

## THE BALANCE BETWEEN INTELLECTUAL PROPERTY AND PUBLIC HEALTH

**Testing the regulatory  
framework for trust  
accounting records**

**Parental intoxication:  
A scientific diagnostic approach  
in classifying parental  
substance misuse**

**Commissioning of  
oaths in the  
21st century**

**Female legal  
practitioners  
are least considered  
when legal services  
are sourced**

**When 'no' means 'no' – the  
controversy from misunderstanding  
the concept of sexual consent**

**Prerequisites for the conclusion  
of valid plea and sentence  
agreements in terms of  
s 105A of the CPA**

**SCA has limited powers  
to interfere with the  
decisions of a trial court**

**Termination of contract:  
Sole discretion means  
sole discretion**



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- Retired Chief Justice Mogoeng – a man who led the judiciary with courage, integrity, and wisdom
- SAWLA celebrates the appointment of its president to the JSC
- Social justice under customary law
- Judiciary mourns the death of Judge Bhekisisa Mnguni

### 12 The balance between intellectual property and public health

The African Commission of Human and Peoples' Rights urges African states to develop their intellectual property (IP) laws to promote access to medicine. Laws governing medicine and IP that are outdated or do not comply with the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement may prove to be a serious weakness in pharmaceutical regulations, which consequently poses a threat to the health of the public. LL.M graduate, **Mpho Adam Titong**, writes that when the right legislative framework exists a balance is struck between pharmaceutical innovation and IP, which ultimately benefits public health and creates greater access to potentially lifesaving medicine.

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## FEATURES

### 16 When 'no' means 'no' – the controversy from misunderstanding the concept of sexual consent

Magistrate, **Desmond Francke**, discusses the recent controversy surrounding the misunderstanding of consent as it pertains to sexual activity which arose as a result of *Coko v S* (ECG) (unreported case no CA&R 219/2020, 8-10-2021) (Ngcukaitobi AJ). Magistrate Francke turns to Canadian case law to unpack the meaning of subjective consent, which is a conscious agreement in one's own mind to engage in the sexual activity in question; and the specious defence of implied consent, where the absence of protest or resistance is deemed a sign of consent. Mr Francke notes this concept is a mistake in law and has no place in South Africa.

### 19 Parental intoxication: A scientific diagnostic approach in classifying parental substance misuse

Drug and alcohol abuse are omnipresent in South Africa and the percentage of individuals abusing alcohol and drugs ending up in parental rights and responsibilities disputes is increasing. Forensic toxicologist, **Dr Johannes B Laurens**, and Senior Family Advocate and Head of the Pretoria Office of the Family Advocate, **Chris Maree**, discuss the detection of inappropriate drug and alcohol use in parental rights and responsibilities cases where there has been substance misuse allegations.



Dr Laurens and Mr Maree write that the current approach in problematic substance use in South Africa is incorrect and a scientific diagnostic approach is needed. However, some of these diagnostic tests may be part of the problem.

### 22 Testing the regulatory framework for trust accounting records

The compliance framework for keeping trust account records is well-established. These rules as stipulated by the Legal Practice Act 28 of 2014 (LPA) and specifically r 54 of the Rules made under the authority of ss 95(1), 95(3) and 109(2) of the LPA, create a strict framework for the keeping and maintaining of reports. However, legal practitioner, **Carl Holliday**, notes that trivialities arise and become critical and major issues, which are often ignored. Mr Holliday suggests using the headline and midline tests among others within a robust framework may be necessary to ensure effective practical results are always achieved.

### 24 Female legal practitioners are least considered when legal services are sourced

Co-founder of Molefe Dlepu Inc, former Chairperson of the Legal Practice Council (LPC) and current LPC Council member, **Kathleen Matolo-Dlepu** and candidate legal practitioner and Executive Assistance to the directors of Molefe Dlepu Inc, **Laura Morwesi Dlepu**, are a dynamic mother-daughter duo. *De Rebus* news reporter, **Kgomotso Ramotsho** had the opportunity to interview them about their experiences within the legal profession and to get their thoughts on some of the challenges facing black female legal practitioners today.

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# LPC amendments

**A**s we bid farewell to 2021, amidst a looming fourth wave of the rise in COVID-19 infections, the discovery of a new B.1.1.529 COVID-19 variant and the concerning multitudes of hung municipalities after the November local government elections, the year has proved to be an eventful one until the end. Added to that, the Legal Practice Council (LPC) has made several amendments during the month of November, below are the amendments:

## Amendments to Rules made under the authority of ss 95(1), 95(3) and 109(2) of the Legal Practice Act 28 of 2014 (LPA)

### • Amendment of r 22.1.4.2

'22.1.4.2 Council may, on the application of a candidate attorney in any case –

22.1.4.2.1 where the principal refuses to grant the candidate attorney leave of absence from office; or

22.1.4.2.2 where the period of absence from office exceeds, or the periods of absence from the office in the aggregate exceed, thirty working days in any one year of the practical vocational training contract authorise leave of absence from office for the period in question, if Council is satisfied that the principal and the Council received due notice of the application and that sufficient cause for the absence exists or existed, as the case may be.'

### • Amendment of r 30.1

'30.1 Any person duly admitted by the High Court and enrolled to practise as a legal practitioner under the Act may, in the manner prescribed by rule 30.2, apply to the Council, through the Provincial Council where the legal practitioner intends to practise, to convert his or her enrolment as an attorney to that of an advocate, and vice versa.'

### • Amendment of r 30.4.4.2

'30.4 The application referred to in rule 30.1 must be signed by the applicant, and must be accompanied by the following –

...  
30.4.4 where the applicant is an advocate applying to convert his or her enrolment to that of an attorney, proof to the satisfaction of the Council –

...  
30.4.4.2 a statement indicating whether he or she intends to practise as an attorney and, if so, whether he or she intends to practise for his or her own account or

as a partner in a firm of attorneys or as a member of a professional company'.

### • Amendment of r 32.2.2

'32.2 An advocate referred to in section 34(2)(a)(i) and practising as such may at any time, as determined in the rules and upon payment of the fee determined by the Council, apply to the Council for the conversion of his or her enrolment to that of an advocate referred to in section 34(2)(a)(ii) and practising as such, provided the applicant satisfies the Council –

...  
32.2.2 that the applicant shall within a period of one year after the date on which the applicant was required for the first time to be in possession of a Fidelity Fund certificate, or within such further period as the Council may approve in any specific case, complete to the satisfaction of the Council a legal practice management course approved by the Council'.

### • Amendment of r 47.7.1

'47.7 Every such application shall be accompanied by –

47.7.1 in the case of an applicant who, for the first time, is required to be in possession of a Fidelity Fund certificate, a statement indicating that the applicant shall within a period of one year after the date on which the applicant was required for the first time to be in possession of a Fidelity Fund certificate, or within such further period as the Council may approve in any specific case, complete to the satisfaction of the Council a legal practice management course approved by the Council, failing which a Fidelity Fund certificate will not be issued to him or her until he or she has completed the course'.

### • Amendment of r 54.34

'54.34 An office other than a branch office opened by a firm, which for the first time opens a practice within the jurisdiction of a Provincial Council, shall be designated as a main office of the firm in that jurisdiction, and the firm shall ensure that:

54.34.1 banking accounts for the firm are opened;

54.34.2 consolidated accounting re-



Mapula Oliphant - Editor

cords are kept for the firm, including all branch offices.'

## Amendments to the Code of Conduct made under the authority of s 36(1) of the LPA by amendment and inclusion of the following clauses to the Code of Conduct

### • Amendment of Clause 13

'An attorney, other than an attorney referred to in section 34(5)(c), (d) and (e) of the Act, may not, without the prior written consent of the Council, share offices with a person who is not an attorney or an employee of an attorney or a trust account advocate.'

### • Insertion of Clause 25.9

'25.9 Counsel may not, without the prior written consent of the Council, share offices with a person who is not a counsel.'

### • Insertion of Clause 41.6

'41.6 A trust account advocate may not, without the prior written consent of the Council, share offices with a person who is not a trust account advocate or a practising attorney or an employee of an attorney.'

**The *De Rebus* Editorial Committee and staff wish all our readers compliments of the season and a prosperous new year.**

***De Rebus* will be back in 2022 with its combined January/February edition, which will be available at the beginning of February 2022.**





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# 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.

## The release of examination results by the LPC without the memorandum leaves a lot to be desired

Traditionally, with the outcome of the Competency Admission Examinations, a memorandum with the answers should accompany the results.

The results of the examinations conducted by the Legal Practice Council (LPC) do not. The LPC does not make the memorandum of the answers to the questions asked during the aforesaid examination available.

The consequences, of failing to publish the memorandum –

- robs the candidates of the chance to self-assess and measure their performance in the examination against the answers contained in the memorandum;
- does not inspire confidence in the marking process and the examiners;
- lacks transparency; and
- the costs of R 600 to remark the script is prohibitive and results in the affected candidate to wait for the next window of the subsequent examination, which follows in six months, without removing doubt that might exist.

An attempt to make an inquiry for the non-publication of the memorandum simultaneously with the examination results was directed to the LPC. The response (not official) thereto was 'the publication of the memorandum is withheld because the oral examination will follow soon thereafter and that the release of the memorandum will be done after such process is complete'.

Can someone from the LPC advise when this position will be altered and provide clarity on the withholding of the memorandum on the release of the exam results?

**Affected conveyancing exam candidate, Johannesburg**

## Response from the LPC

The Legal Practice Council's (LPC's) examination process is inclusive of the various stages of testing, which includes the written and oral testing as one process. As a result, the content of the testing at various stages often tests similar competencies and knowledge. Keeping this in mind, the examination results are released to give the candidate a measure of how well they understood the subject. With the oral (marking process, where

applicable) commencing immediately as part of the process – sharing the memorandum would be tantamount to sharing the answer script as the examination is still in progress.

After the remarking and oral examination processes are completed, and the results for those sittings are finalised, the examination papers and marking memoranda are released to the candidates and the legal profession.

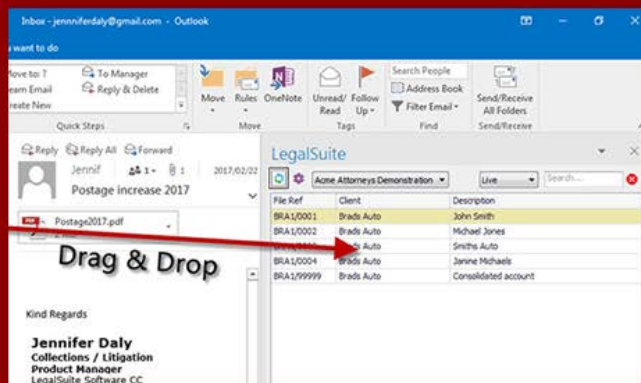
It is important to note that an oral examination is regarded as a supplementary examination, and not as a new examination. The marking memoranda cannot be released until all the examinations and processes are complete.

The examinations are marked by experienced, trained examiners, and moderated to ensure consistency and accuracy in the marking process. If a candidate applies for a remark of their answer script, and their mark changes after the remarking process, the candidate is refunded the fee that they paid for that remark in full.

The examination papers and the marking memoranda are released to all candidates and the legal profession as soon as the examination process is complete. The candidates can then self-assess and measure their performance and ensure

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that they are prepared for the next sitting of the examinations, if applicable. Studying past papers will not assist candidates to pass future examinations, as questions are not repeated in future examinations.

**Legal Practice Council  
National Office, Midrand**

### 'The algorithm fired me!'

This is a lament that we may soon hear from employees, as companies use artificial intelligence to monitor the performance and conduct of their employees. It is currently not clear to what extent employers are using this technology in South Africa (SA). Reports emanating from the United States (US) show that dismissals are already taking place in this manner.

*The Batch* newsletter published by DeepLearning.AI reports that Amazon delivery drivers have complained that the company's 'automated management system played an unfair role in terminating their employment', as reported by *Bloomberg* (see Andrew Ng 'When Algorithms Manage Humans' (<https://read.deeplearning.ai>), accessed 10-11-2021) and Spencer Soper 'Fired by Bot at Amazon: "It's You Against the Machine"' ([www.bloomberg.com](http://www.bloomberg.com)), accessed 10-11-2021)).

The system allocates ratings to drivers automatically on their punctuality in picking up and delivering packages and 'how closely they follow instructions like "place the package on my back porch"' (Ng *op cit*).

Dismissed drivers complained that the system did not take delays at the Amazon distribution centres into account, including traffic jams, gated apartment complexes or bad weather. 'A former Amazon manager told *Bloomberg* the company was aware that its system had flaws that could lead to bad publicity but decided that higher efficiency was worth that risk' (Ng *op cit*). It also emphasised

that algorithms do 'not make the final decision to terminate employment', and that human managers reviewed the issue of poor performance (Ng *op cit*). A few years ago, 'the company abandoned a hiring algorithm after an internal audit found that it was biased against women' (Ng *op cit*).

*The Batch* newsletter makes the worrying observation that organisations are increasingly relying on algorithms to 'make decisions that impact peoples' lives, including who gets a bank loan, a job', or who must be imprisoned (Ng *op cit*). Activists are demanding that there should be accountability to 'mitigate algorithmic bias' and for people to appeal to humans when an automated decision has been made (Ng *op cit*). Human intervention is required because 'compassion and respect' do not appear to be qualities that are capable of being embedded into an algorithm (Ng *op cit*).

If these reports are correct, then I submit that this is a worrying trend. But, it is unlikely that a South African employer will be able to use such evidence at the Commission for Conciliation, Mediation and Arbitration (CCMA) or the court because it is not clear how the device containing the algorithm will present evidence or be subjected to cross-examination.

As the law presently stands in SA, certain interactions must take place, between humans, when the issue of a dismissal for poor performance is at issue:

- An explanation at the outset of the employment relationship of the performance standard expected of the employee.
- The criteria that would be used to monitor and measure the employee's performance. This is also known as the key performance indicators.
- The person to whom the employee will report.
- In cases where the employer is taking affirmative action measures, and in other appropriate cases, suitable

training is given to the employee to enable them to perform.

- That the employee is given guidance and feedback on their performance at regular intervals, in order to enable them to remedy performance deficiencies or shortcomings.
- Where the employee is not performing to the standard, to determine whether the standard is reasonable, realistic, fair and attainable; and whether employees in comparative positions are performing to the standard.
- The technical support, resources and tools that will be provided to the employee to enable them to perform.
- If the employee works in a team, to determine whether the performance of any other team member is impacting negatively on the employee's performance.
- Where the employee is performing below the required standard, for a counselling session to be scheduled so that difficulties can be identified and a plan agreed upon to overcome the difficulties.
- To issue employees warnings if necessary.

Employers should in the circumstances be cautious in the adoption of these technologies, because it is inevitable, that there will come a time when an explanation will be needed to be given by a human, in plain language, on how the employer arrived at a fair decision to dismiss an employee for poor performance. Where such evidence cannot be presented, or where such evidence cannot be interrogated and questioned, a finding may be made against an employer that the dismissal is unfair.

**Ranjit Jamnadas Purshotam**

*BProc LLB (Unisa)* is a legal practitioner at JP Purshotam Attorney and a Consultant with the Legal Resources Centre and part-time commissioner at the Commission for Conciliation, Mediation and Arbitration in Durban



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By  
Kabelo  
Letebele

# Newly elected National Legal Practice Council begins tenure on 1 November 2021

**T**he Legal Practice Council (LPC), a statutory body responsible for regulating the affairs of the legal profession, has announced its new 23-member Council to take office for a term of three years, commencing from 1 November 2021.

This is the second Council that is being appointed to regulate the South African legal profession since the LPC was established in November 2018. 'The appointments followed a rigorous nomination and voting process as stipulated in the Regulations and appointments of additional members designated as per the provisions of s 7 of the Legal Practice Act 28 of 2014. The Council consists of: Sixteen members elected by practising legal practitioners, three members are designated by the Minister of Justice and Correctional Services, Ronald Lamola, and one member each from Legal Aid South Africa (Legal Aid SA), the Legal Practitioners' Fidelity Fund (LPFF) and Deans of Law and Teachers of Law,' explained Charity Nzuza (Executive Officer of the LPC).

'The newly appointed Council will guide LPC National and provincial structures to deliver on its mandate to protect the interests of the public, set norms and standards for the legal profession, facilitate the admission and enrolment of legal practitioners, as well as regulating the professional and ethical conduct of

all legal practitioners and candidate legal practitioners,' Ms Nzuza added.

The newly appointed Council members are:

- Janine Myburgh – Chairperson (attorney);
- Kennedy Tsatsawane, SC – Deputy Chairperson (advocate);
- Kathleen Matolo-Dlepu – Executive Committee member (attorney);
- Miles Carter – Executive Committee member (attorney);
- Priyesh Daya – Executive Committee member (attorney);
- Brenton Joseph, SC – Executive Committee member (advocate);
- Pritzman Busani Mabunda – Executive Committee member (attorney and LPFF designate);
- Anthea Platt SC – Minister's designate (advocate);
- Thulani Kgomo – Minister's designate (attorney);
- Reghana Tulk – Minister's designate (advocate);
- Prof Danwood Chirwa – Deans of Law designate;
- Clement Marumoagae – Teachers of Law designate (attorney);
- Dick Khubana – (Legal Aid SA designate);
- Noxolo Maduba-Silevu (attorney);
- Nolitha Jali (attorney);
- Lucian Edwin Companie (attorney);
- Dr Llewelyn Gray Curlewis (attorney);

- Paula De Azevedo (attorney);
- Seopi Makhafola (attorney);
- Elizabeth Baloyi-Mere, SC (advocate);
- Kameshni Pillay, SC (advocate);
- Margaretha Engelbrecht, SC (advocate); and
- Craig Watt-Pringle, SC (advocate).

'We thank the outgoing Council and commend them for the sterling work done over the last three years. They have set the LPC on the right footing and the organisation will continue to grow from strength to strength. We also extend a warm welcome to our new Council and wish them well in their three-year tenure,' Ms Nzuza concluded.

## About the Legal Practice Council

The LPC is a national, statutory body established in terms of s 4 of the LPA. The LPC and its Provincial Councils regulate the affairs of and exercise jurisdiction over all legal practitioners (attorneys and advocates) and candidate legal practitioners.

Kabelo Letebele is the Senior Manager: Communication and Engagements at the Legal Practice Council in Midrand.



**The Legal Practice Council's mandate is to set norms and standards, to provide for the admission and enrolment of legal practitioners and to regulate the professional conduct of legal practitioners to ensure accountability.**

**If you have an enquiry you are welcome to contact the Legal Practice Council's offices in the following provinces:**

- National Office (010) 001 8500 • Eastern Cape (043) 050 1025
- Free State (051) 447 3237 • Gauteng (012) 338 5800 • Kwazulu-Natal (033) 345 1304
- Limpopo (015) 590 0389 • Mpumalanga (017) 200 2487 • North West (018) 011 0093
- Northern Cape (053) 050 0508/9 • Western Cape (021) 443 6700.



By  
John  
Ndlovu

# Prerequisites for the conclusion of valid plea and sentence agreements in terms of s 105A of the CPA

A plea and sentence agreement, also known as a plea bargain agreement, is an agreement between an accused and the state, represented by the prosecutor, in terms of which an accused agrees to plead guilty in return for a lenient or reduced sentence. These agreements are common in the South African criminal justice system and are often initiated by accused persons who are desirous of having lesser sentences imposed on them. Prosecutors are also often inclined to initiate plea and sentence negotiations to avoid going through a protracted and arduous trial. By agreeing to plead guilty to the offence with which they have been charged, an accused person waives their right to a fair trial, which is entrenched in s 35(3) of the Constitution. These agreements are, however, an important part of our criminal justice systems. This article seeks to discuss the requirements for the conclusion of valid plea and sentence agreements in terms of s 105A(1)(a) of the Criminal Procedure Act 51 of 1977 (the CPA).

## Legislation

Section 105A(1)(a) provides that a prosecutor who is authorised thereto in writing by the National Director of Public Prosecutions (the NDPP) and an accused who is legally represented may, before the accused pleads to the charge brought against them, negotiate and enter into an agreement in respect of a plea of guilty by the accused to the offence charged or to an offence of which they may be convicted on the charge and, if the accused is convicted of the offence to which they have agreed to plead guilty, a just sentence can be imposed by the court.

## A prosecutor authorised in writing

Section 105A(1)(a) requires the prosecutor to have written authority by the NDPP to negotiate and enter into a plea and sentence agreement. In *S v Knight* 2017 (2) SACR 583 (GP) the appellant was sentenced to life imprisonment in

terms of a plea and sentence agreement. One of the grounds of appeal was that there was non-compliance with the provisions of s 105A(1)(a). The appellant submitted that no proof was provided by the prosecutor that he was duly authorised by the NDPP to enter or negotiate a plea and sentence agreement, nor did the prosecutor inform the court that he had such authority and that the plea and sentence agreement ought to be regarded as a nullity. In upholding the appeal the court referred to the decision of the Northern Cape High Court in *S v Saasin and Others* (NCK) (unreported case no 84/02, 20-10-2003) (Majiedt J) where the court said that in order to comply with the requirements stipulated in s 105A(1)(a) the prosecutor must hand into court, at the commencement of the hearing, a certificate indicating that he had been authorised to negotiate and enter into a plea and sentence agreement. The court further stated that such proof of authority is an essential prerequisite for a plea and sentence agreement under s 105A. The court held that failure to comply with the provisions of this section is a fatal irregularity rendering a conviction and sentence based on the plea and sentence agreement null and void even though all the other provisions of s 105A had been complied with.

## A legally represented accused

Section 105A(1)(a) further requires an accused who enters into a plea and sentence agreement with the prosecutor to be legally represented. There is a plethora of authority to the effect that failure to comply with its provisions should result in a fatal irregularity rendering a conviction and sentence based on the plea and sentence agreement null and void. It stands to reason why the legislator enacted this provision. An unrepresented accused may suffer prejudice by negotiating with a prosecutor who has greater bargaining powers than the accused. Such an accused will negotiate with the prosecutor from a weaker position hence the need for legal representation. Wium de Villiers 'Plea and sentence

agreements in terms of section 105A of the Criminal Procedure Act: A step forward?' (2004) 37 *De Jure* 244 at page 245 remarks that an accused may be coerced into waiving their constitutional rights in order to receive a lesser sentence. De Villiers further observes that there is also the risk that an innocent person may plead guilty and accept a lesser sentence rather than taking the risk of a harsher sentence if convicted when defending the charges. The author further points out that the prospect of going to jail becomes so intimidating that an accused will agree to almost anything if the negotiated agreement guarantees that they will not serve time in jail. In view of all the considerations above it becomes essential for an accused to be legally represented during the conclusion of the plea and sentence agreement.

