The CC found that in adopting such an interpretive approach the High Court's finding could not be faulted. The rights were clearly personal to ATS. Given the nature of the rights, ATS's cession of those rights to Wamjay effectively rendered the contract inoperative. UJ could thus reasonably conclude that ATS had repudiated the lease agreement. UJ was accordingly entitled to cancel the agreement.

Local government

Decision of council to remove member of executive committee, holding position of mayor, from office:

The respondent in *Inguza Hill Local Municipality and Another v Mdingi* [2021] 3 All SA 332 (SCA) was a member of the executive committee of the first appellant (the municipality) and was elected as mayor on 3 August 2016. On 23 January 2019, he was removed from his position following a resolution taken by the municipal council ostensibly acting in terms of s 53(1) of the Local Government: Municipal Structures Act 117 of 1998 (the Act). The respondent took the municipality's decision on review to the High Court, which set aside the council's decision on the ground of non-compliance with s 53 of the Act.

A member of the executive committee vacates office, in terms of s 47 of the Act, if, *inter alia*, removed from office as a member of the executive committee in terms of s 53. Section 53 requires prior notice of an intention to move a motion for the removal of a member. A mayor is –

- elected from members of the executive committee and vacates office when he resigns;
- removed from office as a member of the executive committee in terms of s 53; or
- ceases to be a member of the executive committee.

The court stated that on a proper reading of s 53, prior notice is to be given to all members of the municipal council. The purpose is to afford the affected member an opportunity to be aware and to consider the motion before it is tabled for discussion. Additionally, it is to provide council members similarly with an opportunity to engage meaningfully in the ensuing debate before a resolution is taken.

The respondent's removal from office was preceded by alleged acts of misconduct involving maladministration by the municipal manager. At a council meeting on 23 January 2019, a motion for his removal was brought by a council member. A resolution to remove the respondent from the position of mayor was taken by a majority vote. The issue of the mo-

tion regarding the respondent's intended removal was not on the agenda for that meeting. Nobody, including those councillors who voted in favour of the motion against the respondent had the benefit of prior notice.

The High Court was correct in making the order it did, and the appeal was accordingly dismissed.

Property

Community schemes – sectional title scheme: As owners of three loft apartments in a mixed-use sectional title scheme, the applicants in *Heathrow Property Holdings No 3 CC and Others v Manhattan Place Body Corporate and Others* [2021] 3 All SA 527 (WCC) objected to a conduct rule adopted by the body corporate of the scheme in 2003. The rule acknowledged the right which owners had to let their units but sought to regulate the terms thereof in respect of short-term rentals for periods of less than six months. The respondents explained that the rule was adopted with a view to addressing security issues pursuant to an increase in short-term rentals of residential units in the scheme.

In 2017, other owners of loft units challenged the ambit and application of the rule by referring a dispute in this regard to the statutory Ombud, as provided for by the Community Schemes Ombud Ser-

vices Act 9 of 2011. The complainants sought to set aside the rule on the basis that it was unreasonable, and sought the setting aside of penalties levied by the trustees as fines. The adjudicator found the rule to be reasonable and fair.

It was held, as per Sher J that the application had been brought on an urgent basis without any basis, therefore, being established. Secondly, the applicants did not set out any instances where they were unjustifiably refused permission to let their units on a short-term basis since February 2020. Consequently, they had no standing to bring an application in that regard.

A further issue raised by the court was that the application effectively sought to bypass the dispute resolution mechanisms, which have been established by the Community Schemes Ombud Services Act. The issues, which the applicants sought to have determined by the court fell squarely within the ambit of the Act, which provided for the determination of such disputes by an adjudicator. The legislature intended that the primary forum for adjudication of disputes in terms of the Act is to be the Ombud service and the adjudicators appointed by it, who are required to have suitable qualifications and the necessary experience (not only in relation to the adjudication of disputes, but also in relation to community

scheme governance). The High Court is intended to be a secondary, supervisory forum which is to exercise review and appellate jurisdiction (ie, oversight over the discharge by the Ombud and its adjudicators of their duties and powers), and not an adjudicatory jurisdiction.

The matter was consequently struck from the roll, with costs, on the scale as between attorney and client.

Other cases

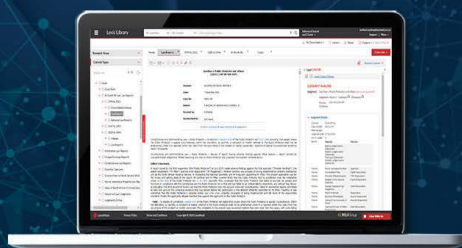
Apart from the cases and material dealt with above, the material under review also contained cases dealing with –

- constitution drawing clear distinction between labour rights and administrative law rights;
- duty of the State to fight corruption;
- jurisdiction confined to constitutional matters and issues connected with decisions on constitutional matters;
- parties signing written document containing words 'subject to signing of agreement';
- rights on insolvency of pledgor; and
- vicarious liability of Ministers.

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Are employees interests overly protected during business rescue proceedings? Striking a balance for all stakeholders



By
Mapakiso
Pita

South African Airways SOC Ltd (In Business Rescue) and Others v National Union of Metalworkers and Others 2021 (2) SA 260 (LAC)

The COVID-19 pandemic has seen a lot of businesses closing their doors. South African Airways was already haemorrhaging money prior to the COVID-19 pandemic, which led to its business rescue proceedings.

The Companies Act 71 of 2008 (the Companies Act) affords employees numerous rights during business rescue proceedings. In terms of s 136, employees immediately before the commencement of business rescue proceedings continue to be employed on the same terms and conditions. In addition, s 136 holds that any contemplated retrenchments in the company's business rescue plan are subject to the Labour Relations Act 66 of 1995 (LRA).

The appellant found itself in an unpleasant financial position and went into business rescue. Subsequently, the business rescue practitioners issued s 189(3) notices to the employees of the appellant before the finalisation of a business rescue plan. The respondents argued that the moratorium on retrenchments during business rescue proceedings barred the appellant from undertaking any retrenchment proceedings and the retrenchment proceedings were premature and unlawful because they were raised before the production of a business rescue plan. In the court *a quo*, the court premised its decision on s 136 of the Companies Act. The court held that the aforementioned section provides protection to employees during business rescue proceedings and, as such, dismissals are prohibited.

The main contention in the Labour Appeal Court (LAC) was whether a business rescue practitioner could commence with retrenchment proceedings under s 189 of the LRA prior to the adoption of a business rescue plan as contemplated by s 150 of the Companies Act.

Faced with this question, the LC held

that 'there was complete protection against the employees' dismissal during the business rescue proceedings and found that the present dispute implicated the right to fair labour practices as enshrined in the Bill of Rights'. Emphasis was put on s 136 of the Companies Act, which holds that any need to retrench employees has to be established in a business rescue plan (para 11).

In addition, the court found that there was no explicit provisions in s 136 of the Companies Act that empowered a business rescue practitioner to retrench employees in the absence of a business rescue plan. As such, absent a business rescue plan, the issuing of notices in terms of s 189(3) of the LRA to commence the consultation process was premature and amounted to procedural unfairness (para 12).

Furthermore, the court noted that the primary purpose of a business rescue procedure is not only to save the ailing company or potentially successful parts of the business. The procedure also aims to rescue the whole company or corporate entity, which will include the preservation of jobs (para 29).

The court noted that the replacement of the judicial management system with business rescue was to rescue the ailing company and thus the retention of jobs (para 29). In addition, with reference to interpreting s 136 of the Companies Act, the court referred to its purpose. The purpose of business rescue it held, is as follows:

'[T]he saving of jobs is a high priority for South Africa and the introduction of an effective and successful business rescue procedure was seen by government as an important measure to prevent further job losses. As was to be expected, the protection of the rights and interests of employees in the new business rescue proceedings were emphasised from the

early stages of the corporate law reform process' (para 29).

Furthermore, the court reiterated on the court *a quo*'s judgment, which pointed out that employees in the employ of the company immediately before business rescue proceedings continue to be employed on the same terms and conditions (para 30). There are only three exceptions to this general protection afforded to employees, which are contained in s 136 of the Companies Act.

Moreover, the court held that s 150 of the Companies Act makes it clear that the rescue plan must precede any retrenchments and forestalls any suggestions that retrenchments may take place without a business rescue plan (para 32). Also, the business rescue plan is intended to reorganise the company by crafting a roadmap aimed at rescuing an ailing company including preserving jobs (para 33). The court pointed out that s 150(5) provides that retrenchments must be contained in the plan as contrasted to a piecemeal reconstruction of the company, which would allow a decision on retrenchments prior to the plan being published (para 33). In closing, the court held that its interpretation of s 136 is compatible with both the words and purpose employed by the legislature (para 39).

The court concluded by holding that the issuing of s 189 notices, by the business rescue practitioner's absent a business rescue plan was premature, unfair, and had to be withdrawn (para 40).

The appeal and cross-appeal were dismissed (para 44).

Mapakiso Pita LLB (UFS) is an LLM (Business Entities) student at the University of the Free State. □



By
Zoleka
Ntshingila

The land is theirs

Council for the Advancement of the South African Constitution and Others v Ingonyama Trust and Others 2021 (8) BCLR 866 (KZP)

It is often said that the South African Constitution is the best in the world. However, this would mean nothing if the rights enshrined in the Constitution were not applied in a manner which improves the lives of ordinary South Africans. The *Ingonyama* case is proof that South African courts remain loyal to affirming the supremacy of our Constitution.

