

UNIVERSAL HEALTH COVERAGE: HAS THE COVID-19 PANDEMIC BROUGHT ABOUT THE NEED FOR ACCESS TO HEALTH FOR ALL?



Show me the money –
maintenance for dependent
children

**Finding the way to good governance for
public benefit organisations**

Unmarried cohabitants:
The court's missed opportunity
to adopt an inclusive approach
to the term 'spouse'

**Professional indemnity
claims trends**

**The constitutional
conundrum of the rights of
children and known sperm donors**

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14 Universal Health Coverage: Has the COVID-19 pandemic brought about the need for access to health for all?

On 16 April 2021, South Africa launched the COVID-19 Vaccination Programme Registration Portal. The launch marked a significant milestone not only for the vaccination campaign but also for the advancement towards a universal health coverage system. Legal practitioner, **Pritzman Busani Mabunda**, and legal practitioner and lecturer, **Dr Llewelyn Gray Curlewis**, ask whether the use of private hospitals and medical centres, among other strategies of ensuring access to vaccines, aligns with s 27 of the Constitution and if this may contribute towards the realisation of access to health for all through the National Health Insurance (NHI). Simply put, if the collaboration between the public and private health sectors, which has been demonstrated through well-crafted policies and legislation can help in the attainment of universal health coverage.

18 Show me the money - maintenance for dependent children

Generally, parents have a common law duty to maintain their children within their respective means. However, even after reaching the age of majority, children may still need financial support from their parents. Nowadays, children may attain the age of majority but have not obtained the necessary skills to enable them to be economically active. They may need to study further to enable them to find employment and become self-sufficient. Legal practitioner and Associate Professor, **Clement Marumoagae**, and lecturer, **Refilwe Tsatsimpe**, reflect on these circumstances where people who have reached the age of majority, but are still dependent on their parents but can claim financial support from them. In their article, they illustrate how the courts have interpreted the law in a way which ensures that while dependent children have lost the protection ordinarily associated to children by virtue of attaining the age of majority, they are not prevented from claiming financial support from their parents when they are not yet self-sufficient.

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FEATURES

20 The constitutional conundrum of the rights of children and known sperm donors

The legal implications involving a known sperm donor are vastly more complex than that of an anonymous donor. This complexity could clearly be seen in the case of *QG and Another v CS and Another* (GP) (unreported case no 32200/2020, 14-4-2021) (Kollapen J), where the known sperm donor sought to obtain guardianship allowing him to have some say and involvement in the child's life despite the presence of a contract in which he denounced all rights to the child. Legal practitioner, **Sipho Tumelo Mdhuli**, writes that currently there is no case law to guide courts in situations where donors seek access to their children. Mr Mdhuli notes that recently there has been a resurfacing of cases of known sperm donors launching applications to revoke their donor agreements, and asks whether a known sperm donor agreement is recognised and whether it is valid in South Africa.

22 Implementing enforceable accountability: Finding a solution for failing state-owned companies

The performance of state-owned companies (SOCs) in South Africa has been on a downward spiral over the last decade. These SOCs have been plagued by a chronic lack of accountability, which has hindered their ability to perform. Legal practitioner, **Angela Stevens**, writes that historically, the accountability of SOCs has not been readily enforced, which has led to largescale corporate governance failures. The recent hearings from the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State have highlighted the underperformance of SOCs such as South Africa Airways, Eskom and Transnet. Ms Stevens suggests that the implementation of an enforceable accountability framework may serve to improve the performance of the various failing SOCs and that the boards of SOCs should adopt the concept of enforceable accountability through the implementation of a reward-based framework.

26 Unmarried cohabitants: The court's missed opportunity to adopt an inclusive approach to the term 'spouse'

Magistrate, **Desmond Francke**, writes that the date when cohabitation began is often blurred because people tend to ease into situations of spending more and more time together. However, certain factors can be used to determine if cohabitation constitutes a marriage-like relationship, such as financial arrangements regarding food, clothing and shelter, the parties sleeping arrangements, did they eat their meals together, did they care for each other during illness etcetera. Magistrate Francke writes that the Constitutional Court had several opportunities to adopt an inclusive approach in the definition of 'spouse' but chose instead to reinforce cultural and religious unions. In fact a reading of the Civil Union Act 17 of 2006 shows people who are not married or have not entered into a civil union do not enjoy the benefits and protection, which they should be entitled to based on their relationship. Magistrate Francke proposes that these marriage-like relationships based on mutual support and financial interdependence are indeed entitled to the same protection as that those who have entered a valid marriage.

30 Finding the way to good governance for public benefit organisations

A public benefit organisation (PBO) is an organisation that does not work for profit and is exempted from paying certain taxes due to its public benefit activities (PBAs) undertaking. Schedule 9 of the Tax Act 58 of 1962 specifically sets out what may be considered a PBA. The list of PBAs is extensive and ranges from humanitarian and welfare activities to environmental conservation and animal welfare. Furthermore, sch 9 provides a level of specificity as to what kinds of PBAs may be considered under these various categories, namely: welfare, cultural, land and housing. It could be said that the goal of every PBO is to directly contribute towards achieving the vision as set out in the Constitution. This should be seen as every PBO's 'North Star' and without this guiding principle a PBA is reduced to a mediocre box ticking exercise. Social Investment Specialist, **Graeme Wilkinson**, points out that there are, however, blind spots that PBOs should be aware of such as embezzlement, money laundering and fraud. In order to avoid these risks that may be lurking in a PBO's blind spot, Mr Wilkinson provides a number of pointers that may be of benefit to your PBO's success.

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Rationalisation Committee appointed to improve access to justice

The Ministry of Justice and Correctional Services has issued a statement noting that the Minister of Justice and Correctional Services, Ronald Lamola, has established a Rationalisation Committee that is mandated to assist the Department of Justice and Constitutional Development to develop transformative solutions and address systemic barriers that impede on access to justice.

The statement further notes that access to justice in South Africa (SA) is severely curtailed by the lingering effects of Apartheid judicial demarcations and spatial planning. 'In some instances, the distances travelled by citizens who interact with the justice system, is excessive. In other instances, the proximity of police stations, legal aid, and other state functionaries to a particular seat of a Division of the High Court, has a bearing on the accessibility of the justice system', the statement said.

The previously undertaken rationalisation process ensured that SA has a High Court in each province. To ensure that the courts are able to fully service the South African population, the Department of Justice and Constitutional Development must assess a number of factors, which includes measuring the population ratio against the number of judicial posts in a division. The statement by the Department of Justice said: 'The rationalisation of the jurisdictional areas of the High Court comes at the heel of the rationalisation of the lower courts which is now

at its final stages of implementation. Amongst other critical activities, the rationalisation committee will assess the judicial establishment of each Division of the High Court of South Africa, with a view to ensure that there is an equitable distribution of judicial posts across all divisions. The Committee commenced its work at the beginning of October, and it is expected to submit within six months, a report with recommendations'.

The Rationalisation Committee is chaired by retired Deputy Chief Justice, Dikgang Moseneke, and comprises the following other members, namely -

- retired Deputy Judge President of the Western Cape Division of the High Court, Judge Jeanette Traverso;
- retired Chief Magistrate of the Verulam Magistrate's Court, Renuka Subban; and
- retired Deputy National Director of Public Prosecutions, Dr Silas Ramaite.

According to the statement, the committee represents emi-



Mapula Oliphant - Editor

nent persons with various experience in the judicial sector who will pledge their time in this tedious process as they have been discharged from active service. The committee is established with a view to rationalise areas under the jurisdiction of the Divisions of the High Court of South Africa and the judicial establishments in order to enhance access to justice.



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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.

Understanding disability in the workplace

As we celebrate National Disability Rights Awareness Month from 3 November to 3 December 2021, it is time to understand disability in the workplace.

Disability is an ever present and real struggle and people with disabilities suffer as the world is developed to cater for able-bodied people, which leaves those with physical challenges battling to make this world work for them. In recent times, policies have been created to force designers and architects to add disabled-friendly features to new developments. On paper this is a step in the right direction, but as with all other policies, the key is in willingness of those in power to see to it that the policies are fully implemented instead of just being a compliance matter. This, among other factors, means that the understanding behind the policy on a piece of paper, is a human being with the capability to add value, but needing an enabling environment and a level playing field. Management of companies must understand that an employee working in an unaccommodating environment is the same as being discriminated against. The em-

ployee must first deal with the psychological pressure that comes with feeling and being perceived as 'different', and perhaps the view that they are less capable of doing the job. A smart and sensitive employer must also understand that no employee can excel where the playing fields are not level.

The following points are some of the toughest issues faced by disabled persons:

- Struggling with self-acceptance themselves.
- Struggling with acceptance from families.
- Struggling with acceptance at the workplace.
- Able-bodied persons thinking people with disabilities are slow and shallow.
- Grouping disability into a single category as if everyone has the same challenges.

Employers and the government need to pay urgent attention to specific and various needs of people living with disabilities to be able to create bespoke solutions for them. These people must be a part of problem-solving instead of having 'solutions' imposed on them.

There is a need to have sensitivity in understanding the type and severity of

disability. For example, there cannot be the same solution for a blind person, as to a person who uses a wheelchair. Their specific needs are not the same. Even in the sport arena there are various categories for this very specific reason.

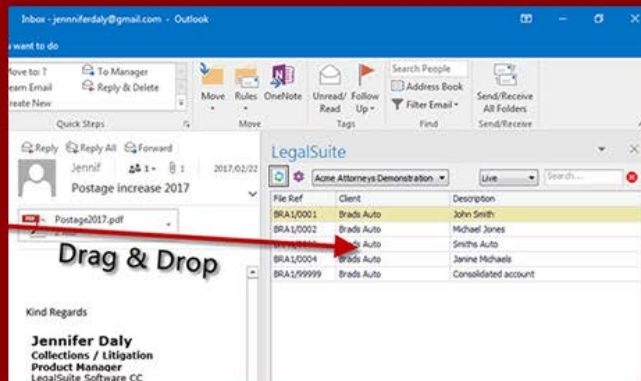
Employers need to understand the specific needs of the person with a disability they have employed.

A lot of people living with disability, like everyone else, have the potential to reach the highest level of professional excellence. They must know and feel that the workplace environment sees them as adding value and not just being 'tolerated' as a minimum compliance matter. They must develop a positive attitude and show they do not expect pity from colleagues, and they should bring out an internal strength to show they are as good as everyone else once given a proper playing field.

Phumelelisiwe Pearl Mbele
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By
Thomas
Harban

The professional indemnity claims trends

At the end of the 2020/2021 scheme year on 30 June 2021, the Legal Practitioners Indemnity Insurance Fund NPC (the LPIIF) had 2 355 outstanding claims recorded. The reserve amount for the outstanding claims at that date was R 645 131 000 (including VAT). This amount gives an indication of the LPIIF's potential liability for the outstanding claims.

It has been noted that professional indemnity (PI) claims against legal practitioners, historically, increase following on a period of economic recession. The most recent example of this was the increase in PI claims brought against legal practitioners in various jurisdictions worldwide following on the 2008 general financial crisis. In South Africa (SA), there was an increase in claims notified to the LPIIF

between 2008 and 2015. New risks (such as cybercrime and bridging finance) also emerged in the aftermath of the global financial crisis.

The effects of the COVID-19 pandemic on PI claims will only become known in time when there is sufficient data on which to analyse the trends. It will be appreciated that the nature of PI claims is long-term (long-tail in insurance parlance), as there will be a long lapse of time between the plaintiff becoming aware of the breach of the mandate or duty of care on the part of the legal practitioner and then embarking on the process to pursue a claim against the practitioner concerned. Many legal practices were not able to operate optimally for long periods since the onset of the pandemic. The change in the operating environment also affected the risks that firms face.

This article gives an overview of the current professional indemnity claim trends.

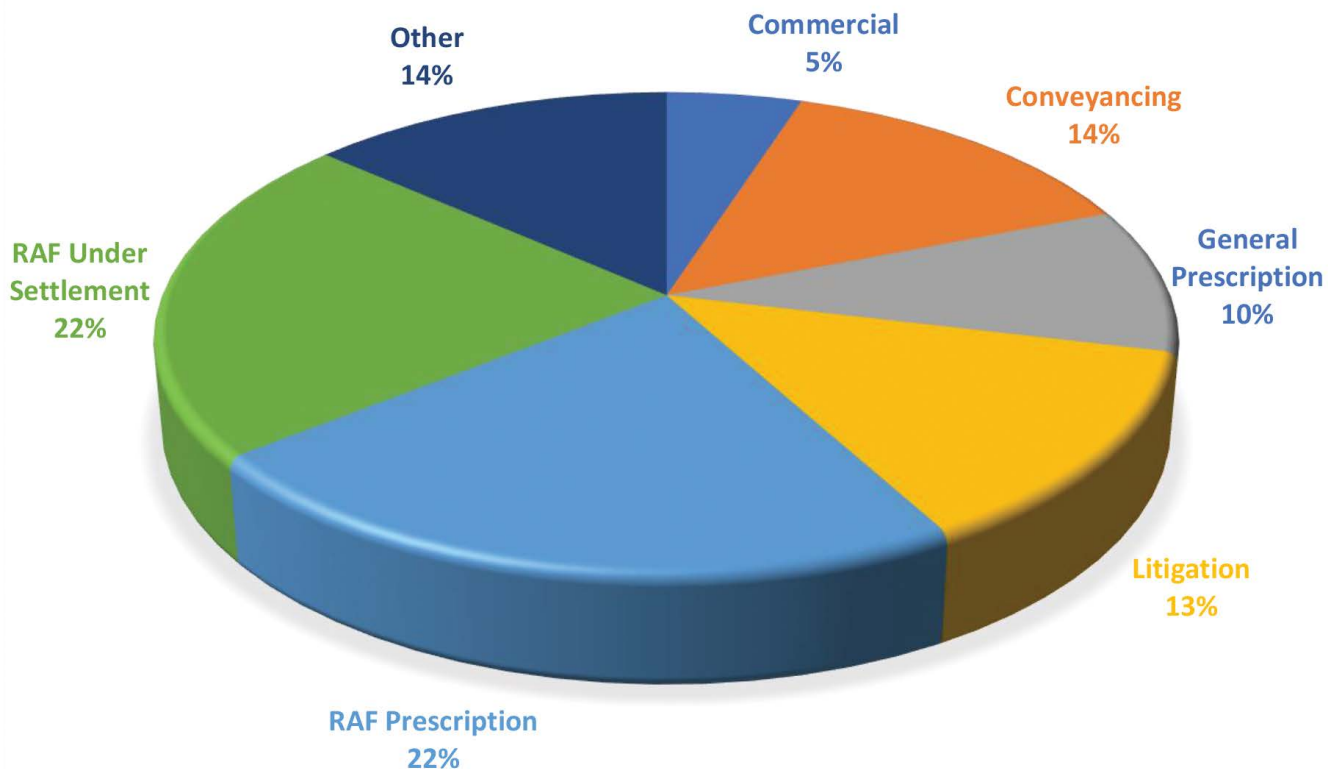
The current claim trends

The breakdown of claims reported in the 2020/2021 scheme (that is, the period from 1 July 2020 to 30 June 2021) as can be seen below.

In the last decade, the main claim types have remained consistent. The category collectively labelled 'other' includes claims arising from practice areas outside of the six main claim types.

The breakdown of the outstanding claims by type can be found on p 7.

Legal practitioners pursuing legal practice in the high-risk areas must reinforce their internal risk management measures. Many of the claims arise from mistakes that could have been avoided had



The breakdown of claims reported in the 2020/2021 scheme (that is, the period from 1 July 2020 to 30 June 2021).

a common-sense, prudent risk management approach been applied. The LPIIF's Practitioner Support Executive is available to provide risk management training to legal practitioners and their staff. This service is provided at no cost to the profession. The Practitioner Support Executive, Henri van Rooyen, can be contacted on risk@lpiif.co.za. The LPIIF website (www.lpiif.co.za) also has extensive risk management resources covering a wide range of practice areas.

The trends for the main claim types over the past five years appear in the graph on p 8.

There has been a general uptick in the

frequency of claim notifications since the end of 2020 commensurate to the easing of the lockdown regulations and as legal practices revert to their full operating capacity. The underlying reasons for this are being investigated.

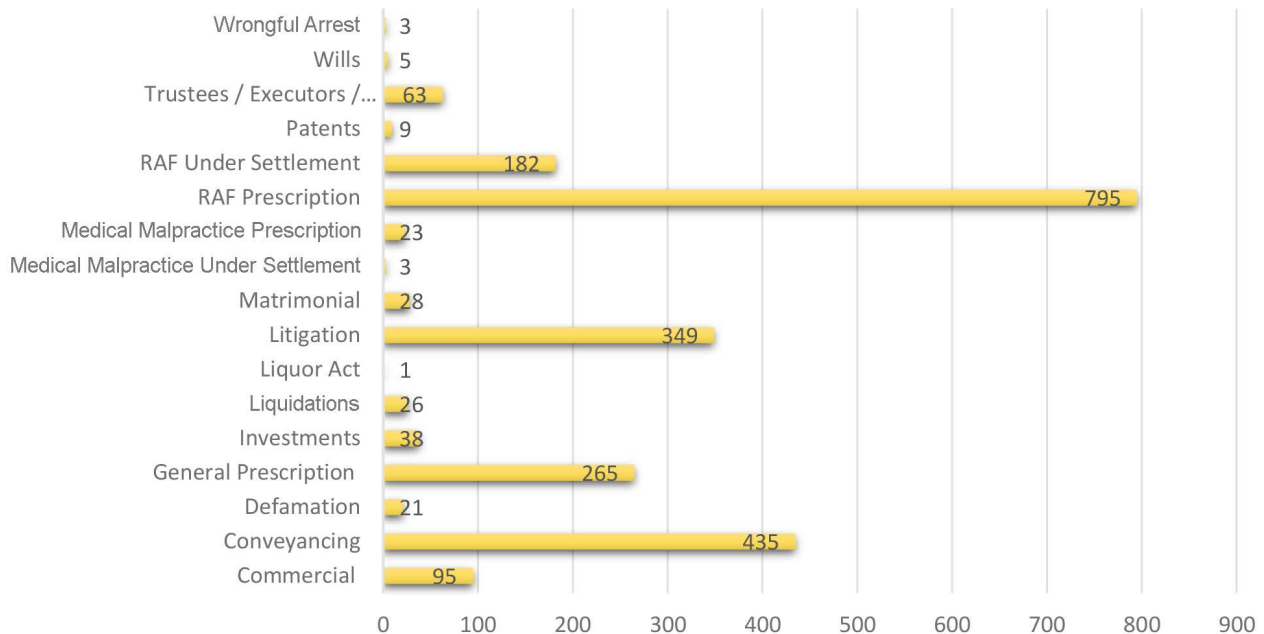
Some areas of concern

• Prescription

The high number and value of claims arising out of the prescription of Road Accident Fund (RAF) related claims remains a serious cause for concern. A large amount of the risk management resources have targeted this risk. RAF work is

also, generally, pursued by smaller legal practices. The Prescription Alert service offered by the LPIIF is an effective tool to track the looming prescription date. The effectiveness of that service is evident in the low number (less than 10%) of claims registered on that system, which prescribe and ultimately result in PI claims against the practitioners concerned. All time-barred matters (not only RAF matters) can be registered on that system. For information on the Prescription Alert system, please e-mail alert@lpiif.co.za. A higher excess is payable where the LPIIF indemnifies prescribed RAF claims that have either not been registered with the

Outstanding Claim Types as at June 2021



The breakdown of the outstanding claims by type

Prescription Alert system or, having been registered, the reminders sent by that system have not been complied with.

There are numerous reasons for the prescription of claims in the hands of legal practitioners. These have been covered in previous articles. For current purposes, I wish to highlight the egregious behaviours of some legal practitioners who – having accepted a mandate to pursue a claim on behalf of a client – simply do nothing to execute the mandate timeously. If the practice does not have the capacity, appetite, or resources to attend to a matter, the client must be informed thereof timeously, and this must be recorded in correspondence sent to the client (in a letter of non-engagement/non-acceptance of the mandate. A present is

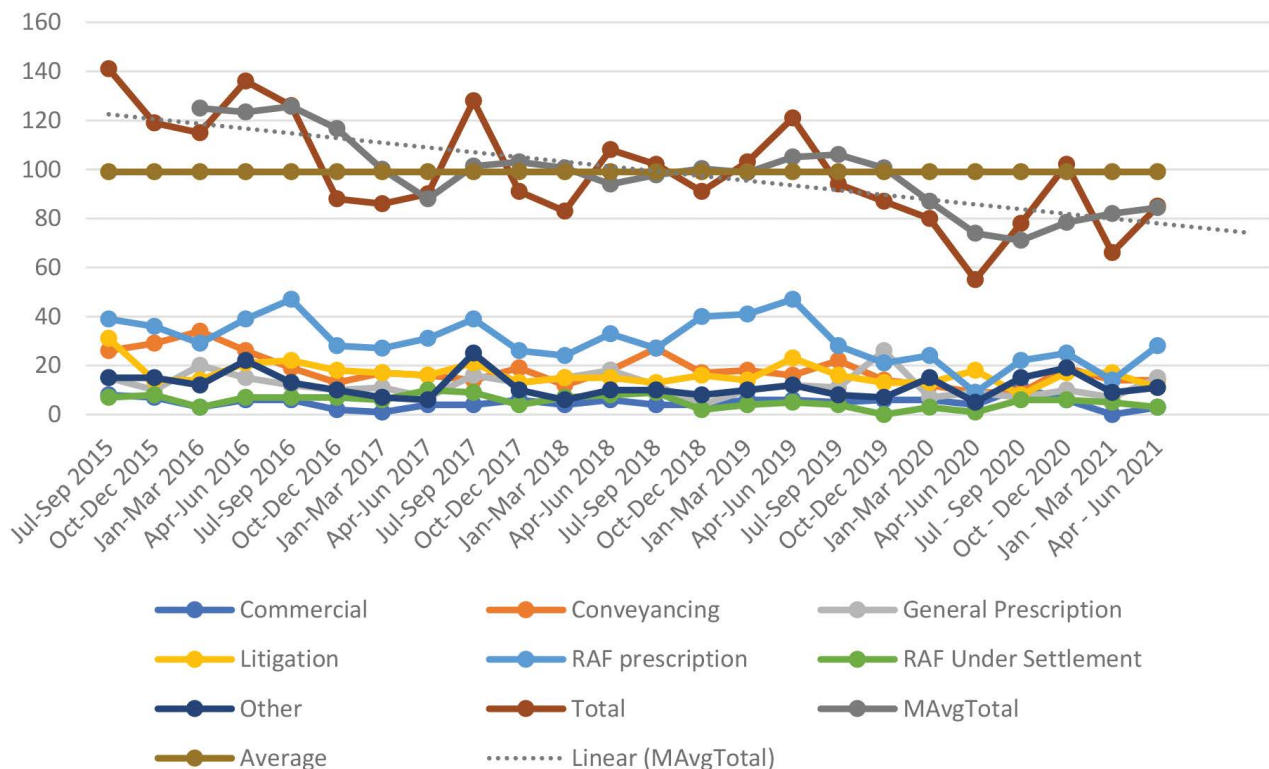
available at www.lpiif.co.za). If necessary and appropriate, refer the client to another legal practitioner. Proper supervision of professional and support staff and regular file audits will also go a long way to mitigating this risk. A lack of adequate knowledge of the law relating to prescription (commencement and interruption) is also a risk.