In *S v Wessels* (FB) (unreported case no 62/2019, 23-5-2019) (Moeng AJ) the accused was convicted and sentenced on one charge of contravening s 4(b) of the Drugs and Drug Trafficking Act 140 of 1992. The accused was sentenced to two years' imprisonment wholly suspended subject to specified conditions. The conviction and sentence were based on a plea and sentence agreement in terms of s 105A. It transpired from the written plea and sentence agreement that the accused was unrepresented when he entered into the said agreement with the prosecutor. The accused was represented when the negotiations in terms of s 105A were initiated, and the accused's attorney withdrew after such negotiations had already begun, but before the accused pleaded to the charge. The magistrate finalised the matter on the basis that the agreement was negotiated and entered into while the accused was represented and did not believe that the accused would suffer any prejudice. The court held that the subsection requires both the negotiations and the conclusion of the agreement to be undertaken while the accused was legally represented. The court further held that even if it could be accepted that negotiations were undertaken while the accused was represented there was no indication on the record that the agreement was concluded while

the accused was legally represented. Furthermore, the court observed that the agreement was not signed by the attorney as required by s 105A(2)(c). The court reiterated the fact that the provisions of s 105A, and specifically the provisions of subs (2)(c), are clearly peremptory and, therefore, require punctilious compliance. The court held that the conclusion of the agreement by the accused without the assistance of a legal representative was fatal and amounted to an irregularity. Consequently, the conviction and sentence were set aside, and the matter was remitted to the court *a quo* for the trial to start *de novo* before another magistrate.

## Conclusion

The plea and sentence agreements are an important part of the South African criminal justice system. These agreements provide the accused and the state with the opportunity to negotiate and reach agreement regarding the conviction and just sentence to impose. Parties to these agreements should always bear in mind that the provisions of s 105A are mandatory and that the courts require strict compliance with these provisions. Failure to comply with the requirements of the section will amount to a fatal irregularity, which will render a conviction and sentence based on the plea and

sentence agreement null and void. The mandatory provisions of this section are designed to provide protection to and ensure justice for the accused who, by having pleaded guilty, has waived his or her rights to a fair trial as provided for in s 35(3) of the Constitution.

**John Ndlovu BLB (UNIZULU) LLB (UP) Masters Cert (Labour Relations Management) (UJ)** is a Senior Legal Adviser at the Prosecutions Unit of the Legal Practitioners' Fidelity Fund in Centurion.



By  
Theo  
Steyn

# Commissioning of oaths in the 21st century

**I**n the recent High Court judgment of *Knuttel NO and Others v Shana and Others* (GJ) (unreported case no 38683/2020, 27-8-2021) (Katzew AJ), the court had to decide whether the rules related to the commissioning of affidavits could be relaxed in certain circumstances.

The deponent to the founding affidavit was infected with COVID-19 at the time of deposing and certain extraordinary steps were taken for the commissioning of the oath. The question that essentially had to be answered was whether there was substantial compliance with the requirements for the commissioning of the oath to the founding affidavit and whether the extraordinary steps taken for the commissioning constituted substantial compliance with the requirements for the commissioning of oaths.

The respondents principally complained that the founding affidavit was not signed by the deponent in the presence of the Commissioner of Oaths (the commissioner) and that this conflicted with the Regulations Governing the Administering of an Oath or Affirmation (the Regulations), which were made by the Minister of Justice in terms of s 10(1) (b) of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 (the Act). The Act empowers the minister to make regulations prescribing the form

and manner in which an oath or affirmation shall be administered, and a solemn or attested declaration shall be taken, when not prescribed by any other law. Regulation 3(1) requires that a deponent shall sign the declaration in the presence of the commissioner.

The legal practitioner on behalf of the applicant deposed to a separate affidavit wherein he gave a detailed explanation of the steps taken by him to ensure substantial compliance with the requirements in reg 3(1) and to ensure that the deponent to the founding affidavit signed in the presence of the commissioner, which, as already stated, was physically impossible due to the deponent's infection with COVID-19 at the time.

The procedure followed by the legal practitioner can be summarised as follows:

- An unsigned draft founding affidavit was e-mailed to the deponent with instructions to read, initial and sign it before e-mailing it back to the legal practitioner.
- The legal practitioner then engaged the services of a commissioner who, in the legal practitioner's presence in the office of the commissioner spoke to the deponent via a video WhatsApp call.
- Having identified the deponent as the

person she professed to be, the commissioner then posed the usual questions before she administered the oath in the conventional way, except that the deponent initialled and signed the affidavit prior to the video call.

Considering the question posed, the court referred to the full court judgment of *S v Munn* 1973 (3) SA 734 (NC), which confirmed that the Regulations are directory only and that non-compliance would not invalidate an affidavit if there was substantial compliance with the formalities in such a way as to give effect to the purpose of obtaining the deponent's signature to an affidavit. The Full Court in the *Munn* case found that the purpose of obtaining the deponent's signature to an affidavit is primarily to obtain irrefutable evidence that the relevant deposition was indeed sworn to. Consequently, non-compliance with the Regulations does not *per se* invalidate an affidavit. As far back as 1973, the *Munn* case confirmed that the requirement of person-to-person physical presence between a commissioner and deponent is not peremptory and can be relaxed on proof on the facts of substantial compliance with the requirements.

In the case under discussion the court consequently held that there was substantial compliance with the requirement for person-to-person presence in

administering the oath for the founding affidavit.

This finding is in line with foreign case law where judicial recognition has been given to the relaxation of the requirement of person-to-person presence for administering of an oath. In the case of *Uramin (Incorporated in British Columbia) t/a Areva Resources Southern Africa v Perie* 2017 (1) SA 236 (GJ), the court allowed the use of a video link to lead evidence in a civil matter from witnesses who were abroad. The judge adminis-

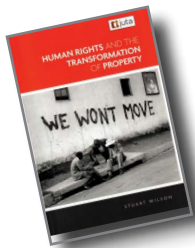
tered the oath to them virtually before their evidence was led. Similarly, in the Canadian Superior Court of Justice (see *Rabbat et al v Nadon et al* 2020 ONSC 2933) the court permitted the virtual commissioning of affidavits considering the restrictions due to COVID-19.

The question of commissioning the oath without physical person-to-person presence arises more frequently in the digital era we live in. This judgment is a welcome guideline for litigants who require a departure from the rigidity of

physical presence when commissioning affidavits. One would be well-advised to take heed of the judgment and the process followed therein should you be in a position, which requires some departure from the Regulations.

**Theo Steyn BCom Law LLB (UP) LLM (Unisa) is a legal practitioner at VZLR Inc in Pretoria.** □

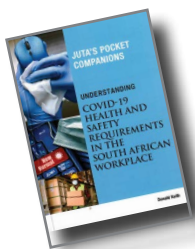
## Book announcements



### ***Human Rights and the Transformation of Property***

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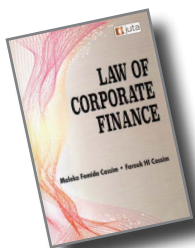
In this book, leading human rights lawyer, Stuart Wilson gives an overview of key aspects of constitutional and common law property rights and shows how recent developments in the law of eviction, rental housing, mortgage and consumer credit have opened up new spaces in which unlawful occupiers, tenants and debtors are challenging the power of landlords and financial institutions to dispossess them.



### ***Juta's Pocket Companions Understanding COVID-19 Health and Safety Requirements in the South African Workplace***

By Donald Keith  
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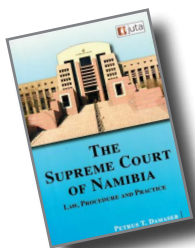
This book explains the health and safety measures that employers are required to implement in the workplace to protect their employees and the public against COVID-19. It contains several checklists that systematically work through and simplify the applicable directions issued by the Minister of Employment and Labour.



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By  
Mpho  
Adam  
Titong

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# The balance between Intellectual Property and public health

Intellectual property (IP) can be defined as any idea or material that is protected by law from the unauthorised use by others (Jose Rivera 'What Is Intellectual Property Theft?' ([www.legalmatch.com](http://www.legalmatch.com), accessed 8-11-2021)). Patent, copyright, design, as well as trade mark laws are what is commonly used to protect the idea or material referred to. A person (natural or juristic) who has invented a particular pharmaceutical drug or medical product will generally apply for a patent to protect such an invention against counterfeiting and other infringements, which means that only such an inventor can profit from its production for a certain period, in exchange for the public disclosure of the invention (Ki Akhbari 'What is Intellectual Property Law?' ([www.legalmatch.com](http://www.legalmatch.com), accessed 20-2-2020)).

Inventors tend to protect their inventions for purposes of being able to recover their costs and to also make profit. This is because the fundamental idea of IP protection is that owners must be allowed to enjoy the fruits of their labour (Michael Yeboah *The Effects of Trade Related Aspects of Intellectual Property Rights on Developing Countries* (MSc thesis Iowa State University, 2005)). The fundamental idea referred to is what inspires further innovation and research, which inevitably results in economic growth and protection of public health (Stephen Ezell and Nigel Cory 'The Way Forward for Intellectual Property Internationally' (<https://itif.org>, accessed 11-4-2020)).

Considering the context provided *op cit*, this article will provide a discussion on how IP is linked to public health within South Africa (SA).

## IP and public health within SA

The right to health began developing into what it is today at the end of World

War II and consequent to the establishment of the World Health Organisation (WHO) (Lonias Ndlovu 'Access to Medicines under the World Trade Organisation TRIPS Agreement: A Comparative Study of Select SADC Countries' (LLD thesis, University of South Africa, 2014) at 87). The Constitution of the WHO was the first international legal instrument, which made an explicit provision for the right to enjoy the highest attainable standard of health (Ndlovu *op cit*).

Before IP was regulated and facilitated effectively as it is today, private pharmaceutical companies were dominating the market and excluding developing countries from essential health technologies by setting high prices for the purchase of their inventions. Intellectual property was therefore, considered bad for public health (Anatole Krattiger and Richard T Mahoney 'Intellectual property and public health' ([www.who.int](http://www.who.int), accessed 6-6-2020)). This shows that IP has been linked to public health since the birth of IP as we know it today.

## IP and health as basic human rights

The link between human rights and IP has been a global topic of discussion for a long time (Mpasi Sinjela *Human Rights and Intellectual Property Rights: Tensions and Convergences* (Leiden: Martinus Nijhoff Publishers 2007)). The Universal Declaration of Human Rights (UDHR) of 1948 states clearly that everyone is afforded a right to the protection of their moral and material interests owing from artistic, literary, as well as scientific production of which they are the author (art 27(2) of the UDHR). This is clearly an IP right afforded to everyone and it, therefore, acknowledges the link between human rights and IP. In this context, it can be submitted that the UDHR acknowledges the fact that there indeed exists a link between human rights and IP.

The UDHR also provides that everyone has the right to a standard of living that is adequate to their and their family's health, which includes housing, food, as well as medical services (art 25(1) of the UDHR). This right is afforded to every human being by virtue of being human and needs to be protected and fulfilled by whoever is under an obligation to do so.

Furthermore, the UDHR provides everyone with the right to own property and affords protection against the unlawful deprivation of such property (art 17 of the UDHR). The right to property is a clear human right in the context of the UDHR and arguably, property is ordinarily defined therein to include IP.

## TRIPS, the WHO and the Constitution

The Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement allows member-states of the World Trade Organisation (WTO) to take the necessary measures to protect public health when formulating or amending their IP laws (art 8 of the TRIPS Agreement and Ndlovu *op cit* at 118). I, therefore, submit that the TRIPS Agreement acknowledges the fact that IP is directly linked and relevant to public health.

The preamble of the Constitution of the WHO clearly states that the enjoyment of the right to health is one of the indiscriminate fundamental rights of every human being. In this context, the right to health is a right afforded to every human being, a right related to other rights and, it is also more than just a political or civil right. The Constitution of the Republic of South Africa (the Constitution) is the supreme source of law in the land and provides for the right to access to health care services and suf-

ficient food (s 27 of the Constitution). Additionally, another important human right related to the right to health (ie, the right to life) is also stated within the Constitution (s 11 of the Constitution).

The TRIPS Agreement states succinctly that an invention which involves an inventive step (ie, one that is new and novel) and is capable of being applied to the industry, shall be eligible for patent protection (art 27(1) of the TRIPS Agreement), it also states that WTO members have the right to use compulsory licensing and other methods to ensure access to medicine (Ndlovu *op cit* iv).

There exists a hierarchy of laws and a hierarchy of rights, (see *Minister of Health and Others v Treatment Action Campaign and Others* (1) 2002 (10) BCLR 1033 (CC) for the importance of the right to health. In the case, the Constitutional Court of South Africa held, *inter alia*, that the conduct of restricting the distribution of antiretroviral drugs to HIV positive pregnant women by the South African government was a violation of the constitutional right to health, which means that if indeed the right to IP was to be deemed a human right (ie, in the context of the UDHR, *inter alia*,) then the right to health would trump the right to IP for a number of reasons (Ndlovu *op cit* 80). One of the reasons referred to is the fact that IP rights depend on legislative promulgation, they are naturally temporary, they can be licensed, assigned to someone other than the owner, be forfeited and they can also be amended accordingly (Emmanuel Kolawole Oke 'Incorporating a right to health perspective into the resolution of patent law disputes' ([www.hhrjournal.org](http://www.hhrjournal.org), accessed 8-6-2020) and Ndlovu *op cit* 79)).

Human rights are inalienable rights, which are afforded to every human being by virtue of being human (preamble of the UDHR). They are, however, not absolute, neither are they tem-

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*'The preamble of the Constitution of the WHO clearly states that the enjoyment of the right to health is one of the indiscriminative fundamental rights of every human being.'*

porary. Additionally, not all IP rights serve to protect the personal interests of their holders because IP rights are viewed as rights used to benefit, while human rights are rights, which are there to guard the personal interests of the human afforded such rights (Ndlovu *op cit* 79).

When a company invents a medicine or medical product, such an invention (falling under the definition of an IP) has a direct impact on the health of the public because it is invented for the public to purchase and use it for health purposes (Krattinger and Mahoney *op cit*). Based on the context provided, the link between public health as a human right and patents as IP is relatively evident.

The link and relevance of IP (particularly patents) to public health is directly evidenced by the increased well-being of the public, while the relevance of same to the economy is evidenced by the sales of the manufactured product (Amy M Bunker 'Deadly Dose: Counterfeit Pharmaceuticals, Intellectual Property and Human Health' (2007) 89 *JPTOS* 493). Intellectual property rights are monopolistic in nature, which means that their prices of sale may be higher than what poor people can afford, thereby directly impacting their right to health negatively (Oke *op cit*). This shows the direct link and relevance that IP has on public health.

One of the reasons for protection of IP is to promote creativity and to generate profit in the name of fostering further research and innovation (Olasupo Owoeye 'Using Intellectual Property to Promote National Interests and Economic Development in Low Income Countries' ([www.aripo.org](http://www.aripo.org), accessed 8-6-2020)).

Further research and innovation are important because new viruses and illnesses always emerge. The pharmaceutical industry, therefore, needs to be prepared and such preparation is done by conducting research (Owoeye *op cit*). The fact that illnesses and viruses referred to are life-threatening to humans shows that a pharmaceutical invention, which targets such an illness or virus has a direct impact on human health since humanity will be its users, this is therefore an indication of how IP (the invention referred to) is relevant and/or linked to public health.

## SADC and the African Commission

The Southern African Development Community (SADC) Protocol on Health states in its preamble that SADC members acknowledge the fact that a healthy population is essential for sustainable human development and for the increment of productivity (Ndlovu *op cit* 103).

Relative hereto, the African Commission on Human and Peoples' Rights (the African Commission) urges African states to develop their IP laws in the name of promoting access to medicines (Ndlovu *op cit* 102), thereby protecting the right to health of the public. The relevance of IP to public health cannot be overemphasised, IP is directly linked to public health, especially where medicinal drugs and medical products are concerned.

South Africa and Zimbabwe (despite its poor economy) are deemed to have pharmaceutical regulatory bodies, which are well-developed, as opposed to Eswatini, which has a regulatory body, which is relatively poor (Amanda Calder 'Assessment of Potential Barriers to Medicines Regulatory Harmonisation in the Southern African Development Community (SADC) Region' (MSc Research Report, University of the Witwatersrand, 2016)). It has been stated that strong protection of IP has the potential

to yield great public health benefits and results. South Africa and Zimbabwe are, therefore, some of the countries with the potential to benefit accordingly.

For a developing country such as SA, medicine laws and IP laws, which are outdated and/or do not comply with the TRIPS Agreement may prove to be a serious weakness in their pharmaceutical regulations and consequently pose a threat to the health of the public (Ndlovu *op cit* 107). In this context, I submit that IP and its laws are relevant to ensuring and protecting of the right to health of the public of SA.

The main purpose of IP protection is to guard against unlawful infringement and, to ensure that property owners enjoy the fruits of their labour (Yeboah *op cit*) and Olusegun Abayomi Olaniyi 'Intellectual Property Rights and Foreign Direct Investment in sub-Saharan Africa' (2000-2016) (MSc thesis, Obafemi Awolowo University, 2018) at 16). These fruits include the making of profit from sale of their property, hence the need to provide a discussion on how IP is relevant to the economy.

## Summative remarks on how IP is linked to public health

Intellectual property refers to an idea or material, which can be protected by law against the unauthorised use or exploitation by other persons. The rights associated with IP are protected by way of trade marks, copyrights, patents etcetera (Rivera *op cit*). These rights cannot be deemed human rights because they are naturally temporary. They can be licenced, assigned to someone other than the owner, be forfeited and they can also be amended (Oke *op cit*). I submit that IP rights enhance, promote, and protect human rights and do not instead surmount them.

The right to health is a human right, which is recognised by both national and international law. For IP to exist in harmony with the right to health of the public, there has to be a balance between the two (such a balance can be made by considering a number of factors such as the availability of resources etcetera) (Owoeye *op cit*). What must be enunciated is the fact that IP is linked to public health.

When a medicinal drug is invented, such an invention amounts to IP and such invention is directly linked to public health because it is invented for the public (consumers) to purchase and use for health purposes, this is where the relevance of IP (in the form of patents) to public health lies (Krattinger and Mahoney *op cit*).

**Mpho Adam Titong LLB (NWU) is an ILM graduate at the North-West University in Potchefstroom.**



## Fact corner

Thomson Reuters, practical law, lists the main categories excluded from patent protection regarding Intellectual Property Rights in South Africa are:

- Discoveries.
- Scientific theories.
- Mathematical methods.
- Literary, dramatic, musical or artistic works or any other aesthetic creation.
- Schemes, rules, or methods for performing a mental act, playing a game, or doing business.
- Computer programs.
- The presentation of information.

Other exclusions from patentability include patents expected to encourage offensive or immoral behaviour, varieties of animals or plants or biological methods for their production, and medical methods of treatment.



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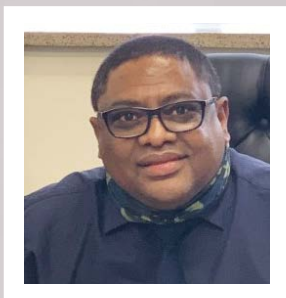
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Jan L. Jordaan Inc. Attorneys

# When 'no' means 'no' – the controversy from misunderstanding the concept of sexual consent



By  
Desmond  
Francke



‘Control over the sexual activity one engages in lies at the core of human dignity and autonomy’ (*R v Hutchinson* 2014 SCC 19). ‘Society’s commitment to protecting a person’s autonomy and dignity requires that individuals have the right to determine who touches their body, and how the touching will occur’ (*Hutchinson* at para 83). Non-consensual sexual intercourse is a coercive sexual practice that undermines women’s sexual autonomy, bodily integrity, and their right to decide in what sexual activity they are willing to participate in. ‘It is deeply troubling that in [2021], we are still trying to sort out the role of these practices in establishing consent to sexual activity’ (Lise Gotell and Isabel Grant ‘Does “no, not without a condom” mean “yes, even without a con-

dom”? The fallout from *R v Hutchinson*’ (2020) 43 *Dalhousie Law Journal* 767). ‘Rather, it must be linked to the “sexual activity in question”, which encompasses “the specific physical sex act”, “the sexual nature of the activity”, and “the identity of the partner”’ (*R v Barton* 2019 SCC 33 (CanLII)).

The controversy in this article arose from a misunderstanding of the concept of sexual activity in question in *Coko v S* (ECG) (unreported case no CA&R 219/2020, 8-10-2021) (Ngcukaitobi AJ).

In para 90 of the judgment, Ngcukaitobi AJ refers to a decision in the Supreme Court of Appeal *S v SM* 2013 (2) SACR 111 (SCA) that sets out the requirements for consent. It is –

- the consent itself must be recognised by law;
- it must be real consent; and

- it must be given by a person capable of consenting.

It is the second requirement that brought about the controversy regarding consent. ‘There are two aspects to the overarching concept of consent. The first is subjective consent, which relates to the factual findings about whether the complainant subjectively and voluntarily agreed to the sexual activity in question, and the second requires that subjective consent also be effective as a matter of law’ (*R v GF* 2021 SCC 20 (CanLII)).