The applicants brought a case against the Trust averring that they were hoodwinked into concluding lease agreements with the Trust in respect of land on which they were living based on permissions to occupy and/or informal land rights, which had been passed down pursuant to Zulu Customary law and protected under the Interim Protection of Informal Land Rights Act 31 of 1996. They averred that over the years, the Trust had been undermining the residents' security of tenure by inducing them to enter into leases, which many of them could not afford. The applicants sought an order declaring that these lease agreements were unconstitutional and, therefore, invalid.

The Trust refuted these averments, asserting that s 2(5) of the KwaZulu-Natal Ingonyama Trust Act 3KZ of 1994 (the Act) permitted the Trust to enter into lease agreements with residents of Trust held land subject to obtaining the prior written consent of the traditional authority or community authority concerned. The Trust was of the view that the permissions to occupy were a remnant of the old order, a racially discriminatory way of providing land tenure to black people, and that leases were a more secure instrument as they could be used to secure financing from financial institutions for residential and commercial purposes. In 2007, the Trust launched its 'Permissions to Occupy Conversion Project' through which it ceased issuing permissions to occupy in respect of Trust held land and encouraged all permissions to occupy holders to 'upgrade' their permissions to occupy to 40-year leases. Any new applications for permissions to occupy would be processed as leases.

Brief background on the Trust

The Trust is a corporate body established

under s 2(1) of the Act. The sole trustee of the Trust is the King of the amaZulu (the King). The affairs of the Trust are administered by the Trust Board (the Board). The Trust holds 2,8 million hectares of land in KwaZulu-Natal, which, in terms of s 3(1)(a) of the Act, is held in trust 'for and on behalf of the members of the tribes and communities and the residents' of the Zulu nation.

The court's findings

The court reiterated that permissions to occupy and/or informal land rights are protected under s 25 of the Constitution. As the custodian of the land, the King does not have absolute power to deal with the land. The King's power is limited by and subject to the Act, customary law, legislation, and the Constitution.

Because tenure of residential land under Zulu customary law is perpetual, transferable, and inherited, the actions of the Trust and its Board had the effect of depriving the residents of their customary, statutory and Constitutional rights to property and security of tenure. The conclusion of lease agreements and termination of permissions to occupy terminated the residents' rights of ownership arising from customary law and had the effect of placing such ownership in the hands of the Trust. The permissions to occupy, unlike the leases, were not subject to the payment of rental and could be transferred in certain circumstances and bequeathed down the family line. The leases, on the other hand, stipulate a rental amount that must be paid annually. Failure to pay the stipulated rental constitutes a material breach, which constitutes grounds for termination. The court found that the payment of rental to traditional authorities for tribal land is a practice, which is foreign to Zulu customary law and one which is a violation of this law.

The leases are only for a 40-year term and require that an application for extension be submitted at the end of the term for consideration by the relevant traditional council. Permissions to occupy, on the other hand, continue in perpetuity unless cancelled by the Minister of Rural Development and Land Reform after consultation with the relevant traditional

authority. Property held under a permission to occupy may, in terms of the Land Affairs Act 101 of 1987, be converted to property held under a deed of title. The buildings erected on the land also belong to the holder of the permission to occupy, which is not the case for buildings on leased land which belong to the landlord.

In addition to the disadvantages attached to the leases as set out above, the Trust presented no evidence to prove that the leases would endow the lessees with the commercial benefits which they alleged the leases would.

The court declared that the Trust had breached the Act by failing to administer the land for the 'benefit, material welfare and social well-being of the beneficiaries and residents' of the Trust held land, and 'in accordance with Zulu indigenous law or any other applicable law' (ss 2(2) and 2(4) of the Act).

The Trust was also in violation of the residents' rights under the Interim Protection of Informal Land Rights Act 31 of 1996, which informal land rights cannot be deprived without the informed consent of the holders.

The Permissions to Occupy Conversion Project was found to be unconstitutional to the extent that it violated the residents' rights to property as enshrined in s 25 of the Constitution. The lease agreements concluded pursuant to the Project were declared unlawful and invalid, and the Trust was ordered not only to bear the costs of the applicants' counsel, but to reimburse all rentals received by it from the residents pursuant to the leases.

Zoleka Ntshingila LLB (Wits) (*cum laude*) is a legal counsel in the Absa Commercial Property Finance team and writes in her personal capacity.



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By
Kgomo
Ramotsho

The Superior Courts Act ushered in a new dispensation in territorial jurisdiction of the High Court

Advent Oil (Pty) Ltd v Vuletjeni Trading and Projects (Pty) Ltd (MM)
(unreported case no 4262/2019, 21-6-2021) (Sigogo AJ)

The Mpumalanga Division of the High Court in Mbombela, removed the matter of *Advent Oil* to the Middleburg Local Division of the Mpumalanga High Court. This was after Sigogo AJ said the Mbombela Seat of the Mpumalanga High Court did not have the jurisdiction to entertain the case. The court pointed out that the applicant sought an order for the respondent to be placed under final winding-up in the hands of the Master of the Mpumalanga High Court in Mbombela. The applicant's application was brought in terms of ss 344(f) and 345(1) of the Companies Act 61 of 1973 (the 1973 Act), read with item 9 of sch 5 of the same Act on the ground that the respondent is deemed to be unable to pay its debt. Sigogo AJ added that winding-up of corporations is done in terms of provisions of the Companies Act 71 of 2008 (the 2008 Act). The choice of the applicable Act will primarily depend on the reason for winding-up of the company.

Sigogo AJ said that the Minister of Justice and Constitutional Development has since determined the areas under the jurisdiction (territorial jurisdiction) of the Mpumalanga Division of the High Court. The court pointed out that by now it should have been settled how territorial jurisdiction of the Mpumalanga Division operates. The court added that 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 Supreme Court Act 59 of 1959 (the Supreme Court Act).

Sigogo AJ said that out of habit, without giving attention to the proclaimed jurisdictional boundaries of the Mpumalanga Division the applicant issued court process, falling under the Middleburg area of jurisdiction with the Local Seats. The court added that this is not a separate incident, and added that in discussion with other colleagues it was revealed that this practice is commonplace within the division. The court pointed

out the judgment aims at addressing this notion.

The court held that the Superior Courts Act 10 of 2013 (the Superior Court Act) ushered in a whole new dispensation in as far as territorial jurisdiction of the High Court is concerned. The circumstances under which the High Court may exercise its jurisdiction to hear any matter is provided for under s 21 of the Superior Court Act.

Sigogo AJ said that s 6(3) of the Superior Courts Act is couched differently from s 6(2) of the repealed Supreme Court Act. Under the Supreme Court Act the provincial of the Transvaal, Natal and Eastern Cape were given concurrent jurisdiction with their local divisions the Superior Courts Act whether the Main Seat of a Division will exercise territorial jurisdiction over the entire Province is left in the hands of the Minister who in consultation with the Judicial Services Commission will determine the necessary jurisdictional boundaries of the High Courts. The Main Seat of the same Division on issues of appeals. Put differently, the Superior Courts Act shifted the authority to determine territorial jurisdiction of Divisions of the High Court from the legislature to the executive.

Sigogo AJ pointed out that the areas of jurisdiction of the two seats of the Mpumalanga Division are captured as follows:

- Name of Division: Mpumalanga
- Main Seat: Mbombela
- Area under jurisdiction of the Division: The following magisterial districts and sub-districts with Mpumalanga Province as described in GN492 GG39961/29-4-2016: Bushbuckridge (including Mhala sub-district); Chief Albert Luthuli (including Carolina sub-district) Emgwenya sub-district of eMakhazeni district; Mbombela (including White River and Nsikazi sub-districts); Nkomazi (including Komatipoort sub-district); Thaba Cheu (including Graskop and Sabie sub-districts) and Umjindi.

- Local Seat: Middleburg
- Area of jurisdiction of the local seat: The following magisterial districts and sub-districts within Mpumalanga Province as described in GN492 GG39961/29-4-2016: Dipaleseng; Dr JS Moroka (including Mbibana sub-district); eMakhazeni (excluding Emgwenya sub-district); eMalaheni (including Ga-Nala and Vosman districts); Dr Pixley ka Isaka Seme (including Amersfoort and Wakkerstroom sub-districts); Govan Mbeki (including Bethal and Secunda sub-districts); Lekwa; Mkhondo (including Amsterdam sub-district), Steve Tshwete (including Hendrina sub-district); Thembisile Hani (including kwaMhlanga sub-district) and Victor Kanye.

Sigogo AJ added that in the instances where provincial division has concurrent jurisdiction with the local division, it remains in the hands of the plaintiff or the applicant, guided by the convenience and expense, to choose the forum to litigate from. The court held that the consideration of convenience and expense in these circumstances inevitably will, in the main, be practised in favour of the *dominus litis* much to the inconvenience and expense of the respondent/defendant. The court pointed out that the Superior Courts Act aims to correct this situation. Sigogo AJ said this is the position because it resonates well with s 34 of the Constitution. The court added that the promise of the right of access to justice as enshrined in s 34 of the Constitution is a promise that will be realised if litigants are given access to court in their locality.