• Under-settlement

The under-settlement of claims occurs where an offer is accepted without properly interrogating whether it is adequate to meet the damages suffered by the client or complying with the client's mandate. Such claims usually arise in circumstances where the legal practitioners concerned have not taken instructions

from their clients regarding the settlements or explained how the settlement figure is arrived at. Settlements at the proverbial doors of court, those 'for commercial reasons' where the difference between the amount claimed and the amount offered is simply split, block settlements or risk discounting are some of the circumstances that lead to under-settlement claims. The claim must be properly quantified with the required medico-legal and actuarial reports being obtained. If the client insists that an offer be accepted where the practitioner recommends otherwise, that must be recorded in writing and signed by the client. A copy retained on file will go a long way in assisting with the defence to an under-settlement claim.

LPIIF Claim Frequency by Type and Total - Quarterly



The trends for the main claim types over the last five years

• Cybercrime

Members of the legal profession continue falling victim to cybercrime. The LPIIF has been notified of cybercrime related losses that now exceed R 136 million. Cybercrime related claims are excluded from the LPIIF policy (see clause 16(o) of the LPIIF policy accessible at www.lpiif.co.za). Insurance companies in various jurisdictions around the world have reported an increase in cyber-attacks against legal practitioners in the wake of the adjusted working circumstances under the lockdown measures. Measures that can be implemented by legal practices to mitigate the risk of cybercrime have been covered extensively by the LPIIF in its publications and are available on the website. Details of the common *modus operandi*, the basis of liability of

the parties concerned and measures that can be implemented to mitigate the risk can be gleaned from the following judgments:

- *Fourie v Van der Spuy and De Jongh Inc and Others* 2020 (1) SA 560 (GP);
- *Jurgens and Another v Volschenk (ECP)* (unreported case no 4067/18, 27-6-2019) (Tokota J);
- *Galactic Auto (Pty) Ltd v Venter (LP)* (unreported case 4052/2017, 14-6-2019) (Makgoba JP); and
- *Lochner v Schaefer Incorporated and Others (ECP)* (unreported case no 3518/16, 24-1-2017) (Plasket J).

Conclusion

The environment under which legal practice is conducted has undergone several significant changes in recent years. Legal practitioners must adapt the way they

operate, design, and implement appropriate measures to manage the risks in their individual practices. The high number of professional indemnity claims will continue to pose a significant threat to the long-term sustainability of the LPIIF, as the primary professional indemnity insurer of all legal practitioners with Fidelity Fund certificates, and to those practices that find themselves in the unfortunate position where they are faced with claims.

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



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By
Trudie
Broekmann

Controversial new test for ‘ordinary course of business’

The Consumer Protection Act 68 of 2008 (CPA) provides a wide range of protections to consumers. It has a particularly complex set of legal rules, which determine when the Act will apply. Entwined in these applicability rules, is the phrase ‘supplier [acting] in the ordinary course of the supplier’s business’. When a supplier is not acting in the ordinary course of its business, the CPA will not apply, and the consumer will be left without the safety net provided by the Act.

The question arises, are the following suppliers acting in the ordinary course of their business:

- I have driven my car for five years and I wish to replace it, so I advertise it on Facebook’s Marketplace and sell it to whoever will pay me the asking price. I am not a second-hand car dealer, just an ordinary individual, but I do go to the trouble of drawing up a short contract, which the buyer and I sign, in which I make it clear the car is sold *voetstoots*.
- I am an insurer and after paying out a client’s claim after a fire ravaged the client’s warehouse, I exercise my right to subrogation in respect of the goods in the warehouse. I sell these goods *voetstoots* to members of the public.

In terms of s 5(1)(a), the CPA applies to transactions occurring in South Africa (SA). ‘Transaction’ is defined with reference to a situation where the supplier of goods or services is acting in the ‘ordinary course of [its] business’.

The phrase ‘in the ordinary course of the [supplier’s] business’ has elicited much debate and is ripe for judicial clarification. To understand what was intended by the drafters of the Act, we must first turn to the Act itself. The definition of ‘business’ in s 1 of the Act is central to our understanding the phrase: “‘business’ means the continual marketing of any goods or services’.

Surprisingly, ‘market’ in turn, is defined as follows: “‘Market’, when used as a verb, means to promote or supply any goods or services’.

When we combine the contents of these definitions, it becomes clear that the phrase ‘in the ordinary course of the supplier’s business’ means that the sup-

plier is someone who acts in the ordinary course of continually promoting or supplying goods or services.

If the test is applied to example one, the seller is not acting in the ‘ordinary course’. In example two, the regularity of these types of sales by the insurer would be determinative. It is likely that the sale of the damaged goods would be ‘in the ordinary course of business’ for the insurer and that the CPA would consequently apply to the goods sold.

It is clear that the CPA does not only apply to the main business of the supplier, a secondary money-making endeavour or a ‘side hustle’ can also be governed by the CPA. As long as the supply is not out of the ordinary for the supplier, and it is not a once-off transaction, then on the wording of the CPA, it is ‘in the ordinary course’ of the supplier’s business.

For example, if I am the senior partner of a law firm, and there is one extra parking bay at the premises, I take the initiative of offering it for rent to our neighbours. We enter into a handshake agreement in terms of which the neighbour rents the parking bay on a month-to-month basis for a monthly rental. Applying the definitions in the CPA one could argue that the ‘ordinary course of business’ requirement has been met due to the ongoing nature of a lease:

- Firstly, because as owner or possessor of the parking space it would not be out of the ordinary to rent out the parking space.
- Secondly, access to the parking bay is supplied to the renter daily, whether the lease runs on a month-to-month basis or is for a longer term.

In the recent judgment of *Airport Inn and Suites (Pty) Limited v Strydom* (GJ) (unreported case no 2020/28545, 7-5-2021) (Du Bruyn AJ) a different test was introduced. The judgment deals with a dispute between a landlord and tenant in respect of commercial premises. The judge was tasked with determining whether the lease is a transaction as defined in the CPA, and consequently investigates whether the lease was concluded in the ordinary course of the landlord’s business. The outcome will determine whether the tenant can be afforded protection under the CPA.

Du Bruyn AJ points out that the phrase ‘in the ordinary course of business’ appears in the definitions of both ‘consumer’ and ‘transaction’ in the CPA. When interpreting this phrase, Du Bruyn AJ does not break down the meaning of the words found in the definition of ‘consumer’ and ‘transaction’, but instead adapts the test found in *Joosab v Ensor*, NO 1966 (1) SA 319 (A) at 326D – E, as follows:

‘In *Joosab*’s case and in the context of section 34(1) of the Insolvency Act 24 of 1936, the Appellate Division set out the test for determining whether a transaction was “in the ordinary course of business”. It was held that the test is an objective one, namely whether, having regard to the terms of the transaction and the circumstances under which it was entered into, the transaction was one which would normally have been entered into by solvent businesspeople. This objective test under the Insolvency Act 24 of 1936 must be adjusted for purposes of applying it to the CPA. Reference should not be made to solvent businesspeople, but merely businesspeople.’

I can paraphrase this new test as: Is the transaction of such a nature as businesspeople would normally conclude, considering the terms of the transaction and the circumstances under which it was entered? This in my view is akin to a test of whether a transaction was concluded at arm’s length.

What is the result if we apply the test to the examples given above?

I would expect that the individual selling their car is likely to be regarded as acting in the ‘ordinary course’ if the purchase price is around market value, the car is sold *voetstoots* and the keys are only handed over after proof of payment of the purchase price has been received. As can be appreciated, the new test has the effect of extending the ambit of the CPA enormously to suppliers who are not expecting to be governed by the CPA.

With the second example, the insurer is likely to sell goods in a business-like manner and so the CPA is likely to (still) apply to the transaction.

If one looks at the example of the law firm renting out the parking bay, the outcome will depend on whether the transaction is entered into on an arms length

basis or not. Since the agreement is not in writing and there is no formal invoicing process followed, the CPA probably does not apply. In this example, the new test is likely to narrow the applicability of the CPA to leases, to the detriment of tenants.

In my view, the new test skews the intention of the legislature that applicability of the CPA be determined by continuous supply and causes unnecessary

confusion by imposing a test, which contradicts that in the Act.

If you are a consumer, it is in your best interests to persuade a supplier to contract with you in a business-like fashion, for example in terms of a written contract.

In the meantime, as legal practitioners, we are hopeful that the Supreme Court of Appeal will bring correction or at least

greater clarity on these conflicting tests.

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By
Zahn
Abreu

Sanity now prevails in the B-BBEE landscape

The Department of Trade, Industry and Competition (DTIC) recently published Practice Note 1 of 2021: Rules for Discretionary Collective Enterprises, together with an explanatory memorandum (GN428 GG44591/18-5-2021). This Practice Note provides clarity on how the ownership by entities such as broad-based schemes, employee share ownership programmes, trade unions, not for profit companies, co-operatives, and trusts (collective enterprises) should be interpreted under the Broad-Based Black Economic Empowerment (B-BBEE) Codes of Good Practice (the Codes).

Framework

Section 14(2) of the Broad-Based Black Economic Empowerment Amendment Act 46 of 2013 (the B-BBEE Act), states that the Minister may, by notice in the *Government Gazette*, issue guidelines and practice notes relating to the interpretation and application of the B-BBEE Act. Therefore, once the Minister has issued a Practice Note, it serves as a non-binding clarification of existing legislation.

Rationale for the publication of the practice note

The B-BBEE Act and the Codes were enacted to address the inequalities of Apartheid with the aim of promoting greater black economic participation in the economy, thereby empowering those who were previously disadvantaged.

The Practice Note recognises the significant contribution by collective en-

terprises in promoting Black ownership in the economy. As such, the Practice Note seeks to provide market certainty for those measured entities that have, or intend to put in place, a collective enterprise in terms of the requirements of the Codes, in that such scheme will be regarded as satisfying the requirements for Black ownership in terms of the Codes.

The salient points

The Practice Note recognises that collective enterprises, such as Broad-Based Ownership Schemes (the schemes), typically in the form of an Education Trust or Community Fund, or an Employee Share Ownership Programme in the form of an Employee Trust, are valid vehicles for furthering B-BBEE participation and are in line with the objectives of the Act. The Codes expressly recognise this form of ownership by Black people in the Measured Entity.

The Practice Note recognises that the use of a defined class of natural person meets the requirements under the Codes and that it is not necessary to list individual beneficiaries of the scheme.

The Practice Note also accepts that the beneficiaries of such schemes may have a 'hope' to participate in the income and capital of the scheme but would not necessarily have a vested right to such income or capital. These schemes would typically allow the trustees or fiduciaries to exercise a discretion to select individuals from a 'defined class of natural persons' as beneficiaries of the Scheme, and to determine the proportion of the entitlement to be awarded to each beneficiary in accordance with the formula

recorded in the constitutional documents of the scheme, or by determining the proportion of the entitlement of that particular beneficiary once selected from the 'defined class of natural persons'. These schemes would comply with the requirements of the Codes.

A good example of the application of this aspect of the Practice Note is the discretionary powers granted to the trustees of a bursary scheme. The trust deed would identify the 'class of natural persons' of the scheme, for example 'black female students intending to study law at a tertiary institution'. The trustees will only be able to select beneficiaries from this defined class. In addition, the trust deed may grant to the trustees a discretion in terms of the value of the distribution to be awarded to each beneficiary. Once the trustees have determined to make an award, then 100% of the award should be paid to the beneficiary or on behalf of the beneficiary. Based on the Practice Note, this scheme would meet the requirements under the Codes.

The Practice Note specifically recognises that distributions can be made in cash or in kind. This clarity will provide comfort to those schemes, which have traditionally made distributions directly to third-party providers on behalf of the beneficiaries, for example, payments directly to the relevant educational institutions or skills development providers on behalf of the beneficiaries.

Another issue, which required clarification, was the recognition of minor beneficiaries of schemes. The Practice Note is now clear that minor Black beneficiaries are not restricted from being participants or beneficiaries of any

scheme, provided that such minor beneficiary forms part of 'the defined class of natural persons' in the constitutional documents. A good example of this, is a scheme which provides for early childhood development, education and/or feeding programs.

In some instances, where the measured entity was unable to declare a dividend to its shareholders in circumstances where it did not meet the requirements of solvency and liquidity in terms of the Companies Act 71 of 2008, or that it had elected to withhold the dividend for commercial reasons, the measured entity was penalised under the Ownership Element of the Scorecard. The Practice Note has now clarified the position

stating that the Economic Interest (dividend) attaches to the right to receive a dividend (or similar right), and not to the distribution itself.

Often, the B-BBEE verification agencies or the B-BBEE Commission may request certain documentation from the collective enterprise or the measured entity in order to verify the black ownership. The Practice Note clearly stipulates that the constitutional documents are key in interpreting the evidentiary requirements. If the constitutional document, for example the trust deed, is clear on the race and gender composition of a defined class of beneficiaries, then the constitutional document or trust deed will serve as the written record of those facts. If

this is not clear from the face of the constitutional documents, then reliance may be placed on an independent competent person's report estimating the rights of Black ownership in the scheme.

Finally, the Practice Note makes it clear that the voting rights exercised by the trustees, or the fiduciaries of a scheme, will be attributed to the race and gender of the beneficiaries of the scheme and not to the trustees themselves.

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Zero rated contracts in South Africa



By Dieketseng Damane and Clement Marumoagae

This article evaluates how South African law addresses the circumstances where employers do not prescribe hours, which their employees are expected to work and exercise their discretion as to when to call such employees to work. This is done in light of s 23 of the Constitution, which provides, among others, that 'everyone has the right to fair labour practices'. We evaluate whether subjecting employees to zero-rated contracts, amounts to fair labour practices under South African labour law.

A zero-rated contract has been defined as 'an agreement between two parties that one may be asked to perform work for the other but there is no set minimum number of hours. The contract will provide what pay the individual will get if he or she does work and will deal with the circumstances in which work may be offered (and, possibly, turned down)' (Chartered Institute of Personnel and Development 'Zero-hours contracts: Understanding the law' Guide June 2021

(www.cipd.co.uk, accessed 11-10-2021)).

In other words, this is a type of contract where employment is offered, without guaranteeing the employee actual working hours. Given the fact that employees do not have certainty as to when they will be expected to render their services, they will only be remunerated when they have worked for certain hours and paid in accordance with the amount of hours they have worked (New Frame 'Zero hours contracts are a poverty sentence' (www.newframe.com, accessed 11-10-2021)). The working hours of employees who are subjected to zero-rated hours are controlled by the employer, who will summon them to work once the employer determines that there is work to be done by those employees at the workplace (New Frame (*op cit*)). With zero-rated contracts, employees are at the mercy of their employers and could go for months without being called to work, thereby preventing them from earning a salary, despite being employed.

Zero-rated contracts are non-standard by their nature, which makes it difficult

to adequately safeguard and enforce employees' rights. There is no specific provision in the Labour Relations Act 66 of 1995 (LRA) that specifically deals with zero-rated contracts in South Africa (SA). Given the uncertainty regarding their hours of work, it makes it difficult for employees to rely on the Basic Conditions of Employment Act 75 of 1997 (BCEA). While s 9 of the Basic Conditions of Employment Act provides the maximum working hours, which an employee is permitted to work, it does not provide the minimum working hours. This is the legislative gap that has allowed some employers in SA to subject some of their employees to employment contracts, which do not prescribe the actual time employees would be expected to render their services. Zero-rated contracts appear to be a clear violation of s 29(1) of the BCEA, which requires employers to supply their employees with ordinary working hours and days of work, what they will be paid and the frequency with which they will be paid. This provision ensures that employees have a level of certainty regarding the terms and conditions of their employment. Zero-rated contracts do not provide certainty and enable employers to punish employees by not scheduling them to work, thereby preventing them from earning a living. These contracts also provide employers with a measure of flexibility when they wish to dismiss any employee. Employers will not be obliged to follow the statutory fair dismissals procedures. They

would simply not schedule the employee concerned to provide services indefinitely.

The conundrum faced by employees subjected to zero-rated contracts in SA was clearly illustrated in the Commission for Conciliation, Mediation and Arbitration award of *Lupindo and Others v Ferrero SA (Pty) Ltd and Adcorp Blu* (CCMA) (GAVL 3153-18, 22-10-2020). In this award, affected employees were subjected to a flexible working hours arrangement. Their contracts did not stipulate their working hours and salaries which they would be paid. The affected employees argued that they were entitled to be treated no less favourably as compared to the employer's permanent employees who performed the same or similar services that they rendered to the employer, as and when they are called to do so (see para 44). Affected employees were paid a cash amount commensurate to the number of hours they worked during the week (see para 57). This meant that if they were not called to come to work, the affected employees did not receive any payment. Unlike the employer's permanent employees, with a clear working schedule during the month, affected employees had no idea when they would be called to work and they did not have a basic salary, which impacted their ability to find credit (paras 59-60).

The employer argued that s 198C of the LRA permitted the employment of part-time employees and that the employees were employed based on the operational needs of the employer (para 69). The commissioner was not convinced by this

argument, because even part-time employees knew exactly when they were expected to render their services, which was not the case with the affected employees in this award. In other words, the affected employees were not part-time employees.

The affected employees' main argument was that they were entitled to the same treatment that the employer provided to its permanent employees. The commissioner noted that the main challenge was that affected employees in this award had no knowledge of how many hours, if any at all, they were entitled to work in any given month (para 123). The commissioner found that there was no justifiable reason for the differentiation between the affected employees and employer's permanently employed employees, and that such differentiation was discriminatory (paras 124 - 127).

Zero-rated employees are subjected to a 'no work, no pay' principle even though the decision to work lies with the employer. With these contracts, employers decide when affected employees should render their services and when not scheduled to work, employers are not obliged to remunerate these employees. This implies that employees are often in a tentative position regarding when their next remuneration will be.

Employees who are party to zero-rated contracts can easily go months without working. As such, they need to earn an additional income elsewhere while waiting to be contacted, for them to pay for their daily expenses, feed and clothe their families as well as send their children to school.

The impact of zero-rated contracts on the country's poverty rates is yet to be quantified. It is not entirely clear whether these contracts can be referred to as flexible contracts that allow employers to create flexible kind of work. What is clear, however, is that some of the people subjected to these contracts have families and urgent financial needs that they may not be able to adequately attend to for as long as their employment and ability to earn a living is uncertain. We submit that there is a need for urgent legislative intervention to prescribe the minimum hours across all sectors with a view to ensure that no employee in SA will be subjected to the uncertainty that results from zero-rated contracts.

In conclusion, we are of the view that zero-rated contracts do not comply with the Basic Conditions of Employment, and are thus invalid. They create unnecessary uncertainty regarding the working conditions. We are of the further view that they amount to unfair labour practice, as it contravenes the BCEA.

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By
Petrus
Khumalo

Dissolving an unregistered Customary Marriage

After the conclusion of the customary marriage, it is likely that the parties in a customary marriage do not register their marriage as it could take weeks, months, or years, to prepare for a civil marriage or civil union, which the couple hope to register at the Department of Home Affairs. For various reasons, things in life tend to change, leading to separations and both parties moving on with their lives. The dilemma

that these parties find themselves in now, is how do they dissolve an unregistered customary marriage? Especially, when one spouse has concluded another customary marriage or civil marriage or civil union with a different person.

Overview

As most customary marriages are unregistered, the Department of Home Affairs is not able to detect when a customary marriage exists on their records between

the parties of the marriage. As a result, the practice of spouses in customary marriages entering a civil marriage or civil union with another person persists and is prevalent. Although a spouse to a customary marriage may not enter a civil marriage or a civil union with somebody else, this still happens (s 3(2) of the Recognition of Customary Marriages Act 120 of 1998 (RCMA)). The unfortunate truth for spouses in such predicaments is that their civil marriages or civil unions are a

nullity (see *Netshituka v Netshituka and Others* 2011 (5) SA 453 (SCA) at para 15).

It is trite law that a mere separation does not terminate a customary marriage. Only a court of law by a decree of divorce may terminate a customary marriage. However, before one dissolves a customary marriage through the court, there must be some *prima facie* proof that the customary marriage exists. Because most customary marriages are not registered, spouses tend to enter into a civil marriage with each other and after that register the civil marriage with the Department of Home Affairs to obtain a marriage certificate. Contrary to popular belief, a customary marriage may also be registered and has the same proprietary consequences applicable to other marriages (Recognition of Customary Marriages Amendment Act 1 of 2021).

Registration of a customary marriage

The spouses of a customary marriage must ensure that their customary marriage is registered (s 4(1) of the RCMA). After the conclusion of the marriage, the spouses must ensure their marriage is registered within three months. However, failure or non-registration of the marriage does not affect its validity (s 4(9) of the RCMA).

To register their marriages, the spouses may approach an office of the Department of Home Affairs and provide the registering officer with the necessary information they may require making sure

as to the existence of the marriage (s 4(2) of the RCMA). In areas with no Department Home Affairs offices, the spouses may approach a designated traditional leader to register a customary marriage.

'The following people should present themselves at either a Home Affairs office or a traditional leader in order to register a customary marriage –

- the two spouses (with copies of their valid identity books and a *lobola* agreement if available);
- at least one witness from the bride's family;
- at least one witness from the groom's family; and/or
- the representative of each of the families' (www.dha.gov.za, access 10-10-2021).

If the marriage officer is not satisfied that a customary marriage exists or there is a dispute between the parties as to whether a customary marriage exists, any one of the parties may approach the High Court to apply for a declaratory order to confirm that there is a customary marriage and directing the Department of Home Affairs to register such marriage.

Section 4(9) outlines that failure to register a customary marriage does not affect its validity. But, on the other hand, the question is, does the failure to register a customary marriage affects its dissolution?

Dissolution

A court may dissolve a customary marriage

by a decree of divorce on the ground of irretrievable breakdown of the marriage (s 8(1) of the RCMA). It is also trite law that before a court dissolves the marriage; it must be *prima facie* proved that the marriage exists. The *prima facie* proof in most cases is the original marriage certificate that is handed to the court on the day of the divorce hearing and marked as 'Exhibit A' (s 12(4) of the Civil Unions Act).