‘Subjective consent requires a complainant to formulate a conscious agreement in their own mind to engage in the sexual activity in question, and it follows, as a matter of logic, that the complainant must be capable of forming such an agreement’ (Elizabeth Raymer ‘Consent and capacity do not have to be consid-



Picture source: Gallo Images/Getty



ered separately in sexual assault cases: Supreme Court’ ([www.canadianlawyer-mag.com](http://www.canadianlawyer-mag.com), accessed 5-11-2021)). ‘The *actus reus* of sexual assault requires the [state] to establish three things: (i) touching; (ii) of an objectively sexual nature; (iii) to which the complainant did not consent ... . The first two elements are determined objectively, while the third element is subjective and determined by reference to the complainant’s internal state of mind towards the touching ... . At the *mens rea* stage, the [state] must show that (i) the accused intentionally touched the complainant; and (ii) the accused knew that the complainant was not consenting, or was reckless or wilfully blind as to the absence of consent ... . The accused’s perception of consent is examined as part of the *mens rea*, including the defence of honest but mis-

taken belief in communicated consent’. ‘Consent means that the complainant, in their mind, agreed to the sexual touching taking place ... . Consent requires “the conscious agreement of the complainant to engage in every sexual act in a particular encounter”’ (*R v GF (op cit)*). Therefore, the accused’s belief as to whether the complainant is consenting is not a factor when determining the absence of consent for purposes of the *actus reus* of sexual assault. It is all about whether the complainant in her mind wanted the sexual touching to take place. It is the complainant’s perspective on the touching that exclusively drives the analysis. It is entirely subjective in nature.

Whether the complainant subjectively consented must be resolved by considering both the complainant’s testimony about her state of mind at the time of

the events and other evidence that may inform the question of what was on her mind at the time. That evidence may include the complainant’s words and actions in and around and at the time of the incident in question.

In para 81 of the judgment reference is made to an excerpt of the Magistrates’ finding that reads ‘the complainant explicitly barred the accused from penetrating her vagina with his penis so as to prevent him from deflowering her.’ In para 82 of the judgment Ngcukaitobi AJ criticises the finding of the Magistrate. I agree with his criticism that ‘there are no different standards applicable to women (or men) who are virgins and those who are not’ (*Coko* at para 82). I do, however, not agree with his finding for the following reasons. ‘The complainant set out her “sexual boundaries”, which included that she would not consent to intercourse’ by sexual penetration (*Gotell and Grant (op cit)*). Consent ‘must be linked to the “sexual activity in question”, which encompasses “the specific physical sex act”, “the sexual nature of the activity”, and “the identity of the partner”’ (*Barton (op cit)* at para 88). The complainant did not consent to at the ‘time to conditions and qualities of the act or risks and consequences flowing from it’, as these ‘conditions are “essential features” of the sexual activity ... or go to “how” the physical touching was carried out’. The reference to her being a virgin substantiates and wanting to remain one is part of her reasoning for setting the sexual boundaries. Throughout the judgment, Ngcukaitobi AJ discussed how the complainant voiced her non-consent to sexual penetration.

Paragraph 94 of the *Coko* judgment reads: ‘The correct sequence of the evidence, as given by the complainant, is that she mentioned that she closed her legs and mentioned that she [did] not want to have sex with the appellant as he was undressing her.’

‘There are essentially two approaches to determining the meaning of what constitutes voluntary agreement to the sexual activity in question and the role of mistake or deception in determining whether such agreement existed. The first approach defines the “sexual activity in question” as extending beyond the basic sexual activity the complainant thought she was consenting to at the time to conditions and qualities of the act or risks and consequences flowing from it, provided these conditions are “essential features” of the sexual activity or go to “how” the physical touching was carried out. The second approach defines “the sexual activity in question” more narrowly as the basic physical act agreed to at the time, its sexual nature, and the identity of the partner’. “Sexual activity in question” ... [refers] simply to the physical sex act itself (for example,

kissing, petting, oral sex, intercourse, or the use of sex toys). The complainant must agree to the specific physical sex act'. 'Agreement to one form of penetration is not an agreement to any or all forms of penetration and agreement to sexual touching on one part of the body is not an agreement to all sexual touching' (*Hutchinson (op cit)* at para 54). In terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, "sexual penetration" includes any act which causes penetration to any extent whatsoever by –

'(a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person'.

A limitation on the definition of the sexual activity in question would be perverse, as it would, without any rationale, prevent a person from limiting their consent in a manner that is intimately related to their personal autonomy and the public interest. It is important that courts do not ignore important physical differences that can exist within broad categories of sexual activity and the consent or non-consent to each specific activity.

It is always open to the accused to attempt to raise a reasonable doubt about a complainant's direct evidence regarding her state of mind at the time of the incident, by pointing to the complainant's 'words and actions, before and during the incident' (*R v Ewanchuk* [1999] 1 SCR 330). Ultimately, though, whether the complainant subjectively consented to the sexual activity in question is a matter of credibility to be determined by the court considering all the evidence.

In para 94 of the *Coko* judgment, Ngcukaitobi AJ writes: 'No force or threats were used to coerce the complainant (who is the same age as the appellant)'. 'As a general rule, non-verbal behaviour, when relied upon as an expression of consent, must be unequivocal. Where this is not the case, avoidance of serious risk-taking, and the defeat of confusion, miscommunication, and unfounded assumption demands that reasonable steps be taken, not themselves [involving] sexually assaultive activity, to clarify the limits of any agreement to sexual touching'. 'A person is not entitled to take ambiguity as the equivalent of consent' (Elizabeth A Sheehy 'From women's duty to resist to men's duty to ask: How far have we come?' (2000) 20 *Canadian Woman Studies* 98). One is not deemed to have consented because one does not protest or resist. 'The "specious" defence of implied consent "rests on the assumption that unless a woman protests or resists, she should be "deemed" to consent ... makes clear that this concept has no place in [South African] law'. A belief that 'silence, passivity, or ambiguous conduct ... constitutes consent is a mistake of law' and provides

***'There are two aspects to the overarching concept of consent. The first is subjective consent, which relates to the factual findings about whether the complainant subjectively and voluntarily agreed to the sexual activity in question, and the second requires that subjective consent also be effective as a matter of law'***

no defence (*Barton (op cit)* at para 98). It is also a mistake of law to infer that the complainant's consent was implied by the circumstances, or by the relationship between the accused and the complainant. In short, it is an error of law, not fact to assume that unless and until a woman says 'no', she has implicitly given her consent to any sexual activity.

Mr Coko did not take any steps to ascertain whether he had consent. The purpose of the reasonable steps' requirement has been expressed in different ways, to protect the security of the person and equality of women who comprise the huge majority of sexual assault victims by ensuring as much as possible that there is clarity on the part of both participants to a sexual act. 'The reasonable steps requirement "replaces the assumptions traditionally – and inappropriately – associated with passivity and silence"'. The "reasonable steps" requirement was intended to criminalise sexual assaults committed by men who claim mistake without any effort to ascertain the woman's consent or whose belief in consent relies on self-serving misogynist beliefs". The common thread running through each of these descriptions is this: the reasonable steps requirement rejects the outmoded idea that women can be taken to be consenting unless they say "no" (*Barton (op cit)* at para 105).

'What can constitute reasonable steps to ascertain consent? In my view, the reasonable steps inquiry is highly fact-specific, and it would be unwise and likely unhelpful to attempt to draw up an exhaustive list of reasonable steps or obscure the words ... by supplementing or replacing them with different language' (*Barton (op cit)* at para 106). Consent as requiring a conscious, operating mind, capable of granting, revoking, or withholding consent to each and every sexual act. The jurisprudence also establishes that there is no substitute for the complainant's actual consent to the sexual activity at the time it occurred. It is not sufficient for the accused to have believed the complainant was consenting. He must also take reasonable steps

to ascertain consent and must believe that the complainant communicated her consent to engage in the sexual activity in question.

'That said, it is possible to identify certain things that clearly are not reasonable steps. For example, steps based on rape myths or stereotypical assumptions about women and consent cannot constitute reasonable steps. As such, an accused cannot point to his reliance on the complainant's silence, passivity, or ambiguous conduct as a reasonable step to ascertain consent, as a belief that any of these factors constitutes consent is a mistake of law. ... An accused's attempt to "test the waters" by recklessly or knowingly engaging in non-consensual sexual touching cannot be considered a reasonable step. ... It is also possible to identify circumstances in which the threshold for satisfying the reasonable steps requirement will be elevated. For example, the more invasive the sexual activity in question and/or the greater the risk posed to the health and safety of those involved, common sense suggests a reasonable person would take greater care in ascertaining consent' (*Barton (op cit)* at para 107 – 108). '[Courts] should take a purposive approach, keeping in mind that the reasonable steps requirement reaffirms that the accused cannot equate silence, passivity, or ambiguity with the communication of consent. Moreover, [courts] should be guided by the need to protect and preserve every person's bodily integrity, sexual autonomy, and human dignity. Finally, if the reasonable steps requirement is to have any meaningful impact, it must be applied with care – mere lip service will not do' (*Barton (op cit)* at para 109).

'A person consents to how she will be touched, and she is entitled to decide what sexual activity she agrees to engage in for whatever reason she wishes. The fact that some of the consequences of their motives are more serious than others', such as in this case, she lost her virginity, 'does not in the slightest undermine her right to decide how the sexual activity she chooses to engage in is carried out. It is neither her partner's business nor the state's. The complainant's voluntary agreement to the manner in which the sexual touching is carried out, requires the complainant's consent to where on her body she was touched and with what' (*Hutchinson (op cit)* at para 88). 'Society is committed to protecting the personal integrity, both physical and psychological, of every individual. Having control over who touches one's body, and how, lies at the core of human dignity and autonomy' (*Hutchinson (op cit)* at para 82). The courts must respect it.

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





Picture source: Gallo Images/Getty

## Parental intoxication: A scientific diagnostic approach in classifying parental substance misuse



By Dr Johannes B Laurens and Chris Maree

**A**lcohol and drug abuse are omnipresent in South Africa (SA). The United Nations Office of Drugs and Crime (UNODC) claims that 22 million people in Africa between the ages of 15 to 64 years used drugs in 2018 (UNODC *World Drug Report 2021, booklet 2, Global Overview of Drug Demand and Drug Supply* ([www.unodc.org](http://www.unodc.org), accessed 15-11-2021)). This figure is forecast to escalate as Africa is predicted to have the most significant population growth in the world during the next decade.

Substance abuse is known to distort an individual's social functioning, therefore, the percentage of individuals abusing alcohol and drugs, ending up in

parental rights and responsibilities disputes, is becoming higher. Inappropriate substance use by parents is often also a contributing factor to these disputes. The percentage of investigations related to drug and alcohol abuse in parental responsibilities and rights disputes by the Office of the Family Advocate is on the rise.

The substances used by parents include legal substances, such as alcohol and cannabis, and illegal substances, such as methamphetamine (TIK), cocaine and heroin. Parents also misuse prescription and over-the-counter medications, all of which can impact their ability to exercise their parental responsibilities and rights responsibly. It is essential to

keep in mind that some legitimate cannabidiol oils (CBD oil) may be contaminated with Tetrahydrocannabinol (THC), the psychoactive substance of cannabis.

This article focuses on detecting inappropriate drug and alcohol use in parental rights and responsibilities cases where allegations of substance misuse are investigated. The outcome of these investigations often disqualifies parents from having contact with their children or limits rights and responsibilities regarding decision making.

The trend in current-day SA to classify an individual's substance use as inappropriate or problematic is to –

- perform screening tests for drugs (without confirmation) and liver enzyme induction tests for alcohol use;
- use the nominal values of test results (without taking the significance of a test into account); and
- make a decision about the parent's substance use habits, which may restrict their parental rights and responsibilities severely.

I submit that the abovementioned approach is incorrect and suggests that a rational, scientifically correct 'diagnostic' approach must be followed when classifying an individual as a problematic substance user. The analytical test results must form part of the diagnostic paradigm instead of a limited threshold

approach for safety-sensitive environments where only the cut-off concentration is used to make a decision. Additional information like medical history, social function, and others must also be considered when making a rational decision in these cases.

The medical-legal questions raised must be viewed at an integrative level with a multi-layered approach, founded in the supreme provisions of the Constitution, relevant legislation, considerations of medical ethics and international due scientific practice.

## Legislative framework

- **Constitutional rights:** The right to privacy, freedom, autonomy, freedom of religion, children's rights, the equal enjoyment of rights and privileges, and the limitation thereof are prescribed in the Bill of Rights of the Constitution.
- **Legislation:** Sections 7, 9, 24 and 28 of the Children's Act 38 of 2005 determines that the High Court is the guardian of all children and will pronounce on the 'child's best interest' standard. This standard applies to parental responsibilities and rights cases where the parents misuse substances, which often disqualify them from having contact or care of their children and often limits their parental responsibilities and rights.
- **Medical ethics:** The overall assessment aims not to have a purely clinical diagnostic purpose but rather to classify an individual as an inappropriate drug or alcohol user. It is essential to keep in mind that analytical testing is still a biomedical intervention on a human. This necessitates an ethical and legal approach similar to the medical profession's regarding fundamental human rights, as prescribed by the Health Professions Council of South Africa (HPCSA). It highlights the general sensitivity in the medical law environment to respect privacy, dignity, and bodily integrity.

The legal fraternity is well versed in the legal aspects of these cases, however, detailed knowledge of scientific and legally defensible testing protocols is often not part of their knowledge base.

## Legally defensible testing protocol

A sampling of biological matrices must be performed by an individual trained and registered at the HPCSA within the required field of expertise. Voluntary informed autonomous consent is required for all biomedical testing. The parent may designate a specific individual whom they deem suitable to receive the test reports or themselves only.

The sampling officer must request photographic identification and take a

*'Hair is an ideal matrice to access an individual's drug-taking habits. Drugs and alcohol, and their metabolites, are taken up in the hair since it is in continuous contact with the blood.'*

photo of the individual at the time of specimen collection. Anonymous submission of hair samples by courier is not ethically correct since the owner of the hair sample must provide consent.

The specimen must be collected and stored to preserve the sample's integrity before shipping to the confirmation laboratory for testing. The chain-of-custody must also be documented.

The test results must be kept confidential and communicated on a need to know basis only, with the explicit permission of the parent or on a court order.

## Medical-scientific framework

- **Markers of exposure and effect:** Drug use is detected with markers of exposure, which refer to parts of the initial parent compound present in the human body after consumption. A marker of effect indicates the effect of the drug or alcohol on the body. A typical example of effect markers is the liver enzymes such as Gamma-Glutamyl Transferase (GGT) and carbohydrate-deficient transferrin (CDT) induced with regular alcohol use.

The testing protocol should involve detecting the substance with a marker of exposure first. An assessment of the amount of the substance consumed can then be done by employing a marker of effect as corroborating evidence. In the ideal case, the exposure and effect markers are identical – such markers are available for alcohol in hair.

The applicability of the matrices such as blood, urine or hair also needs to be appreciated. Drugs and alcohol are present in the blood for a few hours, during which it is metabolised and become detectable in urine for a few days.

- **Hair testing:** Hair is an ideal matrice to access an individual's drug-taking habits. Drugs and alcohol, and their metabolites, are taken up in the hair since it is in continuous contact with

the blood. Hair analysis provides a history of the individual's drug use. The hair grows at approximately one centimetre per month, allowing for profiling a person's drug consumption over time with segmental analysis.

- **Analytical testing:** Threshold testing for safety-sensitive environments such as workplaces usually requires screening and confirmation tests for all non-negative specimens. Screening analyses use immunoassay technology to detect above a safety threshold concentration for the drug in urine. The immune bodies employed in immunoassay screening tests are also well known to be susceptible to cross-reactivity by other substances from the individual's diet, prescription and over-the-counter medication, among others. Therefore, screening test results cannot be accepted as reliable evidence in any forum or court where decisive action is taken and important, far-reaching decisions are made. Confirmation analysis, with a forensically acceptable technique such as gas chromatography-mass spectrometry (GC-MS), will eliminate the uncertainty about the identity and concentration of the substance under investigation. Confirmation tests have limits of detection (LOD) that are significantly lower than screening tests and, therefore, more suitable to detect traces of drugs that are lower than the relatively high cut-off concentrations for risk-sensitive environments. The presence of a substance at a low concentration may also indicate risky behaviour by a parent. Confirmation analytical techniques are also not limited by the number of drugs that can be detected for screening tests.

Given the gravity of the decisions in parental rights and responsibilities disputes, I submit that screening tests do not have a purpose in these cases.

- **Significance of a test:** All test results must be interpreted with their significance in mind. Analytical sensitivity is the ability of a test to identify a substance in the specific matrice correctly, and analytical specificity refers to the ability to identify the absence of a drug correctly.

The analytical sensitivity and specificity of immunoassay screening tests are typically in the order of 60% to 80%. Analytical sensitivity of 70% will imply that 30% of replicate readings on the same person will not indicate the presence of a drug above the safety threshold concentration on the same specimen – 30% false-negative (FN) rate. It follows that an analytical specificity of 80% implies an incorrect detection of a drug in 20% of the replicate readings on the same person – 20% false positive (FP) rate.

Markers of effect (liver enzyme induction)		
Marker	Diagnostic sensitivity	Diagnostic specificity
CDT	46 – 90%	70 – 100%
GGT	37 – 95%	18 – 93%
AST	25 – 60%	47 – 68%
ALT	15 – 40%	50 – 57%
Mean corpuscular volume (MCV) (anatomical changes)	40 – 50%	80 – 90%
CDT+MCV+GGT (combined)	88%	95%
Marker of exposure		
EtGluc (hair) Chronic excessive drinking Cut-off = 30 Pico gram/mg hair	75%	96%

TABLE 1: Biomarkers of effect and exposure and effect for chronic excessive alcohol use. Aspartate aminotransferase (AST), Alanine aminotransferase (ALT), Carbohydrate-deficient transferrin (CDT), Mean red blood cell volume (MCV), Ethyl glucuronate (EtGluc).

Screening test results should be regarded as preliminary only. They cannot be offered as reliable evidence in any court due to their susceptibility to interferences and uncertainty in the drug concentration estimate. It is also important to note that although some screening tests are laboratory-based and performed with auto analysers on hair, blood and urine, they have the same limitations as the devices for on-site screening.

The analytical sensitivity and specificity of forensically acceptable confirmation techniques are in the order of 99, 5% for well-validated protocols operated by well qualified forensic scientists.

- Markers of effect:** The typical markers of effect employed to detect inappropriate alcohol use are the liver enzymes: Alanine aminotransferase (ALT); aspartate aminotransferase (AST); GGT and CDT. These enzymes are widely used to detect chronic alcohol use, however, they also have an associated diagnostic sensitivity and specificity, which must be considered when interpreting these pathology reports. Table 1 (above) indicates the diagnostic sensitivity and specificity for markers of effect when employed to identify chronic excessive drinking (Hilke Andresen-Streichert, Alexander Müller, Alexander Glahn, Gisela Skopp and Martina Sterneck 'Alcohol Biomarkers in Clinical and Forensic Contexts' (2018) *Deutsches Ärzteblatt International* 309). In general, the diagnostic sensitivity of these effect markers for identifying

chronic excessive alcohol use is not as good as the diagnostic specificity. The combination of the three effect markers CDT, MCV and GGT, has an 88% diagnostic sensitivity and 95% specificity.

These markers may also be elevated by medical disorders, which may cause FP test results, such as liver disease, genetic variations and vitamin deficiencies, among others.

- Result interpretation:** The landmark *Daubert* case (*Daubert v Merrell Dow Pharmaceuticals Inc* 509 US 579 (1993)) in the US Supreme Court in 1993 highlighted that the admissibility of scientific evidence, among others, depends on its known or 'potential rate of error'. No scientific conclusions can be made and reported without considering a rationally obtained sensitivity and specificity. FP and FN results have a severe influence on justice. It is essential not to use test results nominally only by comparing the numerical value of the test result with the clinical normal reference range.

It is also of prime importance not to base a decision on parents' fitness to exercise their parental rights and responsibilities regarding their children on a medical test report only. Additional information must also be considered, such as a complete review of all history, including medical, psychiatric information, social functioning, and standardised instruments such as the Michigan Alcoholism Screening Test when alcohol abuse is investigated.

Performing a screening test only, without confirmation analysis, may be

viewed as a *prima facie* transgression of medical ethics (in the context of the regulatory role of the HPCSA). It may also be considered a form of medical malpractice (in terms of possible civil or criminal litigation). Confirmation analysis is the best practice since the identity and concentration of the substance is confirmed, eliminating the analytical uncertainty. Screening test results should not be presented as reliable evidence in any court.

**Dr Johannes B Laurens BSc (Ed) BSc (Hons) MSc (Chem) MSc (Appl Tox) (Surrey, UK) MPhil (Med Law & Ethics) PhD (Chem) PhD (Med Law) (UP)** is a Director/Forensic Toxicologist at Expert Laboratory Services Pty Ltd in Pretoria and Chris Maree BCom (Law) LLB (UJ) is the Senior Family Advocate and Head of the Pretoria Office of the Family Advocate at the Department of Justice and Correctional Services in Pretoria.



### Fact corner

According to the South African Community Epidemiology Network (SACENDU) completed a survey with 10 197 patients across 64 treatment centres:

- Cannabis is the dominant substance of abuse in Gauteng, KwaZulu-Natal, Limpopo and Mpumalanga.
- Alcohol is the dominant substance of abuse in the Eastern Cape, Free State, Northern Cape and South West. (<https://www.edenrecovery.co.za>)





# Testing the regulatory framework for trust accounting records



By  
Carl  
Holliday

**T**he compliance framework for keeping of trust accounting records in terms of the Legal Practice Act 28 of 2014 (the LPA) and specifically r 54 of the Rules made under the authority of ss 95(1), 95(3) and 109(2) of the LPA (GG41781/20-7-2018) is now well-established. These rules stipulate certain requirements, which create a strict framework, within which records are to be kept and reports maintained. Compliance requires strict adherence to the regulatory framework. Unfortunately, without a clear understanding of the intended outcomes and a sound knowledge of the

framework itself, trivialities become critical and major issues are often ignored. For practical purposes, the Financial Intelligence Centre Act 38 of 2001 and know your customer requirements are excluded in this discussion.

Rule 54.7 provides for International Financial Reporting Standards (IFRS) as a business accounting framework and standard accounting conventions are assumed. Trust accounts are not regular business books and typical reports, such as a trial balances and income statements do not exist. The rules governing legal practitioners trust accounts are both specific and voluminous, strict compliance with these rules is required.

Rule 54.10 states: 'A firm shall update and balance its accounting records monthly and shall be deemed to comply with this rule if, *inter alia*, its accounting records have been *written up by the last day of the following month*' (my italics). This suggests that reports should only be drawn, and inferences of non-compliance made, after completing all steps required to balance the books.