Sigogo AJ said that GN615 GG42420/26-4-2019 unequivocally makes it clear that the Main Seat of the Mpumalanga Division does not have concurrent jurisdiction with the Middleburg Local Division to hear matters other than matters of appeal. The court added that the clear intention of the Minister in this regard is demonstrated by the fact that even in respect to the border magisterial district

between the two seats of the Division (eMakhazeni District), the two seats do not have concurrent jurisdiction instead the district is shared between the two seats of the Division.

Sigogo AJ said that during June 2018 the parties concluded an oral agreement for supply of diesel products on a cash on delivery basis. The agreement was later varied to allow payment within 14 days delivery. The respondent fell in arrears. On 25 September 2019 the applicant issued a letter of demand in terms of s 345 of the 1973 Act against the respondent claiming an amount of R 907 777,18. The said letter of demand was delivered by Sheriff at the respondent's previous registered address, which fell under the Main Seat in Mbombela on 30 September 2019.

On 14 October 2019 the applicant prepared the Notice of Motion for the final winding-up of the respondent. On 15 November 2019 the respondent's registered address was changed at the Companies and Intellectual Property Commission (CIPC) from Barberton to Emalahleni, falling under the local seat in Middleburg. Thereafter, on 18 November 2019, the applicant's Notice of Motion was issued by the Registrar of Court at the Main Seat in Mbombela.

On 9 June 2021 the matter appeared before him and on this date the respondent had filed its answering affidavit and the applicant had filed its replying affidavit. In its answering affidavit the respondent averred that the registered offices are not in Barberton but in Emalahleni. The court added that other than making this factual averment no issues were taken in respect of the court's jurisdiction. Sigogo AJ pointed out that it was on those bases that he called on the parties to address the court in respect to jurisdiction of the Mbombela Main Seat to hear this matter. In response to that invitation counsel for the applicant, Mr Masombuka, argued that the High Court in Mbombela had jurisdiction to

entertain the matter on the basis that Emalahleni is within Mpumalanga Province and that the Mbombela Main Seat of the Mpumalanga Division of the High Court has jurisdiction on the whole of the province.

The court held: 'After I had drawn the counsel's attention to Government Gazette number 42420 dated 26 April 2019, he then presented an alternative argument. He argued that this court has jurisdiction because the respondent did not object to the court's jurisdiction, as such it has subjected itself to the court's area of jurisdiction, contends the applicant's counsel'. The court further pointed out that in reply to the respondent's submission the applicant's counsel urged the court, in the interest of justice and not placing form over substance, to continue to hear the matter even though the court does not have necessary territorial jurisdiction over respondent. Failing which, he argued, the court should invoke the provisions of s 27(1) of the Superior Courts Act.

Sigogo AJ said that having regard to the fact that both counsels did not appear to appreciate that his court lacked jurisdiction to hear the matter, he was satisfied that the respondent could be said to have subjected himself to the jurisdiction of the Mpumalanga High Court in Mbombela. The court pointed out that for a litigant to subject himself to a court's jurisdiction such litigant must take a conscious decision to so subject himself. Sigogo AJ added that that meant that the respondent's litigant must firstly know that the court does not have jurisdiction over him, but nonetheless elect to subject himself in that court's jurisdiction. He must consent to the court's jurisdiction.

The court said that to dismiss the matter for lack of jurisdiction will not take away the dispute between parties. 'I did not find the dismissal of this matter to be an answer to the issue of jurisdiction. On the other hand, to proceed with the

hearing of the matter as submitted by counsel for the applicant was going to perpetuate the wrong practice where the parties' issue processes without firstly determining the correct forum having jurisdiction to hear the matter,' Sigogo AJ said. The court arrived at the conclusion that the solution of the matter rested in s 27 of the Superior Courts Act.

The court pointed out that in light of the provisions of GN615 GG42420/26-4-2019 read with s 27 of the Superior Courts Act it became clear that the proceedings of this matter were supposed to have been issued in the Middleburg Local Seat. Sigogo AJ said that having heard counsel for both parties in this regard, he was persuaded that it will be in the best interest of justice that the matter be removed to the court having jurisdiction.

The court made the following order – 'The Mbombela Seat of the Mpumalanga Division of the High Court of South Africa does not have jurisdiction to entertain this matter.

The Seat having jurisdiction to hear this matter is the Middleburg Local Division of the Mpumalanga Division of the High Court of South Africa.

In the circumstance the proceedings herein are removed to the Middleburg Local Division.

The Registrar of the main seat, Mbombela is ordered to forthwith transfer the Court file in this matter together with this order to the Registrar at the local seat Middleburg.

Reasons for the order shall be made available to the parties in due course.

There is no order as to costs.'

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

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By
Philip
Stoop

New legislation

Legislation published from
1 – 31 August 2021

Bills

Employment Equity Amendment Bill B14A of 2020.
Employment Equity Amendment Bill B14B of 2020.
Compensation for Occupational Injuries and Diseases Amendment Bill B21A of 2020.
Compensation for Occupational Injuries and Diseases Amendment Bill B21B of 2020.
Second Special Appropriation Bill B17 of 2021.

Commencement of Acts

Customary Initiation Act 2 of 2021. Commencement: 1 September 2021. Proc35 GG44981/13-8-2021 (also available in isiZulu).
Electoral Laws Amendment Act 4 of 2021. Commencement: 27 August 2021. Proc R35 GG45060/27-8-2021 (also available in Afrikaans).

Selected list of delegated legislation

Agricultural Pests Act 36 of 1983
Control measures relating to the polyphagous shot hole borer. GN R725 GG44983/13-8-2021.
Broad-Based Black Economic Empowerment Act 53 of 2003
Procedures for the application, administration, and allocation of export quotas under the economic partnership agreement between the European Union and the Southern African Development Community for Year 2022. GN786 GG45070/31-8-2021.
Competition Act 89 of 1998
Memorandum of understanding between the Competition Commission and National Agricultural Marketing Council. GN723 GG44981/13-8-2021.
Disaster Management Act 57 of 2002
• **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. GenN442 GG44922/1-8-2021.
• **General regulations**
Extension of the National State of Disaster under the COVID-19 lockdown to 15

September 2021. GN R733 GG44986/12-8-2021.

• **Social development**

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Amendment to the regulations issued in terms of s 27(2): Social relief of distress during the Adjusted Alert Level 3. GN710 GG44950/10-8-2021.

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Amendment of directions regarding measures to prevent and combat the spread of COVID-19 in sports, arts and culture. GN674 GG44924/2-8-2021.

• **Transport**

Amendment of the extension of the validity period of learner's licences, driving licence cards, licence discs, professional driving permits and registration of motor vehicles during the COVID-19 adjusted alert level 3. GN788 GG45073/31-8-2021.

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Amendment of the obligation to apply for and hold a licence. GN737 GG44989/12-8-2021 and GN751 GG45023/20-8-2021.

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Amendment of the Information and Communications Technology COVID-19 National Disaster Regulations. GenN785 GG45069/31-8-2021.

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Medicines and Related Substances Act 101 of 1965

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Mine Health and Safety Act 29 of 1996

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- Search and Seizure Procedure Guide and the Procedure Guide on the Referral of Non-audit Complaints to Accredited Professional Bodies in terms of the Auditing Profession Act 26 of 2005

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- Scope of practice of pharmacists who offer immunisation services, the competency standards for these pharmacists and the criteria for the approval of a course in terms of the Pharmacy Act 53 of 1974 for comment. BN100 GG44981/13-8-2021.
- Proposed amendment of the regulations relating to the protection of geographical indications used on agricultural products intended for sale in South Africa in terms of the Agricultural Product Standards Act 119 of 1990 for comment. GenN467 GG44981/13-8-2021.

- Draft guidelines on collaboration between competitors on localisation initiatives in terms of the Competition Act 89 of 1998 for comment. GN724 GG44981/13-8-2021.
- Scope of practice of primary care drug therapy pharmacists, the competency standards for these pharmacists and the criteria for the approval of a course in terms of the Pharmacy Act 53 of 1974 for comment. BN102 GG44981/13-8-2021.
- Annual single exit price adjustment of medicines and scheduled substances for 2022 in terms of the Medicines and Related Substances Act 101 of 1965 for comment. GN750 GG45022/20-8-2021.

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By
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Compensation for unfair retrenchment and unfair labour practice in relation to post-retirement benefits

In *Total South Africa (Pty) Ltd v Meyer and Others* [2021] 8 BLLR 795 (LAC) an employee was dismissed for operational requirements. The employee had been employed by Total since 1987. He was subsequently seconded to a subsidiary of Total in 1993 and then later Total was sold to Exxaro in 2013. The employee was subsequently retrenched. He was advised at the time that there were no vacancies for him, but he was offered employment on a fixed-term basis with one of the group companies. The employee alleged that he was unfairly dismissed. Furthermore, he alleged that he had been subjected to an unfair labour practice in that he had been denied post-retirement medical benefits.

The dismissal was found to be sub-

stantively and procedurally fair at arbitration. The Labour Court (LC) found that the dismissal was unfair and ordered compensation equal to 12 months' remuneration. This is because there had been no meaningful consultation process followed with the employee and the employee had not been considered for vacancies. Total then challenged the quantum of the award alleging that the compensation was excessive given the fact that the employee had already been paid a substantial severance package. This package included medical aid benefits for two years and severance pay of approximately four weeks' remuneration per year of service. Furthermore, the employee was engaged as a fixed-term employee with another entity shortly after retrenchment (albeit that there was no recognition of past service).