The question now is: Does the customary marriage need to be registered first for purposes of obtaining *prima facie* proof before it gets dissolved? And what of the civil marriage or civil union with another spouse? The answer is no.

Conclusion

Parties in a customary marriage who want to enter into a civil marriage or civil union with a different person needs to ensure that their customary marriage has been terminated. This is possible by presenting a copy of the former spouse's divorce order or death certificate to the marriage officer (s 8(4) of the Civil Union Act). Failure to do so, a marriage officer may proceed with the solemnisation and registration of the civil marriage or civil union (s 8(5) of the Civil Union Act), which will constitute a nullity.

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Universal Health Coverage: Has the COVID-19 pandemic brought about the need for access to health for all?



By Pritzman Busani Mabunda and
Dr Llewelyn Gray Curlewis

The questions around the access to COVID-19 vaccines have raised debates globally and the challenges of the vaccination roll outs in South Africa (SA) have left the majority of citizens uncertain as to when they would be eligible to be vaccinated, as well as the location of vaccination sites (OECD Policy Responses to Coronavirus (COVID-19) 'Access to COVID-19 vaccines: Global approaches in a global crisis' (www.oecd.org, accessed 1-9-2021)). 'Despite calls for solidarity and social justice during the pandemic, vaccine nationalism, stockpiling of limited vaccine supplies by high-income countries and profit-driven strategies of global pharmaceutical manufacturers have brought into sharp focus global health inequities and the plight of low- and middle-income countries (LMICs) as they wait in line for restricted tranches of vaccines' (K Moodley, M Blockman, D Pienaar, A J Hawkrige, J Meintjes, M-A Davies and L London 'Hard choices: Ethical challenges in phase 1 of COVID-19 vaccine roll-out in South Africa' (2021) 111 *South African Medical Journal* 554).

The debate on access to medicine by developing countries has been raging since the latter half of 2020, with SA and India leading the charge (Hilde Stevens and Isabelle Huys 'Innovative approaches to increase access to medicine in developing

countries' (2017) 4 *Frontiers in Medicine* 218). The constraints in the developing and manufacturing of vaccine in Africa has been extensively debated. There is also a need for the relaxation or waiver of certain sections of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement to enable this realisation.

The World Trade Organization (WTO) has been seized with the issue of a waiver of ss 1, 4, 5, and 7 of Part II of the TRIPS Agreement. This is to ensure that the developing countries can manufacture vaccines without falling foul of the provisions of the TRIPS Agreement and that there be a continued waiver for most of the world's population that has developed immunity since exceptional circumstances exist, justifying a waiver from obligations of the TRIPS Agreement (WTO 'Members approach text-based discussions for an urgent IP response to COVID-19' (www.wto.org, accessed 1-9-2021); WTO 'Waiver from certain provisions of the Trips Agreement for the prevention, containment and treatment of Covid-19' (<https://docs.wto.org>, accessed 1-9-2021)).

The World Health Organization (WHO) has been supportive of this campaign on a waiver of certain TRIPS Agreements to facilitate the manufacturing of COVID-19 vaccines in the LMICs. The same goes for the WTO.

Government's vaccine roll-out strategy

According to the Department of Health, three platforms would be used to deliver vaccines in Phase One (South African Government 'COVID-19 Coronavirus vaccine strategy' (www.gov.za (accessed 1-9-2021)). These include work-based programmes, outreach-based programmes and vaccination centres (see South African Government (*op cit*)). It was further pointed out that the same programme would be used during Phase Two and Three of the roll-out (see South African Government (*op cit*)). Of critical importance was mention of the fact that there would be additions of vaccinations at the public primary healthcare facilities.

This is in addition to the use of private hospitals and medical centres for vaccination of all people subject to agreement with both medical providers and medical schemes for the benefit of all, irrespective of whether one has medical aid or not (see South African Government (*op cit*)).

Question to be answered

The purpose of this article is to look at whether the use of private hospitals and medical centres, among other strategies of ensuring access to vaccine for all,

align with s 27 of the Constitution and may be argued as contribution towards the realisation of access to health for all through the National Health Insurance (NHI).

This question arises in the backdrop of SA's current two-tier system and the anticipated health reform through the NHI informed by the Universal Health Coverage (UHC) (WHO 'Universal health coverage (UHC)' (www.who.int, accessed 1-9-2021)).

Analysis of health sector reforms, UHC and NHI

Health sector reforms do not only require attention to specific components, but also a supportive environment in which they can be implemented (Peter O Otieno and Gershim Asiki 'Making Universal Health Coverage Effective in Low- and Middle-Income Countries: A Blueprint for Health Sector Reforms', www.intechopen.com, accessed 14-10-2021). In LMICs, there is still much to be done to ensure that people receive prioritised healthcare services (see Otieno and Asiki (*op cit*)). Despite LMICs spending an average of 6% of their gross domestic product on health, they have made minimal impact on vaccine roll-out compared to high-income countries (see Otieno and Asiki (*op cit*)). The implementation of healthcare reforms is a gradual process with complexities; hence, the need for a vision and long-term strategies to realise the desired goals. South Africa is no exception (Winnie T Maphumulo and Busisiwe R Bhengu 'Challenges of quality improvement in the healthcare of South Africa post-Apartheid: A critical review' (www.ncbi.nlm.nih.gov/, accessed 1-9-2021)).

Most of the LMICs have set the UHC as an aspirational goal for national health sector reform (see Otieno and Asiki (*op cit*)). The dimensions of the UHC as envisaged by the WHO comprise of three key elements –

- the proportion of the national population that is covered by pooled funds;
- the proportion of direct healthcare costs covered by pooled funds; and
- the health services covered by those funds (Adam Fusheini and John Eyles 'Achieving universal health coverage in South Africa through a district health system approach: conflicting ideologies of health care provision' (2016) 16 *BMC Health Services Research* 558).

South Africa launched the COVID-19 Vaccination Programme Registration Portal on 16 April 2021 (South African Covid-19 Vaccination Programme Registration (<https://vaccine.enroll.health.gov.za>, accessed 1-9-2021)). The Electronic Vaccination Data System (EVDS) is available to the public and invites all citizens to register regardless of whether one has a medical aid or not (see South

African Government (*op cit*)). The launch marked a significant milestone not only for the vaccination campaign but also for advancement towards the UHC (see South African Government (*op cit*)). This will be the first time in the democratic history that a major public health campaign will be supported by one digital system for all South Africans (see South African Government (*op cit*)). The system is, therefore, a proud representation of the future of healthcare in the country, under the NHI, which is typified by multi-sectoral collaboration and social solidarity (see South African Government (*op cit*)).

'This is in line with the 9th pillar of the Presidential Health Compact, which commits to strengthening the health system by developing an information system that will guide health policies, strategies, and investments. Some of the key activities proposed in the presidential health compact have found expression in the development and establishment of the EVDS system for the general population' (South African Government 'Minister Zweli Mkhize: Launch of EVDS Registration for COVID-19 Vaccination: Citizens Aged 60 and Above', www.gov.za, accessed 13-10-2021).

The above system was developed and aligned with the envisaged NHI scheme. It seeks to develop 'a system that complies with the Interoperability Standards for Digital health', 'capitalising the functionality of the South African Health Information Exchange Service'. This is to allow for – the 'secure sharing of data between the different systems that make up the [EVDS]'; 'the development and implementation of procedures and systems for identity verification of users of the health system (both those in public and the private sector)'. This also includes expanding the capabilities of the Health Patient Registration System platform and 'utilising the Business Intelligence Platform and the Data Lake functionality to standardise health outcomes reporting for both public and private sectors' (South African Government (*op cit*)).

The NHI is a 'health financing system that is designed to pool funds together to provide access to quality and affordable personal health services for all South Africans based on their health needs, irrespective of their socio-economic status' (National Health Insurance Healthcare For All South Africans (www.hst.org.za, accessed 1-9-2021)). The NHI Bill was presented to and approved by Cabinet in July 2019, and has been presented to Parliament's health portfolio committee.

It has since been subjected to an extensive public consultation process through committee roadshows and is scheduled for further parliamentary debates before it is presented to the president for promulgation [as an Act] (BusinessTech 'The

end of medical aids in South Africa – and other questions raised around the NHI’ (<https://businesstech.co.za>, accessed 1-9-2021)).

Regardless of concerns expressed over speed and efficiency of the roll out of vaccines, the fact remains that a single-payer healthcare system would relieve the financial burden for most South Africans and a burden mostly carried by marginalised communities. ‘Data from Statistics South Africa ... showed that more than 47 million South Africans did not have medical aids, with just 9,4 million people enjoying the benefit’ (Kabelo Khumalo ‘At least 47 million South Africans are without medical aid cover’ www.iol.co.za, accessed 1-9-2021)). Critics of the NHI have asserted that government wants to disrupt a private healthcare system that is working efficiently, and that government should not infiltrate the private health care unaided as this reduces the burden of providing healthcare (Department of Health ‘Some Key Messages on National Health Insurance (NHI)’ www.health.gov.za, accessed 1-9-2021)).

It is not accurate that the private healthcare is a system that is working efficiently. ‘This assertion is a simplification of facts. For starters, a system of health cannot be said to be working well when it serves only a tiny minority in the population (only 16% of South Africans) and excludes the overwhelming majority (84% of South Africans). Secondly, the cost of private healthcare is spiralling out of control with the results that the medical aid contributions (premiums) are increasing more than the [Consumer Price Index] while the benefits to patients are reducing at a very fast pace. This is the only sector in the socio-economic arena that is [impacting its members in this negative manner]. By 2030, if nothing is done to financially protect households, middle income households are likely to spend a third of their income on premiums for medical aid’ (Department of Health (*op cit*)).

The effect of collaboration between public and private health sector in rolling out vaccines

As the Bill of Rights, in particular s 7(2) provides that ‘the state must respect, protect, promote and fulfil the rights in the Bill of Rights’, the government seeks to implement the UHC through the NHI. The collaboration by government and the private sector in rolling out vaccines firmly establishes government’s commitment towards the UHC (Carmen S Christian ‘How the private sector can support South Africa’s COVID-19 vaccine rollout’ (<https://theconversation.com>, accessed 1-9-2021)).

The UHC, as envisaged through the NHI, is different from the current two-tier system and the government is aiming at a radical departure towards access to health cover for all. The UHC specifically entails covering each citizen with a health financing system that is equitable to all citizens, whereas the current two-tier system has the effect of providing some form of healthcare to citizens without considering equity or what type of health care all citizens are presently getting. On the other hand, the private healthcare system provides the services of private medical experts and facilities and is partially funded through private medical schemes and insurance (Department of Health (*op cit*)).

In essence, one cannot divide the country into free but inadequate medical care for the poor and high quality but highly subsidised health care for those who can afford it (Tanja Gordon, Frederik Booysen and Josue Mbonigaba ‘Socio-economic inequalities in the multiple dimensions of access to healthcare: the case of South Africa’ (2020) 20 *BMC Public Health* 289). The partnership between the public and private healthcare in utilising facilities as vaccination centres, is a sign of commitment to the ideals of the NHI and proof of how the UHC can be attainable under the NHI, under government control.

Contrary to popular belief, private medical schemes will continue to exist, but their roles will change (Department of Health (*op cit*)). ‘When the NHI is fully implemented they will provide cover for services not reimbursable by the NHI Fund’ (Department of Health (*op cit*)).

Medical schemes are a voluntary arrangement for those who choose to and can afford them or those caused to join them, through for example employer contracts (see Department of Health (*op cit*)).

‘The private health care providers will definitely continue to operate [under the NHI dispensation]. Contrary to popular belief, NHI is not going to abolish or do away with private health providers. However, they will operate under a completely different environment created by NHI. For instance, NHI will not allow them to charge the exorbitant fees they are charging today, especially the private hospitals. Certain practices will not be allowed under NHI. For instance, a health care provider will not be allowed to start treating you and then discard you or send you away after he/she has exhausted all your funds.

Under NHI, private [healthcare] providers will no longer be allowed to charge you [additional fees] called co-payment after NHI has paid them’ (see South African Government (*op cit*)). ‘Under the present system, a private [healthcare] provider may charge you [additional fees over] and above what your medical aid has paid them’ (Department of Health (*op cit*)).

Section 27(3) of the Constitution, which states: ‘No one may be refused emergency medical treatment’, will strictly be applied under the NHI. The roll out of vaccines under the current arrangement between public and private health sectors is an indicator of such a move towards the UHC in a collaborative way of ensuring access to health cover for all.

The NHI is not a contest between the public and the private health sectors, but it is a system to make both sectors serve the whole population in co-operation rather than in competition.

Conclusion

As one appreciates and learns about the infusion of both sectors in efforts to vaccinate all citizens, one must echo the commitments made to achieve the UHC, which go beyond vaccinations. The commitments go to building a strong primary healthcare system and ensuring essential services are maintained in the normal course and during times of crisis.

The COVID-19 pandemic demands global solidarity and a shared global responsibility to protect everyone under the achievement of the UHC. It is, therefore, important to make sure that those who need the vaccine most get it first, irrespective of whether they belong to a medical scheme or not. The public and the private sectors should not be treated as separate entities. The healthcare system should operate with the values of solidarity and the UHC, which is the perfect lens for planning, monitoring, and assessing our success.

The collaboration between the public and private health sectors, through public and private health institutions, demonstrate, how through well-crafted policies and legislation, an enhanced objective towards the UHC can be attained.

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My journey as a female legal executive – *women realising their leadership strengths*



By
Kedibone
Molefi

Now is an exciting time to be an in-house legal counsel of a multinational corporation. Solving problems across different jurisdictions that are differently legislated is incredibly stimulating. The legal profession is evolving, and it is becoming evident that legal practitioners have evolved into enablers of the overall business strategy and have mastered their business acumen, despite having previously been perceived as the naysayers of the organisation.

Legal professionals are playing a vital role in the decision-making process and their valuable input has begun to carry more weight in the boardroom. I truly believe that women can (and should) start pursuing and aspiring for roles as members of Executive Boards and to a large extent this has shaped my own career in major ways throughout the years. Having received some

of the best training throughout my early career from some of the top partners in commercial departments, I was able to be exposed to the possibilities that I could one day aspire to.

However, my experience as a University of Johannesburg law lecturer, MNS Attorneys Associate, Heineken Legal Director and ultimately taking on the role of Legal Director South East Africa (SEA) at Japan Tobacco International (JTI), has highlighted a flaw within the legal profession, namely that the progression line is not conducive to women in terms of what they want to become and the support required to reach some of their ambitions. This pertinent issue is often overlooked and if an organisation does not take the required effort to address it, often leads to women leaving the organisation. This reiterates and highlights the importance of initiatives on diversity and inclusion.

As a practicing legal practitioner, I continuously realise how difficult it is for female legal practitioners to navigate the industry and that corporates have struggled with assessing professionals based on the quality of their output, and not the hours that they put in. Additionally, securing clients that bring in consistent revenue, making a name for yourself as a female legal practitioner and finding female role models from whom one could create a point of reference for one's career ambitions

was a challenge. Work-life balance is another task that many women face together with trying to make their voices heard. All these challenges – as daunting as they may seem – are an opportunity for one to realise their strength, decide on a vision that they have for themselves and embark on a journey of excellence.

Mentorship plays an essential role in ensuring that you achieve your career ambitions. I believe we owe it to the younger generation to help them grow and thrive in business, by giving them early advice on how to navigate their industries. For the young women already making their way through their careers: Find yourself a role model who resonates with you and always remember – knowledge is crucial. Finding an individual who will share their knowledge willingly and empower you will propel you into relentlessly pursuing your goals. As Oprah Winfrey often says: 'A mentor is someone who allows you to see the hope inside yourself'.

Kedibone Molefi is the Legal Director for South East Africa at Japan Tobacco International. □

Show me the money – maintenance for dependent children



By Clement Marumoagae
and Refilwe Tsatsimpe
(photo not supplied)

This article reflects on circumstances where persons who have reached age of majority, but are still dependent on their parents can claim financial support from them. Most children when they reach 18 years of age are still financially dependent on their parents and may have legitimate claims for maintenance against them. This article illustrates how the courts – correctly in our view – have interpreted the law in a way, which ensures that while dependent children have lost the protection ordinarily associated to children by virtue of attaining the age of majority, they are not prevented from claiming financial support from their parents when they are not yet self-sufficient.

Generally, parents have a common law duty to maintain their children in conjunction with their respective means (*Lamb v Sack* 1974 (2) SA 670 (T) at 671F). The 'duty of supporting a child is a duty common to both parents, according to their respective means, and it

makes no difference whether such child is born in or out of wedlock' (*Lamb* at 671F). In terms of common law, this 'duty does not terminate when the child reaches ... majority' (*Burse v Bursey and Another* 1999 (3) SA 33 (SCA) at 36D). Courts have always realised that attainment of majority does not automatically render children financially independent. Further, that even after reaching the age of majority, there are children who may still need financial support of their parents. This is also true in modern times where children who attain the age of majority have not attained the necessary skills that would enable them to be economically active. They may need to study further or receive training that would enable them to find employment and subsequently be self-sufficient.

While it appears to have been accepted that dependent children do have a right to claim maintenance from their parents, the nature and extent of the maintenance that can be claimed has been somewhat contentious. In this respect, neither the legislature nor the courts have laid down the test that should be used to determine the maintenance that should be awarded. However, it does not mean that parents are obliged to maintain the kind of status children may wish to preserve and the luxuries to which they became accustomed. In *Gliksmann v Talekinsky* [1955] 4 All SA 306 (W) at 309, the court held that:

'A child who is a major and who has gone out into the world and established

his or her own home and mode of life is not entitled to come back to the parent at any time in life and say, "I am your child and when I lived with you as a minor I lived in a rich home where I had everything provided, and in as much as you are still rich and able to support me on the basis, the legal position is that what you must pay me must be decided in accordance with your station in life, your standard of living and your means". In my view the parent's means are a factor to be taken into consideration, but it is not the only factor; the child's position in life and its standard of living are of equal importance'.

The parental responsibility to maintain children who have attained the age of majority, but not yet self-sufficient appears limited to the means available to parents and the actual needs of their children who are in need of financial support. For example, there are children who may need financial assistance for the payment of their education, which can increase their chances of success in life. The extent to which parents can pay for such education, they will be obliged to shoulder that responsibility. Thus, parents cannot unreasonably refuse to financially assist their children when they have the means to do so. In the context of divorce, s 6(1) of the Divorce Act 70 of 1979 enjoins the court granting a decree of divorce to be satisfied that provision has been made for dependent children of the marriage, which it is about to dissolve. Courts are further enjoined to

make orders they deem fit in respect of the maintenance of dependent children (s 6(3) of the Divorce Act and *AF v MF* [2020] 1 All SA 79 (WCC) at para 74).

In terms of s 15(1) of the Maintenance Act 99 of 1998, 'a maintenance order for the maintenance of a child is directed at the enforcement of the common law duty of the child's parents to support that child, as the duty in question exists at the time of the issue of the maintenance order'. It can be argued that, by incorporating the phrase 'common law duty', which can last until the child is self-sufficient, dependent children can rely on this provision to claim maintenance directly from their parents. The challenge, however, is that the word 'child' in s 1 of the Children's Act 38 of 2005 is defined to mean 'a person under the age of 18 years'. The Maintenance Act does not define the word 'child' for the purposes of this Act but in its preamble recognises that 'the Republic of South Africa is committed to give high priority to the rights of children, to their survival and to their protection ... as evidenced by its ... accession ... to the Convention on the Rights of the Child'. Article 1 of this Convention also defines a child as 'every human being below the age of eighteen years'. As such, it is not clear whether an argument that a dependent child can rely directly on s 15 of the Maintenance Act can be sustained. Thus, there is a need for either judicial or legislative guidance on this issue.

Another contentious issue relates to who should claim maintenance on behalf of a dependent child. Given the fact that dependent children have reached the age of majority, they do not need to be represented by any 'adult' in court proceedings. These children have standing on their own right to bring maintenance claims directly against their parents (see generally *Smit v Smit* 1980 (3) SA 1010 (O)). Dependent children may be placed under some emotional burden when forced to institute legal proceedings against their parents. Nonetheless, as was held in *Butcher v Butcher* 2009 (2) SA 421 (C) at para 15, there is no enabling statutory provision in the Divorce Act and the Children's Act that gives the parent of an adult child *locus standi* in divorce proceedings to claim interim maintenance on behalf of such adult children. Further that only adult children have the standing to pursue the claim against one of their parents and can bring a separate claim for maintenance before the court. This case raises some important issues that should be engaged, namely:

- Is the court suggesting that parents generally do not have a right to claim maintenance on behalf of their children against other parents?
- Are there circumstances where parents may have standing to claim maintenance on behalf of their dependent

children, particularly when residing with and regularly incurring expenses in relation to such children?

In *JG v CG* 2012 (3) SA 103 (GSJ), the court considered these issues and followed a different approach to that adopted in *Butcher*. In *JG v CG*, the court was of the view that 'when the facts justify it, an order directing payment to be made directly from one spouse to another *pendente lite* in respect of expenses incurred in regard to a major, but dependent, child, living in the matrimonial home with both parents, is competent' (para 55).

In the *JG v CG* case, the court recognised the wide discretionary powers afforded by ss 6 and 7 of the Divorce Act in ensuring that expenses incurred in respect of the adult but dependent child are well taken care of, whether as expenses forming part of the common home or expenses specific to the adult child (para 3, see also *B v B* (GP) (unreported case no 98328/2015, 23-3-2018) (Strijdom AJ) at para 11). In particular, the court was of the view that the parent who has brought interim maintenance proceedings does have standing to also claim maintenance on behalf of the dependent child where that child currently resides in the same household with both parents (para 55). The same argument appears to hold where the parent claiming maintenance resides with the child and incurs expenses in relation to the child. However, it is not clear whether during a divorce, a parent claiming interim maintenance will have standing to also claim maintenance on behalf of the dependent child with whom they do not reside or should that child bring the maintenance claim separately as was held in *Butcher*. It is also not clear whether the dependent child can independently bring an interim maintenance order during the divorce proceedings involving any or all of their parents or whether this should be done separately. The procedure involved in bringing maintenance claims against their parents may be challenging for some dependent children. The difficulty that children may experience when litigating with their parents should never be downplayed. In *AF v MF* 2019 (6) SA 422 (WCC) at para 75, the court highlighted that it is 'unimaginably difficult' for a child to have to sue their parent for support.