These requirements were introduced with the LPA and do not have a historic corollary. It implies certain behaviours and conditions. First, accounting records need to be kept updated on a continuous basis. Writing up of the accounting records in the final weeks leading up to the

audit event, simply does not comply with this requirement. Compliance with this rule requires up-to-date records. This has other implications discussed below.

A simple conceptual framework for verifying the integrity of the trust account rests on the following three-way test. Imagine a diamond shape with four corners, aligned with a top and bottom corner, and two equal corners left and right.

## The headline test

At month end, the total balances of all client accounts should be matched to all the balances of the trust banking accounts, including investments.

This is contained in r 54.15.1: 'Every *firm shall extract monthly*, and in a clearly legible manner, a list showing all persons on whose account money is held or has been received and the amount of all such moneys standing to the *credit of each such person, who shall be identified therein by name, and shall total such list and compare the said total with the total of the balance standing to the credit of the firm's trust banking account, trust investment account and amounts held by it as trust cash, in the estates of deceased persons and other trust assets in order to ensure compliance with the accounting rules*' (my italics).

To satisfy the headline test, the trust



specifically requires three primary reports:

- The client balance list in terms of s 86(2).
- The trust cash book.
- The trust investment balance list in terms of s 86(4).

Simply compare the total of the client accounts with the trust cash book and investment accounts. It is worth noting that terms, such as customer and supplier, are business accounting concepts and best not used to describe the personal accounts of trust creditors.

The headline test is supported by two tests that confirm the accuracy of the totals used in the headline test.

## The midline tests

### • Banks

While the headline test is a simple comparison of total values, these totals must be broken down and analysed to determine the accuracy and confirm the internal consistency.

This test requires an inspection of the external bank statements, as well as the reconciliation of these statements to the actual internal record books, specifically the trust cash book. The cash book analysis validates the cash book record by comparison to the external bank statement for the current trust account kept in terms of s 86(2). This requires bank statements for any investments in terms of ss 86(3) and 86(4).

Analysis of the trust cash book is primarily by way of bank reconciliation. Due to several factors, the trust cash book and bank statement balances may differ. The explanation must be sought in the bank reconciliation report. A classic example would be a transaction processed over month end but does not yet appear on the bank statement. Prompt depositing of trust money is required by r 54.14.7.2, which states that 'all money received by it on account of any person is deposited intact into its trust banking account on the date of its receipt or the first banking day following its receipt on which it might reasonably be expected that it would be banked'. This difference will show up on the reconciliation report and should remedy itself within a very short time span.

Obvious, although overlooked, risks include –

- overdrawn trust banking accounts;
- multiple outstanding items;
- items outstanding for a long period of time; or
- simply bank reconciliations not done.

Bear in mind that in terms of r 54.10 this bank reconciliation must be done monthly, and in a way that the activity date can be confirmed.

### • Ledgers

Where the cash book analysis focuses on comparing the internal records (cash

books) to the external reports (bank statements) the ledger analysis is focused on the internal integrity of the accounting records.

The primary statement of the position of the trust account is defined by r 54.14.8, which requires a list of trust credit balances. Rule 54.14.9 stipulates that 'a firm shall ensure that no account of any trust creditor is in debit'.

Trust bank charges and interest create certain pertinent issues. By simply comparing the trust cash book to the trust bank statement, any surplus or deficit caused by interest or charges cannot be identified. Rule 54.14.16.1 designates the Legal Practitioners' Fidelity Fund (LPFF) as the trust creditor for all trust interest in terms of s 86(2). Since the trust account does not have income and expense accounts, all related transactions should be processed to a single designated ledger. Only after processing all trust interest, bank charges and value added tax (VAT) refunds, can a determination be made concerning any deficit caused by trust bank charges. Where bank charges exceed interest, the firm must pay the trust bank charges from the business account.

## Custom reports

The link between the cash books and ledgers, and the integrity of the ledgers is contingent on and determined using certain custom reports.

### • Transfers

Transfers are regulated in terms of r 54.11 and may be performed repeatedly during a month. Funds transferred from the trust banking account must be received into a business banking account. Funds transferred must be identifiable as far as the amount and the trust creditor is concerned. Only trust funds available to a trust creditor may be transferred. Note that this is a custom compliance report.

Using a manual one by one trust-payment-to-business-credit method is prone to error and increases bank charges. It also confuses the receipt of funds in business (which is a bank transaction) with fees and other business debits, which are journal entries. It also keeps focus on individual files subject to recent activity and may obscure fewer active matters and bank charge deficits.

Sophisticated legal practitioners' trust account software ought to provide not only auto-corrects on trust deficits, but also categorise funds transferred to cover fees and disbursements. A single bulk transfer amount reduces both bank charges and the risk of error.

A regular, monthly trust-to-business transfer should also correct any deficits as they occur and provide the necessary reports and peace of mind that all client accounts end in either credit or zero balances.

### • Trust accounts not to be in debit

Rule 54.14.9 states: 'A firm shall ensure that no account of any trust creditor is in debit'. This can be achieved using automated trust-to-business transfer software and monitoring the trust cash book balance.

Specific instances of non-compliance are listed and must be reported to the Legal Practice Council (LPC). Rule 54.14.10 deals with general deficits, where available trust cash is less than the balances recorded for trust creditors shown in its accounting records. Rule 54.14.11 requires that a firm shall immediately report in writing to the LPC should an account of any trust creditor be in debit. In both instances reports should be accompanied by a written explanation of the reason for the debit and proof of rectification.

This can be caused by bank charges exceeding interest and can be rectified using a trust-to-business transfer.

### • Payments from the trust

Withdrawals from the trust are subject to the following restrictions: Payments may only be made to the client (the trust creditor) or on the client's instructions. Transfers from the trust to the business account obviously requires an accounting entry entitling the firm to the transfer, as this transfer constitutes payment to the business for disbursements incurred or services rendered.

Section 86(4) investments are further subject to r 54.14.7.3 which specifies that 'unless the firm has received written authorisation for the payment of any guarantees issued by a bank on the strength of a trust investment that any amount withdrawn by it from a trust investment account is deposited promptly by it in its trust banking account'. This implies the flow of investment funds should mainly be between s 86(2) and 86(4) bank accounts. Investment payment on guarantee should be supported by mandate and supporting documentation.

Compliant accounting is a process. It not only requires both technical compliance with specific rules, but that these activities be conducted in a limited time frame. Only by applying these rules in a theoretically robust framework can an effective practical result be achieved. Based on the above, it becomes possible to carefully consider both the structure and purpose of the various rules. Any redundant or superfluous rules should be removed or updated to provide a clear structure in which to operate.

Carl Holliday *BProc LLB (NWU)* is a legal practitioner in Pretoria and writes in his personal capacity. □

# Female legal practitioners are least considered when legal services are sourced



By  
Kgomotso  
Ramotsho

**D**e Rebus news reporter, Kgomotso Ramotsho had the opportunity to interview, mother and daughter duo, co-founder of Molefe Dlepu Inc and former chairperson of the Legal Practice Council (LPC) and current LPC Council member, Kathleen Matolo-Dlepu and candidate legal practitioner and Executive Assistant to the directors of Molefe Dlepu Inc, Laura Morwesi Dlepu, about the legal profession and their respective careers and experiences in the legal profession.

**Kgomotso Ramotsho (KR):** Briefly tell us about yourself.

**Kathleen Matolo-Dlepu (KD):** After my admission in 1989, Ms Ouma Rabaji-Rasethaba and I decided to open a woman-owned law firm named Rabaji Matolo Attorneys. We were later joined by Justice Zukisa Tshiqi and Ms Rabaji-Rasethaba who joined the Bar. We changed the name to Matolo Dlepu Tshiqi Attorneys, and we ambitiously opened two offices, one in Johannesburg and the other in Kempton Park. I was in the Johannesburg branch and concentrated on conveyancing and litigation and the Kempton Park office concentrated on labour law and litigation. As time went on it became challenging for us to run the two offices and we agreed that I keep the Johannesburg office nearer my home and Justice Tshiqi kept the Kempton Park office and we acted as each other's correspondents.

In 1995, I co-founded Molefe Dlepu Inc. Both my previous partners have since become judges. We formed a woman-owned firm with the purpose of giving young, qualified women graduates the chance to serve articles and mentor them. To date we have mentored



*From left: Former Legal Practice Council (LPC) Chairperson, current LPC Council member and co-founder of Molefe Dlepu Inc, Kathleen Matolo-Dlepu and her daughter, candidate legal practitioner and Executive Assistant to the directors of Molefe Dlepu Inc, Morwesi Dlepu.*

more than 30 young women, some have opened their own practices, some have joined the private sector, and others have become advocates.

I am a mother of three girls, and I am the first born in a girl only family. I have always been passionate about mentoring young women as I was mentored by my mom and aunts.

**Morwesi Dlepu (MD):** I hold a BCom Law degree from the University of Pretoria, and I am completing my LLB. I am also one of the co-directors of the WOZA Leadership NPC, which operates under the name WOZA Leadership Academy.

**KR: When did you decide to study law and why?**

**KD:** I initially wanted to do BCom but on my arrival at Turfloop (University of the North), law appealed to me. It brought back my childhood memories when my grandparents were forcefully removed from their fertile land in Kranspoort, Limpopo without compensation and dumped on a barren plot of land. Having attended Morris Isaacson High School, every one of us was an activist and law enabled me to fight for the rights of my peers and those who were oppressed by Apartheid.

**MD:** I have spent my entire life observ-

ing my mother and her peer's practice. I have seen them help communities, individuals, and companies from varying backgrounds in this country and beyond its borders. I have seen them travel the world and make connections with like-minded people. I have observed some move from practice to the Bench, and others to the corporate sector. When I learned to read, the titles of my mother's old textbooks were some of the first words I came across in our home. HR Hahlo and Ellison Kahn *The South African Law of Husband and Wife* (Cape Town: Juta 1975) immediately comes to mind. I chose to study law because it was always around me, and I gravitated towards it. I had other interests, but I always circled back around to law.

**KR: What do you think about the quality of law in South Africa (SA)?**

**KD:** After 1994, everything changed for the better in SA. The South African Constitution and the entrenchment of our Bill of Rights ensures that everyone's rights are protected.

**MD:** I believe the law in SA has a great amount of potential in its laws and its legal practitioners. We have started off strong with a progressive Constitution and have followed with Acts of Parliament and case law that support the ideals set out in the Constitution. There is still room for improvement; we must not forget that our young democracy emerged from a long history of inequality that must still be addressed and rectified.

**KR: Do you think transformation in the legal profession is moving at a good pace or do we still have a long way to go?**

**KD:** Transformation in the legal profession is moving at a slow pace. Black men and women are still not getting quality work. The Broad-Based Black Economic Empowerment Act 53 of 2003 and the generic score card does not go far in relation to the legal profession. Each profession needs a sector specific code, which could be monitored and enforced.

**MD:** Transformation is not moving at the pace that I believe it should. While the legal profession continues to evolve, there appears to be hesitation in understanding what transformation really means and how it should be implemented. It is an uncomfortable discussion in the legal profession but one that must take place. The demographics that make up the profession speak for themselves. We have a long way to go.

**KR: In your own words, how would you describe access to justice?**

**KD:** Legal services and the costs thereof, is beyond reach for the majority of South Africans. The black majority still

do not have access to justice, especially black South African women. Everyone has a right to have a matter of dispute heard before a court of law or appropriate body, in public and on any matter or issue and everyone is equal before the law, regardless of their standing in society. Unfortunately, to the black majority more especially those in rural areas this is still a dream yet to be realised.

**MD:** I would describe access to justice as the ability for anyone in SA to approach a legal practitioner to get advice, to get access to our courts, or to have their legal issues remedied without being burdened by bureaucracy or exorbitant fees. I also believe access to justice includes the education of all people in SA regarding their rights and responsibilities.

**KR: As a female legal practitioner, are you getting equal opportunities as your male counterparts?**

**KD:** As I earlier indicated, female practitioners especially black women, both attorneys and advocates, are the least considered when legal services are sourced. They can hardly survive in practice. It is a constant fight. There have been many promises of intervention, but few have come to fruition. Many black female practitioners are leaving the profession because they cannot survive.

**MD:** There is still a bias in favour of men.

**KR: What are some of the spaces that you would like to see more women occupying in the legal fraternity?**

**KD:** Women practitioners are qualified, and some are more qualified than their male counterparts. These women just need an opportunity not only to prove themselves but to fully practice law. They are more than capable of occupying every position in the legal space, including leading this country.

**MD:** I would like to see women occupy all spaces in the profession. I do not think there should be any fields within legal practice that are closed off to anyone who has the knowledge and the ability to excel in that field.

**KR: How has the law changed since you started? Please let me know of both the good and the bad.**

**KD:** The law has changed for the better in SA, and the support of its Constitution has made it one of the most progressive laws in the world, but it lacks the implementation, monitoring and consequence management.

Corruption has weakened the implementation of South African laws, and a lot must be done to restore respect and faith in our laws by the majority of South Africans.

**KR: How has the Legal Practice Act 28 of 2014 (the LPA) affected the way law**

**firms were run before, has there been a change, has it been negative or positive?**

**KD:** The LPA has not really changed how law firms are run. However, it is the regulator of all legal practitioners. Before the LPA, attorneys and advocates were regulated by different legislation, the code of conduct was not uniform. The LPA brought about uniformity of standards, the protection of the public, promoted access to justice and access to the legal profession and ensured transformation of the legal profession among others.

The LPC has come up with a Legal Sector Code compared to the Legal Sector Charter, which did not achieve anything. The *status quo* remained; thus we came up with the Legal Sector Code, which will be monitored by the LPC who in turn will report to the B-BBEE ICT Sector Council.

**KR: How have the demographics changed since you first started? Has there been any transformation (in both gender and race)?**

**KD:** The demographics have changed with more black female and female practitioners practising. There are more female owned firms but many close due to lack of instructions and support from the private sector and other spheres of government, state-owned enterprise (SOEs) and local government. Many black females cannot secure training and are not offered articles. The Bar Council only takes a few pupils. It is a sad situation for the young legal graduates.

**KR: What is the work of the Chairperson of the LPC?**

**KD:** The LPC derives its mandate from the LPA and is empowered to address issues of access to the legal profession, including access to justice, to come up with uniform standards and to protect the public.

To enhance education and training, facilitate the realisation of the goal of a transformed and restricted legal profession that is accountable, efficient, and independent, to ensure that fees that are charged by legal practitioner are reasonable and promote access to justice among others.

**KR: What are some of the challenges you have encountered as the Chairperson of the LPC?**

**KD:** For the first-time attorneys and advocates have had to be regulated by one legislation and restructuring the whole legal profession, which had been operating for the past 100 years and taking over the staff of the four provincial law societies that had been operating differently. Taking over the regulation of advocates who were regulated by different bar councils and coming up with standards and criteria of standards. Establish-



ing the Provincial Councils to be aligned with the LPC and dealing with various complains from the members of the public without the Ombudsman in place have been some of the challenges that I have experienced.

**KR: How did you feel being nominated to be the first Chairperson of the LPC?**

**KD:** I felt the appointment was an endorsement for all female practitioners. At last, we [legal practitioners] were given the most important task of changing the face of the legal profession. I had to prove that women are born leaders and so far, I would like to believe that I am still on track.

**KR: What was your reaction when your daughter, Morwesi, said that she wanted to study law, especially with some of the challenges you might have gone through as a black female legal practitioner?**

**KD:** It was her choice although I had felt that she would have been a good doctor or scientist or anthropologist, as she is still fascinated by science and nature. Once she had made her choice I respected and encouraged her, and my mentorship mode kicked in. I treat her like any other female employee, and I always encourage my children to be the best they can be. No cutting corners.

**KR: If you were to change anything in the legal profession, what would it be?**

**KD:** I love my profession; however, I would love to see many women actively participating in the governing structures of the profession. Women are born leaders and SA would be a safer space if women were in power.

**KR: Do you work at Molefe Dlepu Inc?**

**MD:** I am the Executive Assistant to the directors of Molefe Dlepu Inc, and I am also part of the business development team.

**KR: How is it like working in the same law firm as your mother?**

**MD:** It has proven to be a challenge, but it has also been very enlightening. My mother holds me to a very high standard, even though my work is more administrative in nature. The experience thus far has shown me what it really takes to run a law firm.

**KR: What is the biggest lesson you have learned from Mrs Dlepu, on being a good legal practitioner?**

**MD:** I have learned that it is important to –

- listen to your client;
- understand the needs of your client;
- communicate with your client in a way that they understand;
- ask questions when you are not sure;

- write things down; and
- be prepared.

**KR: Being in the legal profession and looking at your tertiary studies, do you think you were prepared for the practical side of the profession?**

**MD:** Looking at my tertiary studies and what the candidate legal practitioners at Molefe Dlepu Inc have experienced, there is a gap in the level of preparedness. I do not know if it is something that can be addressed at tertiary level because institutions of higher learning may not have the resources required to give all law students basic practical training before graduating and moving on to the working world.

**KR: What is the most challenging thing you have encountered since being in the legal profession, especially as a black female candidate legal practitioner?**

**MD:** I have seen how difficult it is to acquire quality work as a 95% woman-owned firm with a staff contingent of more than 75% women. The firms has been appointed to numerous legal panels since the business development team was established and in a number of instances the period of the contract would lapse without receiving a single instruction. Black-owned and black woman-owned firms continue to be 'window dressing' in the name of diversity and transformation without being given the opportunity to showcase their skills.

**KR: What has been your most rewarding moment in your career?**

**MD:** As part of the business development team, it is always exciting to be appointed to a legal panel following a long tendering process. I have also successfully completed numerous short courses to broaden my knowledge. My proudest moment, however, was being appointed as a co-director of the WOZA Leadership Academy.

**KR: Is being a legal practitioner anything like you imagined it would be?**

**MD:** It is far more challenging than my mother has made it look over the years and continues to make it look. I knew about the long hours and the continuous education, but I was not prepared for how much of a sacrifice it requires. Being a legal practitioner is not something you do for self-glorification or wealth; it truly requires a servant heart and an enormous amount of patience. It requires passion and a lot of expectation management. Even with what I know now, I am still interested in legal practice and look forward to it.

**KR: You are working on some programmes with the Women in Law Awards (WOZA), tell us about the work you do with them?**

**MD:** The inaugural Women in Law Awards that took place in 2019 exposed to the organisers the lack of diversity in the profession especially across gender lines. This prompted them to establish the WOZA Leadership Academy. The WOZA Leadership Academy aims to uplift and educate young legal practitioners, especially women, in the 'specialised' fields of law such as, intellectual property, tax law, and environmental law, among others. Since its establishment in 2020, the WOZA Leadership Academy has partnered with Judge Margaret Victor, SA Women Judges Making a Difference, LexisNexis, The Women in Law Initiative – Vienna, The Women in Law Initiative – Pakistan, the University of Johannesburg, Allan Gray and several legal practitioners to host different events and online seminars educating young legal practitioners on how they can enter these fields of law and give insight into what practising in those fields is like. The Academy is developing a formal curriculum for some of these areas of law to offer training that will be accredited by the LPC.

**KR: What would you say to young girls who would like to pursue a career in law?**

**KD:** To all young girls, dream big, set yourself attainable goals, collaborate with other women. As a young lawyer you cannot operate alone, be part of women organisations that mentor and coach. Reach out to older women in your profession for mentoring. Always look for opportunities for self-empowerment. Law is a gateway to anything. Success depends on what you set yourself to achieve if you fall, stand up and try again, know your blind spots and be open to learning.

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By  
Merilyn  
Rowena  
Kader

# THE LAW REPORTS

October [2021] 4 All South African Law Reports  
(pp 1 – 319); October 2021 (10) Butterworths  
Constitutional Law Reports (pp 1087 – 1201)

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  
ECG: Eastern Cape Division, Grahamstown  
KZD: KwaZulu-Natal Local Division, Durban  
LC: Labour Court  
LAC: Labour Appeal Court  
SCA: Supreme Court of Appeal  
WCC: Western Cape Division, Cape Town

## Building contract

**Dispute resolution by adjudication:** In *Zingwazi Contractors CC v Eastern Cape Department of Human Settlements and Others* [2021] 4 All SA 299 (ECG), a building contract was concluded between Zingwazi and the first respondent (the Department), wherein Zingwazi was to provide a community centre in the Eastern Cape. The contract provided for dispute resolution by way of settlement, adjudication, arbitration, and mediation. A determination by the adjudicator would be immediately binding on and implemented by the parties. If dissatisfied with the determination, either party could give notice of dissatisfaction to the other party and to the adjudicator within ten days of receipt of the determination and refer the dispute to arbitration. The determination would remain in force and continue to be implemented until overturned by an arbitration award. The Rules of Adjudication of the eighth respondent provided in r 6.1.4, that the adjudicator's written determination would be binding on the parties until overturned or varied through arbitration.

When a dispute arose between the parties, the tenth respondent as adjudicator, decided in favour of Zingwazi, for payment by the Department of the sum of R 12 657 815,80. The Department was dissatisfied with the determination and elected to refer the matter to arbitration and did not pay in terms of the determination. Zingwazi instituted motion proceedings against the first to seventh respondents for an order directing them to prosecute the arbitration proceedings to finality and

to pay in terms of the adjudicator's determination. An order was subsequently made by agreement in terms of which Zingwazi's relief was granted but was suspended pending the determination and finalisation of a counterapplication by the second respondent (the MEC). If the counterapplication was dismissed, the suspension was to terminate within two days of such dismissal.

In the counterapplication, the MEC sought declarations of invalidity against two clauses in the contract and r 6.1.4. Relying on the right to a fair public hearing in terms of s 34 of the Constitution, it was argued that the impugned provisions conflicted with the rule that a judgment is usually suspended pending an appeal or review; and that the adjudication process did not adhere to the principles of natural justice.

The immediate enforceability of the adjudicator's decision did not prevent an aggrieved party from proceeding to arbitration where a fair hearing would be afforded. Confirming the efficacy of adjudication as a dispute resolution process, the court stated that the voluntary nature thereof ensured against a contractual term being unfairly weighted in favour of only one of the parties. None of the grounds raised by the MEC in support of the contention that the Adjudication Rules conflicted with s 34 of the Constitution were found to be sustainable.