The Labour Appeal Court (LAC) referred to the case law in which it has been held that compensation is not limited to compensating an employee for actual financial loss incurred but is a payment for the infringement of the employee's dignity. Therefore, the compensation award in these circumstances was to compensate the employee for a breach of his rights. The LAC, however, found that the employee was not automatically entitled to the maximum compensation. The court took into account

the fact that the employee had been paid severance pay in excess of the statutory minimum and had received an income for some time after the retrenchment. It was held that this should have been taken into account and it was, therefore, found that in the circumstances compensation equal to six months' remuneration was just and equitable.

As regards the unfair labour practice dispute, the LC had found that it was an unfair labour practice dispute to deny the employee post-retirement medical aid benefits. The LAC found that nine employees who had been retrenched prior to the employee had been paid post-retirement medical benefits. Total alleged that the reason for the differentiation between the nine retrenched and the employee was that the terms and conditions of the 2010 restructuring were only relevant to 2010 and were not applicable to the employee's retrenchment. The LAC held that there was no rational justification for the treatment of the employee compared to the other employees who had previously been retrenched. It was accordingly held that Total had exercised its discretion not to provide post-retirement medical benefits arbitrarily and capriciously and, therefore, Total was ordered to extend post-retirement medical aid benefits to the employee.

Dismissal for misconduct and inconsistent application of discipline

In *Nyathikazi v Public Health and Social Development Sectoral Bargaining Council and Others* [2021] 8 BLLR 778 (LAC) a senior manager was dismissed for two allegations of misconduct for contravening supply chain procedures when procuring goods. This had resulted in irregular expenditure being incurred in contravention of the policies.

At arbitration the arbitrator found that the employee was guilty of approving irregular expenditure. However, it was found that the dismissal was substantively unfair because there had been inconsistent application of discipline in that three other heads of department had also authorised irregular expendi-

ture, but no disciplinary action had been taken in respect of them. The arbitrator found that the employer had provided no 'reliable evidence and reasonable explanation' as to why those three employees were not disciplined and, therefore, the dismissal of the employee was found to be substantively unfair. In addition, the dismissal was found to be procedurally unfair because the disciplinary hearing had continued in the employee's absence after the employee had left the hearing because the presiding officer had arrived late.

The arbitrator, however, found that reinstatement would not be appropriate in the circumstances because the misconduct was serious in that irregular expenditure of more than R11 million had been incurred. This rendered continued employment intolerable, but the arbitrator awarded two months' remuneration

as compensation. This was upheld on review by the LC.

On appeal, the LAC considered the issue of consistency in that there were three other employees who had not been dismissed for committing similar misconduct. It was held that the parity principle did not apply if no evidence had been led regarding the inconsistent treatment of other employees. Furthermore, an employee guilty of serious misconduct cannot rely on inconsistency alone to escape the consequence of their misconduct. The dismissal was therefore found to be fair, and the appeal was dismissed with costs.

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By
Moksha
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Job applicant seeks to set aside the decision of his prospective employer

Booyesen v Beaufort West Municipality and Another (LC) (unreported case no PR160/2019, 15-6-2021) (Van Niekerk J) The respondent, the Beaufort West Municipality (the Municipality) advertised for the post of Director: Community Services. The applicant, who was not an employee of the Municipality, applied for the post, was short-listed and received the highest score among all the candidates who applied for the position. Despite this, the Municipality decided to re-advertise the post.

On his second attempt the applicant was ranked second, however, the Municipality decided to appoint the second respondent, who immediately prior, had resigned as one of the Municipality's councillors and applied for the position.

Arguing that the Municipality's decision was based on political interfer-

ence and corruption, the applicant approached the Labour Court (LC) seeking an order to review the Municipality's decision not to appoint him and to further review and set aside its decision to appoint the second respondent.

The Municipality raised the point that the LC lacked jurisdiction to entertain the applicant's claim.

In dealing only with the point *in limine*, the court began by unpacking the nature of the applicant's claim. Having read the applicant's notice of motion, as well as his founding affidavit, the court concluded that the applicant sought to invoke the legality review as per s 158(1)(h) of the Labour Relations Act 66 of 1995 (LRA), as well as his constitutional right to fair labour practice relying directly on s 23 of the Constitution and indirectly on s 186(2) of the LRA.

The Municipality argued that irrespective of the nature of the applicant's claim, the LC lacked jurisdiction on the grounds that the applicant was never an employee of the Municipality. In amplifying its argument, the Municipality relied on the wording of s 158(1)(h), which states that the LC can review any decision taken by the state as 'employer'. In this case, so it was argued, the Municipality was never the employer of the applicant.

The court firstly addressed the applicant's claim asserting his constitutional right to fair labour practice in terms of s 23 of the Constitution. To the extent the applicant's claim was that his right to fair labour practice had been threatened or violated by the Municipality's actions. The court found it had jurisdiction to hear the matter in terms of s 157(2) of the LRA. Noting that there may be challenges the applicant could face should he pursue such an argument, the court

nevertheless found that those issues were issues, which went to the merits of the applicant's claim and not issues around the court's jurisdiction.

If, however, the applicant sought to rely on any of the provisions in s 186(2) (a) to (d), that being the instances of unfair labour practices set out in the LRA, the court held that it would not have jurisdiction as it is only the Commission for Conciliation, Mediation and Arbitration (CCMA) or the appropriate bargaining council, which could hear such matters.

Turning to the legality review and in particular the wording of s 158(1)(h), the LC stated:

'The LRA seeks, amongst other things, to give expression to the constitutional rights to fair labour practices and the freedom of association. Although the definition of unfair labour practices in the LRA is limited to those persons in employment, section 5(2) of the Act protects persons seeking employment against violations of the right to freedom of association. In other words, the LRA recognises that in some circumstances at least, applicants for employment are entitled to statutory protections of their fundamental rights. ... Section 158(1)(h) makes no reference to an employment relationship with any particular employee. The absence of the pronoun "an" before "employer" is not insignificant. What this indicates is that the sole determinant is that the impugned decision or act must be one performed in the capacity of an employer, not as the employer of the employee seeking the remedy of review. In short, section 158(1)(h) is a self-standing, jurisdiction conferring provision capable of bearing the interpretation for which the applicant contends.'

Moving on to the applicant's heads of arguments, the court addressed the notion that there was a 'contractual dimension' to the applicant's claim. While accepting that the court has jurisdiction to hear contractual claims arising out of an employment contract, the court found there was no employment contract between the applicant and the Municipality. Therefore, there was no contractual dispute before the court.

In summary the court found:

'In so far as the applicant seeks to enforce directly a claim based on the right to fair labour practices, this court has jurisdiction except to the extent that he seeks directly to enforce section 186(2) of the LRA. In so far as the applicant seeks to review and set aside the resolution to appoint a competing candidate on the grounds of legality or the PAJA [Promotion of Administrative Justice Act 3 of 2000], this court has jurisdiction in terms of section 158(1)(h).'

Costs of the *in limine* were reserved and the registrar was directed to set the matter down on the opposed motion roll.

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By
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Recent articles and research

Abbreviation	Title	Publisher	Volume/issue
<i>AHRLJ</i>	African Human Rights Law Journal	Centre for Human Rights, Department of Law, University of Pretoria	(2021) 21.1
<i>DJ</i>	De Jure	University of Pretoria	(2021) 54
<i>EL</i>	Employment Law Journal	LexisNexis	(2021) 37.4
<i>LDD</i>	Law, Democracy and Development	University of the Western Cape, Faculty of Law	(2021) 25
<i>LitNet</i>	LitNet Akademies (Regte)	Trust vir Afrikaanse Onderwys	(2021) 18(2)

Children's rights

Chibwana, MWT 'Towards a transformative child rights discourse in Africa: A reflexive study' (2021) 21.1 *AHRLJ* 126.

Fambasayi, R and Addaney, M 'Cascading impacts of climate change and the rights of children in Africa: A reflection on the principle of intergenerational equity' (2021) 21.1 *AHRLJ* 29.

Khoza, TN 'The Sen-Nussbaum diagram of article 11(3) of the African Charter on the Rights and Welfare of the Child: Facilitating the relationship between access to education and development' (2021) 21.1 *AHRLJ* 7.

Singh, A and Power, T 'Understanding the privacy rights of the African child in the digital era' (2021) 21.1 *AHRLJ* 99.

Vohito, S 'The African Children's Charter and ending corporal punishment of children in Africa: A work in progress' (2021) 21.1 *AHRLJ* 74.

Continental Free Trade Agreement

Qumba, MF 'The exhaustion of local ju-

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COVID-19 - children's rights

Nanima, RD 'Evaluating the role of the African Committee of Experts on the Rights and Welfare of the Child in the COVID-19 era: Visualising the African child in 2050' (2021) 21.1 *AHRLJ* 52.

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Environmental law

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Vinti, C 'The Treaty on the Lesotho Highlands Water Project and the principle of "equitable and reasonable utilisation"' (2021) 54 *DJ* 328.

International constitutional law

Nyane, H 'The changing nature of the power of prorogation of Parliament in Lesotho: From absolute prerogative to rationality?' (2021) 25 *LDD* 193.

Eyongndi, DTA 'The Administration of Criminal Justice Act, 2015 as a harbinger for the elimination of unlawful detention

in Nigeria' (2021) 21.1 *AHRLJ* 441.

Koske, NT and Milej, T 'The right to privacy under the Constitution of Kenya and the criminalisation of consensual sex between same-sex adults' (2021) 21.1 *AHRLJ* 417.