In conclusion, we are of the view that the dependent children should retain their *locus standi* and be joined to the interim maintenance proceedings to which their parents may be involved. This will enable courts to finalise interim maintenance claims for all the parties concerned which will prevent these children having to bring separate maintenance claims against their parents. Waiting for the divorce to be finalised while in need of immediate financial support or bring-

ing a separate maintenance claim against any of the parents might be prejudicial to the dependent child who may not have the financial resources to sustain maintenance claims in court. This approach is in line with that adopted in *AF v MF*, where it was held 'courts should be alive to the vulnerable position of young adult dependents of parents going through a divorce. They may be majors in law, yet they still need the financial and emotional support of their parents' (para 75). We are of the view that courts dealing with applications for maintenance should be satisfied that dependent children are properly provided for having regard to their immediate and pressing needs to the extent to which their parents can meet them.

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The constitutional conundrum of the rights of children and known sperm donors



By Siphon
Tumelo
Mdhuli

The rights of children are of paramount importance in terms of s 28 of the Constitution and s 38 of the Children's Act 38 of 2005. The High Court is the upper guardian of all children to determine what is the best interest of the children. Although 'the best interest principle has not been given an exhaustive content ... the standard should be flexible as individual circumstances will determine the best interests of the child' (see *Ex parte WH and Others* 2011 (6) SA 514 (GNP) and *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC)).

'The rights of individuals to bear and raise children are broadly recognised and supported by the state through various measures, including the provision of financial assistance, social and other support services. It encompasses the right to have one's own child with whom the parents share a genetic link, the right to adopt a child under certain circumstances, and, more recently, in recognition of the physical and medical difficulties people may experience in seeking to have a child of their own, the right to have a child through a surrogacy arrangement' (*Ex parte WH* at para 31).

African law remains to be decided and uncertain. South Africa (SA) recognises surrogacy agreements, which has been incorporated into South African family law with the introduction of s 40 of the Children's Act.

'The [Children's] Act provides in broad terms for the legal requirements attendant upon entering such agreements, as well as requiring the confirmation of the High Court to render such

agreements valid. The Act followed after considerable thought was given to the legal ramifications of the acknowledgment of surrogacy within our legal framework by the ad hoc committee on surrogacy motherhood' (*Ex parte WH* at para 31).

Currently there is no case law to guide courts for donors who want access to their children and recently there has been the resurfacing of cases of sperm donors launching applications to revoke their donor agreements. Known sperm donors want to be included in being role players in the child's wellbeing and upbringing. Thus, the question arises whether a known sperm donor agreement is recognised and whether it is valid in SA.

It remains a fact to note that some 'situations involving a known sperm donor's parental rights are much more complex than situations involving an anonymous donor. For instance, in New York, courts will not enforce any contract between a sperm donor and the recipient in relation to parental rights.

However, creating a sperm donor agreement prior to using medical insemination may help to establish the parties' intent. Absent an agreement, the best interest of the child standard is used for custody issues.

In California, any person who provides sperm that is used for assisted reproduction is considered a sperm donor, and is not a parent. If the donor intends to be a parent to the child conceived, then a written agreement with the birth parent must be signed before conception' (Sarah Tipton 'Sperm donor parental rights and obligations', www.legalmatch.com, accessed 7-10-2021).

On 14 April 2021, judgment (*QG and Another v CS and Another* (GP) (unreported case no 32200/2020, 14-4-2021) (Kol-lapen JJ)) 'was reserved in an application launched by a sperm donor to have access to his biological son after the child's biological mother and her same-sex partner severed all ties with him' (Zelda Venter 'No case laws to guide court for sperm donor who wants access to child-counsel', www.iol.co.za, accessed 7-10-2021).

'The applicant approached the [Gauteng Division of the High Court] in terms of section 23 of the Children's Act, which states that anyone who has an interest in the care, well-being or development of a child may approach the relevant court for an order granting contact with the child or care of the child. [The sperm

donor] is not asking to replace the couple but to be granted the right to have contact with the child' (Caxton Reporter 'Sperm donor's battle to see "his child"', <https://rekord.co.za>, accessed 7-10-2021).

'The parties ... agreed that this case is a first of its nature in South African legal history. Judge Jody Kollapen was told by counsel for the sperm donor that the application addressed novel issues paving the way forward in law and that there are no existing case laws in this country to guide the court.

...
At centre stage is a little boy who turned five this month. On the one hand is the applicant, who donated the sperm to conceive him. In the other camp are the child's same-sex parents. The sperm donor and his mother (the child's biological [grand-mother]) want to be involved in the child's life and be able to have contact with him.

The [same-sex] couple, on the other hand, said they are legally the child's parents and that they do not want the donor to be involved and to interfere in their family. The donor is at this stage only asking the court to grant him interim access to the child, which would involve him seeing the child at certain agreed on times. This, [the donor] wants, pending an investigation by the office of the Family Advocate as to what is in the best interest of the child.

The ultimate aim of the donor is to obtain guardianship over the child. His [legal] team argued that he does not want to take over the parental responsibilities. He respected the fact that the two respondents were the [child's] parents. He only wanted to be able to have some say and be involved in the child's life. The respondents, however, said after they had linked-up with the sperm donor on social media and he agreed to father the child, they had drawn up a contract in which he denounced all rights to the child. The father is not deny this, but he and his mother have approached the court, under the Children's Act, which means that the court has had to determine what was in the best interest of the child.

While the respondents denied that the sperm donor was very involved in the child's life up to now, he differed. Judge Kollapen was told that on the day after he was born, the mothers invited him and his mother to come to hospital to see [the child]. The [donor] said when he held the newborn baby in his arms, he realised he had not appreciated the psychological effect his sperm donation would have on him when he entered into the donorship agreement.

According to [the donor] he had ever since been involved in the child's life - especially in 2019 when the [child's parents] stayed in another house on his plot for eight months. [Advocate Liezl Haupt SC, acting for the donor] said that the man did not want to encroach on the child's family life and he would never tell the child he is the father, without the consent of the [parents]. He just wanted contact.

It was agreed between the parties during argument that the fact that the applicant [was] the sperm donor, did not automatically give him parental rights or cause him to receive special treatment. The judge was asked by the applicant to weigh the case up against the provisions of the Children's Act and the duty of the court as upper guardian of all children in [SA], and then to decide what would be the best for the child.

The respondents maintained that the applicant had no legal standing in bringing the application, as he should be viewed as an ordinary person who wanted contact with a child who already had a close-knit family. Counsel for the [parents] used the example that she liked her neighbours' child, but that did not allow her to be involved in that child's life.

...
In reserving judgment, Judge Kollapen said he not only had to consider these complex issues measured against the law, he also had to look at the human side of things' (Venter (*op cit*)).

It is important to note that 'states vary widely on their laws concerning sperm donation and legal parentage. In Pennsylvania [in the United States] genetics determines legal parentage. This

means that if a DNA test shows that the known donor is the father, then he will be considered the legal father - even if his name is not on the birth certificate.

In most states, such as New York, the best interest of the child is considered before allowing a genetic parent to surrender their parental rights and obligations. If the parental rights are to be surrendered to the mother's spouse or partner, the court will likely allow that surrender.

However, if the mother is a single parent and no one else is assuming the surrendered parental right, then the known donor cannot surrender those rights. This means that the known donor may be able to sue for custody and visitation rights, and the mother can sue for child support.

...
Even if you have a written contract that attempts to relinquish parental rights, a court may enforce full parental obligations upon you. It is the job of the court to uphold state law, as well as consider what is in the best interest of the child.

This is not to say that one should not have a written contract, because you should have a detailed contract outlining parental intentions' (Tipton (*op cit*)).

Although each case is treated differently on its merits, the questions that still needs to be addressed by Parliament are:

- Does a sperm donation make a donor a parent?
- What are the sole intentions of the parties when entering into the agreement?
- Can the donor's agreement be revoked and be challenged later, more particular, to known sperm donors considering the best interests of the child?
- Can the donor acquire full custody of the child, let alone to share guardianship of the child?
- When does the contract becomes *contra bonos mores*?

A lot has been written by authors and writers about the legal implications of known sperm donors over the years and I share the same sentiments that 'a known sperm donor's parental rights are much more complex than situations involving an anonymous donor' (Tipton (*op cit*)) and most do not have to enter into known sperm donor agreements, since it causes legal uncertainties until same is clarified by the courts through precedents.

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WHO IS ACCOUNTABLE

Implementing enforceable accountability: Finding a solution for failing state-owned companies



By
Angela
Stevens

The performance of State-Owned Companies (SOCs) in South Africa (SA) has been on a downward trajectory over the last decade. Against a backdrop of many issues, these SOCs are plagued by a chronic lack of accountability, which has hindered their ability to perform. The board is the focal point for ensuring the accountabil-

ity of an SOC to its stakeholders, with the state being the sole shareholder in most instances. Each director and the board of an SOC, in compliance with the predominant statutes, namely the Companies Act 71 of 2008 (Companies Act) and the Public Finance Management Act 1 of 1999 (PFMA), is under a duty to always act in the best interests of the SOC. This article will provide a brief overview of the accountability and corporate governance issues facing SOCs and suggests a solution involving the implementation of an enforceable accountability framework to improve the accountability, corporate governance and, ultimately, performance of SOCs.

The lack of accountability of SOCs

The recent hearings from the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (Zondo Commission) have highlighted the underperformance of many SOCs. The boards from South African Airways SOC Limited (SAA), Eskom Holdings SOC Limited and Transnet SOC Ltd have come

under scrutiny as a result of vigorous questioning by the Zondo Commission. The shortcomings of SAA have become abundantly clear with business rescue proceedings being initiated in December 2019 and its former chairperson, Duduzile Myeni being declared a delinquent director under s 162 of the Companies Act, in the case of *Organisation Undoing Tax Abuse and Another v Myeni and Others* [2020] 3 All SA 578 (GP). It is clear from these two events, as well as testimony given at the Zondo Commission, that the board of SAA has experienced a total failure of corporate governance over the past decade. At the heart of this failure lies the demonstrable lack of accountability by the board of an SOC to its various stakeholders, including the state as its sole shareholder and the public as its ultimate funder with taxpayer money.

The corporate governance of SOCs

Every director and the board of an SOC is under a statutory fiduciary duty and a duty of care and skill to always act in the best interests of the SOC, in accordance with s 76 of the Companies Act and s 50



of the PFMA. The board is also encouraged to apply the voluntary recommended practices from the King IV Report on Corporate Governance for South Africa, 2016, published by the Institute of Directors Southern Africa, to achieve sound corporate governance. One of the core pillars of corporate governance is the achievement of the principle of accountability. There is a sector specific supplement dedicated to SOCs in ch 16 of the King IV Report, which provides distinct recommended practices for SOCs due to their unique nature and structure. The structure of an SOC is unique as the state is the sole shareholder, which begets tailoring of the recommended practices to accommodate this uniqueness and enhance the accountability of SOCs.

The accountability of SOCs is distinct in comparison to that of public or private companies. The boards of SOCs are held accountable by the minister under whose portfolio they fall. SOCs were previously under the control of the Minister of Finance but are now under the purview of the Minister of Public Enterprises (Minister). The unique challenge facing the ac-

countability of SOCs is that the Minister, and not various shareholders, is required to supervise the accountability of the board and ensure compliance under s 63 of the PFMA. This challenge is completely distinct to the nature and structure of an SOC and not comparable to the ownership structures of private or public companies with numerous shareholders.

The presence of numerous shareholders provides an accountability enforcement measure for the boards of private and public companies. If the board fails to perform, the shareholders may demand accountability at annual general meetings and then divest their shareholding if they remain unsatisfied with the performance of the board or the company. The shareholders are also able to vote against board decisions to increase the remuneration of the directors. Through this shareholder activism, the accountability of the boards of private and public companies is enforced. Directors who take decisions, which are found to be in breach of their statutory duties, are often swiftly punished due to shareholder pressure and activism. Any complacency by the shareholders in supervising the board may result in decisions taken, which are not in the best interests of the company. This in turn may result in a diminution in the value of the shares of the company and, consequently, a loss in the investment made by the shareholders. Shareholders who desire to see a growth in their investment are incentivised to hold the board accountable to ensure improved corporate and financial performance.

This is not the case for SOCs whose sole shareholder is the state and where the Minister alone is required to hold the board to account. The Minister is then accountable to the President and Parliament for the administration of the Public Enterprises Portfolio, in terms of s 92 of the Constitution. There are no other shareholders to hold the board of an SOC accountable or to vote against board decisions, which may not be in the best interests of the SOC. Therefore, enforcement of the accountability of the board of an SOC, through the supervision of its shareholder, is diluted in comparison to the activist role played by the numerous shareholders of private and public companies. As a result of this unique ownership structure of an SOC, the accountability of its board has always been problematic. This accountability issue is further compounded when the sole shareholder, who is responsible for supervising the board, is faced with numerous allegations of complacency and corruption. The accountability of the board of an SOC becomes questionable when the accountability of the Minister and the state is compromised.

Despite being under statutory duties to act in the best interests of the SOC, the

punishment levied against recalcitrant directors for a failure to discharge these duties is not often implemented. Save for the recent *Myeni* case (and a slew of recent media reports), there have been few court cases alleging breaches of duties by various SOC directors. With the recommended practices under the King IV Report remaining voluntary, the enforceability of the accountability for SOC directors must be embodied under the statutory duties and liabilities. The fear of punishment, which is levied against guilty directors, is meant to act as a deterrent for future recalcitrant directors. However, this retributive approach may not be the most effective enforcement mechanism for ensuring the accountability of the board of an SOC.

The enforceable accountability of SOCs

Currently, there is a Shareholder Management Bill (the Bill) that is intended to be presented to Parliament in 2021 for consideration. The purpose of the Bill is to construct a framework to improve the accountability of all State-Owned Enterprises, including SOCs, to the state. This Bill has been waylaid for over three years and the urgency of its statutory enactment has become undeniable given the recent hearings of the Zondo Commission. President Cyril Ramaphosa also appointed members of the Presidential State-Owned Enterprises Council on 11 June 2020 to assist the state to effectively reposition State-Owned Enterprises, including SOCs. However, the effectiveness of this Council has yet to be seen.

The boards of all SOCs should be galvanised into implementing their own enforceable accountability measures, while waiting for the Bill and Council. The concept of enforceable accountability stems from a reward-based mechanism, which seeks to incentivise the board of an SOC to be accountable for its decisions. It is proposed that an independent, third-party institution be created in order to rate the accountability of the board of an SOC. This independent institution may be established in terms of ch 9 of the Constitution, akin to other independent state institutions, such as the office of the Auditor-General and Public Protector.

The accountability rating by the independent institution is then linked to the amount of state funding provided to the SOC, on an ascending scale. In this way, the accountability of the board of an SOC is enforced through the incentive of a reward in the form of favourable state funding (on preferred terms) and, therefore, the possibility of increased remuneration for SOC directors. This reward-based enforcement mechanism may incentivise the board of an SOC to be accountable for its decisions. Given that the best interests

of the SOC are required for every decision taken, the performance, sustainability, and growth of the SOC may consequently improve.

The strict linking of the outcome of the annual rating of the SOC to the provision of its state funding may also serve to improve the accountability of the state in effectively performing its supervisory role. SOC's with limited state funding may not be able to effectively discharge the service delivery functions that they perform on behalf of the state. Favourable or increased state funding should incentivise the state to properly supervise an SOC to ensure the achievement of a good accountability rating.

A possible solution for failing SOC's

The current retributive measures levelled against directors who are alleged to have breached their duties may not be the best mechanism to enforce the accountability of the board of an SOC. While the Zondo Commission continues to deliberate on its investigation, current and future directors of SOC's need to be deterred from attempting to commit a breach of their duties, to the ultimate detriment of the SOC and the economy at large. While directors of various SOC's may still be found to have breached their statutory duties and

be held liable following the possible findings and recommendations of the Zondo Commission, the dismal performance of SOC's still needs to be addressed.

The implementation of enforceable accountability as a corporate governance mechanism for all SOC's may serve to improve their performance. The mechanism for enforcement being a reward-based approach, as opposed to a retributive-based approach, may better illuminate, and significantly improve the accountability of the directors and the board of an SOC. Improved accountability may lead to better decision taking, thereby eliminating decisions being taken due to personal gains, political motivations, as a result of a conflict of interest or due to complacency. The enforceable accountability of SOC's should be coupled with the application of various other principles including: Transparency, disclosure, fairness, leadership and responsibility in order to promote a holistic implementation of accountability and to reap the benefits associated with good corporate governance. The blind application of corporate governance practices which are showcased in the robust annual integrated reports of SOC's should be avoided at all costs.

Conclusion

The implementation of an enforceable ac-

countability framework may serve to improve the performance of various failing SOC's. By no means the only challenge facing SOC's, a dire lack of accountability has been highlighted as a direct root cause of the downfall of many SOC's. As part of its corporate governance measures, the board of an SOC should adopt the concept of enforceable accountability through the implementation of a reward-based framework. This framework incorporates the use of an independent rating agency to attend to the mandatory rating of the accountability of various SOC's on an annual basis. The framework also incorporates the mandatory linking of the outcome of the rating of an SOC to the provision of its state funding. This proposed enforceable accountability framework is reliant on the enactment of legislation for regulation and the implementation of such legislation by the executive in holding SOC's accountable. The aim of the framework is to improve the performance of SOC's and incentivise the state to effectively supervise such performance.

Angela Stevens *BCom LLB LLM PhD (UCT)* is a legal practitioner at Tim du Toit & Co Inc in Cape Town. □

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COHABITATION AGREEMENT

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Unmarried cohabitants: The court's missed opportunity to adopt an inclusive approach to the term 'spouse'



By
Desmond
Francke

There are many varied spousal relationships. Individuals in spousal relationships – whether they are married or not – structure their relationships differently. 'In some relationships there is a complete blending of finances and property – in others, spouses keep their property and finances totally separate and in still others one spouse may totally control those aspects of the relationship with the other spouse having little or no knowledge or input. For some couples, sexual relations are very important – for others, that aspect may take a back seat to companionship. Some spouses do not share the same bed. There may be a variety of reasons for this such as health or personal choice. Some people are affectionate and demonstrative. They show their feelings for their "spouse" by holding hands, touching and kissing in public. Other individuals are not demonstrative

and do not engage in public displays of affection. Some "spouses" do everything together – others do nothing together. Some "spouses" vacation together and some spend their holidays apart. Some "spouses" have children – others do not.

It is this variation in the way human beings structure their relationships that make the determination of when a "spousal relationship" exists difficult to determine. With married couples, the relationship is easy to establish. The marriage ceremony is a public declaration of their commitment and intent' (*Yakiwchuk v Oaks* 2003 SKQB 124 (Can-LII)).

Section 9 of the Constitution provides: 'Everyone is equal before the law and has the right to equal protection and benefit of the law'.

The Constitutional Court (CC) has decided in various decisions whether people must choose whether to marry or not

and depending on their decision whether protection flows from it or not. It seems the court sided with sectional religious or moral views despite the wording of s 9(3) of the Constitution. I say this with specific reference to what Justice Sachs said in his minority decision of *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC).

'By opting not to marry, thereby not accepting the legal responsibilities and entitlements that go with marriage, a person cannot complain if she is denied the legal benefits she would have had if she had married. Having chosen cohabitation rather than marriage, she must bear the consequences. Just as the choice to marry is one of life's defining moments, so, it is contested, the choice not to marry must be a determinative feature of one's life'.

'Instead of insisting that the guarantee of non-discrimination on the ground of marital status requires existing family-law style protection to be extended to all relationships that are comparable to marriage, the court sees nothing wrong with legal discrimination against those who have chosen not to enter civil marriages' (Denise Meyerson 'Who's in and who's out? Inclusion and exclusion in the family law jurisprudence of the Constitutional Court of South Africa' (2010) 3 *Constitutional Court Review* 295).

The CC, with its 'marriage-centric' focus privileges religious unions in its approach to the term spousal relationship has turned a slippery slope rapidly into an icy cliff. The court's approach does not force the legislature to protect all legally unrecognised unions that play the same social role as marriage. The definitions of legislation that is of particular importance to women are discriminatory based on how relationships are categorised. Regrettably, South African courts had an opportunity to change the Napoleonic adage 'cohabitants ignore the law and the law ignores them' (see *Volks NO* and Susan Hutchings and Elize Delpont 'Cohabitation: A responsible approach' 1992 (Feb) *DR* 121). I echo the sentiments expressed by Meyerson (*op cit*) that the courts have based their decisions on morality.

The Domestic Violence Act 116 of 1998

Section 1 of the Domestic Violence Act defines 'domestic relationship' as 'a relationship between a complainant and a respondent in any of the following ways:

- (a) they are or were married to each other, including marriage according to any law, custom, or religion;
- (b) they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;

...

(e) they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or

(f) they share or recently shared the same residence'.

The Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990

The term spouse is given its ordinary grammatical meaning. The CC had several opportunities to adopt an inclusive approach in defining the term 'spouse' when challenged with the term 'spouse'. In *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC), the CC held the word spouse as used in the Intestate Succession Act, includes the surviving partner to monogamous Muslim marriage. In *Volks* the court held at para 56: 'The distinction between married and unmarried people cannot be said to be unfair when considered in the larger context of the rights and obligations uniquely attached to marriage. Whilst there is a reciprocal duty of support between married persons, no duty of support arises by operation of law in the case of unmarried cohabitants. The maintenance benefit in section 2(1) of the [Maintenance of Surviving Spouses] Act falls within the scope of the maintenance support obligation attached to marriage'. The justification offered for the special treatment of the married has traditionally been moralistic and religious. Certain kinds of intimate and family relationships are seen as morally superior to their functional equivalents, and it is thought appropriate to use the law to encourage such relationships by bestowing more favourable treatment and the stamp of legitimacy on those who enter into them by acquiring an official licence from the state.

Civil Union Act 17 of 2006

Section 1 of the Act defines 'civil union partner' as 'a spouse in a marriage or a partner in a civil partnership, as the case may be, concluded in terms of this Act'. Section 4 enacts the solemnisation of civil union as a marriage officer may solemnise a civil union in accordance with the provisions of the Civil Union Act. It begs the question of why relationships should have to assume a particular legal form to attract appropriate rights and duties. A reading of the Civil Union Act shows persons who are not married or have not entered into a civil union do not enjoy the benefits and protection they are entitled to based on their relationship.

'The purpose of family law is to protect vulnerable members of families and to ensure fairness between the parties in family disputes' (*Volks NO* at para 194).

As such, the functional approach to family law recognises that not all families are created by the conclusion of a valid marriage and that a domestic partnership can possibly fulfil the same social function as marriage. I think a more inclusive and functional approach must be adopted to ensure that all 'spousal relationships' enjoy the right to equality as enshrined in the Constitution. It will afford all parties the protection their spousal relationship is entitled to.