Finally, the court addressed the MEC's contention that the Construction Industry Development Board and the Minister of Public Works should have been joined in the counterapplication. Highlighting the nature of the dispute, the court found neither of those parties to have a direct interest in the matter. The counterapplication was thus dismissed.

## Civil procedure

**Delictual damages arising from conduct of lessor which resulted in demise of lessee's business:** In *Brentmark (Pty) Ltd and Another v Puma Energy South Africa (Pty) Ltd* [2021] 4 All SA 106 (WCC), a ser-

vice station operated by the first plaintiff (Brentmark) sold petroleum products supplied to it by the defendant (Puma). An adjoining convenience store was operated by the second plaintiff (OK). The premises on which the plaintiffs' businesses were conducted was leased for the owner (Caledonian) by a company (Brent Oil) from which Brentmark sub-leased the property. Brent Oil later changed its name to Puma. The convenience store business was conducted by OK in terms of a further sub-lease the 'BrentOK sub-lease' concluded between it and Brentmark. Brent Oil (and subsequently Puma) was not a party to the BrentOK sub-lease, while OK was not a party to the dealer agreement or the Brentmark sub-lease.

Dissatisfied with the allegedly onerous terms of the dealer agreement and Puma's refusal to revise such terms, Brentmark entered into a sale agreement in respect of the service station and OK in turn sold the convenience store. In terms of the Brentmark sub-lease, Puma's consent was needed for the sale of the filling station. Its refusal to furnish consent was alleged by Brentmark to constitute a breach of contract, and Brentmark gave notice of cancellation of the agreement. However, subsequent discussions between the parties led to the termination of the agreement being postponed until 31 January 2019. According to Brentmark, Puma took certain commercial steps that ultimately led to the demise of its filling-station business, forcing it to close the filling-station business. The convenience store business of OK was similarly forced to close. The plaintiffs sued Puma for damages for breach of contract.

Puma filed a notice in terms of r 23(1) raising an exception to the particulars of claim, averring that they were both vague and embarrassing, and/or lacked averments necessary to sustain their causes of action.

Gamble J held that in order to succeed with the exception, Puma had to persuade the court that on every interpretation, which OK's claims against it could rea-

sonably bear, no cause of action was disclosed. It also had to show that the claims were bad in law.

The exception related to delictual damages for pure economic loss occasioned to a plaintiff by a defendant whose causal negligence has allegedly resulted in such loss. Puma contended that OK had failed to make out a case that Puma's breach of the dealer agreement with Brentmark, a contract to which it claimed OK was a stranger, was wrongful to the extent that Puma should be held liable to OK for damages in delict.

The court held that in a case such as the present, where there was no established legal precedent for the claim asserted by OK, the court would be required to consider whether the claim so advanced met the relevant policy considerations such as indeterminate liability, blameworthiness, and vulnerability to risk. The court found the alleged conduct of Puma to fall short of the standards of decency and fairness that informs the substantive law of contract and did not measure up to the behaviour to be expected of a party in its position.

The exception was dismissed.

## Class action

**Nature of opt-out class action:** Certification of an opt-out class action was sought by the applicants in *Stellenbosch University Law Clinic and Others v Lifestyle Direct Group International (Pty) Ltd and Others* [2021] 4 All SA 219 (WCC), who were seeking to end alleged fraudulent conduct by the respondents. The applicants alleged that the respondents targeted consumers needing loans, duped them into concluding unwanted contracts for legal services, and deducted unauthorised amounts from their bank accounts.

Two applications by non-parties to the suit were brought for leave to intervene, and for admission as *amicus curiae*.

The admission to proceedings of an *amicus curiae* is governed by r 16A of the Uniform Rules, as well as the court's inherent jurisdiction to regulate its own process. Ultimately, the discretion to admit an *amicus* is taken in the interests of justice. The party seeking such admission succeeded in this matter.

The court referred to the benefits and representative nature of class actions. A class action does not require every member of the class to have an identical cause of action or to seek identical relief. It is sufficient that there be some issues of fact, or some issues of law (or a combination thereof) that are common to all members of the class and can appropriately be determined in one action. The court was satisfied that the interests of justice warranted certification in this case.

The type of class action sought was an 'opt-out' action. Such a class action automatically binds members of the class to

the class action and the outcome of the litigation unless the individual class members take steps to opt out of the class action. The court held that the present matter was suited to an opt-out class action.

The court granted the applicants' request for the appointment of a 'special master' to attend to the administration of the class action, including the verification of claims, the disbursement of payments and the management of any surplus amounts.

## Constitutional and administrative law

**Direct reliance on provisions of Constitution for exercise of right:** In March 2019, the second respondent (the Good Party) in *Electoral Commission of South Africa v Democratic Alliance and Others* [2021] 4 All SA 52 (SCA) lodged a complaint with the Electoral Commission of South Africa, alleging that the first respondent, the Democratic Alliance (the DA), had contravened s 89(2) of the Electoral Act 73 of 1998 and item 9(1)(b) of the Code in the run up to the national and provincial elections held on 8 May 2019 by publishing false information with the intention of influencing the outcome of an election, and false and defamatory allegations concerning the Good Party leader, Ms Patricia De Lille.

Ms De Lille was a former member of the DA. In guidelines prepared for campaigners of the DA, it was stated that Ms De Lille had been fired because she was involved in all sorts of wrongdoing in the City of Cape Town. It was that and related statements, which grounded the Good Party's complaint. The Commission found that the DA had contravened item 9(1)(b) of the Electoral Code of Conduct and ordered it to issue a public apology. DA launched an application in the Electoral Court to review and set aside the Commission's decision. The court held that the Commission's power to adjudicate disputes was limited to the mechanics of an election, and it had no power to adjudicate an issue, which was not administrative in nature. It was thus concluded that decisions of the Commission were invalid and had to be set aside, which led to the present appeal.

The court as per Schippers JA (Maya P, Zondi JA, Goosen and Sutherland AJJA concurring) held that the Commission erred in submitting that s 190(1) and (2) of the Constitution, in terms of which it was enjoined to manage elections and was granted additional powers prescribed by national legislation, gave it the power to determine a complaint concerning a breach of the Code and to take remedial action. It had made its finding against the DA in terms of s 5(1)(o) of the Electoral Commission Act 51 of 1996. A decision deliberately and consciously taken under the wrong statutory provision cannot be validated by the existence of another stat-

utory provision authorising that action. In any event, none of the provisions relied on grounded the power to make a finding that the Code had been contravened or to take remedial action under it. Secondly, the Commission was precluded from relying directly on the Constitution by the principle of subsidiarity. Where legislation has been enacted to give effect to a constitutional right, a litigant must either rely on that legislation or challenge its constitutionality. It cannot bypass legislation and rely directly on the right.

The principle of legality, an aspect of the rule of law, requires that a body exercising a public power must act within the powers lawfully conferred on it. The Commission violated that principle when it decided that the DA had breached the Code.

## Costs in Labour Courts

**Rule of practice that costs follow the result does not apply in labour matters:** In *National Union of Mineworkers obo Masha and Others v Samancor Limited (Eastern Chromes Mines) and Others* 2021 (10) BCLR 1191 (CC), the applicant, the National Union of Mineworkers, acting on behalf of five of its members, employed by the first respondent, Samancor Ltd (Eastern Chromes Mines) sought leave to appeal to the CC against a judgment and order of the Labour Appeal Court (LAC).

The employee applicants were charged with insubordination, found guilty at a disciplinary inquiry, and dismissed. The charge of insubordination was based on an allegation that the employee applicants had disobeyed instructions to install certain safety measures before resuming actual mining work. They referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). They alleged that the employer had been inconsistent in disciplining them in that one of them, Ms Maseko, had not been charged along with the others until the applicant complained. Once charged, Ms Maseko and another employee were not dismissed. The CCMA arbitrator found that there had been an unjustifiable differentiation in the treatment of the employees, holding that the dismissal was unfair and awarded reinstatement. First respondent challenged the award on review to the Labour Court (LC). The LC found that the misconduct charged had not been proven and dismissed the review application, making no order as to costs. On appeal, the LAC held that the LC failed to consider the actual issue, which was whether there had been inconsistency of discipline. The LAC held that on the evidence Ms Maseko's acquittal was appropriate. It found that the employees' complaint of inconsistent application of discipline was thus founded on an incorrect premise. As the employees had been aware of the rules, dismissal was an appropriate sanction, given the seriousness of the misconduct. The LAC set aside



the LC's order. It held that the dismissal was procedurally and substantively fair and ordered the applicant to pay the costs incurred both in the LC and the LAC.

The CC held that the LAC's finding that there was no inconsistency of discipline was unassailable. The court held that, given the nature of the mining industry and its often-unsafe conditions, the disregard of the instructions that had been given was a serious matter and dismissal was an appropriate sanction. The application for leave to appeal against the dismissal fell to be dismissed. In relation to costs, however, the LAC had erred in awarding costs against applicant. Where such an order was made, reasons had to be provided. The LAC had failed to provide reasons. This was compounded by the fact that the LAC substituted the order of the LC on costs and issued a costs order against the applicants where the LC had not done so. The LAC had erred in departing from the general rule that losing parties in labour matters should not be ordered to pay the successful parties' costs, unless there were reasons warranting the imposition of a costs order. The LAC had not exercised its discretion judicially. The CC was thus entitled to interfere. The appeal on costs was upheld and the costs orders set aside.

## Family law and persons

**Existence of marriage where alleged wedding ceremony did not fulfil legal requirements:** The plaintiff in *Botha v Steyn* [2021] 4 All SA 87 (KZD) instituted action seeking a decree of divorce against the defendant, as well as payments of R 100 000 per month and half of the nett value of the defendant's estate.

Having met and become engaged in 2005, the parties resided together, travelling between London and South Africa (SA). In 2007, they hosted a ceremony which was meant to be a wedding ceremony. Guests were flown from SA to London at the defendant's expense and the parties exchanged rings at the ceremony. However, the wedding was not registered as there was insufficient time to obtain a marriage licence. On their return to SA, the parties cohabited as husband and wife until December 2007 when the marriage began floundering. By 2009 the relationship had ended permanently, and in 2014 the plaintiff started the litigation in this matter by issuing summons against the defendant.

The evidence of an English solicitor, consulted by the defendant on discovering the problem regarding obtaining of a marriage licence, testified that he had advised the defendant that the ceremony could proceed as a 'blessing ceremony'. He also stated that he had been requested by the parties after the ceremony, to draw up an agreement regulating their cohabitation as they were not married. The plaintiff was said to have been aware of the legal status of the relationship at that point. The

defendant also called an expert in English law as a witness. Her testimony was that the absence of a marriage licence meant that there was no marriage. The court's only task was to determine whether there had been a valid marriage. It found the plaintiff to be a poor witness who failed to prove that she had been married to the defendant.

The court was satisfied that there was never a marriage contracted between the plaintiff and the defendant and, therefore, there could be no talk of a decree of divorce. The plaintiff was always aware that there never was a marriage existing between her and the defendant as the prerequisites for a marriage in English law had not been met. She knew that the ceremony had no legal effect and that they would need to undertake another ceremony in terms of the marriage laws of SA if they were to be validly married.

It was held by Hadebe J that the defendant had made an overwhelming case for the dismissal of the plaintiff's action with costs, which costs should be granted at a punitive scale.

## Financial services regulation

**Nature and requirements of reconsideration application:** The second respondent, the Prudential Authority issued a direction in terms of s 83 of the Banks Act 94 of 1990 against the applicant and a close corporation in which he was sole member. It was common cause that during 2010, the applicant joined an illegal pyramid scheme.

In *Mwale v Financial Services and Another* [2021] 4 All SA 167 (GP), the applicant applied to the Financial Services Tribunal for a reconsideration of the decision of the Authority. The Tribunal's dismissal of his application led to the present application for review of that decision. The grounds of review were that the Tribunal's decision was influenced by a material error of law; that the decision was unreasonable and irrational; and that the Tribunal (and specifically the chairman) was biased.

A reconsideration application must be made in accordance with the Tribunal Rules, must contain full particulars of the grounds on which the application is based and must be drafted to conform as far as possible to a standard form.

A reconsideration application constitutes an internal remedy as contemplated in s 7(2) of the Promotion of Administrative Justice Act 3 of 2000. The court had regard to the Authority's reasons to determine whether the Tribunal correctly dismissed the reconsideration application. The Authority had found that the pyramid scheme in which the applicant had participated had conducted the business of a bank in contravention of the Banks Act, and the Tribunal could not fault that finding. Arguing that the Tribunal had materi-

ally erred in its interpretation of 'the business of a bank', the applicant alleged that his involvement in the pyramid scheme was not a regular feature of his business practice. The Tribunal held that the acceptance of money from members of the public by the applicants, was a regular feature of the scheme, and was satisfied on the facts that the applicants conducted the business of a bank. The court agreed with the Tribunal's evaluation of the facts and the conclusion reached.

For the applicant to establish bias by the Tribunal, he had to show that he (as the person who apprehended bias) and the apprehension itself were reasonable. He failed to discharge the onus on him in that regard. The application was dismissed with costs.

## Property

**Eviction order:** The respondents in *Davidan v Polovin NO and Others* [2021] 4 All SA 37 (SCA) were trustees in a trust, which owned a house in which the appellant and her partner had resided together. In September 2019, the High Court granted an order in terms of s 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, evicting the appellant and all those who occupied through or under her, from the property. According to the appellant, she and her partner had entered into an oral agreement with the trust, allowing them to occupy the property. After the death of her partner, the appellant was requested to enter into a formal lease agreement with the trust. Her refusal led to the trustees obtaining an eviction order against her.

The jurisdictional requirement to trigger an eviction under the Act is that the person sought to be evicted must be an unlawful occupier within the meaning of the Act at the time when the eviction proceedings were launched. Section 1 of the Act defines an unlawful occupier as 'a person who occupies land without the express or tacit consent of the owner or person in charge or without any other right in law to occupy such land'. Consent is defined as 'the express or tacit consent, whether in writing or otherwise, of the owner or person in charge to the occupation by the occupier of the land in question'.

The key question was whether the appellant enjoyed a right of occupation. The first inquiry was whether the appellant had the necessary express or tacit consent to reside on the property owned by the trust. In other words, it had to be established whether the oral agreement had been proved. After establishing that the appellant had the necessary consent, the court considered whether the appellant's right to occupy was lawfully terminated. The appellant relied on the oral agreement with the previous trustee in support of her allegation of consent having been obtained to occupy the property. The

trust would have been obliged to comply with the terms of that agreement before it could terminate the appellant's right of residence. The underlying basis for the termination had to be legal, for example, the expiration of the lease or a material breach of the terms of the agreement. There was no suggestion that the oral agreement was terminated.

The majority of the court concluded that the appellant was not an unlawful occupier in terms of the Act. The eviction order was not justified, and the appeal was upheld with costs.

In a dissenting judgment, it was stated that the appellant did not have consent or any other right to occupy the property and, therefore, the trustees had no obligation to terminate her right of residence. The eviction order was viewed as just and equitable.

### Trade (customs and excise)

**Claim for refund of fuel levy by mining company:** In the course of its coal mining operations, Glencore, the appellant in *Commissioner for the South African Revenue Service v Glencore Operations SA (Pty) Ltd* [2021] 4 All SA 14 (SCA) used vehicles and equipment requiring diesel fuel. In terms of the Customs and Excise Act 91 of 1964, diesel attracted a fuel levy. Glencore's claims for a refund of the fuel levy were disallowed by the appellant (the Commissioner) on the ground that Glen-

core did not use the diesel in primary production activities in mining as contemplated in Note 6(f)(ii) and (iii) of Part 3 of sch 6 to the Act. The High Court upheld Glencore's appeal, leading to the Commissioner appealing to the present court.

The court, as per Petse DP, held that the primary issue for decision on appeal was whether the mining operations in relation to which diesel refunds were claimed by Glencore had been carried on for own primary production in mining as contemplated in Note 6(f)(ii) and (iii) of Part 3 of sch 6 to the Act and, therefore, qualified for a refund of levies as asserted by Glencore. A related, but subsidiary issue, was whether the list of activities set out in Note 6(f)(iii) of Part 3 of sch 6 to the Act, which qualify as own primary production activities in mining was exhaustive. The answer to that question turned solely on the interpretation of the word 'include' in Note 6(f)(iii) in light of the underlying purpose to which the fuel rebates were directed.

The appeal hinged on the proper interpretation of the expression located in Note 6(f)(ii)(aa) of Part 3 to sch 6, namely 'own primary production activities in mining'. The court set out the principles of statutory interpretation, and applying such rules, concluded that Glencore's activities underlying the fuel levy rebate claims did not constitute primary production activities in mining.

On the related question, it was held that

the long list of inclusions in Note 6(f)(iii) of Part 3 of sch 6 served to carefully circumscribe the ambit of the activities in respect of which rebate refunds could be claimed under the relevant item, thereby dispelling any notion that the list of inclusions was open-ended.

The High Court's order was set aside and the appeal upheld.

### Other cases

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

- allocations of fishing quotas in terms of Marine Living Resources Act 18 of 1998;
- appeal against setting aside of indictment;
- class action in non-Bill of Rights cases;
- derivative misconduct of employees;
- development of common law with 'due regard to spirit, purport and objects' of fundamental rights provisions;
- duty of Parliament and provincial legislatures to facilitate public involvement in legislative processes; and
- provisional sentence or order.

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By  
Kgomoiso  
Ramotsho

# SCA has limited powers to interfere with the decisions of a trial court

*Heppell v Law Society of the Northern Provinces (SCA)*  
(unreported case no 1096/16, 22-9-2017) (Shongwe AP  
(Mokgohloa, Gorven and Ploos van Amstel AJJA concurring))

In the case of *Heppell*, the Supreme Court of Appeal of South Africa (SCA) dismissed an appeal by attorney, Warrick Lesley Visser Heppell (the appellant), on the basis that it had found that he did not disclose critical information when he was applying for his sequestration.

## Background

The appellant was admitted as an attorney on 7 May 1991 and became a member of the provincial law society. He ceased to practice as an attorney on 30 May 2007 but remained on the roll of attorneys as a non-practising attorney. He ventured into business and formed a close corporation, traded in liquor, and became a property developer and signed several suretyships for debts of close corporations.

Due to the unstable economic climate the businesses did not do too well. The appellant eventually sold all that he had at a loss and decided to practise law again. He practised as an attorney from 1 September 2010, because he could not cope with all his financial responsibilities while in business. He decided to approach the court with an application for the voluntary surrender of his estate, which order was granted on 11 January 2012. After the appellant had been sequestrated, the then Law Society of the Northern Provinces (the Society), instructed a legal officer of its Monitoring Unit, Magda Geringer, to investigate the circumstances that led to the appellant's sequestration.

Ms Geringer's finding were that the appellant did inform the provincial law society during August 2011 that he was contemplating applying for the voluntary surrender of his estate and that the appellant did not have complaints that had been lodged against him regarding the trusts funds and that there appeared to be no risks for the then Attorneys Fidelity Fund (AFF) and in her opinion the appellant was a fit and proper person to practise as an attorney. After the appellant's successful application for the acceptance

of the voluntary surrender of his estate, the respondent incorporated in terms of s 56 of the now repealed Attorneys Act 53 of 1979 (the Act), commenced an investigation into the appellant's fitness to remain in practice.

The Investigative Committee of the Council of the Law Society of the Northern Provinces (the Council) concluded that the appellant was guilty of unprofessional or dishonourable or unworthy conduct and was no longer a fit and proper person to continue to practise as an attorney. The respondent was motivated by the provisions of s 22(1)(e) of the Act, which provides as follows:

'22. Removal of attorneys from roll –

(1) Any person who has been admitted and enrolled as an attorney may on application by the society concerned be struck off the roll or suspended from practice by the court within the jurisdiction of which he or she practises –

...

(e) if his or her estate has been finally sequestrated and he or she is unable to satisfy the court that despite his or her sequestration he or she is still a fit and proper person to continue to practise as an attorney.'

After several consultations and a formal inquiry, the committee concluded that the appellant had been dishonest in his application for voluntary surrender and failed to disclose material facts, as he was obliged to do. It found among others that he misrepresented his liabilities under oath to the High Court as amounting to R 146 000, while in fact, when suretyships were included, they amounted to approximately R 20 million. The appellant had also failed to disclose that he was a practising attorney and misled the High Court concerning his monthly income and failed to disclose the type of marriage he had entered. The appellant's explanation at the time was that his attorney had drafted the founding affidavit and that he signed it without properly checking whether the content was correct or not. The Council at the provincial

law society concluded that the appellant could not be regarded as a fit and proper person to practise as an attorney and resolved to refer the matter to court, hence the application to have the appellant's name struck off the roll of attorneys, and alternatively to have him suspended from practising as an attorney. The court *a quo* (Gauteng Division of the High Court in Pretoria) conclude that the appellant was not a fit and proper person to remain on the roll of practising attorneys 'without any form of sanction', this conclusion was based on the proven facts.

The appellant, however, contended that –

- he did not contravene any of the sections of the Act or rules of the provincial law society;
- there was no complaint lodged against him relating to his practice as an attorney;
- he had no shortfall in his trust account; and
- he did not contravene any of the provisions of the Insolvency Act 24 of 1936.

He stated that he was not an insolvency practitioner and, therefore, not acquainted with applications for voluntary surrender and that he relied on his attorney. The provincial law society argued that voluntary surrender applications required an even higher level of disclosure.

## Judgment by the SCA

In essence, the SCA said that the issue before it, was whether the court was correct in finding that the appellant is not a fit and proper person to practise as an attorney and, if so, whether the sanction imposed should be interfered with on appeal. The SCA when embarking on a three-stage inquiry, said that the appellant failed to disclose that he had signed a suretyship with his creditors and instead of admitting the fact that he did not disclose suretyships he prevaricated and mounted a misconceived defence of why he failed to do so. The SCA added that in its view, it was irrelevant whether the suretyships had been called on – their



disclosure would certainly have affected the benefit to creditors. That the suretyships amounted to an approximate R 20 million, and such failure to disclose is a contravention of the general principle including the failure to disclose these suretyships amounted to misrepresentation of the appellant's liabilities.