International human rights

Atabongawung, T 'A legally-binding instrument on business and human rights: Implications for the right to development in Africa' (2021) 21.1 *AHRLJ* 262.

Bwire, B; Akech, M and Meroka-Mutua, A 'Utilising the due diligence standard to interrogate Kenya's accountability efforts with regard to survivors of sexual violence in the 2007-2008 post-election violence' (2021) 21.1 *AHRLJ* 389.

Gichana, HP 'Sub-regional organisations and the responsibility to protect: A case for the localisation and normative repatriation of sub-regional authority for coercive measures' (2021) 21.1 *AHRLJ* 335.

Igbayiloye, OB and Bradlow, D 'An assessment of the regulatory legal and institutional framework of the mining industry in South Africa and Kenya for effective human rights protection: Lessons for other countries' (2021) 21.1 *AHRLJ* 363.

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International women's rights

Adebimpe, RJ 'Liberalisation of Nigeria's

abortion laws with a focus on pregnancies resulting from rape: An empirical analysis' (2021) 21.1 *AHRLJ* 469.

Johnson, A 'Barriers to fulfilling reporting obligations in Africa under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2021) 21.1 *AHRLJ* 176.

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Mining and mineral law

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Chamberlain, L and Khunou, K 'Realising the right of access to water for people living on farms: The impact of the KwaZulu-Natal High Court decision in *Mshengu v uMsunduzi Local Municipality*' (2021) 21.1 *AHRLJ* 573.

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Women's rights

Basson, Y 'Relative poverty in female disability grant recipients in South Africa' (2021) 54 *DJ* 346.

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Open access law journals:

- *African Human Rights Law Journal*: www.ahrlj.up.ac.za/
- *African Public Procurement Law Journal* (Faculty of Law, Stellenbosch University, South Africa): www.applj.journals.ac.za/pub
- *Comparative and International Law Journal of Southern Africa* full electronic copies of retrospective issues from 1968 up to and including 2006 can be found at: African Journal Archive.
- *De Jure* published by the University of Pretoria: www.dejure.up.ac.za/
- *Journal for Juridical Science*: www.journals.co.za/content/journal/juridic

- *Law, Democracy & Development* is the journal of the Faculty of Law at the University of the Western Cape: www.ddd.org.za/current-volume.html
- *LitNet Akademies* (Regte): www.litnet.co.za/category/akademies/litnet-akademies/litnet-akademies-regte/
- *Potchefstroom Electronic Law Journal*: www.law.nwu.ac.za/per
- *Speculum Juris*: Journal of the Nelson R Mandela School of Law, Fort Hare University: www.ufh.ac.za/speculumjuris/

Open access websites:

- www.lawsouthafrica.up.ac.za
- www.saflii.org



By
Unathi
Jukuda

Time to dismantle the entry barriers to the legal profession

It is time to dismantle the entry barriers to the legal profession and level the playing field for aspirant legal practitioners in South Africa (SA). The journey towards becoming a legal practitioner is a long and winding one, from studying through tertiary institutions, to securing practical vocational training (PVT), and passing competency-based examinations. This article will focus primarily on PVT and will elaborate whether there is a need for the Legal Practice Council (the LPC) to recognise in-house legal experience (corporate legal experience) and accredit more institutions to provide PVT to prospective candidate legal practitioners and address the impasse that many legal graduates find themselves in after completing their legal studies. As a point of departure, before discussing the topic at hand, it is important to first set out the requirements for admission into the profession.

Requirements for admission into the profession

The Legal Practice Act 28 of 2014 (the LPA) regulates the legal profession and according to s 26(1) of the LPA there are three main prerequisites that an aspirant legal practitioner will require in order to be enrolled as a legal practitioner, namely, they must –

- have completed an LLB degree or an equivalent law degree;
- undergo all the practical vocational training requirements prescribed by the Minister;
- pass the competency-based examination (Alicia Koch ‘The long and winding road to becoming a lawyer’ www.golegal.co.za, accessed 8-9-2021).

A candidate legal practitioner must satisfy all three requirements to be admitted into the profession. It is important to highlight that two of the above requirements, namely bullet one and three rest on the individual’s potential,

unlike bullet two that depends on the candidate legal practitioner’s luck and fortune to secure PVT within a limited pool of accredited institutions or organisations suitable for offering PVT. In the current framework many legal graduates find themselves systematically excluded from entering the profession, and furthermore disregards a larger range of equivalent legal experience (for example in-house legal experience) that is largely commensurate with PVT.

What is a PVT contract and what requirements must be met for an institution to qualify to offer PVT?

The requirements are set out under reg 6 of the LPA: Regulations under s 109(1)(a) in the schedule (GN R921 GG41879/31-8-2021). Before I address these, it is important to highlight that both the LPC, and as well as the relevant legislation, the LPA and the Rules made under the authority of ss 95(1), 95(3) and 109(2) of the LPA do not expressly exclude the possibility of accrediting more institutions to offer PVT. On the contrary, the LPA does empower the LPC to accredit more institutions. This can be traced to reg 6(5)(f)(iii).

Regulation 6(1) provides that: ‘Any person intending to be admitted and enrolled as an attorney must, after that person has satisfied all the requirements for a degree referred to in sections 26(1) (a) or (b) of the Act serve under a practical vocational training contract with a person referred to in subregulation (5) – (a) for an uninterrupted period of 24 months’.

The requirements that must be met by an institution to qualify to offer PVT

Regulation 6(5)(a) to (d) provides that a candidate attorney may be engaged or retained under a PVT contract by an at-

torney that is practicing law and furthermore, reg 6(6) provides that ‘an attorney engaging a candidate attorney –

(a) ... must have practiced as an attorney for a period of not less than three years, or for periods of not less than three years in the aggregate, during the preceding four years’.

Lastly, reg 6(8) provides that ‘an attorney referred to in subregulation (5)(a) to (e) may, at no time, have more than three candidate attorneys’ under supervision. ‘An attorney referred to in subregulation (5)(f) may, at no time, have more than six candidate attorneys in the aggregate engaged or retained in terms of a [PVT] contract’.

I will demonstrate later in this article that most big corporate organisations with in-house legal services departments are substantially meeting the above requirements, in that they do offer 24 months of legal internship to legal graduates, and usually the person that these graduates report to is an admitted attorney with solid practice and in-house experience. This then begs the question why the LPC should not relook at the requirements and allow legal graduates to show cause why their corporate legal experience should be deemed equivalent as the articles of clerkship.

Challenges confronting the profession

The current pool of institutions permitted by the LPC to offer PVT is skewed in comparison to the number of legal graduates who want access to the legal profession. Many graduates find themselves alienated from the profession even before their careers commence. This crisis is likely to be accentuated by the current COVID-19 pandemic, which has affected many businesses negatively. Going forward, undoubtedly many organisations will decrease their usual annual intake of candidate legal practitioners, and in turn, this will increase the number of legal graduates who will not be able to access the legal profession. A solution

to this growing crisis needs to be sought urgently.

Access and admission to the profession must not be a preserve of a well-connected few, and reasonable progress needs to be made to ensure that aspirant candidate legal practitioners are allowed to pursue more flexible pathways into the profession. As stated previously, the LPA does not preclude the possibility of recognising and certifying more organisations to offer PVT. On the contrary the idea seems welcomed. There are two propositions that might be explored and rapidly implemented, which could help to ameliorate the situation that many aspirant legal professionals find themselves in.

- **The first proposal:** Would recognise other credible institutions, such as major financial institutions, state-owned enterprises, insurance companies and major groups. The experience that graduates obtain from these aforementioned organisations measure up to the professional experience envisaged by the LPA, and indeed in some instances the degree of professional training and development is far greater than in many private legal practices. A common trend among these organisations are that when they recruit a chief legal advisor/legal manager, they usually appoint an admitted attorney with solid legal experience. This, therefore, means that legal interns, junior legal and senior legal advisors are constantly working under supervision of an experienced, admitted practitioner. This experience, coupled with the LPC's own supplementary programmes, will place these individuals in the same category

as those within law firms. Another additional requirement would be to write and pass Board examinations. This is not proposed as blanket recognition for all corporate legal contexts, but rather an opportunity to identify organisations that meet the requirements. In such cases, organisations should be encouraged to apply annually to the LPC for approval to offer PVT contracts.

- **The second proposition** is meant for legal graduates who have acquired considerable corporate legal experience but are not admitted as attorneys. The proposal here would be to condone in-house legal experience where a candidate has three and above years of uninterrupted satisfactory service, provided that a candidate attends compulsory classes organised by the LPC to supplement their training or experience. Furthermore, they should be required to write and pass Board examinations.

Adopting the above suggestions would drastically improve the plight that many poor and disadvantaged legal graduates find themselves in and widen the pool of admitted legal practitioners in SA.

Quality of legal training

One might ask the question whether implementing the above suggestions could potentially lead to concerns about quality of legal training. While one needs to accept that this is not an unreasonable apprehension, however, what evidence is there that those who are currently undergoing training within the institutions that are currently recognised are getting the best experience?