I believe it is more important to determine whether a spousal relationship exists than legalising a relationship through marriage and the solemnisation of a civil union. In saying the above, I am consciously aware that 'relationships outside marriage are much more difficult to ascertain. Rarely is there any type of "public" declaration of intent. Often people begin cohabiting with little forethought or planning. Their motivation is often nothing more than wanting to "be together". Some individuals have chosen to enter relationships outside marriage because they did not want the legal obligations imposed by that status. Some individuals have simply given no thought as to how their relationship would operate. Often the date when the cohabitation actually began is blurred because people "ease into" situations, spending more and more time together. Agreements between people verifying when their relationship began and how it will operate often do not exist. ... The legislation provides little guidance on what constitutes cohabiting in a spousal relationship or when such a relationship may be said to start or end. It is left to the court to examine the facts of each case and make those determinations. In a perfect world, the courts would have all the information necessary to make such a determination but this is not a perfect world' (*Yakiwchuk* at para 10 - 11).

'Determining whether a marriage-like relationship exists sometimes seems like sand running through one's fingers. Simply put, a marriage-like relationship is akin to marriage without the formality of a marriage. ... [P]eople treat their marriages differently and have different conceptions of what marriage entails' (*Mother 1 v Solus Trust Company* 2019 BCSC 200). It is the reason courts must be cautious in adopting a 'checklist approach'. A holistic approach examining all the relevant factors should be adopted to determine whether a spousal relationship exists. The presence or absence of any particular factor cannot be determinative of whether a relationship is marriage-like or not. 'The parties' intentions, particularly that the relationship will be of lengthy, indeterminate duration' - may be of importance in determining whether a relationship is 'marriage-like' (*Mother 1* at paras 136 and 143). The question of

whether a relationship is marriage-like will also typically depend on more than just their intentions. Objective evidence of the parties' lifestyle and interactions will also provide direct guidance on the question of whether the relationship was marriage-like.

Certain factors are considered to determine whether a relationship was marriage-like. At the fear of repetition, it is important to state it is not an exhaustive list, nor is the absence of one or more of the factors fatal in the determination of whether the parties had a spousal relationship. These factors include:

1. Shelter:

- (a) Did the parties live under the same roof?
- (b) What were the sleeping arrangements?
- (c) Did anyone else occupy or share the available accommodation?

2. Sexual and personal behaviour:

- (a) Did the parties have sexual relations? If not, why not?
- (b) Did they maintain an attitude of fidelity to each other?
- (c) What were their feelings toward each other?
- (d) Did they communicate on a personal level?
- (e) Did they eat their meals together?
- (f) What, if anything, did they do to assist each other with problems or during illness?
- (g) Did they buy gifts for each other on special occasions?

3. Services:

What was the conduct and habit of the parties in relation to:

- (a) preparation of meals;
- (b) washing and mending clothes;
- (c) shopping;
- (d) household maintenance; and
- (e) any other domestic services?

4. Social:

- (a) Did they participate together or separately in neighbourhood and community activities?
- (b) What was the relationship and conduct of each of them toward members of their respective families and how did such families behave towards the parties?

5. Societal:

What was the attitude and conduct of the community toward each of them and as a couple?

6. Support (economic):

- (a) What were the financial arrangements between the parties regarding the provision of or contribution toward the necessities of life (food, clothing, shelter, recreation, etc)?
- (b) What were the arrangements concerning the acquisition and ownership of property?
- (c) Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?

7. Children:

What was the attitude and conduct of the parties concerning children? (*Mother 1* at para 134).

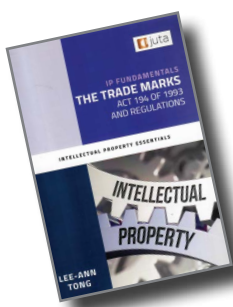
'Like human beings themselves, mar-

riage-like relationships can come in many and various shapes' (*Connor Estate 2017 BCSC 978 (CanLII)*). 'However, the traditional factors are not a mandatory checklist that confines the "elastic" concept of a marriage-like relationship. And if the [COVID-19] pandemic has taught us nothing else, it is that real relationships can form, blossom and end in virtual worlds' (*Han v Dorje 2021 BCSC 939 (CanLII)*). I say this despite the CC's decisions that imply that those whose reasons for not entering a valid marriage are not religious are second-class citizens and less worthy of respect.

Lastly, 'South Africans live in a society that proclaims ... the "right to be different" and the "right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others". ... [R]elationships characterised by mutual support and financial interdependence are entitled to the same protection as the legislature confers on marital relationships, regardless of whether such arrangements have the imprimatur of religion or culture' (see Meyerson (*op cit*) at 311 and *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others 2006 (1) SA 524 (CC)*).

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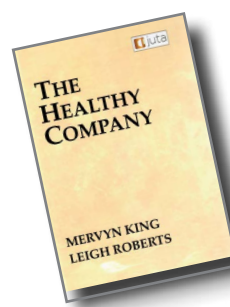
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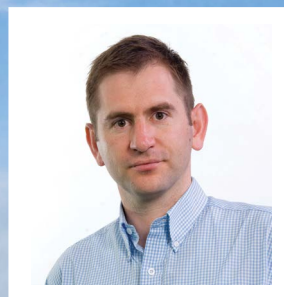
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Finding the way to good governance for public benefit organisations

By
Graeme
Wilkinson



Picture source: Gallo Images/Getty

A public benefit organisation (PBO) is an organisation (whether voluntary association, trust, non-profit company, or local branch of a foreign tax-exempt charitable organisation) that does not work for profit and is exempted from paying certain taxes because it undertakes public benefit activities (PBAs).

As a republic, [South Africa (SA)] is centred on the primacy of “the public”. The preamble to our Constitution explains that we are a country particularly encumbered by the legacy of an unjust past. I would argue that the primary benefit to our nation’s public are therefore those activities that:

- heal the divisions of the past ... ;
- improve the quality of life of all citizens ... ; [and]
- lay the foundations for a democratic and open society in which government is based on the will of the people, and in which every citizen is equally protected by law

One should read the ninth schedule to the Income Tax Act No. 58 of 1962 [ITA], which specifically sets out what can be considered PBAs, in the context of this constitutional injunction.

The list of PBAs is quite extensive and is divided into sections covering humanitarian and welfare activities; healthcare; education; land and housing; environment conservation and animal welfare; religion and belief; cultural, research and consumer rights; sport; and the providing of funds, assets or other resources.

The schedule provides a further level of specificity as to what kinds of PBAs would be considered under each of these themes, and includes activities such as:

- “The care or counselling of, or the provision of education programmes relating to, abandoned, abused, neglected, orphaned or homeless children” (Welfare, under Part II);
- “The advancement, promotion or preservation of the arts, culture or customs” (Cultural, under Part I); or
- “Building and equipping of clinics or crèches for the benefit of the poor and needy” (Land and Housing under Part II).

It is quite easy to see how PBAs could directly contribute towards achieving the vision set out for us in the Constitution. Many do help improve the quality of life; others ensure that citizens are equally protected by law. Most PBAs chip away at inequality and steadily work towards social justice for all.

Every PBO's North Star

However, it is not sufficient to say that undertaking a PBA is the same as supporting the Constitutional imperative. That imperative is only achieved if these activities are carried out with the Constitution clearly in view – holding it as the North Star guiding the PBA implementer each step of the way. Only then can we expect to see a PBA meaningfully contribute to the primary project of nation building. Without this North Star, it will quickly become evident that the PBA is merely a mediocre “ticking of a box”; one that will eventually distract more than contribute towards the national goal’ (Graeme Wilkinson ‘Good governance – every PBO's North Star’, <https://tshikululu.org.za>, 8-10-2021).

Just because polo is considered a sport (a recognised PBA), does not mean a match at *Val de Vie Estate* is of itself necessarily nation building.

‘Indeed, a badly oriented PBA can be disruptive to the national effort, and even destroy that which has been built by others who are keeping the Constitution in their sights.

...
A badly governed PBO will also allow the trust placed in it by the public (and public officials ...) to slowly erode, and with it, the organisation's relevance. Any irrelevant organisation, by choice or by circumstance, will eventually cease to exist’ (Wilkinson (*op cit*)).

Blind spots of a PBO

‘Mere compliance with the [ITA] is not sufficient to ensure long-term sustainability of your PBO. PBO status gets you the licence to run the race, but you still have to get out there and pound the asphalt. As with marathon running, the success of the run depends on numerous factors: how fit your body is, who you may have chosen to partner with on the run and your mindset.

The way you are set up to govern your run is probably more important than all the practice you have put in before the race. You can never fully prepare for every moment of the race; what will eventually happen on race day is unknown. Each marathon race has its risks, and every PBO faces things that put its long-term sustainability at risk.

Two of the known risks that every PBO faces, and which could be lurking in your board's “blind spot” are –

- embezzlement, money laundering, fraud, corruption, tax evasion and terrorist financing; and
- non-compliance with statutory requirements’ (Graeme Wilkinson ‘Good governance – PBO blind spots’, <https://tshikululu.org.za>, 8-10-2021).

In terms of the first, ‘South African tax law holds that a fiduciary board member may not directly or indirectly enhance their economic self-interest through a PBO, except to claim for reasonable remuneration for services rendered’ (Graeme Wilkinson ‘Good Governance – Decision-making Principles that PBOs should follow’, <https://tshikululu.org.za>, 8-10-2021).

‘[I] suggest that there are five [further] categories of abuse facing a PBO. These are:

- Diversion of funds by people within your PBO or by external actors (such as a foreign partner or a third-party fundraiser);
- Your PBO's staff or board members knowingly or unknowingly maintaining an affiliation with a complex syndicate or terrorist entity, which may result in your PBO being abused for multiple purposes, including general logistical support ...
- Abuse of programming – the flow of resources is legitimate, but your PBO's programmes are abused at the point of delivery ... ;
- Supporting others' recruitment efforts ... or mobilisation for illicit activity ... ;
- Abuse through false representation in which other entities in your community start a “sham” PBO or falsely represent themselves as the agents of “good works” in order to deceive your staff, or even your board, into providing them support

...
The public expects your PBO's board to protect your legitimate activities from these sorts of nefarious agendas’ (Wilkinson (*op cit*)). Increasingly, social investors and grant makers are asking applicant PBOs how they are monitoring and mitigating against these risks.

A PBO should not allow itself to ever fall foul of its numerous statutory requirements, such as those set out in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, the Basic Conditions of Employment Act 75 of 1997, and the Children's Act 38 of 2005, to name just a few. Should a PBO have voluntarily subscribed to the Nonprofit Organisations Act 71 of 1997, this Act's provisions would apply to how the PBO governs itself. In short, a public-benefit board must establish which laws are pertinent to its work and always ensure compliance.

Two laws I would like to highlight, and which every board needs to ensure its PBO is adequately capacitated to comply with, are the Financial Intelligence Centre Act 38 of 2001 (FICA) and the Protection of Personal Information Act 4 of 2013 (POPIA).

En vogue acronyms

The POPIA is now very topical as all PBOs have to be compliant as of 1 July 2021. A PBO needs, for example, a very specific reason, and permission, for requesting and storing the biometric details of its clients/beneficiaries. The widespread practice of keeping copies of beneficiaries' identity documents on record will have to be reviewed as a photograph of a person's face is regarded as biometric (and thus protected) personal information.

Not many PBOs are aware that FICA also has relevance to them. ‘While not designated as an accountable or reporting institutions under FICA, PBOs and their fundraisers are holders

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of the public trust, and so the Financial Intelligence Centre (FIC) does expect PBO's full support and collaboration in relation to two scenarios:

- PBOs that become aware or suspect that they are being abused for terrorist financing and/or money laundering purposes' (Wilkinson (*op cit*)); and
- PBOs that supports any person who acquires any property, provides financing, and/or other services and/or benefits to a person or entity listed in terms of s 25 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 (see the FIC's website at www.fic.gov.za) can be found guilty of an offence.

'While [I] would like to believe that both of these scenarios are rare ... the negative impact could be quite severe. [I] flag them here as potential "blind spots" for you [PBO] to be aware of. The last thing your [PBO] board needs while trying to rapidly respond to an emergency situation, is to be confronted with a non-compliance notice from the Information Regulator or FIC' (Wilkinson (*op cit*)).

Decision-making principles that PBOs should follow

'The legal imperative for a PBO to practice good governance is set out in South African law'. 'A leading principle is the implied fiduciary duty that the board of every PBO has'. 'A board member is expected, at all times, to act in the best interests of their organisation, its staff and, ultimately, its beneficiaries' (Wilkinson (*op cit*)).

Taking inspiration from the Organisation for Economic Co-operation and Development (OECD), which in turn took the lead from the United Kingdom's Better Regulation Task Force, 1997, '[I] suggest that the following five principles be applied to any governance decision that your PBO board takes, to help strengthen each decision, and in so doing, ensure the long-term [relevance and] sustainability of your organisation:

- **Transparency:** Your board should be open (that is, not sit on information or try to conceal information that is relevant to any of its stakeholders), and keep its decisions, policies, and regulations simple and user-friendly.
- **Accountability:** The board should be able to justify its decisions and be subject to public scrutiny. It is a "public" organisation after all, enjoying distinct privileges (such as tax exemption) afforded it by the public, for the public's benefit.
- **Proportionality:** Your board should intervene only when necessary. Remedies should be appropriate to the risk posed, and costs identified and minimised.
- **Consistency:** The organisation's rules and standards, as set by the board, should be consistently compiled, not be contradictory, and should be implemented fairly.
- **Targeting:** Each decision or policy put in place by the board should be focused on a defined problem. This makes it more

likely that when addressing the problem, your organisation is better able to minimise any side effects arising out to the decision as much as possible.

Factoring these principles into all major board decisions, and the way they are implemented, will also help ensure your PBO's board remains "beyond reproach". That is, the board will continue to enjoy the trust of its stakeholders and be able to mitigate against claims of being unfair, incompetent, uncaring or corrupt.

Addressing conflict of interest

One of the most important policies for your PBO board to adopt, in light of these principles, would be a policy addressing conflict of interest. This is the sort of policy you want written up carefully, and made available to all stakeholders. It would be good practice to have board members and staff commit to it annually. The policy should:

- require those with a conflict of interest, or those who think they might possibly have one, to formally disclose this in writing; and
- require board members with a conflicting interest in a matter to excuse themselves from voting on that matter. In the case of staff members with a conflicting interest, they should excuse themselves from officiating on the matter concerned

...

[I] suggest that your [PBO] board facilitates a discussion once a year where the types of hypothetical situations that could result in a conflict of interest are explored, and ways to manage these situations be agreed upon. This way, when a real conflict of interest arises (and they can be quite nuanced), the board will be better able to recognise and manage it' (Wilkinson (*op cit*)).

Far horizon

This is certainly not a comprehensive list of governance risks that face local PBOs. I sought only to demonstrate that the risks must be 'systematically itemised and worked through by each PBO's board. It is imperative that your [PBO] board takes these risks into consideration and has developed plans to mitigate their effects on their organisation' (Wilkinson (*op cit*)). In so doing, a PBO board is best able to manage whatever unknown eventualities its future might hold, while keeping its eyes firmly set on the promise of a stronger, democratic, and open society.

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What does a R 145,8 million war chest mean for the legal fraternity?



By Simon Kuper and Gary Sweidan

Clients who may, reluctantly, have had to consider abandoning their claim or accepting a settlement well below its true value now have access to funding to ensure that their legal team can litigate boldly and without any budget constraints,' says Partner at Taurus Capital, Simon Kuper.

This is good news for the legal fraternity. Many cases that may have had to be strategically compromised or simply could not go ahead can now proceed and be properly funded. A litigation fund, such as that put together by **Taurus Capital**, holds a portfolio of investments in litigation cases, which will provide Taurus and its investors with a return via a share of the proceeds should the claims be successful. If any claim is unsuccessful, then Taurus would have lost its investment and have no recourse against the funded litigant for repayment.

The transaction is an investment made on risk. It is not a loan.

Mr Kuper adds: 'What is interesting now is that we are constantly being approached by commercial litigants who already have the required funding to pursue their claims themselves, but rather look at litigation funding as a way for their business to prioritise resources and focus on income-generating activities. In today's economy, litigants are attracted to a solution that ensures they can pursue their claims in a manner that does not tie up funds for legal costs on their income statements and balance sheets.'

Co-founder of Taurus Capital, Gary Sweidan, adds: 'There is nothing worse for attorneys than having to litigate with a timid budget and scared money. The clients we have funded also like having a partner in the litigation who does not suffer from litigation fatigue, which is common for litigants in high-value claims against well-resourced defendants.'

Taurus Fund One, raised by the legal financier, which is the first in its sector in South Africa (SA) to raise such a fund, is the only commercial litigation fund of

its kind in the country and was recently closed off with total funds raised of R 145,8 million.

Third-party financing for legal matters has been gaining traction locally over the past five years. It is already a popular finance solution in other jurisdictions, so much so that it has become recognised as an investment asset class in the United States, United Kingdom and Australia.

The rise of litigation funding as a popular investment product in the global market began after the global financial crisis of 2008. Locally, this type of transaction is still gaining traction despite it being permitted in South African law since 2004 (see MJ Khoza 'Formal Regulation of Third Party Litigation Funding Agreements? A South African Perspective' (2018) 21 *PER* 25 and Rob Scott, Maurice Kenton, Alon Meyerov, Athol Gordon and Nicole Gabryk 'The advent of litigation funding and what does it involve?' (www.mondaq.com, accessed 28-10-2021)). Contrast this with a jurisdiction like the United Kingdom, where its law deemed it legal in 1967 (Katch Investment Group 'The history and attractiveness of litigation funding in the UK' (<https://katchinvest.com>, accessed 28-10-2021)).

Taurus Capital believes that the reason litigation funding for high value commercial claims has not been adopted as quickly in SA is because a local, reputable and transparent litigation funder with a large pool of dedicated ring-fenced funding has not existed in the past.

'What the success of this fundraise means is that we are now well placed to continue to assist litigants in funding high value commercial litigation in South Africa. Litigation is expensive and the costs escalate the closer a case gets to the hearing. We give litigants the opportunity to engage or retain their choice of the best attorneys and senior counsel available and have the confidence to litigate with the knowledge that they will not be outmuscled legally or financially,' Mr Sweidan adds.

In SA, most litigation matters generally take between three to five years to

conclude. The high cost of legal fees can also become unaffordable for most businesses to successfully litigate their matter to completion. These costs can be exacerbated by a well-resourced defendant who may look to delay and disrupt the process through a Stalingrad litigation strategy.

Taurus Capital generally looks to invest in commercial litigation claims above R 20 million in value. Their focus is on court, arbitration, and adjudication matters. Funding is available at any stage of proceedings – whether it is a matter beginning from inception, or at a final appeal and near completion.

'The transaction provides a well-considered risk-adjusted solution which assesses a litigation based on cost versus risk and return. This properly aligns the interests for the litigant, legal representatives and financier. We know from experience that something unforeseen will happen in every litigation. It is guaranteed. The only way to cater for these unforeseen developments, increased costs and delayed durations is to partner with an experienced litigation funder with a dedicated fund,' Mr Kuper further explains.

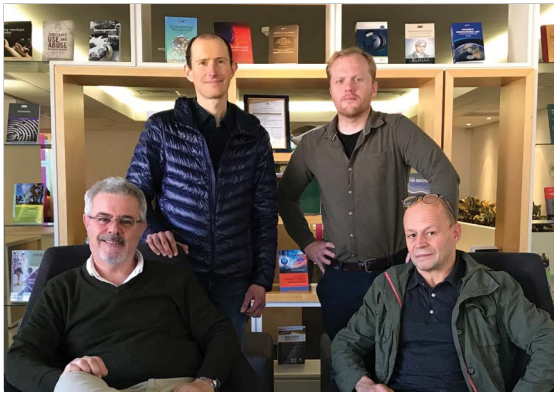
When determining which matters to fund, Taurus Capital is guided by its legal risk and investment committees made up of experienced lawyers, accountants, businessmen and private equity professionals. The chairman of its investment committee is advocate Neil Lazarus SC.

'Ultimately,' Mr Sweidan concludes, 'this is about providing greater access to justice for all litigants, both those who can and those who cannot afford it'.

Simon Kuper and Gary Sweidan are the co-founders of Taurus Capital. www.tauruscapital.co.za



THE LAW REPORTS



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

September 2021 (5) South African
Law Reports (pp 1–325); September
2021 (2) South African Criminal Law
Reports (pp 225–331)

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

GJ: Gauteng Division, Johannesburg
GP: Gauteng Division, Pretoria
KZD: KwaZulu-Natal Division, Durban
NCK: Northern Cape Division, Kimberley
NWM: North-West Division, Mahikeng
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Arbitration

Do an arbitrator's notes form part of the r 53 record? In *Zamani Marketing and Management Consultants (Pty) Ltd and Another v HCI Invest 15 Holdco (Pty) Ltd and Others* 2021 (5) SA 315 (GJ) the applicants and first to sixth respondents had been involved in a dispute, which had gone to arbitration. The respondents obtained an award in their favour. The applicants later instituted a review of the arbitrators' award and called on the arbitrators to dispatch to the registrar, under r 53(1)(b) of the Uniform Rules of Court, the record of the arbitration proceedings. The arbitrators, all retired judges, were the seventh to ninth respondents in the present matter. They sent on the requested documents save for those containing their handwritten notes. Unhappy with the omission, the applicants issued an r 30A notice requesting despatch of the annotated documents. The arbitrators refused and the applicants instituted interlocutory proceedings to compel their production. The arbitrators' reasons for refusing to hand over their notes were that r 53(1)(b) did not apply to reviews of awards brought under s 33 of the Arbitration Act 42 of 1965 and that in any event their notes were not part of the record.

The GJ, per Unterhalter J, held that

r 53 applied in s 33 reviews of arbitration awards. This appeared from the language of the rule, case law, and the rule's utility in making for fair review proceedings. The GJ found in addition that the arbitrators' notes did not form part of the record and that their production could, therefore, not be compelled under r 53. This was because the notes might be fragmentary, provisional, exploratory, or subject to revision or discard, and because their relationship to the award's reasoning was uncertain. Moreover, the notes, as the 'raw material' of reflection, should be produced under conditions of utmost freedom, and this might be curtailed if their production could be compelled. The GJ, therefore, dismissed the application.

Children

Guardianship and contingency fee agreements in RAF claims: The facts in *Bouwer obo MG v Road Accident Fund* 2021 (5) SA 233 (GP) were that Mr Bouwer had been appointed *curator ad litem* to pursue a claim for damages in the GP against the Road Accident Fund (RAF) on behalf of MG, a seven-year-old girl who was injured when a car driven by her great-grandmother, Ms G, was involved in an accident.

The Fund conceded liability and counsel for the plaintiff prepared a draft order. The GP, per Van der Westhuizen J, however, *mero motu* raised the issue of the validity of contingency fee agreements (CFEs) Ms G had concluded on behalf of MG. The curator indicated that he had ratified the CFEs because MG was represented by Ms G, her '*de facto*' guardian. MG had resided with Ms G at the time of the accident and when she concluded

the CFEs, and only later went back to live with her biological mother, who did not participate in the proceedings.