With regard to him signing the documents without reading them, the SCA pointed out that an attorney's duty, among others, is to advise his clients not to sign documents without reading and understanding them, but the appellant did the opposite. The SCA said that the appellant's evidence is tantamount to perjury. The court said the gravamen of the case essentially was whether he was a fit and proper person to remain on the roll of attorneys. The SCA added that in terms of s 22(1)(e) of the Act, the appellant bears the onus of satisfying the court, despite his sequestration, he is still a fit and proper person to continue to practise as an attorney.

The SCA pointed out that counsel for the appellant concealed during the hearing of the matter that, in this case it cannot be said that the court below exercised its discretion capriciously nor that it failed to bring an unbiased judgment to bear. The SCA added that the counsel attacked the exercise of the court's discretion on the basis that it exercised its discretion on a wrong principle or as result of a material misdirection. The SCA said that it was unclear from the submission what the wrong principle was.

The SCA pointed out that the appeal court has limited powers to interfere with the decision of the court below and referred to the following matter, *Malan and Another v Law Society, Northern Provinces 2009 (1) SA 216 (SCA)* at para 12. Shongwe AP said that the SCA has on numerous occasions decided that this discretion is a strict discretion, meaning that the court of appeal will not interfere if the discretion was exercised judicially (see *Mabaso v Law Society, Northern Provinces, and Another 2005 (2) SA 117 (CC)* at para 20 and *Giddey NO v JC Barnard and Partners 2007 (5) SA 525 (CC)* at para 20). Shongwe

AP pointed out that he was unable to conclude that the court below exercised its discretion capriciously or that it based its judgment on a wrong principle. Shongwe AP, therefore, said that the court found, correctly so that the appellant is not a fit and proper person to practise as an attorney.

In the question of whether the sanction of suspension was appropriate in the circumstances of the case. Shongwe AP, pointed out that this too, was a matter for the discretion of the court. He added that the court exercises discretion depending on the degree and severity of the misconduct. Shongwe AP said in the present case the court found that the appellant was 'at least grossly negligent', however, acknowledged that there was merit in the provincial law society's contention that the appellant was dishonest. Shongwe AP added that the court motivated the suspension on the basis that the appellant should be given the opportunity to rehabilitate himself, and to do so, it held that he needed time to reconsider his unprofessional conduct while on suspension.

Shongwe AP said that the period of suspension will indeed be an opportunity for the appellant to reconsider and change his ways and that the appellant's absence from practise will of necessity protect the public more than punishing him, in as much as he will think twice before committing the same act of misconduct. Shongwe AP found that there was no basis to interfere with the exercise of the discretion of the court.

The appeal was dismissed with costs on the attorney and client scale.

### Dissenting judgment

Majiedt JA on a separate judgment said although he agreed with judgment by Shongwe AP, it was necessary that he wrote on certain less than satisfactory aspects of the approach adopted by the High Court. Majiedt JA said that it bears repetition and special emphasis that in her detailed report, Ms Geringer, made no negative findings whatsoever against the appellant, as far as his practice as an attorney was concerned. On the contrary,

she alluded to his unblemished professional record, in particular his handling of his trust account.

Majiedt JA said that the High Court rightly concluded that the offending conduct did not warrant a striking off, but some form of sanction was necessary. Majiedt JA added that it bears emphasis that, as Shongwe AP pointed out, the crux of the High Court's finding was that the appellant had been 'at least grossly negligent in his failure to make a full and proper disclosure to the court in his application for the surrender of his estate'.

Majiedt JA said that the court failed to enunciate and follow the correct approach, but it also neglected to consider suspending the appellant's suspension from practice. Majiedt JA pointed out that such an order of suspension could have been made for a period of, say, three years appropriate conditions (for example, on a condition that, during the period of suspension, the appellant not be found by a court or by the provincial law society to have failed to make material disclosure (either deliberately or negligently, whether on his behalf or on behalf of his client). Majiedt JA pointed out that the sanction of that type was competent and would, in his view, arguably have served to protect the public more than a suspension from practice for six months. However, Majiedt JA said that he was mindful of the limited power of the SCA to interfere with the discretion of a trial court in matters such as these.

Majiedt JA said in his view it would have been of adequate severity to have penalised the appellant for his reprehensible conduct and would simultaneously have served to protect the public. Majiedt JA concluded the summary by saying that while the High Court's underlying reasoning for the sanction imposed and sanction itself are rather unsatisfactory, there are not sufficient grounds on which to interfere with the exercise of its discretion.

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

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By  
Mongezi  
Mpahlwa

# Termination of contract: Sole discretion means sole discretion

*MultiChoice Support Services (Pty) Ltd v Calvin Electronics t/a Batavia Trading and Another (SCA) (unreported case no 296/2020; 226/2021, 8-10-2021) (Schippers JA and Potterill AJA (Mbha JA and Phatshoane and Molefe AJJA concurring))*

**O**n 8 October 2021, the Supreme Court of Appeal (SCA) handed down judgment in the matter of *MultiChoice Support Services*.

The judgment was in respect of a consolidated appeal hearing of two inter-related appeals from the Limpopo Division of the High Court in Polokwane (LP). Both matters arose from MultiChoice's termination of its agency and accredited installer agreements concluded with Calvin Electronics. The former agreement allowed Calvin Electronics to solicit subscriptions, collect subscription fees and activate customer accounts on behalf of MultiChoice; the latter permitted it to install MultiChoice's equipment, for which it obtained access to its information technology (IT) systems.

## October 2019 terminations

MultiChoice brought the contractual relationship to an end by using a widely framed discretionary termination clause in its agreements. However, this was met by a 'flurry' of litigation on the part of Calvin Electronics.

First, an urgent application was brought in the Limpopo Local Division of the High Court in Thohoyando, which was struck from the roll. Shortly thereafter, Calvin Electronics brought a review application in the LP, ostensibly under r 53, against the decision that MultiChoice had taken to terminate the agreements, as if the decisions were the exercise of public power. A few days after that 'review' application had been brought, Calvin Electronics brought another extremely urgent application to the court seeking interim interdictory relief, pending the resolution of the 'review' application.

On 26 November 2019, the court, per Makgoba JP, handed down an order, directing MultiChoice to reconnect the access of Calvin Electronics to the IT systems of MultiChoice and interdicting it from preventing Calvin Electronics from

performing its obligations as a service provider under both agreements.

## December 2019 terminations

Having complied with the interim interdict, MultiChoice discovered that there had been malfeasance on the part of Calvin Electronics and its employees, after the reconnection, causing MultiChoice to suffer substantial financial loss. The malfeasance included a fraudulent scheme by employees of Calvin Electronics who would connect end users to MultiChoice's services, and then cash in directly from the end user, without MultiChoice ever receiving payment. MultiChoice terminated afresh on those new grounds of termination.

Shortly after the December terminations, MultiChoice brought an application in the Gauteng Local Division of the High Court in Johannesburg for a declaratory order that the agreements had been properly terminated based on the new grounds that had arisen after the granting of the interim interdict. The latter application was heard in Johannesburg shortly after Calvin Electronics had, in the wake of the fresh terminations and disconnection, in February 2020, approached the LP on an urgent basis for an order holding MultiChoice in contempt of the interim interdict of 26 November 2019. Phatudi J found that MultiChoice was in contempt of court without giving reasons, which order was appealed on the same day.

Considering the existence of the contempt order, the Gauteng Local Division of the High Court, per Campbell AJ, had been unwilling to grant the declaratory relief confirming the fresh terminations. However, the court did not dismiss it but postponed it until the appeal against the contempt order had been resolved.

When MultiChoice appealed the contempt order of Phatudi J, Calvin Electronics brought yet another urgent applica-

tion in the LP under s 18 of the Superior Courts Act 10 of 2013 for the contempt order to be enforced immediately pending the appeal. The s 18 application was granted, per Tshidada AJ. MultiChoice then approached the SCA in terms of its automatic right of appeal in s 18(3) of that Act, the SCA in its view being the next highest court.

## The SCA

The SCA found that MultiChoice had exercised its contractual right to unilaterally terminate the contracts in terms of a procedure to which the parties had specifically agreed. It was entitled to do so on any ground of cancellation specified in the agreements, including fraud on the part of Calvin Electronics. It stated further that the conclusion by the High Court that this 'constituted contempt or that the imputations of fraud were premature, [was] incorrect'.

Furthermore, the SCA found that Calvin Electronics throughout had abused the process of court in that it used the procedures permitted by the rules of court for a purpose other than the pursuit of the truth, namely, to ensure access to MultiChoice's systems without any legal basis. The SCA reasoned that the order of Makgoba JP, 'the foundation of everything that followed' was 'erroneous in a number of respects'. It followed that neither the contempt order, nor that of the s 18 could stand.

The SCA allowed the appeals, overturning both orders of the LP and replacing them with two costs orders in favour of MultiChoice, both on the attorney-and-client scale – a huge victory for MultiChoice.

Mongezi Mpahlwa BCom (Law) LLB (UWC) is a legal practitioner at Cliffe Dekker Hofmeyr. Mr Mpahlwa was involved in the above matter. □



By  
Philip  
Stoop

# New legislation

Legislation published from  
1 – 29 October 2021

## Commencement of Acts

**Local Government: Municipal Structures Amendment Act 3 of 2021.** *Commencement:* 1 November 2021. Proc37 GG45305/11-10-2021.

## Promulgation of Acts

**Private Security Industry Regulation Amendment Act 18 of 2014.** *Commencement:* To be proclaimed. GenN594 GG45295/8-10-2021 (also available in Afrikaans).

## Selected list of delegated legislation

**Auditing Profession Act 26 of 2005**  
Regulatory strategy for the Independent Regulatory Board for Auditors. GN1435 GG45389/27-10-2021.

**Continuing Education and Training Act 16 of 2006**

National norms and standards for funding technical and vocational education and training colleges. GenN620 GG45352/22-10-2021.

**Compensation for Occupational Injuries and Diseases Act 130 of 1993**

Banking information requirements for occupational injuries and diseases related claims. GenN615 GG45344/19-10-2021.

Updating of banking information for occupational injuries and diseases related claims. GenN616 GG45344/19-10-2021.

Compensation for COVID-19 vaccination side-effects. GenN629 GG45356/22-10-2021.

**Disaster Management Act 57 of 2002 (COVID-19)**

### • Education

Amendment of directions on the closing and re-opening of schools and measures to address, prevent and combat the spread of COVID-19 in the education sector. GenN633 GG45380/22-10-2021.

### • General regulations

Alert level 1 regulations. GN R1024 GG45297/11-10-2021.

Extension of National State of Disaster under the COVID-19 lockdown to 15 November 2021. GN R1031 GG45313/13-10-2021.

### • Social development

Amendment of directions on measures to address, prevent and combat the

spread of COVID-19 relating in social development. GN1028 GG45302/11-10-2021.

### • Sports, arts and culture

Amendment of directions on measures to address, prevent and combat the spread of COVID-19 relating in sports, arts and culture. GN1037 GG45329/15-10-2021.

### • Transport

Amendment of directions regarding measures to address, prevent and combat spread of COVID-19 in air services. GN1091 GG45379/22-10-2021.

**Disaster Management Act 57 of 2002 (severe weather events)**

Classification of a provincial disaster in terms of s 23 due to severe weather events in the Overberg and Cape Wine-lands District Municipalities. GN1023 GG45296/8-10-2021.

### Legal Practice Act 28 of 2014

Amendment of rules (replacement of sch 8). GenN634 GG45396/29-10-2021.

**Magistrates Act 90 of 1993**

Amendment of the Regulations for Judicial Officers in the Lower Courts. GN R1440 GG45395/29-10-2021 (also available in Afrikaans).

**National Qualifications Framework Act 67 of 2008**

Policy for the re-issue of National Certificates. GN1013 GG45275/8-10-2021.

Policy and criteria for development, registration and publication of qualifications for the General and Further Education and Training Qualifications Sub-Framework. GN1011 GG45275/8-10-2021.

Occupational Qualifications Sub-Framework Policy, 2021. GN1463 GG45401/29-10-2021.

**Pharmacy Act 53 of 1974**

Fees payable. BN133 and BN134 GG45352/22-10-2021.

**Plant Improvement Act 53 of 1976**

Amendment of the regulations relating to establishments, varieties, plants and propagating material (Hemp/Cannabis). GN1008 GG45275/8-10-2021.

**Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000**

National strategic framework on reasonable accommodation for persons with

disabilities. GenN605 GG45328/15-10-2021.

National strategic framework on universal design and access: Promotion of universal design and access in South Africa. GenN606 GG45328/15-10-2021.

**Public Finance Management Act 1 of 1999**

Statement of the National Revenue, Expenditure and Borrowings as at 30 September 2021. GenN641 GG45418/29-10-2021.

**Road Accident Fund Act 56 of 1996**

Adjustment of the statutory limit in respect of claims for loss of income and loss of support with effect from 31 October 2021 to R 312 439. BN138 GG45396/29-10-2021 (also available in Afrikaans).

**Social Housing Act 16 of 2008**

Social Housing Policy: Additional Restructuring Zones. GN962 GG45250/1-10-2021.

**South African Civil Aviation Authority Levies Act 41 of 1988**

Amendment of the determination imposing a fuel levy on sale of aviation fuel. GN R1004 GG45269/5-10-2021.

**South African Weather Service Act 8 of 2001**

Regulations regarding fees for the provision of aviation meteorological services. GN1025 GG45298/11-10-2021.

**Tax Administration Act 28 of 2001**

Incidences of non-compliance by a person that are subject to a fixed amount penalty. GN1461 GG45396/29-10-2021 (also available in Afrikaans).

**Veterinary and Para-Veterinary Professions Act 19 of 1982**

Amendment of regulations: Fees payable. GenN581 GG45250/1-10-2021.

### Draft delegated legislation

- Increase in meat classification and quality indication mark inspection fees in terms of the Agricultural Product Standards Act 119 of 1990 for comment. GenN584 GG45250/1-10-2021.

- Information Memorandum on Licensing of Spectrum in the IMT700, IMT800, IMT2600 and IMT3500 Bands in terms of the Electronic Communications Act 36 of 2005 for comment. GenN587 GG45255/1-10-2021.

- Packaging Guideline: Recyclability by Design for Packaging and Paper in South Africa in terms of the National



Environmental Management Waste Act 59 of 2008 for comment. GN1005 GG45273/6-10-2021.

- Determination of permit fees in terms of the National Railway Safety Regulator Act 16 of 2002 for comment. GN1017 GG45275/8-10-2021.
- Proposed hunting/export quota for elephant, black rhinoceros and leopard hunting trophies for the 2021 calendar year in terms of the National Environmental Management: Biodiversity Act 10 of 2004 for comment. GN1022 GG45294/8-10-2021.
- Draft Road Traffic Management Corporation Regulations, 2021 in terms of the Road Traffic Management Corporation Act 20 of 1999 for comment. GN1019 GG45291/8-10-2021.
- Policy for the certification of candidate records on the General and Further Education and Training Qualifications Sub-Framework in terms of the General and Further Education and Training Quality Assurance Act 58 of 2001 for comment. GN1012 GG45275/8-10-2021.
- Proposed amendment of levies on fish and fish products in terms of the Ma-

rine Living Resources Act 18 of 1998 for comment. GN1034 GG45328/15-10-2021.

- Registration and Assessment Policies, 2021 in terms of the Landscape Architectural Profession Act 45 of 2000 for comment. BN131 GG45328/15-10-2021.
- Regulations relating to the qualifications for registration of optometrists in terms of the Health Professions Act 56 of 1974 for comment. GN1065 GG45352/22-10-2021.
- Amendment of the regulations relating to the conduct of inquiries into alleged unprofessional conduct in terms of the Health Professions Act 56 of 1974 for comment. GN1066 GG45352/22-10-2021.
- Declaration of lead in paint or coating material as a group II hazardous substance in terms of the Hazardous Substances Act 15 of 1973 for comment. GN1067 GG45352/22-10-2021.
- Amendment of the Civil Aviation Regulations, 2011 in terms of the Civil Aviation Act 13 of 2009 for comment. GN R1437 GG45391/27-10-2021.
- Regulations defining the scope of the

profession of occupational therapy in terms of the Health Professions Act 56 of 1974 for comment. GN1457 GG45396/29-10-2021.

- Regulations relating to lead in paint or coating materials in terms of the Hazardous Substances Act 15 of 1973 for comment. GN1456 GG45396/29-10-2021.
- Draft amendments to the regulations made in terms of s 36 of the Pension Funds Act 24 of 1956 for comment. GN1460 GG45396/29-10-2021 (also available in Afrikaans).

### Draft Bills

- Draft Companies Amendment Bill, 2021. GenN586 GG45250/1-10-2021.
- Draft Non-Profit Organisations Amendment Bill, 2018. GN957 GG45244/1-10-2021.

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By  
Monique  
Jefferson

## 'Double jeopardy' and second hearings in misconduct cases

In *Anglo American Platinum Ltd (Rustenburg Platinum Mines) v Beyers and Others* [2021] 10 BLLR 965 (LAC) an employee failed to comply with the employer's safety rules as machinery had been left 'live' while working on the equipment. He was required to attend a disciplinary hearing, during which he pleaded guilty. The chairperson issued a final written warning and recommended that the employee attend re-training. In making the decision on sanction, the chairperson considered that this was a first offence for the employee and there had been no breakdown in the trust relationship. Furthermore, the chairperson found that

the employee had just breached procedure but had not caused real harm to the workplace. The employee was sent for re-training and was then instructed to report for duty again.

The trade union then complained that there had been inconsistent application of discipline as members of the trade union had previously been dismissed for the same offence. In response to this complaint, a review panel was convened, and the employee was required to attend a review hearing, during which summary dismissal was recommended.

The employee was, therefore, dismissed and referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration. The commissioner found that the dismissal was substantively and procedurally fair. On review, the Labour Court set aside the arbitration award and ordered reinstatement. This was because the chairperson had been afforded the power to make the decision on sanction as opposed to merely making a recommendation. Therefore, it was held that there were no exceptional circumstances to warrant another review panel changing the decision. Furthermore, it was held that there

was no evidence of inconsistent application of discipline.

On appeal, the Labour Appeal Court (LAC) had to consider under what circumstances there can be interference with the decision made by a chairperson appointed by the employer to chair a disciplinary hearing in circumstances where the employer's disciplinary code does not provide for a review or appeal hearing.

The LAC considered the principles in *BMW (South Africa) (Pty) Ltd v Van Der Walt* [2000] 2 BLLR 121 (LAC) where it was held that whether or not a second disciplinary inquiry may be convened against an employee would depend on whether it is in all the circumstances fair to do so. It was held that the yardstick to apply is 'fairness and fairness alone' and that it would probably not be fair to hold more than one disciplinary inquiry save for in exceptional circumstances.

In this case, the LAC found that there would have to be exceptional circumstances to warrant a second hearing into the misconduct in these circumstances. The evidence suggested that the employer would not have interfered with the sanction if the union had not com-

# Employment law update

plained. There was also no evidence on the inconsistent application of discipline. It was held that the arbitrator had failed to determine whether fairness between the employer and the employee, informed by exceptional circumstances to do so, justified the interference with the sanction imposed by the chairperson. The dismissal was accordingly found to be substantively unfair and as such the appeal was dismissed with costs.

## Alleged automatically unfair dismissal in the context of a restructuring

In *De Bruyn v Metorex (Pty) Ltd* [2021] 10 BLLR 979 (LAC), an employee who was dismissed for operational requirements referred a dispute to the Commission for Conciliation, Mediation and Arbitration alleging that his dismissal was automatically unfair on the basis of nationality and language. In this regard, the employer had embarked on a restructuring process. The operational rationale for this was part of a plan where there would be greater autonomy for the mines owned by the employer and there would be a reduction in the oversight role played by the head office in Johannesburg, where

the employee was based. The intention was for there to be only Chinese or Chinese speaking managers at the mine so that they could effectively communicate with the employees on the mine. It was for this reason that the employee's role at head office was proposed to be made redundant. The employee argued that the redundancy of his role was as a result of a Chinese-speaking person being appointed as Chief Executive Officer (CEO), who took over a lot of the employee's duties and responsibilities. Furthermore, the employee alleged that he should have been accommodated as the deputy CEO when his role was made redundant, but the employer had a requirement that both the CEO and deputy CEO needed to be Chinese or Chinese-speaking so that they could effectively communicate with the mine managers in Chinese. A retrenchment process was accordingly commenced in respect of the head office staff, including the employee.

The employer conceded that the reason for the dismissal was based on language but alleged that the discrimination was justified. This was because the employer was in a difficult financial situation, which required operational and structural changes, including raising

finances and reducing operating costs. Importantly, even the employee had not disputed that there was a legitimate business rationale for appointing Chinese mine managers and retaining head office personnel who could communicate effectively with them. The Labour Court dismissed the claims, finding that the employee had been fairly dismissed because his position had become redundant. It was also found that the dismissal was procedurally fair because a fair consultation process had been followed with the employee.

As regards severance pay, the employee disputed the fact that the lower paid employees who were retrenched were paid higher multiples of severance pay more than the statutory minimum whereas executives were not paid this enhanced severance package. The Labour Appeal Court found that this different treatment was not unfair because it was aimed at alleviating the financial burden for the very low earning employees.

**Monique Jefferson BA (Wits) LLB (Rhodes)** is a legal practitioner at DLA Piper in Johannesburg.



By  
Moksha  
Naidoo

## No condonation – no jurisdiction

*SAMWU obo Moloisane and Others v City of Tshwane Local Municipality and Others* (LC) (unreported case no JR850/19, 9-9-2021) (Prinsloo J)

In this instance, three applications involving the same parties were served before the Labour Court (LC). The first was an application brought by the South African Municipal Workers' Union (SAMWU) (the union) to review and set aside an arbitration award, which was opposed by the municipality. The second was an application brought by the municipality to have the union's review application

dismissed or deemed to be withdrawn. The third application was brought by the union to reinstate its review application.

In terms of its review application, the union alleged the award, which it sought to be reviewed and set aside, was delivered to it on 12 March 2019. It served its review application on the municipality on 29 April 2019 and filed same at the LC on 2 May 2019.

In its answering affidavit to the review application, the municipality stated that it handed the union a copy of the award on 15 March 2019 and raised the point that the union filed its application outside the prescribed six-week period and thus should apply for condonation. The union did not file a replying affidavit.

In the municipality's application to dismiss the union's review application, the municipality once again raised the issue of condonation. The union, in its answering affidavit simply denied that it was late in filing its papers, however, did not go further to explain why it took this position.