In addressing these concerns, one

ought to be mindful that the LPC in the current framework, does not have quality check mechanisms in place to vet the organisations that it currently permits to offer PVT contracts. Organisations have a free range to structure their PVT programme as they deem fit. Depending on the size of the organisation and its focus areas, there are organisations that specialise in a particular branch of law, for example boutique labour and conveyancing practice firms. Candidate legal practitioners in the aforementioned firms get exposure to a specific areas of the law. A question must be asked what separates these candidate legal practitioners from those who work in-house. Furthermore, there are also law firms that offer no rotation, whereas others rotate their candidates in different focus areas of business. The experience and training provided by these recognised institutions in many instances falls short of providing the experience that many legal interns/junior legal and senior legal advisors gain in the corporate organisations, yet the latter experience is not recognised as PVT.

It is time to revisit these limitations and allow for greater inclusivity and multiple professional training paths, so that a larger and more diverse pool of legal graduates can access the profession and develop their careers. Access to the profession and transformation is crucial to an equitable profession.

Unathi Jukuda LLB (UWC) ND Marketing (CPUT) is an admitted attorney and employee relations consultant at the University of the Western Cape in Cape Town.



People and practices

Compiled by Shireen Mahomed

Phatshoane Henney Attorneys in Bloemfontein has one appointment and two promotions.



Lesley Mokgoro has been appointed as the Chief Executive Officer.



Damian Viviers has been promoted as a Director.



Corlia van Zyl has been promoted as a Director.

Iusprudentia Specialist Counsel in Johannesburg has one new appointment.



Kagiso Mathebula has been appointed as a Junior Associate.



Administration of Deceased Estates



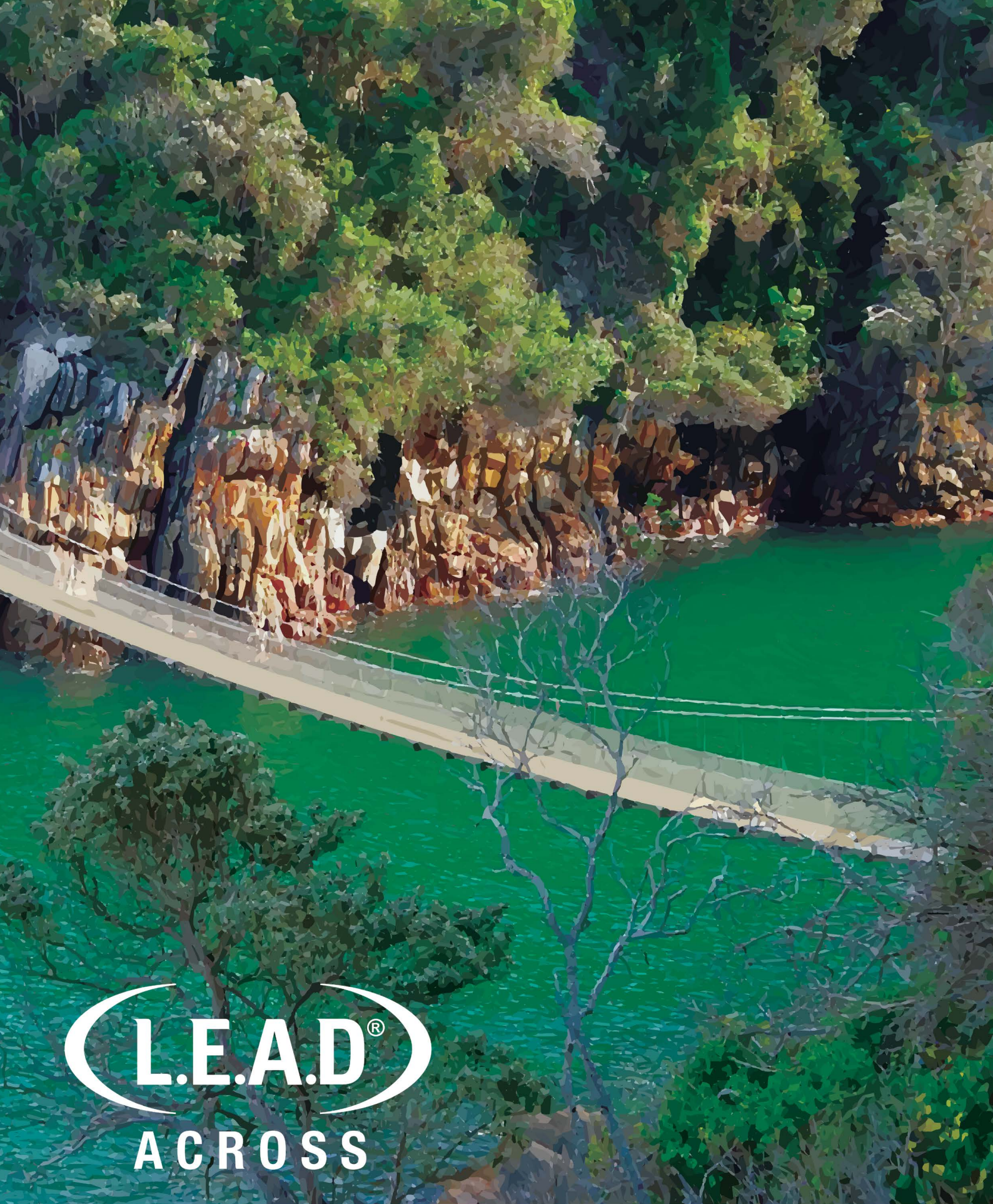
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ACROSS



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

RISKALERT

OCTOBER 2021 NO 4/2021

IN THIS EDITION

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RISK MANAGEMENT COLUMN

LIABILITY ARISING FROM A MANDATE YOU (MISTAKENLY BELIEVED YOU) DID NOT HAVE

Introduction

In assessing a professional indemnity claim brought against a legal practitioner, one of the initial assessments is whether the practitioner concerned had a mandate to act in the underlying matter. Whether the claim against the practitioner is framed in contract or delict, the existence of the mandate and the terms thereof are central to the assessment of liability.

From time to time, there are cases where the practitioner will initially dispute that there was a mandate in place. Depending on the circumstances of the individual matter, such a defence may wane with time as the litigation progresses and evidence contrary to the initial position of the practitioner emerges when the matter is investigated. Explanations such as that the matter was dealt with by a staff member who has since left the practice are commonplace. It is also not uncommon for practitioners in these circumstances to claim that they bear no knowledge of the matter or even that the matter only



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came to their attention after the staff member concerned has left the practice or, quite commonly, when a clean-up of the office was being conducted and the 'file' was 'discovered' having been hidden, the client made enquiries or the notification of the claim was received. A distinction must, however, be drawn with those claims where the practitioner in good faith did not know of the existence of the mandate.

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LEGAL PRACTITIONERS' FIDELITY FUND
SOUTH AFRICA

RISK MANAGEMENT COLUMN continued...

In this article I will highlight some of the examples of cases where there has been an about-turn after the mandate was initially disputed but is later admitted. I will also make suggestions that legal practitioners can consider to mitigate the risk of claims arising from matters that they, ostensibly, bore no knowledge that their practices were dealing with.

At the outset it must be stated that providing dishonest information not only jeopardises the right to indemnity under the firm's insurance policy, but also exposes the practitioner/s concerned to possible disciplinary action as it amounts to unprofessional conduct. It also results in a waste of resources where a lack of mandate is pleaded and a defence is investigated and pursued on that ground, only to be withdrawn later when the practitioner is faced with extrinsic evidence that the firm did, in fact, accept the mandate. The fact that a firm accepted a mandate but did not pursue it (to finality or at all) does not change the fact that the mandate existed and that the practice will be liable for losses arising from its failure to diligently carry out such mandate.

Case study 1

The plaintiffs instituted a claim against a firm alleging that they had instructed the practice to pursue a claim on their behalf to recover damages suffered because of the death of their son at the hands of an on-duty police officer. It was alleged that the plaintiffs had, at all times, dealt with a professional assistant who had been employed by the firm. The claim against the Minister of Police was not pursued timeously and prescribed in the hands of the firm.

The sole director of firm at the time, in good faith, indicated that he had no knowledge of the matter and could not recall having dealt with the plaintiffs. The existence of the mandate and, thus, a duty of care and liability to the plaintiffs was denied. After an investigation of the matter, it emerged that at the time that the instruction was given to the firm, a system had been in place where the details of all clients visiting the firm's office were recorded in a visitors' book (a type of register) together with the details of the matter that the clients came to enquire about. The details had been entered in the register by a member of staff on the date/s of the visit and the plaintiffs' details were recorded accordingly in the register. The fact that the director of the firm at the time that the cause of action arose did not have personal knowledge of the matter nor could the file be located could not assist him in escaping liability in this case.

The former professional assistant was also contacted, and he confirmed having received and accepted a mandate in the matter and that he had left the file with the firm when he departed. At all times he acted within the course and scope of his employment with the firm, and the firm was thus vicariously liable for his actions.

The firm could thus not escape liability in this instance and the matter was settled.

Case study 2

Client X suffered serious injuries in a motor vehicle collision in June 2009. He visited the offices of an attorney, B, in May 2010 in order to obtain advice and assistance in pursuing a claim against the RAF.

B consulted with X and got the latter to sign a standard power of attorney and documents in which X consented to B obtaining his hospital records and the accident report. The documents authorised B to lodge the claim with the RAF on X's behalf, sign all documents as his agent and to settle the matter for an amount that B deemed appropriate. B informed X that claims against the RAF take a long time to be finalised and that the matter will be complicated as X will be entitled to substantial compensation because he had suffered serious injuries. As the years passed, X enquired from B's office what the status of his matter was and received assurance, verbally, that the matter was being attended to. B never sent X any written correspondence. X was semi-literate and thus did not write to B.