Counsel for the plaintiff argued that Ms G, as *de facto* guardian, was legally qualified to sign the CFEs on behalf of MG. He further argued that a broad interpretation should be afforded to the word 'guardianship' in the Children's Act 38 of 2005 to include *de facto* guardianship of the kind Ms G had provided to MG. He contended that the phrase 'other person who act as guardian of a child' in s 18(3) of the Act, which stipulates the duties of a guardian, included persons who were none of the types of guardians recognised by South African law. These were natural (parents), testamentary (appointed in the testament of the last surviving parent) and assigned (appointed by the court).

The GP ruled that the definition of the word 'guardian' in s 1 of the Act was clear and unambiguous and had to be understood within the ambit of the existing South African law on guardianship. The words 'other person who acts as guardian of a child' did not create a new kind of guardian, a '*de facto*' guardian. At best, a *de facto* guardian would be the person contemplated in s 23 of the Act, in terms of which a High Court may assign 'contact and care' of a child to a person with an interest in the care, well-being or development of that child. However, no true guardianship was awarded to such a person, only the specific responsibilities and rights awarded by the High Court in question. The true status of Ms G was that contemplated by s 32 of the Act, which regulated care of a child by a person who did not hold parental responsibilities and rights. But that section in specific terms

did not grant guardianship. Therefore, at the time the CFEs were concluded, Ms G had no authority or court-awarded rights to act on behalf of MG. In particular, she could not usurp the rights contemplated in s 18(3)(b) of the Act, namely the right to assist or represent the child in legal matters.

The GP held that there was another reason why Ms G could not have concluded the CFEs, and that was that a CFE was in the best interests of the legal practitioner representing the child, not the child itself. With CFEs, the risks involved in potential litigation was crucial; where the risk was minimal, or so far removed that the necessity of concluding one was questionable, it might not pass the limitations imposed by the Contingency Fees Act 66 of 1997. Since MG was barely seven-years-old and a passenger in a motor vehicle involved in a collision, no contributory negligence could befall her. There was thus no risk in claiming damages from the defendant. No CFE was therefore necessary. The CFEs were voidable transactions, if not void, and the mere fact that the curator ratified them was of no consequence. There was no valid agreement to ratify, and it was not in MG's best interest to slice away a sizable portion of the award to be allowed.

Criminal law

Whether a 'dangerous wound' inflicted for purposes of sch 1 of the CPA to be determined objectively: The case of *Mananga and Others v Minister of Police* 2021 (2) SACR 225 (SCA) concerned an appeal against a decision dismissing the appellants' claim for wrongful arrest. The SCA was required to determine whether the police officer who had carried out the arrests for assault with intent to do grievous bodily harm, without an arrest warrant, had the authority to do so in terms of s 40(1)(b) of the Criminal Procedure Act 51 of 1977 (CPA).

The complainant had been beaten by several assailants, including the appellants, and was taken to a hospital where lacerations to his head were sutured and a fractured wrist was put into a cast. He was kept in hospital for four days as he had lost a lot of blood and was dehydrated. When he received the police docket, the arresting officer interviewed the complainant and observed his wounds. He also took statements from various other witnesses before arresting the appellants and charging them with assault with intent to do grievous bodily harm.

Counsel for the appellants contended that for the police officer to have lawfully arrested the appellants he could only have done so for an offence mentioned in sch 1 to the CPA, the operative one being an assault where a 'dangerous wound' was inflicted, and there was simply no

proof that the wounds inflicted on the complainant were indeed dangerous.

In considering this aspect, the court reasoned that since the issue of whether the suspicion of the person effecting the arrest was reasonable had to be approached objectively, the circumstances giving rise to the suspicion had to be similarly approached, that is, had to be such as would ordinarily move a reasonable person to form the suspicion that the arrestee had committed a sch 1 offence. Applying this approach, the court concluded that the information before the arresting officer in the docket, coupled with his own observations of the injuries, which were objectively proved, demonstrated an actual suspicion, founded upon reasonable grounds, that an assault in which dangerous wounds had been inflicted had been committed. The arrest, and subsequent detention, were therefore lawful and the appeal was dismissed.

Other criminal cases

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

- arrest with warrant for malicious purposes;
- bail pending appeal;
- evidence-witness-incomplete cross-examination;
- murder-sentence; and
- trial-in camera hearings.

Shipping

Associated ship arrests: The practice of effecting a second arrest in anticipation of a first arrest being set aside: The dispute in *MT Pretty Scene: Galsworthy Ltd v Pretty Scene Shipping SA and Another* 2021 (5) SA 134 (SCA) arose out of the arrest, in 2016, of the *Pretty Scene* as a ship associated with the *Jin Kang*, which had in June 2007 been time chartered to an entity called *Parakou Shipping* from the appellant, *Galsworthy*. Delivery was due to take place in April 2009 but *Parakou*, which had in the meantime concluded a back-to-back time charter with an entity that went bankrupt soon afterwards, repudiated its charterparty with *Galsworthy*.

Dissatisfied with this, *Galsworthy* proceeded to London Arbitration, where it was successful, obtaining two awards totalling over US\$41 million. To enforce them, *Galsworthy* applied *ex parte* to the three South African coastal High Court divisions for orders directing their registrars to issue warrants of arrest and writs of summons in respect of eight *Jin Kang*-associated ships, including *Pretty Scene*, which was duly arrested when it arrived in Durban in June 2016.

Pretty Scene's owner, the first respondent

(PSS) successfully applied in the KZD (*Vahed J*) to set aside the arrest. *Galsworthy* then effected a second arrest of the vessel. This time the application to set it aside was unsuccessful in the same court (*Henriques J*). Both cases went on appeal to a KZD full bench, which dismissed the appeal against *Vahed J's* order but upheld the one against *Henriques J's* order. In the result both arrests were set aside and a counterapplication for security for a claim of wrongful arrest granted. *Pretty Scene* was sold, and the proceeds distributed. *Galsworthy* appealed to the SCA.

The principal issue before the SCA was the legality of the second arrest of the *Pretty Scene* and whether the full bench correctly overturned *Henriques J's* finding that the arrest was in order. *Pretty Scene Shipping* argued that the practice of effecting the second arrest to protect an arrestor's position if the first arrest failed, constituted an abuse of process.

The SCA, per Wallis JA with Zondi JA, Mocumie JA, Schippers JA and Goosen AJA concurring, ruled that a second arrest of the same ship in relation to the same claim was only prohibited where security had been given for that claim. In the circumstances, the full Bench erred in upholding the appeal against the judgment of *Henriques J*.

Spoliation

Is the *mandament van spolie* available to remedy a denial of access to a computer server and e-mail? The facts in *Blendrite (Pty) Ltd and Another v Moonisami and Another* 2021 (5) SA 61 (SCA) were that Mr Moonisami (the first respondent) and Mr Palani (second appellant) were directors of *Blendrite (Pty) Ltd* (first appellant). Palani was in factual control of *Blendrite*. A dispute arose between the pair and Palani claimed Moonisami had resigned. Moonisami contested this. Ultimately Palani caused *Blendrite* (via instruction to Global Network Systems (Pty) Ltd (second respondent)) to terminate Moonisami's access to *Blendrite's* e-mail and server.

Moonisami then approached the KZD, claiming his peaceful and undisturbed possession of access had been unlawfully denied him. He was successful, obtaining an order that his access be restored. *Blendrite* and Palani then applied for leave to appeal, but this was refused, causing them to apply for and receive such leave from the SCA.

The SCA, per Gorven AJA, upheld the appeal. It pointed out that while it was true that the *mandament van spolie* was available where incorporeal property was spoliated, the issue here was whether the prior access to an e-mail address and company network and server amounted to quasi-possession of an incorporeal which qualified for protection by a spolia-

tion order. The SCA emphasised that only quasi-possession of a supply of a service that arose as an incident of possession of corporeal property was protected by the *mandament*. Here, however, Moonisami's prior access was not an incident of possession of corporeal property because he did not possess any movable or immovable property in relation to his erstwhile use of the server or e-mail address. The SCA pointed out that any entitlement to use the server and e-mail address was wrapped up in the contested issue of whether the Moonsami remained a director of Blendrite and might relate to the terms of his contract of employment. It was a personal right enforceable, if at all, against Blendrite. Since Moonisami's prior use did not amount to *quasi* possession of incorporeal property, it was not protectable by the *mandament*. The SCA, therefore, set aside the KZD's order, replacing it with an order dismissing the application.

Is the *mandament van spolie* available against a threatened deprivation of possession? In *Bisschoff v Welbeplan Boerderye (Pty) Ltd* 2021 (5) SA 54 (SCA) the appellant had leased out several farms to the respondent. The appellants' attorneys sent two letters to the respondent's attorneys in which they were informed

that all agreements between them were cancelled, that the respondent should not trespass on, and that should they do so an urgent High Court application would be brought against him. The respondent's case was that the statement in the letters had deprived it of its possession. The representative of Welbeplan Boerderye and the manager of farming operations, as well as his labourers, were as a result of the letters convinced that if they entered upon the land the appellants would not hesitate to remove them and charge them with trespassing. Based solely on what was stated in the letters, the respondent, on an urgent basis, obtained a spoliation order in the NWM with costs.

Upholding the appeal in a unanimous decision, per Dlodlo JA, the SCA held that the High Court had erred. For a spoliation order to be available there must be unlawful spoliation, for example, a disturbance of possession without the consent and against the will of the possessor. A minimum threshold or degree of actual physical interference or deceit sufficiently grave to qualify as effective deprivation of possession was required, the disturbance must be substantial enough to effectively end or frustrate the complainant's control over the property. Where the conduct complained of merely constituted threatened deprivation of possession,

the *mandament van spolie* was not available as a remedy because it was aimed at the actual loss of possession. The mere use of 'strong and unequivocal' words in a letter that a person should not trespass upon land, did not constitute deprivation, let alone unlawful deprivation, of possession of the land.

Revenue: value-added tax

Deductible input tax and financial services: In *Commissioner, South African Revenue Service v Tourvest Financial Services (Pty) Ltd* 2021 (5) SA 86 (SCA) the respondent taxpayer (TFS) – a vendor conducting a foreign currency-exchange business through a number of branches – attempted to claim the entire value-added tax (VAT) charge paid by it on acquiring goods and services for its branches, as deductible input tax.

TFS had charged a commission based on a percentage of the transaction value and levied VAT on the commission. A client purchasing foreign currency paid it an amount made up of the quoted rand value of the foreign currency, plus the commission and VAT; a client selling foreign currency would receive the quoted rand value of the currency, less the commission and VAT. The Commissioner argued that the goods and services had

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been acquired by the taxpayer for use while making both taxable and exempt supplies, and accordingly applied an apportionment in terms of s 17(1) of the Value-Added Tax Act 89 of 1991 (the Act).

This case concerned the Commissioner's appeal after the taxpayer had successfully challenged the Commissioner's additional assessments in the tax court. At the heart of the appeal was the effect of the proviso in s 2(1) of the Act. While 'financial services' as defined in the Act are exempt from value-added tax, s 2(1) provides that activities which are deemed financial services – including the exchange of currency – will not be so deemed to the extent that the consideration payable in respect thereof is 'any fee, commission, merchant's discount or similar charge, excluding any discount cost'.

Upholding the appeal in a unanimous decision, per Ponnar JA, the SCA held

that the effect of the *proviso* in s 2(1) was not that the activity lost its exempt nature entirely; it remained an exempt supply for all other purposes while the taxable component carried VAT. This was so because, rather than causing the activity to lose its exempt status in its entirety, the *proviso* created a mixed supply out of an identified activity by adding a taxable element to what was, and at its core remained, an exempt financial service. The effect of the *proviso* was to turn the activity into a partly exempt and a partly taxable supply. That being so, any tax paid on goods and services acquired by TFS must be apportioned and only the part attributable to the taxable supply may be deducted as input tax.

Other cases

Apart from the cases and material dealt with or referred to above, the material

under review also contained cases dealing with –

- commissions of enquiry;
- interim interdicts *pendente lite*;
- land reform;
- suretyship;
- the Independent Police Investigative Directorate;
- the indisposition of a judge;
- the legal personality of companies;
- the validity of the s 21(2)(a) Matrimonial Property Act 88 of 1984; and
- voidable dispositions in insolvency.

Gideon Pienaar BA LLB (Stell) is a Senior Editor, Joshua Mendelsohn BA LLB (UCT) LLM (Cornell), Johan Botha BA LLB (Stell) and Simon Pieterse BBusSc LLB (UCT) are editors at Juta and Company in Cape Town.



People and practices

Compiled by Shireen Mahomed

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



DSC Attorneys in Cape Town has appointed Zuko Mtlomelo as a legal practitioner.

Motsoeneng Bill Attorneys Inc in Johannesburg has two promotions and one appointment.



Sharlyn Geza has been promoted as a Senior Associate Attorney.



Thokwadi Mosima Seabela has been promoted as a Senior Associate Attorney.



Renita Naicker has been appointed as a Senior Associate Attorney.

Bezuidenhout Lak Attorneys in Pretoria has two new appointments.



Zanelize Lak has been appointed as a conveyancer.

Phatshoane Henney Attorneys in Bloemfontein has three new appointments.



Millisanté de Wee has been appointed as an associate.



Elani van Collier has been appointed as an associate.



Herman du Randt has been appointed as an associate.



Niël Jonker has been appointed as a legal practitioner.



By
Mdumseni
Gambushe

Same but different: The two ways to initiate business rescue proceedings

Mango Pilots Association and Others v Mango Airlines SOC Limited (GJ) (unreported 21/35958, 10-8-2021) (Antonie AJ)

The most often necessary step of placing the company under supervision and commencing business rescue proceedings has profound effects on the company and all the affected persons. More so when there is some resistance to the taking of such a step. What was peculiar in the *Mango Pilots Association* matter, was that both parties agreed with the need for the commencement of the business rescue proceedings and the High Court was only called on to adjudicate, which mechanism ought to have been used on the particular circumstances of the case.

The facts of the case

On 16 April 2021, the board of Mango Airlines SOC limited (the respondent) took a resolution in terms of s 129(1) of the Companies Act 71 of 2008 (the Act) to place the company under business rescue. Thereafter, and in accordance with the Public Finance Management Act 1 of 1999 (PFMA) the respondent sought and eventually obtained the Minister of Public Enterprise's (the Minister's) approval on 22 July 2021. On 28 July 2021, the resolution was filed with the Companies and Intellectual Property Commission (CIPC). The CIPC rejected the resolution on the ground that it was adopted more than five days from the date on which it was filed.

On 28 April 2021 after the respondent had adopted the resolution but before it was filed with the CIPC two entities called Aergen Aircraft Four Limited and Aergen Aircraft Five Limited (collectively, Aergen) launched a liquidation application against the respondent.

Thereafter, Mango Pilots Association and two others (the applicants), launched an urgent court application for an order placing the respondent in business rescue. The respondent opposed the relief sought by the applicants on the ground that when the application was launched the respondent had already adopted and filed a resolution to commence business rescue with the CIPC, which it asserts became effective from 28 July 2021.

The respondent also issued a third-party notice joining CIPC on the proceeding. The CIPC did not oppose such a joinder but also did not take part in the proceedings and opted to abide by the court's decision.

Legal issues

As a point of departure, it is important to note that both the applicants and the respondent agreed that the matter was urgent, that the respondent is financially distressed and, that there is a reasonable prospect of rescuing the respondent.

The principal dispute between the applicants and the respondent was which mechanism must govern the business rescue proceedings in the circumstances. The applicants' argument was that the respondent failed to comply with the provisions of s 129 and thus the resolution adopted on 16 April 2021 was a nullity, hence, the present application.

The respondent argued that the resolution they adopted was filed and became effective on 28 July 2021 and thus the present application was legally incompetent.

The applicants argued that because of ss 129(2)(a) and (b), which provides that a resolution may not be adopted if liquidation proceedings have been initiated by or against the company and that the resolution has no force or effect until it has been filed, respectively, the resolution by the respondent was null and void for two reasons –

- first, that the resolution could not be adopted because liquidation proceedings had been initiated by Aergen; and
- secondly, the resolution was of no force effect, had lapsed, and was a nullity because Mango had not filed the same within five days of having adopted it.

What the applicants were arguing is that Mango adopted a resolution and failed to file it within five days, therefore, such a resolution became a nullity, hence, Aergen were within their rights to initiate liquidation proceedings against the respondent, which once done pro-

hibited the respondent from beginning business rescue proceedings through the resolution of the board. The only competent mechanism to institute business rescue proceedings in those circumstances should have been an application to the court.

While accepting the need to adopt and file the resolution as expeditiously as possible the court found neither textual nor contextual support in the Act for the proposition that the resolution must be adopted and filed within five days.

Contextually the court argued that the proposition ignores the fact that state-owned institutions could never be able to comply because once a resolution is adopted there are additional requirements to be met in terms of the PFMA, which cannot be realistically met within five days before filing the resolution.

The court held that the five-day period does not govern the time between adoption and filing. Properly understood it governs what must happen within five days after the filing of the resolution. The court argued that there are numerous indications in the Act (which were quoted and analysed) supporting this conclusion.

Further, the court rejected the argument that the respondents were barred from adopting a resolution by the liquidation proceedings instituted by Aergen. The court held that liquidation proceedings commence the day they are lodged with the registrar of the court and since the respondent's resolution predates Aergen's liquidation application s 129(2) is inapplicable and thus cannot justify the applicant's argument.

Further, the applicants argued that the Minister's subsequent approval of the resolution already adopted by the respondent was legally irrelevant since it was tantamount to ratification rather than approval. The applicants argued that the respondent ought to have submitted a draft resolution to the Minister and get the necessary prior approval before passing the resolution that would also have enabled them to adopt and

file the resolution within five days, as per their reading of the Act.

The court held that the applicants were at all material times alive to the fact that they need the Minister's approval hence the delay in filing the resolution, and there was no reason to believe that the Minister ratified as opposed to approve the resolution. Further, in the circumstances of the case, it was unnecessary to obtain the Minister's approval before adopting a resolution.

The respondent argued that when the applicants launched the application to court, they were aware of its resolution adopted and filed with the CIPC to begin business rescue and considering s 131(1), which prohibits launching of the

business rescue application if the company has adopted the s 129 resolution, the application is legally incompetent.

The court upheld this argument and stated that it was not open to the applicants to simply conclude that the resolution was of no force and effect and then launched their application. The applicants ought to have approached the court to set aside the resolution in terms of s 130 if it believed it had grounds to do so, if and when they are granted such order then launch their application, and the failure to do so rendered their application legally incompetent.

Conclusion

The business rescue proceedings can ei-

ther be initiated by the resolution of the board or by an application to court. Although the goal is the same, namely rescue an ailing company, these two mechanisms have different procedures and consequences, therefore, it is of utmost importance to properly appreciate their salient features because failing to meet the requisite requirements can have far reaching consequences for all involved.

Mdumseni Gambushe LLB (UKZN)
is a candidate legal practitioner at
Venns Attorneys in Pietermaritzburg.



By
Thubelihle
Shange

Can you use good faith to alter contractual rights and obligations?

Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others [2021] 3 All SA 647 (SCA)

Good faith remains a fundamental principle in many countries, including in South African contract law, but you still cannot invoke it to squeeze consent out of your counterpart. Many negotiating parties will insist on having a good faith obligation, but what real value does this give to parties involved and what impact does good faith have on the terms of a contract? South African courts (among other jurisdictions) have wrestled with this topic on various occasions and in different factual complexities. In particular, the question of when the principles of reasonableness and fairness can be invoked to release a contracting party from the consequences of an agreement duly entered continues to be the centre of judicial discourse. The *Capitec* case reaffirmed some of the key principles to the application of the good faith principle on the contractual obligations of the parties.

Background facts

The facts of the case are that Capitec Bank Holdings Limited (Capitec Holdings), Coral Lagoon Investments 194 (Pty) Ltd (Coral), and Ash Brook Investments 16 (Pty) Ltd (Ash Brook), concluded a

subscription of shares and shareholders agreement (the subscription agreement). In terms of the subscription agreement, Coral, wholly owned by Ash Brook, would subscribe for shares in Capitec Holdings (BEE shares) for Capitec Holdings to increase its black shareholding, and thereby fulfil its black economic empowerment obligations. Coral later sought to sell the BEE shares as fulfilment to a settlement agreement obligation. Coral requested Capitec Holdings' consent to the sale of the shares on the grounds of a clause in the subscription agreement, which limited the rights of Coral to sell its shares. Capitec Holdings refused to grant Coral the consent. Coral and Ash Brook brought an urgent application to the High Court for a declarator that the withholding by Capitec Holdings of its consent for the disposal of the sale shares, was among other things, and for the purposes of this discussion, in breach of Capitec Holdings' duties of good faith.

Key principles of judgment

The Supreme Court of Appeal (SCA) looked at the jurisprudence on the issue of good faith and succinctly set out some of the key principles that were recently

affirmed by the Constitutional Court in *Beadica 231 CC and Others v Trustees, Oregon Trust and Others 2020 (5) SA 247 (CC)*. The four principles are –

- freedom of contract or *pacta sunt servanda* remains central to the law of contract;
- our common law now read with the Constitution determines how the freedom of contract should be exercised;
- the scope of public policy and its application, to invalidate contract terms, should be undertaken with circumspection and only in clear cases; and
- good faith and fairness are not substantive, free-standing principles to which direct recourse may be had to decline the enforcement of a contractual term.

The SCA also cautioned against the inclination to distinguish between good faith in terms of contract law and in terms of common law and stated that our contract law is part of our common law. No more weight is, therefore, given to a good faith provision over the doctrine of good faith, which is already enshrined in our law of contract.

Although the court had already found that the provision in dispute did not require Capitec Holdings' consent and that

the High Court had erred in its finding, Unterhalter AJA highlighted a significant point, that even if Capitec Holdings consent was required according to the High Court's finding, Capitec's ethical or moral duties according to the High Court's view did not impute a duty on Capitec Holdings to give consent to the sale. Capitec Holdings would have still enjoyed the right to either grant the consent or refuse to grant it.

Conclusion

The key lessons from this decision are that:

- The inclusion of the good faith duty does not add any weight to the other terms of the contract as this is a doctrine already fundamental to our contract law.
- Consents and approvals conferred to a party, particularly, which is left to the discretion of that party, remain their right to exercise. That party's election to refuse consent does not automatically offend fundamental public values.

With this case, we are once again reminded that invocations of good faith cannot be used to alter the contractual

rights and duties of parties. Parties must clearly consider terms such as 'reasonably', 'discretion', 'undue' etcetera, to ensure that an agreement is substantially clear of the pitfalls that come with the interpretation of contracts and the doctrine of good faith.