In dealing with the three applications, the LC began by addressing its jurisdiction to hear the matters. It is accepted that if a review application is filed outside the statutory period, the LC does not have jurisdiction to entertain the application, until such time as condonation is sought and granted.

On the union's version, having received the award on 12 March 2019, the

last day in which to file its review application would have been 23 April 2019. On the municipality's version, the union received the award on 15 March 2019, whereafter it ought to have filed its review application on 29 April 2019, yet it only filed it on 2 May 2019.

Therefore, on both versions, the union filed its papers outside the prescribed time.

The LC reiterated the position (as set out in *Mbatha v Lyster and Others* (2001) 22 ILJ 405 (LAC)) that an applicant in a review application, must not only serve their application on the respondent within the six-week period, but must also ensure that their application is filed at the LC within the said time period. In this case, and on the municipality's version, although the union served its review application on the municipality on the last day of the six-week period, it only filed its application on 2 May 2019 and thus the union was obliged to apply for condonation.

Going further the LC held:

'In *Ellerine Holdings Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [(2002) 23 ILJ 1282 (LC)] the court has held that:

"Where the non-compliance relates to a statutory provision, ie as set out in an Act, then failure to comply with those provisions goes to jurisdiction. In such cases (for example where time-limits relate to jurisdiction) an application must

be made to court to condone the non-compliance. In circumstances where the time-limit is prescribed by the *rules*, this court would be prepared to entertain a matter in spite of the fact that the pleadings were not filed within the prescribed time-limits, as long as there is no objection thereto by the party who stands in opposition to the party who has failed to comply with the time-limits prescribed by the rules of this court."

The late filing of a review application constitutes a failure to comply with a statutory provision and not a time limit prescribed by the rules and the applicant had to apply for condonation. The review application *in casu* was filed with the Registrar on 2 May 2019, evidently outside the prescribed six-week period. *In casu* there is no application for con-

donation for the late filing of the review application.'

The LC again noted that the Labour Appeal Court in *SA Transport and Allied Workers Union and Another v Tokiso Dispute Settlement and Others* (2015) 36 ILJ 1841 (LAC) held that when an applicant files its review application outside the statutory period, even by one day; the LC cannot assist that party without first addressing the issue of condonation.

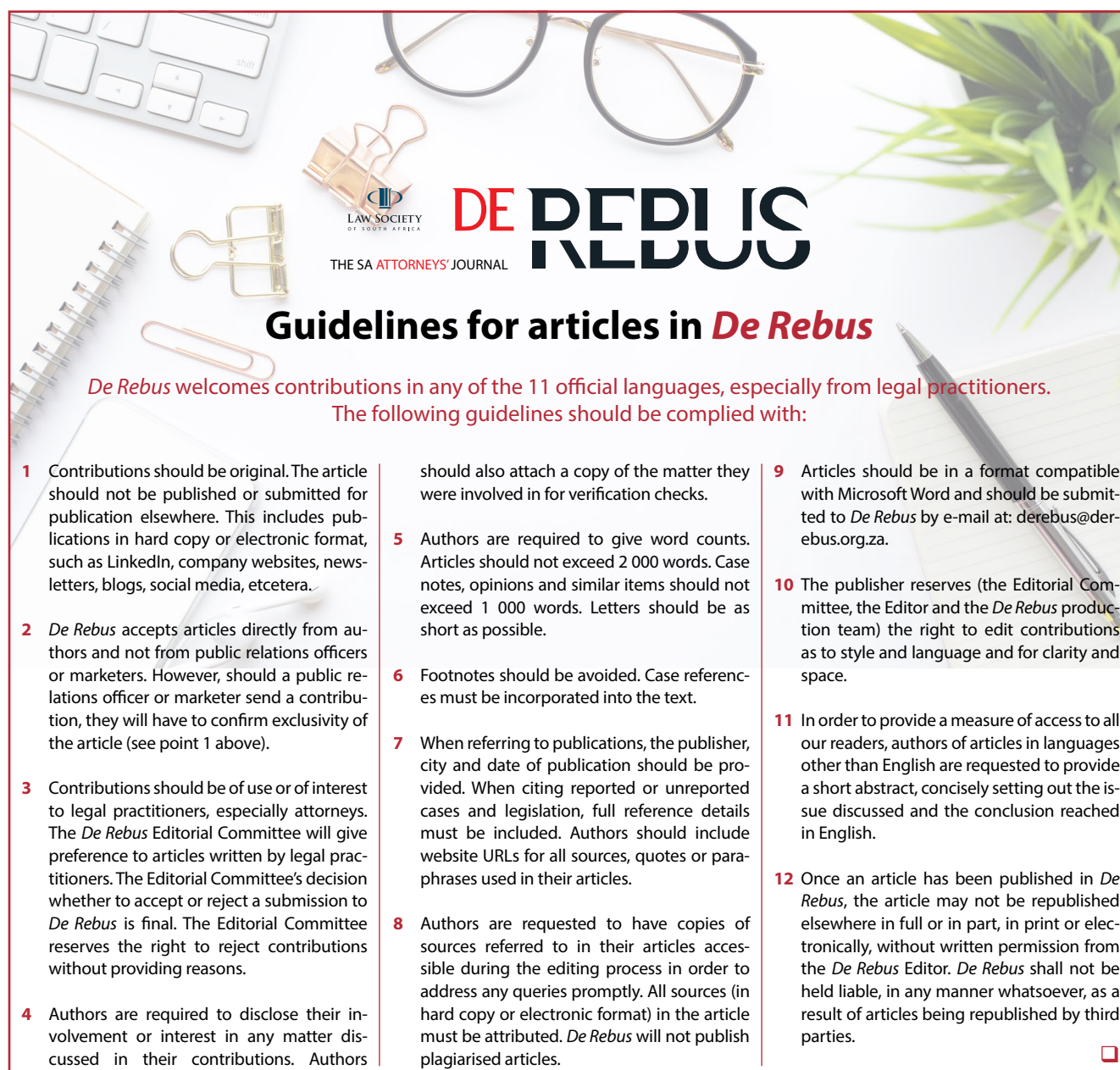
Following the above string of authorities, the LC found that absent an application for condonation, it did not have jurisdiction to hear the union's review application.

On the issue of costs and while acknowledging the rule that costs do not automatically follow the result in the LC, the court took issue with the fact that

the union was informed of the need to apply for condonation on two occasions over the past years. Instead of dealing with this issue, it persisted with its refusal to address the issue meaningfully. The union's attitude on this score warranted an adverse cost order against it.

The LC ordered that the review application be struck off the roll for lack of jurisdiction and that the union pay the municipality's costs.

**Moksha Naidoo BA (Wits) LLB (UKZN)** is a legal practitioner holding chambers at the Johannesburg Bar (Sandton), as well as the KwaZulu-Natal Bar (Durban). □



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By  
Kathleen  
Kriel

# Recent articles and research

Abbreviation	Title	Publisher	Volume/issue
<i>DJ</i>	De Jure Special focus: Implementing regional human rights standards in East and West Africa	University of Pretoria	(2021) 54
<i>JJS</i>	Journal for Juridical Science	University of the Free State, Faculty of Law	(2021) 43.1
<i>LDD</i>	Law, Democracy and Development	University of the Western Cape, Faculty of Law	(2021) 25
<i>SA Merc LJ</i>	South African Mercantile Law Journal	Juta	(2020) 32.3
<i>SALJ</i>	South African Law Journal	Juta	(2020) 138.3
<i>SJ</i>	Speculum Juris	University of Fort Hare	(2021) 35.2
<i>SLR</i>	Stellenbosch Law Review	Juta	(2021) 32.2

## Alcohol testing in South Africa

**Laurens, JB; Carstens, PA; and Curlewis, LG** 'Blood and breath alcohol test results: Uncertainty at the interface of science and law' (2021) 138.3 *SALJ* 535.

## Broad-Based Black Economic Empowerment

**Mhlongo, L** 'Clash of laws? Testing the effectiveness of the national treatment principle against black economic empowerment laws in South Africa' (2021) 35.2 *SJ* 210.

## Children's rights

**Lutchman, S** 'Notes: Children, autonomy and statements: The need for a bright-line rule' (2021) 138.3 *SALJ* 500.

## Civil procedure

**Mabeka, NQ** 'Pagination of court files in civil procedure: "a thing of the past" in evolving digital technology' (2021) 35.2 *SJ* 134.

## Company law

**Bidie, S** 'Dismantling obstacles impeding better governance in companies: Affirming the expansion of the interpretation of "shareholder and director" under section 163 of the 2008 Act' (2021) 25 *LDD* 377.

**Mongalo, TH** 'Notes: The unlamented demise of the common-law derivative action: A note remembering Michael Larkin' (2021) 138.3 *SALJ* 508.

**Mudzamiri, J and Osode, PC** 'A reflective assessment of selected problematic aspects of South Africa's appraisal remedy regime against the backdrop of *Cilliers v La Concorde Holdings Ltd*' (2020) 32.3 *SA Merc LJ* 389.

**Njotini, M** 'Securing shareholder information in the digital age - an analysis of the proposed amendments to section 26 of the Companies Act' (2020) 32.3 *SA Merc LJ* 334.

## Constitutional law

**Visser, CJ** 'The doctrine of subjective rights, the *actio iniuriarum* and the Constitution: A convergent doctrinal basis for the law of personality' (2021) 32.2 *SLR* 272.

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**Barnard-Naudé, J** 'Form and substance in the Constitutional Court: Whither contract law's policy after Apartheid?' (2021) 138.3 *SALJ* 569.

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**Malherbe, K** 'Assessing the protection of older persons' access to social services in South Africa during the COVID-19 pandemic' (2021) 35.2 *SJ* 118.

**Sobikwa, N and Phooko, MR** 'An as-

essment of the constitutionality of the COVID-19 regulations against the requirement to facilitate public participation in the law-making and/or administrative processes in South Africa' (2021) 25 *LDD* 309.

## Criminal law

**Okpaluba, C** 'Damages for injuries arising from the infringement of the rights of persons in police or prison custody: South Africa in comparative perspective (Part 3)' (2021) 35.2 *SJ* 259.

**Van der Linde, DC** 'Does the aggravated sentencing regime under the Prevention of Organised Crime Act 121 of 1998 violate freedom of association? A constitutional and comparative analysis' (2021) 32.2 *SLR* 288.

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**Amadi, VT and Lenaghan, P** 'Facilitating trade and strengthening market access in the Southern African Customs Union: A focus on South Africa's customs reform' (2020) 32.3 *SA Merc LJ* 309.

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of trace DNA or low copy number (LCN) DNA evidence in court proceedings' (2021) 46.1 *JJS* 1.

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**Strydom, M** 'A critique on privately prosecuting the holder of "after the fact" environmental authorisations: *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd*' (2021) 138.3 *SALJ* 617.

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**Iheme, WC and Mba, SU** 'A doctrinal assessment of the insolvency frameworks of African countries in coping with the pandemic-triggered economic crisis' (2021) 32.2 *SLR* 306.

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**Mahlangu, N** 'Residual goodwill – a case of discontinued marks: *Beiersdorf AG v Koni Multinational Brands (Pty) Ltd*' (2020) 32.3 *SA Merc LJ* 360.

## International human rights

**Asaala, E** 'Assessing the mechanisms and framework of implementation of decisions of the African Court on Human and Peoples' Rights fifteen years later' (2021) 54 *DJ* 430.  
**Biegon, J** 'State implementation and compliance with the human rights decisions of the East African Court of Justice' (2021) 54 *DJ* 404.  
**Dinymoi, AMI and Lubaale, EC** 'The right to decision-making for persons with mental disabilities in Uganda' (2021) 35.2 *SJ* 226.  
**Fokala, E** 'Do not forget the Nubians: Kenya's compliance with the decisions of African regional treaty bodies on the plight and rights of Nubians' (2021) 54 *DJ* 476.  
**Fokala, E** 'Editorial introduction: Compliance with regional human rights – focus

on East and West Africa' (2021) 54 *DJ* 401.

**Kabira, N and Masore, P** 'Monitoring compliance of African women's human rights commitments by the African Court on Human and Peoples' Rights' (2021) 54 *DJ* 453.

**Mutangi, T** 'Status of the implementation of the human rights related decisions of the ECOWAS Community Court of Justice' (2021) 54 *DJ* 512.

**Njiru, EM** 'Adjudication of human rights disputes in the sub-regional courts in Africa: A case study of the East African Court of Justice' (2021) 54 *DJ* 493.

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**De Man, A and Bello, M** 'Prioritising socio-economic rights in sovereign debt governance: The obligations of private creditors' (2021) 46.1 *JJS* 57.

## State capture

**Swanepoel, CF** 'The slippery slope to state capture: Cadre deployment as an enabler of corruption and a contributor to blurred party-state lines' (2021) 25 *LDD* 440.  
**Tsele, M** 'Notes: "Observations" on the *State Capture* judgment' (2021) 138.3 *SALJ* 477.

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**Clark, B** 'A trans man as a "gestational parent": Trans parenting and the best interests of the child' (2021) 32.2 *SLR* 234.

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**Nel, E** 'Beneficial ownership of trust assets in an international reality: An intersection between trust law, tax and crime prevention' (2021) 35.2 *SJ* 169.

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



By  
Chetna  
Singh

# Sentencing public violence offenders: The conundrum of social context

Subsequent to the decision 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), parts of South Africa erupted into mass social unrest, coupled with acts of violence and looting.

There can be no argument with the fact that the social unrest and its accompanying violence reflects a subversion of the rule of law, and with it, a deep social crisis. Economically, the estimated value of theft and damage to property, as well as a loss of productivity has run into the hundreds of millions of Rands.

Public violence has been defined as 'the unlawful and intentional commission, together with a number of people, of an act or acts which assume serious dimensions and which are intended forcibly to disturb public peace and tranquillity or to invade the rights of others' (CR Snyman *Criminal Law* 6ed (Durban: LexisNexis 2014) as cited in *S v Le Roux and Others* 2010 (2) SACR 11 (SCA)).

The crime of public violence bears distinct features:

- First, the *actus reus* is ascribed to a unified group action, so the guilt of each participant is attributed to the conduct of all the participants, acting in concert, and as a single unit.
- Secondly, the crime of public violence is notable in that it must achieve the high-water mark of being regarded as conduct within 'serious dimensions'. This has been interpreted in different ways by different courts. Acts of public violence are polysemic, and are open to multiple, although not unlimited, interpretations. Therefore, identifying blame or finding the cause is important to explain why people acted so far outside the accepted norms of society.

For those public violence matters that are successfully prosecuted, s 274 of the Criminal Procedure Act 51 of 1977 (the CPA) becomes an important tool in the hands of both litigants, as well as factfinders. Evidence relating to the social, economic, and financial damage

caused by public violence and/or other related offences should naturally factor in any financial loss as proved by the impact of the violence (*S v Dingiswayo and Others* 1985 (3) SA 175 (Ck) at para 178B-C).

Lawyers carry the duty to shape and transform the legal landscape in which the rule of law reigns supreme. Public violence can open kairotic windows through which change is possible, as observed in *S v Abrahams* 1990 (1) SACR 172 (C), which shifted the sentencing patterns on public violence, arising from the uprisings of the 1980's, from imprisonment to a suspended sentence. Perhaps a new shift is underway?

It is, therefore, important to understand the inventive possibilities that emerge from the interpretations of violence. The role of social context in defining the legal convictions of the community cannot be disregarded because in a case-by-case analysis, the interpretation of 'public violence' is as different between the ideological aspirations of the accused in the dock as that which is entrenched in the mind of the prosecutor, the defender, and the factfinder, especially in the assessment of 'serious dimensions'.

As much as deterrence is almost always a prime purpose of punishment, legal practitioners are urged to consider restorative justice principles and find creative solutions when arguing for an appropriate sentence.

Naturally, the *boni mores* or legal convictions of the community as found in the *Zinn* triad (*S v Zinn* 1969 (2) SA 537 (A)) cannot be divorced from either the crime or the offender. The natural indignation of the community should be acknowledged in sentencing. As public violence can overlap with other crimes, such as assault, malicious injury to property, arson, and robbery, identifying restorative justice solutions can make for effective sentencing while balancing social context principles within the matrix of the prevailing interests of the community. Examples, such as, community-based sentences involving community service and victim-offender dialogues can and should be pursued with vigour. This will at best, send a strong message

to the community that the courts are a model of effective punishment, in turn, reinforcing confidence in the criminal justice system.

In conclusion, like a North Star in the guiding process, the provisions of s 274 of the CPA must, therefore, be wholly embraced by lawyers and factfinders alike, as a 'hallowed principle' (*S v Moke-la* 2012 (1) SACR 431 (SCA) at para 14) in the delivery of a fair and balanced judgment that is not in public opinion, but in the public interest.

Chetna Singh LLB LLM (UKZN) Cert Insolvency Litigation and Practice (UP) is an additional magistrate at the Evander Magistrate's Court.



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By  
Anthony  
Pillay

# Do you have the right strategies in place for a cyber-attack?

**C**yber theft, especially ransomware, has hit businesses and the legal profession has become a key target for cyber-criminals. Critical services to the public, such as healthcare and social services have been targeted, and recently the Department of Justice has seen the adage 'not if but when'.

Large corporations who have invested millions in cybersecurity have all fallen victim to this scourge.

Business executives have learned that cybersecurity should be treated as a risk and evaluated by cost and benefit analysis.

Dependent on your business and the potential impact and the cost of recovery, this risk may be classified as a strategic risk.

Discussions on cyber risks are not confined to information and communications technology. They must include risk management discussions at the executive level, namely -

- understanding the nature of the risk;
- the potential scale of the risk on the practice;
- vulnerable systems;
- digital infrastructure; and
- business processes etcetera and develop a plan to mitigate the impact of cyber breaches.

Unlike other risks, there must be an audit of the users, devices, critical systems, business recovery plans on post-breach communication strategy.

This information must be used to build resilience in the systems and educate users continuously. Thus, it requires a directed and focused approach.

Based on the National Association of Corporate Directors and the Internet Security Alliance guidelines on 'Cyber-risk Oversight 2020: Key Principles and Practical Guidance for Corporate Boards', risk oversight must include the following:

- 'Directors should understand the legal implications of cyber risks as they relate to their company's specific circumstances'.
- 'Boards should have adequate access to cybersecurity expertise, and discussions about cyber-risk management should be given regular and adequate

time on board meeting agendas' for risk management, including cyber risks.

- Directors should set the parameters on the level of acceptable risks (appetite) for strategic risks.
- Directors should ensure that management establishes an enterprise-wide risk framework, including cyber risk with skilled risk staff and an adequate budget.
- The Board in discussions with management 'should include identification and quantification of financial exposure to [strategic] risks and which risks to accept, mitigate, or transfer, such as through insurance, as well as specific plans associated with each' tactic chosen. The Board must keep a balance between protecting the organisation's security and mitigating losses, while ensuring profitability and growth in a competitive environment.

The **Law Society of South Africa** previously published the following key strategies for cyber risks:

- Reasonable assurance is not sufficient, dynamic methods of managing risk are needed to survive in the fierce world of cyber-attacks, including automated controls.
- Zero trust - staff, should only have access to systems/processes that are essential for their functions.
- Apply design thinking (the vanguard of cybersecurity) -
  - 'first, fully understand the problem;
  - second, explore a wide range of possible solutions;
  - third, iterate extensively through prototyping and testing; and
  - finally, implement through customary deployment mechanisms' (Rebecca Linke 'Design thinking, explained' (<https://mitsloan.mit.edu>, accessed 23-11-2021)).
- Organisational mass and inertia resist change - management must be the catalyst.
- Cyber risks should be addressed in an integrated approach across all risks to achieving business objectives.
- Strategic decisions regarding technology should be integrated with broader business strategy and methods of man-

aging risk in the strategy development process.

- Staff awareness and training should be continuous as the greatest threat is individuals' attitudes and behaviours strongly influence intrusions into IT systems.
  - Enforce mandatory regular password changing (at the very least every two weeks), multiple character strings with minimum safety at least 12 characters strong (insurers insist on 14).
  - Ensure all software updates are regularly installed, have regular backups with offline storage, run malware software before reinstating back-ups.
- Specific guidelines for ransomware published previously:
- Recognise the high likelihood that not only will firms be attacked but their defences will be breached.
  - Complete (and maintain over time) a business impact analysis to understand how a breach might affect firms. This is an exercise that must have the active and committed participation of both the technical and practice managers and staff experts.
  - Assess how significant a breach could be (there is a range of possible magnitudes, each with its own likelihood) in their specific circumstances.
  - Prepare for the event.
  - Harden both defences and response - within reason - and test them regularly. The articles have some great recommendations.
  - Invest according to the risk to the firm, based on the business impact analysis, rather on another's survey, the news headlines, or on a consultant's advice.
  - Review and audit (using the firm's own staff and management) periodically with the frequency based on the level of risk, continuously updated.

The Law Society of South Africa's Cybersecurity Helpdesk is headed by Anthony Pillay. Mr Pillay is the Acting Executive Director of the Law Society of South Africa.



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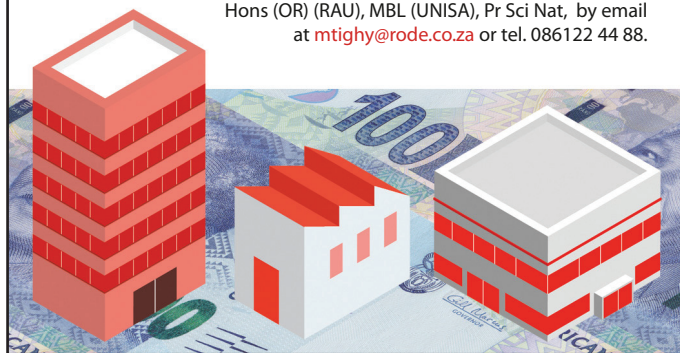
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# RISKALERT

DECEMBER 2021 NO 5/2021

## IN THIS EDITION

### RISK MANAGEMENT COLUMN

- The attorney-client relationship: does the person who pays the piper exclusively call the tune? 1

## RISK MANAGEMENT COLUMN

### THE ATTORNEY-CLIENT RELATIONSHIP: DOES THE PERSON WHO PAYS THE PIPER EXCLUSIVELY CALL THE TUNE?

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### Introduction

*"He who pays the piper calls the tune", according to an old proverb.*

This raises the question whether attorneys, in the execution of their mandates, are solely required to consider the interests if their fee-paying clients to the exclusion of those of any third parties?