By 2014, X became uneasy and was advised by a police officer to contact the RAF directly to enquire whether a pay-out has been made in his claim. He did so. The RAF informed X that there was no claim registered with his name or the details of his accident on its system. X decided to consult with another attorney, DD, a few weeks later. DD investigated that matter and informed X that his claim against the RAF had prescribed as it was not lodged timeously by B.

DD, acting on X's instructions, then issued summons against B in a professional indemnity claim aimed at recovering the damages suffered because of the prescription of the RAF claim. B denied liability and claimed that he did not have a mandate from X to pursue the RAF claim. He denied the existence of a contract between X and himself and thus said that he was not liable. He contended that his discussion with X was a

RISK MANAGEMENT COLUMN continued...

general one, that no contingency fee agreement was signed, and that X did not place him in funds to cover the costs of the disbursements.

X persisted that B had accepted the mandate and produced copies of the documents he signed at the consultation in May 2010, which were handed to him by B. B was not able to seriously counter X's version or to give an explanation why, if his dispute of the existence of a mandate was correct, his office allegedly informed X that the RAF claim was being pursued. B also had no explanation for his failure to either have sent a draft contingency agreement to X, or not to have followed up with X after the meeting in May 2010, if his version was correct. As the litigation continued and preparation for trial commenced, B dug his heels in on the mandate issue but was resistant to allowing the parties to consult with any of his staff who had knowledge of the matter and who had spoken to X. It was found that X had given B a mandate to act on his behalf and he was found liable for X's damages.

Some of the lessons learned

It is in the interests of a legal practice to have a record of all instructions received and to retain a record thereof as prescribed by legislation.

Case study 1:

- Issues regarding the level of supervision of the professional assistant come to the fore. A system of regular discussions with the professional assistant and keeping a record of the matters he was dealing with would have mitigated the risk;
- Regular file audits should have been implemented;
- A formal handover process could

have been implemented when the professional assistant left the practice to ensure that 'nothing fell through the cracks'; and

- Being alert for professional (or even administrative) staff who effectively run parallel practices from your office is important. Understandably, it is neither desirable nor pleasant to act as a police officer constantly looking over the shoulders of your staff. At the end of the day, liability and professional responsibility and accountability will lie with you. Impressing on your staff that the measures that you have implemented are for the protection of all stakeholders in the firm may go a long way in getting their buy-in and cooperation.

Case study 2:

- B should have indicated to X that he (B) did not have the appetite, capacity or resources to pursue the matter;
- In the event that he did not wish to accept the mandate, that could be set out in a letter to the client (a letter of non-engagement/non-acceptance of the mandate. A precedent is available under the risk management section on the LPIIF website, www.lpiif.co.za);
- The further unilateral requirements on B's part for acceptance of the mandate (signature of the contingency fee agreement and receipt of funds to cover the disbursements) must be explained to the client and also recorded in correspondence sent to the client;
- All discussions and updates given to the client must be recorded in file notes and confirmed in correspondence;

- The person instructed to deal with the matter would be the most appropriate person to give the client feedback on the matter. This avoids the situation where inaccurate and contradictory reports are provided to the client;
- Ensure that the person giving what purports to be updates actually has knowledge of the status of the matter; and
- A system of file audits and the tying up of any potential loose ends would have gone a long way in mitigating the circumstances that led to this claim. This would have avoided a situation where B got X to sign documents at the consultation, handed the latter copies but seemingly did not know what he had done with the originals nor take any further action in the matter.

Conclusion

If the firm disputes a mandate, it is important that it has all the correct information at hand on which to base its challenge of the plaintiff's allegations. Remember that the information you need to dispute the mandate in a professional indemnity claim may be the same as that needed defend yourself in a disciplinary proceeding launched by the Legal Practice Council. A half-hearted or ill-informed challenge to the existence of the mandate will not suffice.

Undertaking internal checks and ascertaining from staff whether anyone has knowledge of a matter may go a long way to avoiding a situation where you dispute a mandate that your firm has actually accepted.

A SHOCKING CASE OF POLICE BRUTALITY: EGREGIOUS CONDUCT OF TWO ATTORNEYS AND A FILE GONE WITH THE WIND

“To the plaintiff, Mr Tarquin Julies, the problem with the law has been lawyers.”

Eksteen J, in *Julies v Peter McKenzie Attorneys* (1117/2019) [2021] ZAECPHC 49 (7 September 2021) at paragraph 1.

Introduction

When faced with some or other legal problem, members of the public consult with lawyers. In so doing, the expectation is that being experts in the legal field, the lawyer who has accepted the mandate, will give their matter the appropriate attention and perform the legal services in a proper and professional manner and without negligence. Lawyers solve legal problems, and it is unimaginable (it is hoped) that they will become the problem the clients face. As observed by Eksteen J in quotation above, that certainly was not the case for Mr Julies in the case that is the subject matter of this article.

Mr Julies, the plaintiff, embarked on a quest for justice that has lasted for longer than a decade. However, along the way he was let down not by one, but two attorneys who failed to meet the standard of care expected of attorneys in the circumstances and carry out the

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respective mandates that he had given them.

In the years spent giving risk management education to attorneys and their staff, I have noted that case studies with practical examples of conduct that has resulted in professional liability of legal practitioners have resonated with the audiences. The *Julies v Peter McKenzie Attorneys* case is an example of such a ‘war story’. This article examines the case in the hope that the breaches of the respective legal duties by the two law firms are avoided by others.

The conduct of the members of the South African Police Services (SAPS) in the initial incident which set off the series of liability claims is nothing short of shocking. The protagonists in this, and any other similar delictual claim, are human beings who must forever live with the consequences of the series of events. I make this point as the consideration of the legal and risk management points arising in these cases

can, in many instances, be debated in a sterile, academic manner without an acknowledgement of the underlying affected persons.

Background

The plaintiff, described in the judgement as an ‘unsophisticated man’, was 25 years old at the time of the incident which led to this tragic tale. He had grown up in the northern suburbs of Gqeberha and, due to financial constraints, terminated his education after successfully completing Grade 7 at school. He had no further education. He lived with his mother and was to have been employed as a handyman before the shooting.

On Saturday, 6 December 2008, Mr Julies had been at his home with friends. Two unmarked police vehicles arrived and parked in the street in the vicinity of his home. Two policemen in civilian clothing alighted from the vehicles, entered the home and, shortly thereafter, left to return to their cars. It was unclear what they did inside the

GENERAL PRACTICE continued...

house. While Mr Julies requested an explanation for their conduct inside the house, one of his friends threw a beer bottle at the police, striking one of their vehicles. A sergeant De Maar who had remained in one of the vehicles then alighted and shot Mr Julies in the face with a shotgun without saying a word. Mr Julies was rendered unconscious immediately and only regained consciousness in hospital. Three of Mr Julies' friends were subsequently arrested and charged with public violence, assault and malicious damage to property. The judgement does not specify who the arrested parties were alleged to have assaulted, the property alleged to have been damaged or the details of the alleged public violence. The incident was investigated, and a police docket was prepared but the charges were, unsurprisingly, ultimately withdrawn.

Mr Julies lost one eye because of the shooting and, ultimately, a loss of all vision in his other eye.

The instruction to Masimla attorneys

In February 2009, Mr Julies instructed Masimla Attorneys in Gqeberha to institute action against the Minister of Police (the Minister) for the damages he had sustained as result of the injuries he suffered in the shooting. That firm accepted the mandate. The plaintiff testified that:

- He had known Mr Masimla as

the latter had assisted previously assisted him in legal matters;

- He had no knowledge of litigation and trusted Mr Masimla;
- Mr Masimla had told him that "this was a big case and that it would take very long" (paragraph 5 of the judgement);
- He met Mr Masimla two or three times each year after the initial instruction, but the attorney did not explain the delay in finalising the matter;
- Mr Masimla always assured him that the matter was being attended to and that an advocate would be briefed to assist him;
- After undergoing a procedure in October 2015 aimed at saving his eyesight, he contracted Mr Masimla to enquire about funds as he (Mr Julies) was concerned about that the private institution at which the surgery was conducted may look to him for payment; and
- As Mr Masimla did not provide him with a satisfactory response, he went to see the attorney in November 2015 and was informed by the latter that he was not pursuing any claim on his behalf and had no file in respect of that litigation.

Shocked by the news that Mr Masimla was not pursuing his claim, Mr Julies was advised by a police officer to approach the SAPS Litigation Centre to verify whether a

claim had been lodged in his name. He approached the Centre on 11 July 2016. An officer at the SAPS Litigation Centre handed him a written note confirming that no claim had been issued in his name and advised him to see another attorney.

The instruction to McKenzies attorneys

On 15 August 2016, Mr Julies instructed the defendants, McKenzies attorneys, and handed Mr McKenzie a copy of the handwritten note received from the SAPS Litigation Centre.