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By
Kgomo
Ramotsho

The High Court must admit a non-citizen as a legal practitioner if they have satisfied the requirements of the Legal Practice Act

Rafoneke and Another v Minister of Justice and Correctional Services and Others (FB) (unreported case no 3609/2020 and 4065/2020, 16-9-2021) (Musi JP (Molitswane J and Wright AJ))

The Free State Division of the High Court in Bloemfontein, declared s 24(2) of the Legal Practice Act 28 of 2014 (LPA) unconstitutional and invalid to the extent that it does not allow foreigners to be admitted and authorised to be enrolled as non-practising legal practitioners.

Applicants Relebohile Cecilia Rafoneke and Sefoboko Phillip Tsuinyane decided to challenge the constitutionality of s 24(2) of the LPA, after their applications to be admitted as attorneys of the High Court in the Free State Division were dismissed because they were neither South African citizens nor lawfully admitted to the country as permanent residents. The applicants are both citizens of the Kingdom of Lesotho, who both studied at the University of Free State, where they respectively obtained LLB degrees. The applicants entered articles of clerkship, completed their practical vocational training, and passed the competency-based examinations for attorneys.

In 2004, Ms Rafoneke was granted a visa to study in South Africa (SA) by the Department of Home Affairs, having been accepted by the University of the Free State. In 2005 she enrolled to study a Baccalaureus Commertii Law (BCom Law), however, before complet-

ing degree, she registered for the LLB degree. On 30 July 2014, in undertaking her desire to practice law in SA, she entered into a contract of clerkship for two years with Azar and Havenga Attorneys in Bloemfontein. During this period, she attended and successfully completed the Law Society of South Africa's (LSSA) School for Legal Practice Course. Additionally, she had the right of appearances in lower courts. Furthermore, she wrote and passed all parts of the competency-based examinations for attorneys.

On 27 July 2016, she was issued with a Lesotho Special Permit (LSP) entitling her to temporarily reside and work in SA, which expired on 31 December 2019. The LSP does not give the holder thereof a right to apply for permanent residence status in SA. On 25 September 2019, her employer applied to the Director-General of Home Affairs for a waiver of reg 18(3) certificate requirements for permanent residency. The application was rejected with reasons that, in terms of s 31(2)(c) of the Immigration Act 13 of 2002, which states 'upon application, the Minister may under terms and conditions determined by him or her -

...
(c) for good cause, waive any prescribed requirement or form.'

When applying for a general work visa, the employer is obliged to satisfy the Director-General that the employment of a foreigner would promote economic growth would not disadvantage a South African citizen or permanent residence. On 4 February 2020, she applied for a Lesotho Exemption Permit (LEP) which has the same conditions as LSP. She was issued an LEP valid from 25 March 2020 to 31 December 2023. The conditions of the LEP are that -

- she may work in the Republic of SA;
- she may not apply for permanent residence irrespective of the period of stay;
- the permit will not be renewable/extendable; and
- she may not change the conditions of the permit in the Republic of SA.

Ms Rafoneke is currently employed at Fixane Attorneys as a legal consultant since March 2018. Her functions are similar to those of candidate legal practitioners although she has no right for appearance and may also not consult with clients.

Mr Tsuinyane was issued a study visa and commenced his studies at the University of the Free State. He obtained his LLB in 2013 and his LLM from the same university in 2014. On 20 May

2014 he entered a contract of clerkship for two years with Matlho Attorneys in Bloemfontein. On 11 September 2014, Mr Tsuinyane ceded the rest of his articles of clerkship to Kenosi McDonald Moroka. He attended the LSSA School for Legal Practice course, additionally, he wrote and passed all parts of the attorneys' competency-based examinations. In December 2015, Mr Tsuinyane married a South African citizen and as a result of the marriage, he was granted permission to reside with his wife and to work in SA. They bought immovable property in Bloemfontein.

Mr Tsuinyane is currently employed at Moroka Attorneys as a legal researcher and consultant, this position was created for him, and he is apprehensive that the position might become redundant if he is not admitted as an attorney. He has lived in SA since his student days. On 11 June 2018, he applied to the Minister of Home Affairs to be granted rights of permanent residence in terms of s 31(2)(b) and (c) of the Immigration Act. The application was rejected with reasons, that he did not file a formal application and secondly because the requirement stipulated in the Immigration Act may not be waived.

The court said that it was clear that s 31(2)(c) was not applicable. The court added that Mr Tsuinyane was informed that the waiting period to apply for permanent residence status in the spouse category is five years in terms of the Immigration Act and it cannot be waived. He launched this application before the five-year period lapsed. The court looked at provision of s 24 of the LPA and s 115 of the LPA. During the hearing, the applicants jettisoned their constitutional challenge aimed at s 24(3) of the LPA. The applicants argued that s 24(2)(b) read with s 115 of the LPA violates their right to equality because it differentiates between South African citizens and permanent residence on the one hand and foreigners on the other.

They submitted that s 115 of the LPA discriminates against them because foreign legal practitioners from designated countries may be admitted and enrolled to practise in SA without being citizens or permanent residents, whereas they who studied and trained here may not. The crux of their argument is that non-citizens who are temporary residents ought to be treated like citizens. They submitted that the differentiation serves no legitimate government purpose, it is arbitrary and irrational. They contended that the impugned sections unfairly discriminate against non-citizens based on their social origin and nationality. They contended that they should be admitted and enrolled to practise as attorneys in SA, after fulfilling the requirements in s 24(2)(a), (c) and (d).

The first respondent, the Minister of

Justice and Correctional Services, the fourth respondent, the Minister of Labour, and the fifth respondent the Minister of Home Affairs, argued that there is a rational connection between the differentiation and the legitimate government purpose it was designed to further achieve. They and the *amicus curiae* contended that the applicants should be dismissed because the applicants wanted to circumvent the employment and immigration laws of SA.

The court referred to the matter between *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC), where Ngcobo J explained the stages as follows:

'The proper approach to the question whether the impugned rules violate the equality clause involves three basic enquiries: first, whether the impugned rules make a differentiation that bears a rational connection to a legitimate government purpose; and if so, second, whether the differentiation amounts to unfair discrimination; and if so, third, whether the impugned rules can be justified under the limitations provision. If the differentiation bears no such rational connection, there is a violation of s 9(1) and the second enquiry does not arise. Similarly, if the differentiation does not amount to unfair discrimination, the third enquiry does not arise'.

Analysis

Section 24(2)(b) differentiates between citizens and permanent residents on the one hand and non-citizens from legal practitioners who have been admitted in designated foreign countries and non-citizens from those countries, who have never been admitted but seek to be admitted and enrolled as legal practitioners in SA. The court said that the Ministers referred extensively to the provisions of the Immigration Act and the Employment Services Act 4 of 2014 (ESA) in order to show the rational connection between the impugned provisions and the governmental purpose.

The court said it agreed with the Ministers that the LPA should not be viewed in isolation. That the impugned provision must be adjudged considering the Constitution and in conjunction with the Immigration Act and the ESA. The court added that s 22 of the Constitution states:

'Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.'

The court said that the right in s 22 is granted to citizens. That it has been said that 'under the Constitution a foreigner who is inside this country is entitled to all the fundamental rights in the Bill of Rights except those expressly limited to South Africa citizens'. The court pointed

out that the LPA regulates the legal profession. In *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) the Constitutional Court held that:

'These two constitutional constraints define the scope of the regulations of the practice of a profession which is permitted under s 22. Legislation that regulates practice will pass constitutional muster if (a) it is rationally related to the achievement of a legitimate government purpose; and (b) it does not infringe any of the rights in the Bill of Rights'. What the Constitution, therefore, requires is that the power to regulate the practice of a profession be exercised in an objectively rational manner. As long as the regulation of the practice, viewed objectively, is rationally related to the legitimate government purpose, a court cannot interfere simply because it disagrees with it or considers the legislation to be inappropriate.

The LPA was assented to on 20 September 2014 and its commencement date was 1 November 2018. On 6 March 2014, the LSSA sent a letter to the office of the Deputy Director-General: Immigration Services advising that it is in favour of the retention of citizenship or permanent residence requirement for admission as an attorney. It LSSA sustained its view by stating that:

'A "blanket" provision for foreigners to qualify will have a negative impact on many graduates who find it difficult to secure articles of clerkship or community service for purpose of qualification. In some provinces a substantial number of students of LEAD have not found work by the end of the programme (eg, in Polokwane). In 2012, 3 300 LLB students graduated, but 2 200 contracts of articles were registered in 2012. We should guard against actions that will limit the transformation of the profession, both in terms of access by law graduate and professional advancement of young South African practitioners'.

The court said that although the statistics cited by the LSSA are outdated, they indicate that at the time many students graduated but a sizeable number could not secure contracts of articles of clerkship. The statistics also indicate that the LLB degree is conferred on many law graduates annually. It is, therefore, rational for the LSSA to take a stance that is in favour of catering for young South Africans or permanent residents to enter the profession without competition from foreigners from the rest of the world. The court added that there is a risk in allowing non-citizens to practice. Society and clients need to be protected. The court said it was of a view that these were not fatal considerations in favour of the retention of the differentiation because citizens and permanent residents can also do sometimes embezzle

clients' money. The court said that it is a fact that some, albeit very few legal practitioners commit acts of dishonestly that put clients at peril.

The court said that the LPA seeks, among others, to –

(a) provide a legislative framework for the transformation and restructuring of the legal profession that embraces the values underpinning the Constitution and ensures that the rule of law is upheld;

(b) broaden access to justice by putting in place –

...
(iii) measures that provide equal opportunities for all aspirant legal practitioners in order to have a legal profession that broadly reflects the demographics of the Republic.'

The court added that to have a legal profession that broadly reflects the demographics of SA it is reasonable and rational for the LPA to regulate entry into the profession in order to meet that stated objective. The court referred to s 15 of the Attorneys Act 53 of 1979 that required citizenship or permanent residency for admission as an attorney. On admission on non-citizens the court pointed out that there was an issue which was foreshadowed in the papers but not dealt with in the parties' heads of arguments. The court said that during the hearing it had requested all the parties address on the issue, which they duly did.

The court said that the issue is, can a person – citizen, permanent resident, or non-citizen – be admitted as a practitioner without being allowed to practise? In Ms Rafoneke's replying affidavit to the first respondent's answering affidavit she stated the following:

'The first respondent confuses the issue of admission with that of employment. Of course, a foreign national admitted as a legal practitioner must still comply with the relevant requirements of employment in the Republic, including work visas.' Mr Tsuinyane's founding affidavit alleged that the impugned provisions adversely prejudice him because:

'It limits my competitiveness in the job market. I cannot secure any employment that requires a candidate to be an admitted attorney. With my current occupation, I do not earn a similar income to that of persons who are professionals in the same position and level of experience as I am.'

The court said that s 15 of the Attorneys Act stated that the court shall admit and enrol a person as an attorney if the stated requirements were met. Section 24(1) of the LPA states that a person may only practise as a legal practitioner if they are admitted and enrolled to practise as such. Section 24(2) states that the High Court must admit to practise and authorise to be enrolled as a legal practi-

tioner any person who meets the requirements set out in the section. The court added that there is a deliberate and important difference between the two Acts. In terms of the Attorneys Act the court had to admit and enrol. Currently, the court only admits but authorises enrolment. The court pointed out that the enrolment of an admitted legal practitioner is now done by the Legal Practice Council (LPC). The LPA has disaggregated admission and enrolment.

Musi JP said that the court must admit to practise and authorise enrolment and pointed out that the verb 'practise' is not defined in the LPA. The court said the verb 'practise' is defined as 'carry out or perform habitually or constantly ... work at, exercise, or pursue a profession, occupation, etc', as performing a single isolated act of practising as an attorney or legal practitioner. The court is convinced of the equivalence in the context of s 24(2) of the LPA. The words 'admit to practise' therefore mean that the court admits the person to work as a legal practitioner.

Musi JP pointed out that it does not make sense for the court to admit a person to practise, as defined in the dictionary and judicially when that person does not have any intention to practise. The court said it makes sense for the court to admit a person as a legal practitioner and authorise the LPC to enrol them as such. The applications were dismissed because they were neither South African citizens nor lawfully admitted to the country as permanent residents. The court added that this interpretation is consonant with the rest of the provisions of the LPA and the rules, for example, the LPA defines an attorney as a legal practitioner who is admitted and enrolled as such under this Act and legal practitioners is defined as an advocate or attorney admitted and enrolled as such in terms of ss 24 and 30 respectively.

The court said that the objections by the Ministers against admitting non-citizens are to ensure that there is compliance with immigration and employment legislation. The court asked, what about those persons who want to be admitted but do not want to practise? Put differently, the court asked what about persons who want to be admitted here but not work here? The court added that many citizens want to be admitted as legal practitioners without any intention to practise. Likewise, non-citizens may want to be admitted without any intention to practise.

The court said in terms of s 32(3) of the LPA the Council may make rules regulating the circumstances under which a legal practitioner can apply for the conversion of their enrolment and any requirements such legal practitioner must comply with r 30 read with r 31 regulate conversions. The court added that nothing in the rules

proscribe the admission of a person by the High Court and that court authorising the enrolment of such person as a non-practising legal practitioner. The court pointed out that this might, at first glance, seem like a placebo. It has, as illustrated, many practical advantages for non-citizens like the applicants.

The court said that both applicants have instruments that allow them to work in SA and said that they can conceive of no reason why a person on a spousal visa or LEP cannot be admitted as a non-practising legal practitioner. Musi JP added that s 24 of the LPA does not pass constitutional muster to the extent that it prohibits non-citizens to be admitted and authorised to be enrolled as non-practising legal practitioners.

The court pointed out that it found that the ground of citizenship or permanent residence in the impugned section of the LPA is based on attributes and characteristics which have the potential to impair the fundamental human dignity of non-citizens affected by it. Musi JP said they have established discrimination based on nationality. The court added that it accepts that the refusal to admit the applicants to practise and authorise their enrolment causes hardship. The court said that the Department of Employment and Labour has a constitutional duty to ensure that the employment of foreign nationals in SA is aligned to the economic growth of the Republic. And that this must be done in a manner that does not place citizens and permanent residents of SA at a disadvantage.

The court noted that although the LEP issued to Ms Rafoneke does not entitle her to apply for permanent resident status. She is entitled to work in SA during the validity of the permit, that her employer may also apply that a general work visa be issued to her.

The court in its findings, found that the discrimination in s 24(2)(b) of the LPA is fair. That being the case, there is therefore no need to consider s 36 of the Constitution. However, the court found that s 24(2) of the LPA is inconsistent with the Constitution and invalid to the extent that it does not allow non-citizens to be admitted and authorised to be enrolled as non-practising legal practitioners.

The court said that after considering different remedies it had decided that a just and equitable remedy would be a declaration of invalidity and a suspensive order to allow the legislature to cure the defect. Due to the hardships that non-citizens are exposed to and the immediate change in their employability, development, and financial position this judgment may bring. Musi JP decided to grant interim relief. The interim relief will benefit non-citizens but would not prejudice the government's policy or the interest of practising legal practitioners.

The court made the following order:

'Section 24(2) of the LPA is declared unconstitutional and invalid to the extent that it does not allow foreigners to be admitted and authorised to be enrolled as non-practising legal practitioners.

The declaration of invalidity is suspended for 24 months from the date of this order to allow parliament to rectify the defects as identified in this judgment.

During the period of suspension, the operation of the order of invalidity of section 24 of the Legal Practice Act No 28 of 2014 shall read as follows:

"24 Admission and enrolment

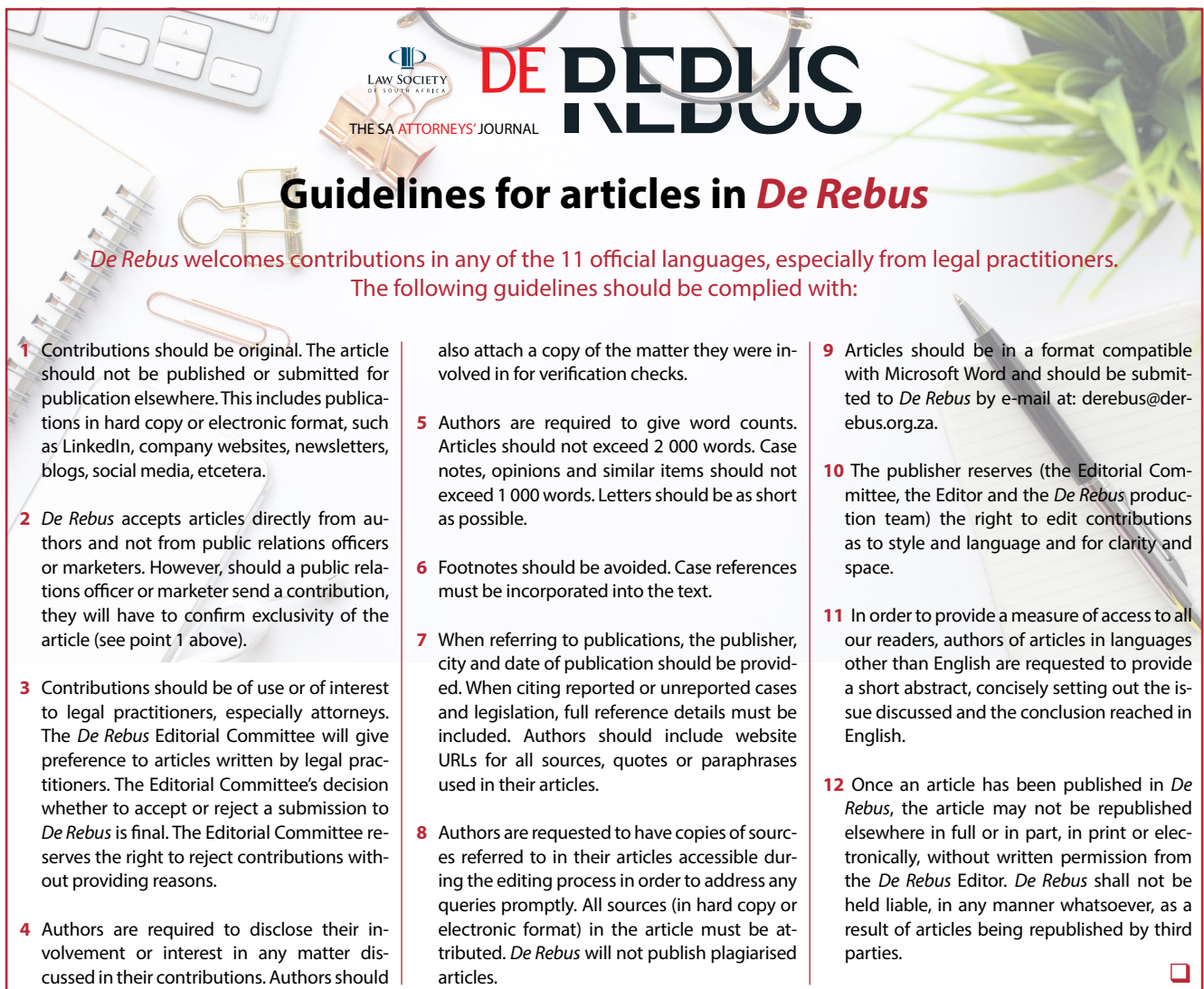
- (1) A person may only practise as a legal practitioner if he or she is admitted and enrolled to practise as such in terms of this Act.
- (2) The High Court must admit ~~to practise~~ a person as a legal practitioner and authorise the Council to enrol such person as a legal practitioner, conveyancer, or notary, if the person upon application satisfies the court that he or she -
- (a) Is duly qualified as set out in section

26;

- (b) Is a -
 - (i) South African citizen; or
 - (ii) Permanent resident in the Republic;
- (c) is a fit and proper person to be so admitted; and
- (d) has served a copy of the application on the Council, containing the information as determined in the rules within the time period determined in the rules.
- (3) *The High Court must admit a non-citizen as a legal practitioner and authorise the Council to enrol such person as a non-practising legal practitioner if he or she has satisfied the requirements in paragraphs (a), (c) and (d) of subsection (2).*
- (4) Subject to subsection (1), the Minister may, in consultation with the Minister of Trade and Industry and after consultation with the Council, and having regard to any relevant international commitments of the Government of the Republic, make regulations in respect of admission and enrolment to -

- (a) determine the right of foreign legal practitioners to appear in courts in the Republic and to practise as legal practitioners in the Republic; or
- (b) give effect to any mutual recognition agreement to which the Republic is a party, regulating -
 - (i) the provision of legal services by foreign legal practitioners; or
 - (ii) the admission and enrolment of foreign legal practitioners".
4. The first respondents was ordered to pay the applicants' costs' (the court's italics).

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DE REBUS
THE SA ATTORNEYS' JOURNAL

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By
Philip
Stoop

New legislation

Legislation published from
1 – 30 September 2021

Bills

Local Government: Municipal Systems Amendment Bill B2D of 2019.

Promulgation of Acts

Liquor Products Amendment Act 8 of 2021. Commencement: To be proclaimed. GenN567 GG45179/17-9-2021 (also available in Afrikaans).

Selected list of delegated legislation

Auditing Profession Act 26 of 2005
Revisions to the IRBA Code of Professional Conduct for Registered Auditors. BN112 GG45099/3-9-2021.

Animal Diseases Act 35 of 1984
Repeal and introduction of control measures relating to foot and mouth disease in certain areas in KwaZulu-Natal. GN827 GG45109/7-9-2021.

Broad-based Black Economic Empowerment Act 53 of 2003

Procedures for the applications, administration and allocation of export quotas under the economic partnership agreement between the Southern African Customs Union and Mozambique (SACU) and the United Kingdom (UK) for the year 2022. GN793 GG45078/1-9-2021.

Application for market access permits for Agricultural Products in terms of the World Trade Organisation (WTO) Agreement for 2022. GN795 GG45083/2-9-2021.

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Banking requirements for occupational injuries and diseases related claims. GenN526 GG45126/10-9-2021.

Council for Medical Schemes Levies Act 58 of 2000

Imposition of levies on medical schemes. GenN513 GG45099/3-9-2021.

Disaster Management Act 57 of 2002 (COVID-19)

• General regulations

Determination of alert level 2 from 13 September 2021. GN R868 GG45156/12-9-2021.

Adjusted alert level 2 regulations. GN R869 GG45156/12-9-2021.

Extension of National State of Disaster under the COVID-19 lockdown to 15

October 2021. GN R867 GG45155/12-9-2021 and GN953 GG45222/26-9-2021.

• Home Affairs

Amendment of directions on measures to address, prevent and combat the spread of COVID-19 in Home Affairs. Proc36 GG45239/28-9-2021.