This article attempts to show that the proverb is misplaced in the context of the contemporary relationship between attorneys and their clients. In the first part of the article, the intention is to demonstrate that the professional duties of an attorney are not exclusively owed to their clients. The second part gives a brief overview of the jurisprudence on the liability of attorneys to non-clients.

The attorney-client relationship is unique. There are, for example, consequences flow-



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ing from that relationship that may not find application in any other relationship between a professional service provider and a client. Attorney-client privilege is one example. The attorney-client relationship is an important spoke in accessing justice. It is trite that an attorney has a legal and eth-

## RISK MANAGEMENT COLUMN continued...

ical duty to perform the lawful instructions of the client, subject to the ethical considerations (the *boni mores*) of the legal practitioner.

Expressions such as an attorney “being a creature of instruction” are used in the context of explaining that the attorney “was merely carry out the client’s instructions” without regard to what the wider implications and consequences of those instructions are. There are several potential risks that flow from this narrow view of the professional duties of the attorney.

It has long been established that there are several duties owed by the attorney to the client and that a breach of these duties attracts liability for the attorney on various fronts. Depending on the nature of the breach, the attorney may face disciplinary action by the Legal Practice Council (LPC), civil action or, where the breach also amounts to a criminal offence, prosecution. The attorney’s duties to the client arise from the relationship entered into between the parties, and that relationship is also the source of liability to the client. A professional indemnity claim against the attorney will either be framed in contract (a breach of the terms of the mandate agreed between the parties) or in delict (a breach of a duty of care). Similarly, disciplinary action against a legal practitioner will be based on the failure by the practitioner

concerned to meet the prescribed high standard of ethical conduct.

Another preliminary point needs to be made to correct some common misconceptions. A breach of a professional duty will not on its own be a basis for a sustainable professional indemnity claim against an attorney. The party bringing the claim will have to prove the contractual or delictual claim by establishing all the elements of liability under the respective basis on which liability is alleged. Similarly, not all circumstances that give rise to professional liability are, automatically, breaches of the ethical duties of an attorney. Put differently, it cannot be said that every attorney found liable in a professional indemnity claim is guilty of a misconduct solely by virtue of such liability. If a legal practitioner insured by the Legal Practitioners Indemnity Insurance Fund NPC (the LPIIF) is faced with a professional indemnity claim, the matter will be dealt with between the LPIIF (as insurer) and the legal practitioner (as insured). The LPIIF is independent of the LPC. Information submitted to the LPIIF by the insured in notifying the claim will not be shared with the LPC as a matter of course. The insurance relationship between the LPIIF and the insured is based on the terms of the Master Policy. The only circumstances under which the Master Policy permits the reporting of the conduct of an insured to the LPC are where either:

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2. there is a material non-disclosure or misrepresentation in respect of an application for indemnity (clause 35).

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### **The attorney’s professional duties**

The professional duties of an attorney have developed over the centuries. There is a rich body of jurisprudence on this subject developed from practice, judgments of the courts and the statutes that have regulated the conduct of legal practitioners at various stages in history. The textbook written by EAL Lewis, *Legal Ethics: A Guide to Professional Conduct for South African Attorneys*, contains a lot of information that is still relevant today, almost four decades after it was first published.

CH van Zyl, *The Theory of the Judicial Practice of South Africa* (1921) states the following (at 42):

“Now, these general remarks may be said to be axioms applicable to all professions and callings of life, but still it is with regard to legal practitioners that they have mostly occupied the attention of



## RISK MANAGEMENT COLUMN continued...

the Courts and the public. The origin and development of these principles, I shall now endeavour to illustrate. Some of the duties of an attorney are by lawyers better understood than can be fully described. There are many canons of duty which have not yet been in print but (apply) not only to oneself and to one's client, but also to the Bench and the public. This duty on the part of an attorney is not a servile thing; he is not bound to do whatever his client wishes him to do. However much an act or transaction may be to the advantage, profit or interests of the client, if it is tainted with fraud or is mean, or in any way dishonourable, the attorney should be no party to it, nor in any way encourage or countenance it. Better far to part with such a client forever, though he may be till then 'the goose that laid the golden eggs'. 'Honesty' in law, as in everything else, is always and after all, 'the best policy'. The law exacts from an attorney *uberimma fides* – that is, the highest possible degree of good faith. He must manifest in all business matters an inflexible regard for truth. There must be meticulous accountancy, a minute high sense of honour and incorrigible integrity. He must not act in a case which he knows from the beginning to be unjust and unfounded. He must abandon it at once if it appears to him to be such during its progress. He must in no way betray his client to the other side, either by secret cor-

respondence or communication, or in any manner whatsoever. He must enter into no contract or agreement with his client to share the fruits of the judgements in the case of success. *Pactum de quota litis*. He must, when reasonable and necessary, communicate with his client in all matters concerning the case; keeping his advocate well posted on all the facts and assist the client and counsel in devising what, in an honourable way, can tend to the advantage and defence of the rights of the client. He must, once he has undertaken his client's case, not abandon it without good and lawful reasons or excuse."

Though there have been some developments since the first publication of this passage almost a century ago, the key messages are still relevant and applicable today. The Contingency Fees Act 66 of 1997 now provides a statutory framework for the regulation of agreements between attorneys and their clients "to share the fruits of the judgements in the case of success" referred to in the passage quoted and 'many canons of that duty' are now written.

The purpose of the Legal Practice Act 28 of 2014 (the Act) includes the creation of a framework for the development and maintenance of appropriate professional norms and standards for the rendering of legal services by legal practitioners and candidate legal practitioners (section 3 (g) (i)). The Code

of Conduct for legal practitioners, candidate legal practitioners and juristic entities (the code) issued in terms of the Act sets the standards of conduct for legal practitioners. The code prescribes that legal practitioners, candidate legal practitioners and commercial juristic entities established to conduct legal services (i.e., incorporated legal practices and limited liability partnerships as contemplated in sections 34 (7) and 34 (9), respectively) shall –

- "3.1. maintain the highest standards of honesty and integrity;
- 3.2. ....
- 3.3. treat the interests of their clients as paramount, provided that their conduct shall always be subject to –
  - 3.3.1. their duty to the court;
  - 3.3.2. the interests of justice;
  - 3.3.3. the observation of the law; and
  - 3.3.4. the maintenance of the ethical standards prescribed by this code, any other code of ethics applicable to them and any ethical standards generally recognised by the profession;"

The primacy of the duty to the client is thus not an unfettered one, but subject to the other duties listed in the code. The maintenance of highest standards of honesty and integrity are the benchmark for professional con-

## RISK MANAGEMENT COLUMN continued...

duct prescribed in the code and international documents alike.

The principles set out in section 3 of the code are aligned to similar provisions set out in the General Principle's for the Legal Profession adopted by the International Bar Association (IBA) in September 2006. Principle 2 reads as follows:

### **"2. Honesty, integrity and fairness**

A lawyer shall at all times maintain the highest standards of honesty, integrity and fairness towards the Court, his or her colleagues and all those with whom he or she comes professionally into contact."

This essence of this principle was retained in the expanded wording of IBA's International Principles on Conduct for the Legal Profession initially adopted on 28 May 2011 and updated on 11 October 2018. The updated wording reads as follows:

### **"2. Honesty, integrity and fairness**

A lawyer shall at all times maintain the highest standards of honesty, integrity and fairness towards the lawyer's clients, the court, colleagues and all those with whom the lawyer comes into professional contact.

A lawyer shall ensure that equality of opportunity and respect for diversity govern all aspects of conduct in the lawyer's exercise of the profession.

A lawyer shall take reasonable

steps to ensure that those unable to pay or otherwise gain access to justice because of personal circumstances are guided to the best alternatives for such access."

Various jurisdictions around the world have adopted similar rules of professional conduct for legal practitioners.

The current rules of professional conduct, however, were not always universally applied internationally. Professor Freedman (Freedman, Monroe H. (2006) *"In Praise of Overzealous Representation - Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct"*, Hofstra Law Review: Vol. 34: Issue 3, Article 6) writes that:

"For more than a century, the lawyer's ethic of zeal has required, and has inspired, entire devotion to the interests of the client, warm dedication in the maintenance and defense of his rights, and the exertion of the lawyer's utmost learning and ability. In the classic statement by Henry Lord Brougham in 1820 in *Queen Caroline's Case* [2 *Trial of Queen Caroline* (1821)]:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which

he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion."

This "traditional aspiration" of zealous representation pervades all other professional obligations of the lawyer to her client. Ordinarily, of course, a lawyer's zeal on behalf of a client is to be exercised only within the law and the disciplinary rules. "Overzealousness," therefore, connotes conduct that goes over, or beyond, the bounds of law and/or the disciplinary rules. By definition, therefore, it would appear that overzealousness can never be justified as ethical conduct. My argument here, however, is that zealous representation – "entire devotion to the interests of the client" – may sometimes require the lawyer to violate other disciplinary rules." (Footnotes omitted)

An attorney must guard against being placed in a compromised position when requested to pursue unreasonable positions taken by overzealous clients or acting as a mere tool to achieve the unrealistic expectations of the paymaster. The attorney must manage the expectations of the client and disabuse the latter of any perception that the instruction will be pursued "at all costs" or that the attorney is prepared to risk breaching ethical rules in order

## RISK MANAGEMENT COLUMN continued...

to achieve the client's objectives. Guaranteeing a favourable outcome to a client "by any means necessary" or "by whatever it takes" is both risky and unethical. The "means" adopted to achieve the guaranteed "end" might involve unethical or even criminal activities on the part of the practitioner. This risk commonly arises in cases where there is animosity between litigants or where litigation is conducted based on a principle. An example would be litigation undertaken to prove a point to the opposing party or litigation aimed at "teaching the opponent a lesson." Belligerent litigants are also risky clients. Attorneys who descend into the underlying dispute between the parties risk losing their independence and open themselves up to potential liability and the risk of breaching their professional obligations. The position was aptly put as follows in a judgment (*Skinner v Skinner*, 2013 MBQB 276 (CanLII) at paragraphs [22] to [24]) delivered by the Court of Queen's Bench of Manitoba (Family Division):

"[22] ... In this case there is evidence that the petitioner exerted considerable influence over her lawyers and provided inflexible instructions to them. That does not excuse a breach of a professional responsibility.

[23] Clients can take unreasonable positions, but lawyers must serve as their own gatekeepers of professional conduct rather than

blindly following instructions. Lawyers are not free to act on whatever instructions they might receive from their clients. On the contrary, lawyers are obliged by their rules of professional conduct to refrain from acting on certain instructions. Put another way, distinct restrictions or disabilities accompany the rights and privileges afforded to lawyers. One such restriction or disability precludes them from carrying out the instructions of over-zealous clients.

[24] It is the lawyer who has conduct of a litigation file – not the client. The lawyer must maintain a certain independence from its client and must not let the client override his professional judgement. The lawyer is required of course to take instructions from the client, and owes a duty to do his best for the client; but an important part of the lawyer's job is to steer the client through the rocky territory of litigation. The lawyer is responsible for his word, both to the court and to opposing counsel. He owes such a duty to each. The lawyer must maintain his integrity and honour to the profession at all times – even in the face of assertive clients and challenging courtroom environments. All of this is essential to his reputation and relationships with opposing counsel, which are of fundamental importance to the practice of law."

Managing the expectations of the

client, explaining the attorney's professional duties and setting ground rules (or 'rules of engagement') will go a long way in managing the risk of over-zealous clients. Documenting the agreed terms on which the instruction will be pursued in a letter of engagement signed by all parties will go a long way to mitigate this risk. Making detailed file notes of all discussions clients and confirming the discussions in correspondence sent to the client as soon as possible after the discussion has taken place also helps to clear any confusion that might otherwise have crept in. These measures will assist in the event of a breakdown in the relationship with the client and where the latter then decides to zealously pursue a claim against your firm. Clients with unrealistic expectations tend not to be satisfied with the outcome of matters despite the best efforts and the achievement of, objectively viewed, the best possible results in the circumstances. I have seen claims where the breakdown in the relationship between an attorney and an assertive client is ignited by a cost order granted against the client. Punitive cost orders against attorneys acting in highly charged matters are also common. The Master Policy does not cover liability for compensation "arising from or in connection with any fine, penalty, punitive or exemplary damages awarded against the insured, or from an order against



## RISK MANAGEMENT COLUMN continued...

the Insured to pay costs *de bonis propriis*" (clause 16 (g)).

### Liability to non-clients

I have been asked on several occasions whether a non-client who is the opposite party in a legal matter can successfully pursue a claim against an attorney and, if so, where the basis of such liability lies.

It would not be possible in this article to give a detailed analysis of all the legal principles underlying the liability of an attorney to a non-client. I will, however, attempt to give a broad overview of the legal principles by reference to some of the cases where the matter was considered. The circumstances of each case will have to be considered in order to ascertain whether or not there is liability on the part of the attorney to the non-client. It is hoped that the cases referred to below will assist practitioners in understanding how the courts have dealt with the assessment of liability to the third party.

Road Accident Fund (RAF) related claims are one of the high risk areas of practice. For that reason, it is appropriate to commence with an example drawn from this area of practice. The principles raised in the case may also be relevant to some of the disputes between the RAF and certain attorneys acting for plaintiffs. In *Road Accident Fund v Shabangu and Another* 2005 (1) SA 265 (SCA) the attorney had innocently acted for an

imposter claiming to be the widow of a man who had allegedly been killed in a motor vehicle collision between two vehicles. She also claimed that she was the mother of the deceased's children. The claim had been submitted to the RAF. The RAF settled the claim and the amount of the settlement was paid into the firm's account and then dealt with in accordance with their client's instructions. It later emerged that the imposter had colluded with the deceased's brother and an employee at the Department of Home Affairs. It was also later found that the deceased's dependents had no claim against the RAF as the vehicle driven by the defendant had collided with a tree and he was killed in the accident. No other vehicle was involved. It was not the RAF's case that the attorneys were involved in the fraud. The RAF sought to recover the amount paid in settlement from the imposter and the attorneys. The RAF based its claim on six alternative bases. For current purposes, only the four grounds listed below are relevant. The RAF contended that the respondents –

- (i) had breached an express warranty in the discharge form that they were acting on behalf of the true widow- the court found (at [4]) that the RAF's submission was without merit as the warranty in the discharge form constituted an undertaking by the

signatory, the attorney, that he was entitled to settle the claim on behalf of his client; had tacitly warranted the identity of the claimant. The SCA (at [7]) found no basis for finding that if the claimant was an imposter, the respondents had tacitly undertaken liability to the RAF for any damages which the latter might suffer and that this was "a far-reaching conclusion and therefore inherently improbable". The court stated that "[a]n attorney who submits a claim on behalf of a client does not thereby and without more tacitly warrant the client's *locus standi* to make the claim any more than the attorney tacitly warrants the truth of the facts on which the claim is based or the correctness of the *quantum* of the damages claimed";

(ii) were bound to compensate the RAF because of their breach of warranty of authority. The court found (at [8]) it unnecessary to consider this ground as the answer to the contention was clear on the facts. It was clear from the facts that the attorney had the authority that he warranted, that is to act for his client, the claimant, and that was the end of the matter (at [9]);

(iii) had negligently misrepresented to the RAF that they acted for the true widow.

## RISK MANAGEMENT COLUMN continued...

The basis of the alleged negligence was that they failed to ascertain the identity of the true widow when they submitted the claim. The court (at [10]) considered whether an attorney can owe a duty to a third party whilst carrying out the instructions of a client. The court stated that it is only if a legal duty is owed that an enquiry into negligence can be conducted. The court stated that –

“[11] The attorney-client relationship imposes a duty on an attorney to advance the interests of his client, even where that course will cause harm to the opposite party; and in general, an attorney will incur no liability to the party on the other side in doing so: *White v Jones* [1995] 2 AC 207 (HL(E)) at 265C-D. In *Ross v Caunter* [1980] 1 Ch 297 Sir Robert Meggry V-C said at 322B-C:

“In broad terms, a solicitor’s duty to his client is to do for him all that he properly can, with, of course, proper care and attention. Subject to giving due weight to the adverb ‘properly’, that duty is a paramount duty. The solicitor owes no such duty to those who are not his clients. He is no guardian of their interests. What he does for his client may be hostile and injurious to their interests; and sometimes the greater the injuries the better he will have served his client. The duty owed by a solicitor to a third party is entirely different. There is no trace of a wide and general

duty to do all that properly can be done for him.”

Of course the relationship and concomitant duty owed to the client will not protect the attorney civilly and criminally against unlawful conduct such as fraud. An attorney is not entitled nor obliged to advance his client’s interests at all costs. But, generally speaking, it is no part of an attorney’s function to protect the interests of the opposite party by so doing, or refraining from doing, something that might injure that party. Something more is required.

[12] It is impossible to lay down an all-embracing test as to when an attorney will be held to owe a legal duty towards a person other than a client particularly where, as here, that person relies on a negligent misrepresentation inducing a contract (here the contract of settlement), or on negligent omissions on the part of the attorney to safeguard that person’s interests when the attorney is performing the duty the attorney owes the client. The question of wrongfulness that pertinently arises on each of such cases is essentially one of legal policy ....”

The court then considered cases from a number of foreign jurisdictions on the question whether an attorney can be liable to a person with whom that attorney had no contractual relationship. It found that the values and norms of the inhabitants of this country, enshrined in the Constitution, must

dictate the legal position in South Africa. The respondents owed no legal duty to the RAF. The RAF had a statutory function to investigate claims or to appoint agents who had that function. The investigation included the *locus standi* of the claimant and therefore the claimant’s identity, the merits and *quantum* of the claim. There was no statutory or contractual obligation on the attorneys bringing claims against the RAF on behalf of clients to verify the identity of claimants and public policy did not require the imposition of such a duty in delict and such a duty “would be inimical to the trust fundamental to the attorney-client relationship. It would also increase the cost to the client and result in delay, with the concomitant danger of prescription” (at [17]). Shifting the RAF’s statutory investigative functions to the attorney would also undermine the attorney-client relationship. Even if the respondents had owed a legal duty to the RAF, there was no negligence in this case.

In *Barlow Rand Ltd t/a Barlow Noordelike Masjinerie Maatskappy v Lebos and Another* 1985 (4) SA 341 (T), the court stated (at p346) that “the duty of an attorney to the Court, as well as towards his opponent, is not a matter that readily admits of a clear definition.”

The question regarding liability to a third party has also arisen in respect of conveyancing transactions. *Basson v Remini and Another* 1992 (2) SA 322 (N) considered

## RISK MANAGEMENT COLUMN continued...

nature of the relationship between a conveyancer and the parties to a transaction. In accepting appointment as a conveyancer in a contract of sale, the conveyancer was said to become the agent of both the seller and the purchaser.

In *Stopforth Swanepoel & Brewis Incorporated v Royal Anthem Investments 129 (Pty) Ltd and Others* [2014] ZACC 26 the Constitutional Court dealt with an appeal by a firm of attorneys. The firm had acted as conveyancers in a failed property transaction. Before the collapse of the transaction, the firm acted for the seller had received funds from the purchaser to be held in trust in accordance with the conditions of the sale. The firm had been cited as one of the respondents in an application brought by the purchaser. The firm had not opposed the application and the purchaser had withdrawn the application against it. The Supreme Court of appeal had, however, granted an order against the firm despite the fact that it was not a party to the proceedings in that court. The firm applied to the Constitutional Court for leave to appeal that order. The Constitutional Court granted the leave to appeal and the appeal was successful. The rights and duties of a conveyancer in a failed transaction can also be gleaned from this case. As the conveyancer was acting as the agent of the seller, a payment to the conveyancer was payment to the seller. The seller, and not the conveyancer, was liable to purchaser.

The approach taken in *Clarkson NO v Gelb and Others* 1981 (1) SA 288 (W) was that an action by an heir for the loss suffered as a result of the executor's maladministration was not an *aquilian* action but is an incident of the special fiduciary position the executor holds. Where the executor is an attorney, his partner was found not liable under such an action. In *Jicama 194 (Pty) Ltd v Lotter NO* 2012 JDR 0207 (KZD) the fiduciary duty of the executor towards the heirs was also considered.

*Fourie v Van Der Spuy and De Jongh Inc* (65609/2019) [2019] ZAGPPHC 449; 2020 (1) SA 560 (GP) (30 August 2019) arose out of circumstances where the plaintiff had suffered a loss following on a cybercrime incident and the attorney being duped into making payment to a fraudster. In considering the liability of the attorney, the court also considered the fiduciary duties of the attorney.

Other relevant cases include –

- *Pienaar v Pienaar* 2000 (1) SA 231 (O);
- *HEG Consulting Enterprises (Pty) Ltd v Siegwart* 2000 (1) SA 507 (C);
- *Pretorius v McCallum* 2002 (2) SA 423 (C);
- *Hirschowitz Flionis v Bartlett and Another* (546/04) [2006] ZASCA 23; 2006 (3) SA 575 (SCA) ; [2006] 3 All SA 95 (SCA) (22 March 2006);
- *Du Preez and Others v Zwieggers*

(61/07) [2008] ZASCA 42; 2008 (4) SA 627 (SCA); [2008] 3 All SA 425 (SCA) (28 March 2008); and

- *Margalit v Standard Bank of South Africa Ltd and Another* (883/2011) [2012] ZASCA 208; 2013 (2) SA 466 (SCA); [2013] 2 All SA 377 (SCA) (3 December 2012).

### Conclusion

The professional duties of an attorney are core to the relationship with clients. As demonstrated above, the ambit of the professional duties extends to the court and the opponents. The widening of the professional duties over the years has opened the doors for claims by non-clients. Prudent practitioners will ensure that their risk management measures adequately mitigate the expanding risks and are effectively applied in all cases.

Legal practitioners cannot risk pursuing the expectations of their clients without considering the broader implications of their actions.

The LPIIF offers a risk management service to all insured legal practitioners at no cost. Please contact the Practitioner Support Executive, Henri van Rooyen, on [risk@lpiif.co.za](mailto:risk@lpiif.co.za) to arrange a training session for you and your staff.