The following points emerge from the judgement regarding the handling of the matter by McKenzies attorneys:

- The firm admitted having accepted a mandate to pursue a claim against Masimlas for allowing Mr Julies' claim against the Minister to prescribe and that they did not carry out the mandate;
- The firm had a copy of a contingency fee agreement signed by Mr Julies on 15 August 2016, but it had been misfiled and only handed to Mr Julies' current attorney at a pre-trial conference shortly before the trial;
- The firm admitted never receiving a power of attorney from Mr Julies;
- The remainder of the contents of the file, including file notes that Mr McKenzie had made, had been

GENERAL PRACTICE continued...

lost. It is stated at paragraph 9 of the judgement that:

“The loss of the file content occurred, [Mr McKenzie] said, when he moved offices at the end of August 2017. He explained that his brother-in-law helped him to carry files when a gust of wind blew the contents of several files away. They retrieved all the documents that they were able to gather, but some were beyond their reach. The note from [the SAPS Litigation Centre at] Mount Road, dated 11 July 2016, Mr Julies’ hospital cards and all McKenzies’ file notes were among the documents that were lost. When he was pressed under cross-examination, Mr McKenzie acknowledged that he had not attended to the file at all after August 2017.”

- Mr Julies lost faith in McKenzies and instructed his current legal representative in December 2019. The current legal representative attempted to obtain a copy of McKenzies’ file but only received two letters from Masimlas evidencing their acceptance of the mandate given to him.

The issues for determination

By agreement between the parties, an order was granted at the commencement of the trial that the issue of McKenzies’ alleged liability to Mr Julies be separated from the remaining issues in the matter. Three questions thus arose for adjudication, being whether:

- (a) the shooting of Mr Julies was wrongful and unlawful;
- (b) Masimlas had negligently permitted the claim against the Minister to prescribe; and
- (c) McKenzies had negligently permitted the plaintiff’s claim against Masimlas to prescribe.

The court, at paragraph 12, found in favour of Mr Julies on question (a). The question in (b) was also found in favour of Mr Julies (paragraph 15 of the judgement).

Dealing with Masimla’s liability, the court stated that:

“[13] The liability of an attorney to a client for damages resulting from the attorney’s negligence is based on breach of contract between the parties. It is an implied term of the mandate that an attorney will exercise the skill, adequate knowledge and diligence expected of an average practising attorney. Where an attorney falls short of this standard, he commits a negligent breach of his mandate.

[14] In order for a plaintiff to succeed in a claim against an attorney he is required to allege and prove:

- (a) [a] mandate given to the attorney;
- (b) a breach of the mandate;
- (c) negligence in the sense of his failure to exercise the skill, adequate knowledge or diligence expected of an average attorney;

- (d) damages, which would generally require proof of the likelihood of success in the aborted proceedings; and
- (e) that damages were within the contemplation of the parties when the contract was concluded.”

(footnotes omitted)

On the third question ((c) above), McKenzies raised two defences being:

- (i) a denial of the negligent breach of their mandate; and
- (ii) a contention that their failure to issue summons was not the cause of the damages allegedly suffered by Mr Julies.

The court found against McKenzies on both defences. In the end, the defendant was ordered to pay Mr Julies such damages as the he is able to prove that he has suffered in consequence of the shooting which occurred on 6 December 2008. The defendant was also ordered to pay the plaintiff’s costs of suit.

Discussion

Accepting the mandate and doing nothing

The first observation I wish to make is that the two firms, Masimlas and McKenzie, having respectively accepted mandates from Mr Julies, elected to do nothing in order to fulfil their mandates. An attorney must only accept a mandate for a client where that attorney has the

GENERAL PRACTICE continued...

capacity, appetite, resources and knowledge in the area of law to carry out that mandate. If the firm is unable or unwilling to continue with the mandate, the client must be informed accordingly. Further steps that need to be undertaken and important upcoming dates such as prescription must be explained to the client and set out in a letter confirming the discussion and advice. Mr Julies, like many other plaintiffs in similar cases, was a particularly vulnerable client and both firms should have taken that into account in how they handled the matters.

Mr Masimla only informed Mr Julies more than six years after accepting the mandate that he had not acted on the mandate and had, purportedly, no file for the matter. The plaintiff's claim against the Minister had prescribed by then. There is no explanation from McKenzies on their failure to carry out the mandate. Even after part of Mr Julies' file had blown away with the wind, the firm could have taken steps to reconstruct the file and to obtain the necessary information. Mr McKenzie's admitted that he not attended to the matter at all after August 2017, a year after he had accepted the mandate.

The conduct of both firms can, with respect, only be described as egregious.

Avoiding prescription related claims

Prescription related claims make up the highest number and val-

ue of claims notified to the Legal Practitioners Indemnity Insurance Fund NPC (the LPIIF). Prescription is thus one of the main risks facing legal practitioners. Prescription related claims can be avoided by the implementation of internal control measures such as:

- Registering all time-barred matters with the LPIIF's Prescription Alert unit and adhering to all the reminders sent out by that unit. In matters against the state, the Prescription Alert system will send reminders for the date on which the statutory notice is due and notify the practice ahead of the date by which summons is to be served
- Not taking instructions close to the prescription date
- Obtaining full and detailed instructions at an early stage in the matter
- Obtaining all the information necessary to institute the action and all the relevant documents from the client as early as possible
- Acting on client instructions promptly and without procrastination
- Properly supervising all staff to ensure that all matters are timeliness and adequately attended to
- Conducting regular file audits and ensuring that files are safely stored
- Educating all staff on the prescription periods, the statutory notice periods for claims against the state and the circumstances where the running of prescription begins to run, is suspended or interrupted
- Reviewing files and, where necessary, closing problem files after discussing the matter with the client. If necessary, refer the client to another attorney
- Keeping abreast of judgments and legal developments on the law in respect of prescription
- Not assuming that prescription is a three-year period in all cases
- Implementing a peer review system in the firm- even a sole practitioner can have a peer review system with an experienced secretary/ paralegal/ candidate legal practitioner
- Designing and implementing a dual diary system with the secretary or filing clerk so that nothing "falls through the cracks"
- Obtaining more than one contact number and an accurate address (physical, email and postal) for your client
- Ensuring that the correct cause of action is pleaded and that action is instituted in the correct court. There have been claims where action is instituted in the incorrect court and by the time this fact comes to light the claim has prescribed and the ac-

tion cannot be withdrawn and instituted afresh in the correct court. Similarly, a new cause of action or head of damages added by way of amendment after the prescription date may elicit a special plea of prescription

- Being wary of the tactics of the defendant- not naively accepting a verbal assurance that a matter will be settled before the prescription date and that there is thus no need to serve summons to interrupt the running of prescription.
- If the parties agree that the running of prescription is to be suspended while a settlement is being negotiated, this must be recorded in writing
- Noting that it is the service of the process whereby payment of the debt is claimed that interrupts prescription and not the issuing thereof. Service must thus be affected before the prescription date.

Was there a sustainable defence to the claim?

I think not.

To succeed in defending a claim such as this one, a substantial amount of work would have been required in investigating the events underlying the three questions placed before the court.

On the first question before the court, the police officer who shot Mr Julies, sergeant De Maar, was

not called to testify. He would have been the most appropriate person to testify in discharging the onus for the contention that the shooting was justified. I pause to note that the charges laid against Mr Julies' friends and later withdrawn are common in cases where members of the SAPS seek, after the fact, to justify wrongful and unlawful conduct. Having noted the *modus operandi* in other cases, I was quite surprised that an unconscious, blinded Mr Julies was not also arrested. Be that as it may, the defence on this ground was unsustainable without evidence justifying the shooting. In such cases, the law firm against which the claim is brought steps into the shoes of the Minister and must discharge the onus of proving a justification for the shooting if that is its defence.

Turning to the second question, it is unclear why Mr Masimla was not called as a witness when it was disputed that he allowed the plaintiff's claim against the Minister to proceed. It will be noted from the judgement that letters from his firm evidencing the acceptance of the mandate to act in that matter were provided. In the nature of professional indemnity litigation, the defendant would have to step into Masimla's shoes to in discharging the onus that would otherwise have rested on him had the claim been pursued against him.

If the defendant doubted whether Mr Julies had a sustainable claim

against the Minister on the one hand and against Masimlas on the other, why was this not communicated to him in the year between the acceptance of the mandate and his file being blown away by the wind? Was there any work done on pursuing the mandate prior to August 2017?

The assurance given to the plaintiff by Mr Masimla that his claim was being attended to, when it was not, is a common feature of claims of this sort. In many instances, in instituting professional indemnity claims the plaintiff explains that the attorney gave assurances that the matter was being attended to. Commonly, the plaintiff only becomes aware that this is not the case when an enquiry independent of that attorney is conducted. Prescription of the professional indemnity claim then only starts running when the plaintiff acquires such knowledge.

On the last question, the defendant in this matter could hardly have disputed its own liability when, by his own admission, he did nothing to pursue the matter since August 2017.

It is hoped that the lessons learned from this case will not be blown away with the wind like the contents of the defendant's file of papers.

Classified advertisements and professional notices

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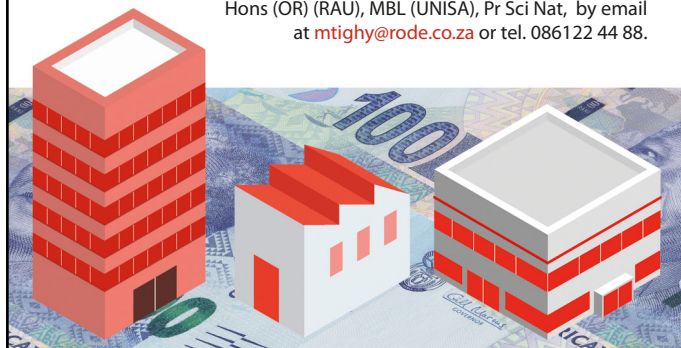
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