Health Professions Act 56 of 1974

Repeal of the regulations relating to the conditions under which registered orthoptists may practice their profession. GN884 GG45176/17-9-2021.

International Trade Administration Act 71 of 2002

Amendment of guidelines and conditions relating to extension of safeguard measures. GenN542 GG45131/10-9-2021.

Labour Relations Act 66 of 1995

Bargaining councils accredited by Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation and/or arbitration and/or inquiry by an arbitrator. GenN536 GG45131/10-9-2021.

Legal Practice Act 28 of 2014

Amendment of the Code of Conduct by insertion of clause 3.16 and clause 3.17. GenN537 GG45131/10-9-2021.

Local Government: Municipal Systems Act 32 of 2000

Local Government: Municipal Staff Regulations. GN890 GG45181/20-9-2021.

Local Government: Guidelines for implementation of the Municipal Staff Regulations. GN891 GG45181/20-9-2021.

Medicines and Related Substances Act 101 of 1965

Regulations relating to a transparent pricing system for medicines and scheduled substances: Dispensing fee for pharmacists. GN859 GG45131/10-9-2021.

Plant Improvement Act 53 of 1976

Amendment of the South African Seed Potato Certification Scheme. GN875 GG45176/17-9-2021.

Postal Services Act 124 of 1998

Price Cap Amendment Regulations for Reserved Postal Services, 2021. GN924 GG45217/23-9-2021.

Public Service Act 103 of 1994

Amendment of the establishment of the Municipal Infrastructure Support Agent (MISA) as a government component and establishment of an advisory board for

MISA. GN832 GG45125/10-9-2021 (also available in Afrikaans).

Superior Courts Act 10 of 2013

Establishment of circuit courts within the Western Cape Division of the High Court of South Africa. GenN561 GG45176/17-9-2021.

Water Research Act 34 of 1971

Water Research Levy 2021/22: Rates and Charges: Increase of 4.2%. GN874 GG45175/17-9-2021.

Draft delegated legislation

- Amendment of the Road Traffic Management Corporation Regulations, 2007 in terms of the Road Traffic Management Corporations Act 20 of 1999 for comment. GN797 GG45085/3-9-2021.
- Amendment of the schedules to the Civil Aviation Regulations, 2011 in terms of the Civil Aviation Act 13 of 2009 for comment. GN R798 GG45086/3-9-2021.
- Amendment of the regulations relating to the Protection of Personal Information, 2018 in terms of the Protection of Personal Information Act 4 of 2013 for comment. GN829 GG45120/9-9-2021.
- Amendment of the regulations relating to the Constitution of the Professional Board for Optometry and Dispensing Opticians in terms of the Health Professions Act 56 of 1974 for comment. GN860 GG45131/10-9-2021.

Amendment of r 2, 3, 4 and 5 of Rules of the Council in terms of the Legal Practice Act 28 of 2014 for comment. GenN538 GG45131/10-9-2021.

- Amendment of the Maritime Occupational Health and Safety Amendment Regulations in terms of the Merchant Shipping Act 57 of 1951 for comment. GN863 GG45131/10-9-2021.

Amendment of r 54.34 of Rules of the Council in terms of the Legal Practice Act 28 of 2014 for comment. GenN539 GG45131/10-9-2021. Amendment of rules 30.4.4.2, 32.2.2 and 47.7.1 of the Rules of the Council in terms of the Legal Practice Act 28 of 2014 for comment. GenN540 GG45131/10-9-2021.

Amendment of r 30.1 of the Rules of the Council in terms of the Legal Practice Act 28 of 2014 for comment. GenN541 GG45131/10-9-2021.

- Fishing Rights Allocation Process 2021/2022 – Proposed fees payable in respect of applications for commercial fishing rights and grant of rights in terms of the Marine Living Resources Act 18 of 1998 for comment. GN866 GG45154/13-9-2021.
- Draft General Policy on Allocation of Commercial Fishing Rights for Fishing Rights Allocation Process of 2021/2022 in terms of the Marine Living Resources Act 18 of 1998 for comment. GN865 GG45154/13-9-2021.
- Proposed amendment of the code of professional conduct for registered auditors in terms of the Auditing Profession Act 26 of 2005. BN124 GG45176/17-9-2021.
- Regulations defining the scope of the profession of podiatry in terms of the Health Professions Act 56 of 1974 for comment. GN878 GG45176/17-9-2021.

Amendment of the Code of Conduct in respect of sharing of offices in terms of the Legal Practice Act 28 of 2014 for comment. GenN559 GG45176/17-9-2021.

- Regulation relating to the Constitution of the Medical and Dental Professions Board in terms of the Health Professions Act 56 of 1974 for comment. GN879 GG45176/17-9-2021.

- Regulations relating to names that may not be used in relation to the profession of dietetics or nutrition in terms of the Health Professions Act 56 of 1974 for comment. GN880 GG45176/17-9-2021.
- Draft Rules relating to Practicing of Para-Veterinary Profession of Veterinary Physiotherapist in terms of the Veterinary and Para-Veterinary Professions Act 19 of 1982 for comment. GenN556 GG45173/17-9-2021.
- Regulations defining the Scope of the Profession of Oral Hygiene in terms of the Health Professions Act 56 of 1974 for comment. GN881 GG45176/17-9-2021.
- Standardisation of the South African Sign Language interpretation of the National Anthem in terms of the Pan South African Language Board Act 59 of 1995 for comment. GenN562 GG45176/17-9-2021 (also available in Afrikaans).
- Amendment of the Rules relating to Practicing of Para-Veterinary Profession of Veterinary Nurse in terms of the Veterinary and Para-Veterinary Professions Act 19 of 1982 for comment. GenN555 GG45173/17-9-2021.
- Regulations relating to fees payable to the South African Pharmacy Council in terms of the Pharmacy Act 53 of 1974 for comment. GN882 GG45176/17-9-2021 and GN919 GG45208/23-9-2021.
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- Amendment of the Rules relating to Practicing of Veterinary Technologist in terms of the Veterinary and Para-Veterinary Professions Act 19 of 1982 for comment. GenN551 GG45173/17-9-2021.
- Draft sector specific policies for the fishing rights allocation process of 2021/2022 and the Draft Policy on the Transfer of Commercial Fishing Rights in terms of the Marine Living Resources Act 18 of 1998 for comment. GN889 GG45180/20-9-2021.
- Draft regulations relating to assistance of victims in respect of basic education in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995 for comment. GenN575 GG45206/22-9-2021.

Philip Stoop BCom LL.M (UP) LL.D (Unisa) is the Head of the School of Law at STADIO.



By
Nadine
Mather

'Mob attack' – doctrine of common purpose applied during strike action

In *National Union of Metalworkers of South Africa obo Dhludhlu and Others v Marley Pipe Systems SA (Pty) Ltd* [2021] 9 BLLR 894 (LAC), employees engaged in a work stoppage pursuant to Marley

Pipe Systems SA (the employer) tabling certain wage increases. Shortly thereafter, a wage agreement was concluded, to which the National Union of Metalworkers of South Africa (NUMSA) was not a party. Consequently, the employees who were members of NUMSA (the employees) engaged in an unprotected strike. The employees moved from their workstations carrying placards and demanding the removal of the employer's Head of Resources, Mr Steffens.

When attempting to engage with the employees, Mr Steffens was seriously assaulted. He was pushed out of a glass window, had rocks thrown at him and

was punched and kicked while lying on the ground. Having sustained significant injuries, Mr Steffens was taken off the premises to obtain medical attention. The employees only left the premises after being issued with an ultimatum by the employer to do so. The same day, the employer obtained an order from the Labour Court (LC) interdicting the strike and prohibiting further acts of violence, intimidation, and harassment.

Following the assault, the employees were provided with an opportunity to furnish information to the employer indicating whether they had participated in the misconduct. Those employees

Employment law update

who provided an acceptable explanation were not subject to disciplinary action, however, 148 employees were disciplined and subsequently dismissed for participating in the strike and acting with common purpose in the assault of Mr Steffens.

Aggrieved with their dismissals, the employees, represented by NUMSA, referred an unfair dismissal dispute to the LC. The employer opposed the claim and filed a counterclaim in which it sought compensation, alternatively damages, for the losses it incurred by as a result of the strike.

The evidence before the LC demonstrated that –

- all the employees had taken part in the unprotected strike, had marched on the employer's premises and carried placards demanding the removal of Mr Steffens;
- 12 of the employees had been directly identified as having participated in the assault of Mr Steffens;
- a further 95 employees had been identified via photographs and video evidence as having been on the scene; and
- the remaining 41 employees were found to have been associated with the unprotected strike and the assault.

The LC held that the employees had acted with common purpose in the assault of Mr Steffens in what was a 'mob attack'. The employees had failed to use the opportunities provided by the employer to distance themselves from the events on the day and accordingly their dismissals were fair. The employer's counterclaim for damages was upheld and NUMSA was ordered to pay compensation in the amount of approximately R 829 835 to the employer.

NUMSA took the matter on appeal in respect of the remaining 41 employees and contended that common purpose in the assault had not been proved in respect of these employees. The employer persisted that the finding of common purpose was sustainable against the 41 employees as they had been placed on the scene of the assault through clocking records and were absent from their workstations.

The Labour Appeal Court (LAC) noted that the difficulties inherent in determining the individual culpability of an employee in the context of collective misconduct were considered by the Constitutional Court in *National Union of Metalworkers of South Africa obo Ngan-ezi v Dunlop Mixing and Technical Services (Pty) Ltd and Others (Casual Workers Advice Office as amicus curiae)* [2019] 9 BLLR 865 (CC). In that matter, the court stated that evidence, whether direct or circumstantial, that individual employees in some form associated themselves with the violence before it commenced, or even after it ended, may be sufficient

to establish complicity in the misconduct. An employee is accordingly not required to be present at the scene but is required to have prior or subsequent knowledge of the violence and the necessary intention.

In the *Marley Pipes* matter, the 41 employees were not identified through direct evidence as having been part of the misconduct. Thus, any inference to be drawn that these employees had associated themselves with the assault before it commenced, or after it ended, whether through direct participation or association, was required to be consistent with all the proven facts.

The proven facts were that all the employees had reported for duty, left their workstations and embarked on the unprotected strike. All the employees moved towards Mr Steffens' office, carrying placards, which sought his removal. The employees sought out Mr Steffens and remained present on the scene during the course of and after his assault, with none of the employees coming to his aid.

Having regard to the possible inferences to be drawn, the LAC noted that no alternative inferences were advanced by the employees. There was no evidence that any of the 148 employees distanced themselves from the actions of the group. In fact, the undisputed evidence was that the employees had all celebrated the assault after the fact. It followed that the most probable and plausible inference to be drawn was that all the employees were involved in, or associated themselves with, the assault.

It was accordingly clear that the employees associated with the actions of the group before, during and after the misconduct and had the requisite prior or subsequent knowledge of the violence. As regards the necessary intention, the LAC found that such intention is proved where an employee either intended for the misconduct to take place or must have at least foreseen the possibility that the misconduct would take place. Having regard to the facts, the 41 employees were proved to have held such intent.

In the circumstances, the LC could not be faulted for finding that the 41 employees committed the misconduct for which they had been dismissed. Given the seriousness of the misconduct, the LAC found that dismissal was an appropriate sanction.

The appeal was dismissed.

Are you required to furnish security to stay the enforcement of an award?

In *Emalahleni Local Municipality v Phooko NO and Others* [2021] 9 BLLR 941 (LC), the employee, appointed as head of

traffic and security of the Emalahleni Local Municipality (the Municipality), was transferred to a new position. Aggrieved by the transfer, and following the conclusion of a grievance process, the employee refused to report to his new position. As a result, the employee was dismissed. The employee referred an unfair dismissal dispute to the relevant bargaining council and was, thereafter, reinstated with backpay. Consequently, the Municipality instituted a review application alleging a defect in the arbitration award.

After a few months had passed, the employee had the arbitration award certified and sought to execute the award. In turn, the Municipality launched an urgent application seeking an order to stay the enforcement of the award in terms of s 145(3) of the Labour Relations Act 66 of 1995 (the LRA), as well as an exemption to furnish security as contemplated in s 145(7) of the LRA.

The Labour Court (LC) was confronted with three issues, namely –

- whether a stay of enforcement of an award may be granted in the absence of security being furnished;
- whether an order granting or refusing a stay can be made without an order for payment of security or exemption therefrom; and
- whether a case had been made out by the Municipality for the stay and an exemption from furnishing security.

Section 145 of the LRA regulates the review of arbitration awards. Section 145(3) of the LRA provides that the LC may stay the enforcement of an award pending its decision in respect of the review application. In turn, s 145(7) provides that the institution of review proceedings does not suspend the operation of an arbitration award, unless the applicant furnishes security to the satisfaction of the court.

The LC noted that some judges had taken the view that security must be furnished before an application for a stay can be considered but disagreed with this view. Before s 145(7) was included in the LRA, a party could stay the enforcement of an award in terms of s 145(3). Despite the insertion of ss 145(7) and 145(3) had been left unchanged. If the legislator intended for a connection between these subsections, it would have expressly done so. Moreover, it was noteworthy that s 145(3) refers to a 'stay [of] the enforcement' whereas s 145(7) refers to suspending the operation of the award.

The LC held that the mischief that s 145(7) seeks to curb only arises once a review application has been instituted. An application in terms of s 145(3) may, however, be launched even before a review application is instituted. Prior to the introduction of s 145(7), the pre-

vailing position was that the launching of a review does not suspend the operation of an award. This subsection codified that position. For these reasons, it is wrong to conclude that in the absence of furnishing security, the court is not empowered to exercise its discretion in terms of s 145(3).

The view that security must be furnished as a precondition for any stay to be granted resulted from a misreading of earlier judgments on which the court had relied. However, the position had since been clarified by the Labour Appeal Court (LAC) in *City of Johannesburg v SA Municipal Workers Union on behalf of Monareng and Another* (2019) 40 ILJ 1753 (LAC). In this judgment, the court held that a stay of enforcement could be granted where injustice would otherwise result and in doing so, the court will be

guided by the factors applicable in applications for interim interdicts. There is no need to furnish security or apply for exemption from that requirement before a stay may be granted.

As to whether the Municipality had made out a case for a stay, the court noted that the review had been launched timeously and had been prosecuted in accordance with the LRA and the Uniform Rules of court. Should the Municipality succeed with its review application, the arbitration award would be set aside and not staying the award would accordingly result in irreparable harm. Such harm would not be prevented by ordering the Municipality to pay security.

Notwithstanding the above, the court was satisfied that the municipality had made out a case for being absolved from furnishing security. In this regard, the

onus lies with an applicant to demonstrate that it has assets of a sufficient value to meet its obligations should the arbitration award be upheld on review. In the present matter, there was evidence that the municipality had assets, capital donations and equitable shares from the National government. Accordingly, the court found that the Municipality should be absolved from providing security.

The court ordered that the enforcement of the award be stayed pending the finalisation of the review application and that the Municipality be absolved from furnishing security as contemplated in s 145(7) of the LRA.

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<i>AYIHL</i>	African Yearbook on International Humanitarian Law	Juta	(2020)
<i>Fundamina</i>	Fundamina	Juta	(2020) 26.1 (2020) 26.2 (2021) 27.1
<i>JOGIA</i>	Journal of Ocean Governance in Africa	Juta	(2021)
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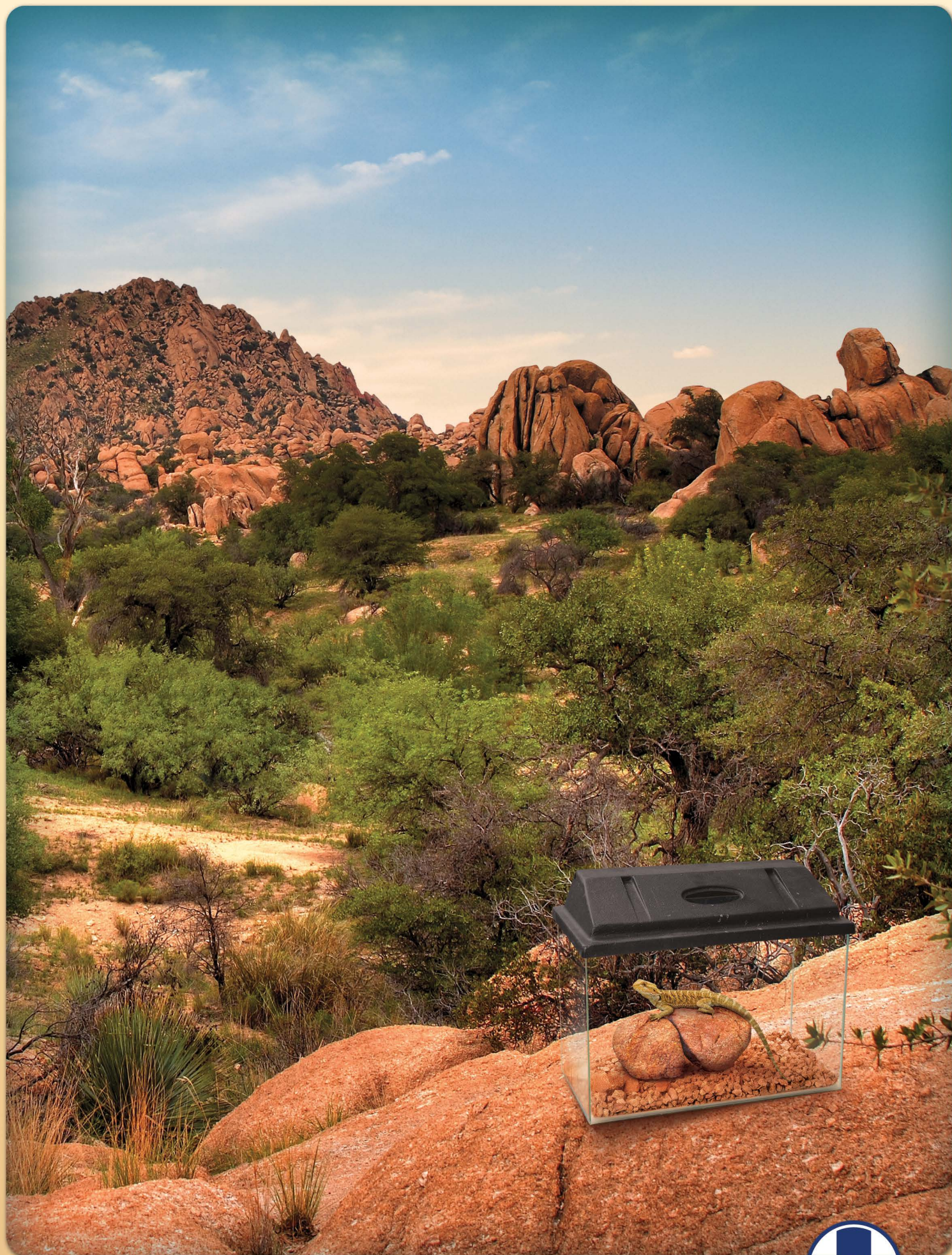
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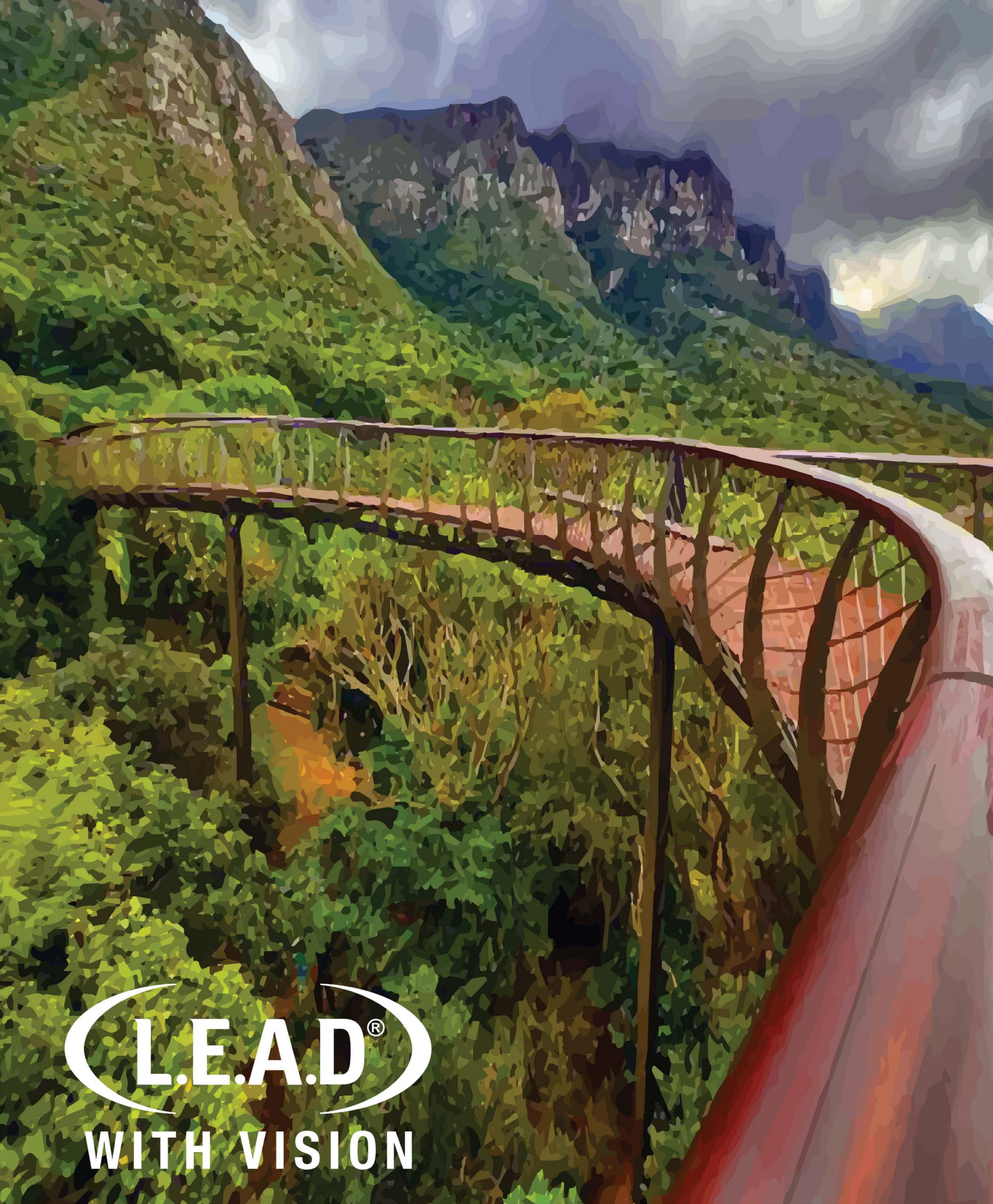
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